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Judicial Activism and Restraint on the United States Supreme Court: A Political-Behavioral Analysis

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INTRODUCTION

This Article examines judicial activisim and restraint on the United States Supreme Court in the context of the changing electoral majorities.[1] Over the years the Supreme Court's role has been challenged most strenuously during periods of political and social change.[2] The main concern during these transition periods has been what impact judicial policy decisions will have on the newly elected national political majority. Specifically, how the Court's policy decisions will hinder or facilitate the consolidation of power by the new political majority.[3]

In light of the concern directed towards the Supreme Court on its potential political effect, the pressures placed upon the individual justices are tremendous. This, especially given the judicial traditions which at one level glorify the jurist who stands alone

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1. Past discussions of judicial activism and restraint have focused on what role the Supreme Court plays within our democratic political system. Unfortunately, these discussions have often been caught up in the debate over the partisan controversies of the day. For example, judicial restraint advocates were often partisans of the New Deal politics of the 1930's, whereas in the 1960's the restrainist position was supported by the more conservative groups on the national political spectrum. Novak, *Economic Activism and Restraint*, in SUPREME COURT ACTIVISM AND RESTRAINT (S. Halpern & C. Lamb eds. 1982).

2. Caldeira & McCrone, *Of Time and Judicial Activism: A Study of the U.S. Supreme Court, 1800-1973*, in SUPREME COURT ACTIVISM AND RESTRAINT (S. Halpern & C. Lamb eds. 1982) [hereinafter cited as Caldeira & McCrone].

3. Caldeira & McCrone, *supra* note 2, at 104.

against the crowd, while at the other extreme praise deference shown the elected political branches.[4] Therefore, what has developed is a generally accepted notion that judicial activism will only be justified at those relatively rare junctures when necessary to protect fundamental values and freedoms.[5]

Noted scholars have developed explanations on how the justices perceive the Court's judicial role.[6] All such explanations are premised upon individual justices evaluating the facts and law and then acting in accordance with their view of the proper judicial role.[7] Most justices, however, are not as open on personal decisional predispositions relative to exercising judicial power as were Justices Frankfurter and Douglas, who were often identified as polar opposites in the process of reconciling opposites.[8] Therefore, the analysis herein examines judicial activism and restraint within a broader context, considering the Supreme Court's reactions to changes in the national electorate.

I. EARLIER VIEWS

In 1957, Robert Dahl examined the role of the Supreme Court in the democratic political system.[9] Dahl discussed the Court's role as a reflection of fundamental political forces in society and

4. Schick, *Judicial Activism on the Supreme Court*, in SUPREME COURT ACTIVISM AND RESTRAINT 39 (S. Halpern & C. Lamb eds. 1982).

5. This judicial activism clearly conflicts with the more usual posture of the justices, which is deference to the other branches of government. This deference is evidenced in several ways. For example, the federal government has won a disproportionate number of its administrative agency cases. Throughout the period from 1801-1958 the United States Government, in fact prevailed an average of sixty-two percent (62%) when they were a litigant in the case. Handberg, *Supreme Court and Administrative Agencies: 1965-1978*, 6 J. OF CONTEMP. L. 161, 161-76 (1979) [hereinafter cited as Handberg, *Supreme Court*]. Further, only rarely were federal statutes, or for that matter, state statutes struck down as unconstitutional. Moreover, the presumption as indicated in the *Ashwander* rules, is that government statutes are constitutional, with the burden of proving otherwise upon the challenger. Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 346-48 (1936). This presumption further supports the government's positions, barring infringement of certain specific constitutional guarantees. In fact, the question has really become when, and under what limited conditions or circumstances will the court be willing to assume a position of judicial activism. Miller, *In Defense of Judicial Activism*, in SUPREME COURT ACTIVISM AND RESTRAINT (S. Halpern & C. Lamb eds. 1982).

6. Champagne & Nagel, *The Advocates of Restraint: Holmes, Brandeis, Stone and Frankfurter*, in SUPREME COURT ACTIVISM AND RESTRAINT (S. Halpern & C. Lamb eds. 1982).

7. *Id.*

8. *Cf. Id.* at 312 (The cases cited indicate the opposite views held by Justices Frankfurter and Douglas).

9. Dahl, *Decision Making in a Democracy: The Supreme Court as a National Policy Maker*, 6 J. OF PUB. L. 279 (1957) [hereinafter cited as Dahl, *Decision Making*].

not in terms of the specific justices.[10] Dahl's arguments opposed what he termed the dominant legal myth that the Court's judicial activism served to protect oppressed minorities.[11] Basically, what Dahl contended was that contrary to the myth, the Court does not function as champion of minority group rights against the law making majority.[12] This theory was premised on the fact that the court's membership is inevitably part of the dominant national coalition. That is, the justices by their very recruitment are integral parts of the national political electorate.[13] Thus, according to Dahl, traditionally the Court, guided by restraint, operates as legitimator of political change rather than defender of the aggrieved. The Court, Dahl claims, will therefore reject challenges to acts of the new legislative majority by consistently asserting the statutes' compatibility with the interpreted constitution.[14]

Dahl contended, however, that major breakdowns in judicial restraint did occur when the existing majority coalition collapsed.[15] Since the justices have lifetime tenure, the Court's relative composition turned over at slower rates than Congress and the executive. The result, therefore, were periods of conflict, which only abated with vacancies through death or retirement of the holdover justices.[16]

Dahl's analysis challenged the traditional view of what role the Supreme Court fulfilled within the American political system. Dahl proposed that instead of the accepted judicial activist role of protection for the oppressed and impartial dispenser of justice the

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10. *Id.* at 280-81.

11. *Id.* at 282-83.

12. *Id.* at 285.

13. Dahl notes that on the average, during most presidential tenures the power to appoint a new justice is exercised at least twice. *Id.* at 293-94.

14. Judicial activism in Dahl's analysis is defined in terms of those instances where the Court struck a federal statute down as unconstitutional. Such actions were seen by Dahl as direct affronts to the political majority. *Id.* at 286-88.

15. *Id.* at 284-85.

16. Although, as pointed out by David Adamany in his examination of Dahl's findings, Dahl did not find very lengthy periods of conflict to ever exist. According to Adamany:

> Dahl, in an essay very widely read in undergraduate political science courses, . . . finds that virtually all "important" congressional policies struck down by the Court within four years of enactment, and thus presumably while the sponsoring lawmaking majority was still intact, subsequently are vindicated by further congressional action or judicial reversal; ascribes this mainly to the President's appointment power, noting that on the average a new justice is appointed every 22 [twenty-two] months; and concludes finally that "the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States."

Adamany, *Legitimacy, Realigning Elections, and the Supreme Court* 1973 WIS. L. REV. 790, 793 [hereinafter cited as Adamany, *Legitimacy*].

Court actually functions as legimator of acts by the dominant political party.[17] In other words, Dahl explained the Court's relatively constant judicial restraint position as a product of political recruitment.

Several years later Richard Funston examined and expanded upon Dahl's thesis.[18] In his dissertation, Funston reconceptualized Dahl's approach[19] in what Funston termed a "lag hypothesis." Basically, Funston's theory or "lag hypothesis" was "that over long periods of time the Supreme Court reflects the will of the dominant political coalition, except during the transition periods when the court is a holdover relic of the old coalition."[20] Thus, Funston contended that the Court will more likely perform the counter-majoritarian function traditionally ascribed to it, primarily during periods of political transition. More precisely, judicial activism becomes more likely during transitions because the political value incongruity, between old and new, increased the potential for conflicts.[21] Funston's analysis, therefore, also assumes that the tides of American politics determine levels of judicial activism and restraint on the Court, rather than the relative proclivities of the individual justices.[22]

Additionally, in his analysis, Funston compared Court activity levels during periods of electoral realignment and nonrealignment

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17. Dahl, *Decision Making*, *supra* note 9, at 279.

18. Funston, *The Supreme Court and Critical Elections*, 69 AM. POL. SCI. REV. 793 (1975) [hereinafter cited as Funston, *The Supreme Court*].

19. Funston, in his evaluation of Dahl's study, felt there was more to be drawn from the data that Dahl had examined, and concentrated his analysis on what the Court does *most* of the time, stating:

> Professor Dahl's tabular data, however, while persuasive, do not support his conclusion on his point. Indeed they are completely unrelated to it. Rather, the conclusion was apparently arrived at impressionistically on the basis of logical deduction. When the court strikes down congressional legislation as unconstitutional, Dahl demonstrated, it is seldom successful in the long run in thwarting the majority policy. But the crucial point is that most of the time the court will not be striking down national legislation. Dahl did not examine this point at length, nor therefore, did he consider where the Court would be most likely to act in a counter-majoritarian fashion.

Id. at 796.

20. *Id.*

21. *Id.* at 793.

22. The tides of change referred to in this Article are the changes of electoral fortune which occurred at certain intervals in American politics. These changes are fundamental in nature and permanent in effect. An example of such a period is the time interval beginning in 1928 and continuing through the 1930's. During this period the Republican party lost its hold on the electorate, or at least significant segments, most notably the northern working class. The result was an era of national Democratic party dominance—a dominance that only began to deteriorate in the 1970's. A. CAMPBELL, A CLASSIFICATION OF PRESIDENTIAL ELECTIONS (1966); J. SUNDQUIST, DYNAMICS OF THE PARTY SYSTEM 200-204 (1973). Further, the New Deal coalition is an example of such a realignment of partisan loyalties, but on at least three other occasions similar shifts have been identified. *Id.*

against periods when the Court had been reconstituted by the newly dominant political coalition.[23] Based upon concrete statistics revealing three times greater a finding of unconstitutionality during realignment, Funston concluded that "the traditional concept of the Court as the champion of minority rights against majority demands is *largely* incorrect."[24] Thus, according to Funston minorities would be protected, if at all, through statutory interpretation rather than declarations of unconstitutionality.

Funston's analysis has, however, been challenged for several methodological errors. One noted scholar, Paul Beck, has criticized Funston by pointing out that the time periods utilized by him were inadequate.[25] As well, Bradley C. Cannon and S. Sidney Ulmer, in their own study of the Court,[26] challenged Funston's results on the grounds of sample skewness. Specifically, their main criticism was that Funston's use of the New Deal cases, numbering fourteen in all, were too distorting, especially where the total case sample numbered thirty-eight.[27] This critique by Cannon and Ulmer is quite important since it identifies the major shortcoming of other earlier studies: an insufficient number of cases used.

Both Dahl, who based his study on seventy-eight cases,[28] and Funston, utilizing thirty-eight,[29] premised their analysis on the Court's willingness to strike down federal legislative acts as unconstitutional.[30] Therefore, only a few cases, in fact, represented instances where the Court struck down federal statutes as unconstitutional. Moreover, Dahl only examined a four year period to identify relevant cases. Dahl's assumption was that the congressional majority initiating the challenged legislation would have disappeared or have been significantly weakened by the end of the

23. Funston, *The Supreme Court*, *supra* note 18, at 809.

24. Funston found that "the Court has been more than three times as likely to declare recently enacted deferral legislation unconstitutional during the realignment periods identifed by Chambers and Burnham than it had been during the vast majority of its history." *Id.* at 805-09.

25. Beck, *Critical Elections and the Supreme Court: Putting the Court After the Horse*, 70 POL. SCI. REV. 930-31 (1976) [hereinafter cited as Beck, *Critical Election*].

26. Cannon & Ulmer, *The Supreme Court and Critical Elections: A Dissent*, 70 AM. POL. SCI. REV. 1215 (1976) [hereinafter cited as Cannon & Ulmer, *The Supreme Court*].

27. When Funston's indices were recomputed, deleting New Deal and later cases, Cannon and Ulmer found that "there is no significant difference between the Court's counter-majoritarian behavior in the lag periods and that in non-critical years." *Id.* at 1218.

28. Dahl, *Decision Making*, *supra* note 9, at 279.

29. Funston, *The Supreme Court*, *supra* note 18, at 793.

30. H. ABRAHAM, THE JUDICIAL PROCESS (3d ed. 1975) [hereinafter cited as ABRAHAM].

four years.[31]

As for Funston's analysis, his much narrower sample represented those instances of judicial review occurring within periods of electoral realignment.[32] Unfortunately, as noted earlier, fourteen of Funston's thirty-eight cases occurred during the New Deal era. This fact is fatal to his analysis since the other three periods of realignment are, in substance, deleted from his study.[33]

II. An Alternative Approach to the Problem

Earlier examinations of the political nature of judicial activism and restraint have employed relatively narrow empirical focuses. For both Dahl and Funston the relevant indicator of judicial activism was whether or not the Court declared a federal statute unconstitutional.[34] Such an approach ignores other, less drastic, decisional opportunities available to the Court such as denial of review and statutory interpretation. For instance, in a more recent view, Jonathan Casper pointed out that the Court can technically sustain a congressional statute and simultaneously significantly change the content and direction of the governmental policy.[35] Therefore, if one conceives of a continuum of possible judicial responses, the declaration of a statute's unconstitutionality marks only one extreme in the continuum of Court action available.

The approach applied herein considers a broader range of the Court's aggregate decisional patterns over the period from 1801 to 1958. For purposes of this analysis, aggregate Court behavior will be defined in terms of whether the Court accepted the government's position when it was a party to the action. In other words, whether the Court elected to engage in judicial restraint.

The Court, it can be assumed, will respond most favorably to

31. Dahl, *Decision Making*, *supra* note 9, at 279.
32. Funston, *The Supreme Court*, *supra* note 18, at 801-03.
33. Cannon & Ulmer, *The Supreme Court*, *supra* note 26, at 1215.
34. *See supra* notes 14, 21 and 24 and accompanying text.
35. Casper explains that "The Courts doctrine that it will, if at all possible, interpret a statute in such a way as to 'save' it from being declared unconstitutional means that the court will often significantly twist and change the ostensible provisions of a statute." Casper, *The Supreme Court and National Policy Making*, 70 Am. Pol. Sci. Rev. 50, 56 (1976) [hereinafter cited as Casper, *The Supreme Court*]. Casper dramatizes this point rather effectively through the case of Pennsylvania v. Nelson, 350 U.S. 497 (1956). In Nelson, an individual was being prosecuted under Pennsylvania's "Little Smith Act," which was modeled after the federal Smith Act. The Court struck down the state statute claiming, *inter alia*, that the relevant federal legislation was intended to be exclusive and thus by invoking the supremacy clause, the Court invalidated the Pennsylvania statute. The Court defeated the statute, however, even though the title was to take away or impair the jurisdiction and laws of the states. Casper, *The Supreme Court*, *supra* note 35, at 56.

government arguments during those periods in which its policy preferences correspond closely to those of the dominant political coalition. Conversely, when the political system is experiencing an electoral realignment, the new coalition and previously constituted Court will experience conflict. Any such conflict would be empirically demonstrated in the form of increased decisions rendered against government positions.[36] When this in fact occurs, the conflict can thus be attributed to differing ideologies and decisional propensities between the holdover Court and the newly dominant political majority. Therefore, the Court as an institution will appear to be engaged in a judicial activist posture relative to the federal government.[37]

III. DATA

The instant analysis will include all formally decided cases in which the federal government participated as a principal litigant during United States Supreme Court terms from 1801 to 1957.[38] This inclusion of the entire universe of litigation in which the federal government was a party is done to overcome the two major defects of previous works, namely limited samples, and too narrow a view of the Court's opinions.[39] Therefore, using 6,120 cases gives a much more complete profile of the interplay between the Court and the federal government.[40]

36. The major hypothesis of this study is that during periods of relatively stable national electoral coalitions, the Court and the federal government will essentially agree on policy issues. This policy agreement will be evidenced by a substantial increase in favorable decisions for the government in cases where it is a principal litigant. Such harmony, therefore, represents period of apparent judicial restraint. Alternatively, following partisan realignment, the Court and the new electoral coalition will experience conflict, traditionally manifested in the form of an increased percentage of unfavorable decisions rendered against the government when it again is a principal litigant.

37. For a developed discussion and further analysis on the relative conflicts between the Court and the federal legislative branch, concentrating on congressional reaction to judicial activism, *see* Handberg & Hill, Jr., *Court Curbing, Court Reversals, and Judicial Review: The Supreme Court Versus Congress*, 14 L. & SOC. REV. 309 (1980) [hereinafter cited as Handberg & Hill, *Court Curbing*].

38. Data beyond the 1957 term was excluded because insufficient historical perspective exists as to whether another electoral realignment has actually occurred. Data prior to 1801 was excluded as well because of a paucity of cases and the problem of incomplete records.

39. R. Handberg & H. Hill, Jr., The Supreme Court and Electoral Majority: 1801-1958, paper presented at Annual meeting of Southern Political Science Association (New Orleans, 1977) [hereinafter cited as Handberg & Hill, paper] [on file in the offices of California Western Law Review].

40. The definition of cases excludes cases which may have involved important policy issues to the federal government, but were cases in which the federal government did not participate as a principal litigant. As well, the present analysis ignores certain qualitative differences between cases. In effect we treat a contract action against a government supplier as equal to a major constitutional case. Obviously, the

For purposes of this analysis, an unfavorable decision will be operationalized as a case in which the Court: (a) directly ruled against the federal government, (b) rejected the federal government's arguments or rationales (at least as is identifiable in the opinion), or (c) denied motions or petitions requested by the Untied States government. Favorable decisions will thus be operationalized in diametrically opposed situations.[41]

Additionally, the electoral realignment periods used for this examination are derived from the earlier critiques by Paul Beck,[42] Cannon and Ulmer,[43] those being the periods 1821-1828, 1853-1860, 1889-1896, and 1929-1936. It should be noted here that although insurgent political coalitions may not have actually gained control of both houses of Congress and the Presidency during these periods, in all cases the political winds were rising.[44] Therefore, the critical election periods used here become important when relying upon Funston's "Dahl-Dooley Hypothesis" that "the Supreme Court follows the election returns."[45] The reason these periods become important is, if the hypothesis is true, the justices would have conformed their behavior to the new order, even before changes occurred in court personnel. Furthermore, and realistically speaking, justices are not vestal virgins uncontaminated by national political currents. Thus, even in their relative isolation, although the degree of involvement obviously varies between individual justices,[46] the justices, in general, are often heavily involved in politics.[47]

In conjunction with the above stated realignment periods, "lag periods" are also identified to annex the periods where the new dominant political coalition took control of Congress, but not the Court. These four lag periods, also derived from the earlier stated critiques,[48] existed during the periods 1829-1836, 1861-1865, 1897-1909, and 1930-1940. During these periods, the legislative branch

absence of a qualitative variable limits our analysis somewhat, but does not disturb the essential decisional patterns. Notably, similar methodological treatments have been profitably used in other contexts. *See e.g.*, G. SCHUBERT, THE JUDICIAL MIND REVISITED (1974) and Leloup & Shull, *Congress Versus the Excecutive: The Two Presidencies Reconsidered*, 59 SOC. SCI. Q. 704 (1979).

41. A breakdown of the substantive issue catagories by the Chief Justice is presented in Handberg & Hill, paper, *supra* note 39 and Handberg & Hill, *Court Curbing*, *supra* note 37, at 309-22 (1980). For an extension of a part of this analysis into the 1970's, *see* Handberg, *Supreme Court*, *supra* note 5.

42. *See supra* note 25 and accompanying text.

43. *See supra* note 26 and accompanying text.

44. Beck, *Critical Elections*, *supra* note 25; Cannon & Ulmer, *The Supreme Court*, *supra* note 26, at 1215.

45. Funston, *The Supreme Court*, *supra* note 18, at 796.

46. *See generally* P. MCGRATH, MORRISON R. WAITE (1963).

47. B.A. MURPHY, THE BRANDEIS-FRANKFURTER CONNECTION (1982).

48. *See supra* notes 42 and 43 and accompanying text.

was controlled by the new majority. Its legislation, certainly reflecting new governmental policy, came before the holdover Court which, at least philosophically, was ambivalent about the proposals.

IV. ANALYSIS

Generally, the Supreme Court's decisional pattern has been one of judicial restraint. However, this pattern of supporting the government's position is not unexpected given the traditional position of restraint assigned to the Court.[49] In fact, throughout the entire period under consideration (1801-1958), the government averaged an aggregate success rate of sixty-two percent, although during the pre-Civil War period it was at a lower rate of fifty-seven percent.[50] Similarly, the Court workload reflected the changing and expanding role of government.[51] Manifestly, as governmental activity became more extensive, the Court became more actively involved in determining the permissible boundaries of such activities. However, the Court's role should still be characterized more as that of a "yeasayer" rather that "naysayer."

Table One below presents an overview of the Court's activity during the four major periods of political change. Column 1 represents the four year period immediately prior to periods of electoral change while column 2 delineates the Court's decisional pattern during the actual period of alteration. Column 3 shows the results when the Court was in the "lag period." That is, where the legislative branch had been captured by the new coalition, but the Court had not. Finally, column 4 exhibits the Court's decisional behavior in that period when both the Court and Congress should have been complementary in terms of governmental ideological principals.

The results which Table One illustrates are that the pattern of the Court was mixed, with the last two realignment periods falling into more of an expected pattern. In fact, the twentieth century pattern is completely consistent with expectations of Court reactions during the respective periods of change. Therefore, Table Two shifts the level of anlaysis from aggregate time spans to a term by term analysis, in order to more precisely demonstrate the Court's forms.

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49. A. BICKEL, THE LEAST DANGEROUS BRANCH (1962).

50. In the aggregate the bulk of the cases occurred after the Civil War, numbering a total of 5471.

51. F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT (1927).

TABLE 1

COURT SUPPORT LEVEL DURING PERIODS OF ELECTORAL REALIGNMENT TIME PERIODS*

EVENT	(1) Pre-Realignment**	(2) Realignment	(3) Lag	(4) Post-Lag**
1st Realignment (1821-1828)	60%	65%	48%	39%
2nd Realignment (1853-1860)	78%	60%	62%	59%
3rd Realignment (1889-1896)	45%	61%	64%	71%
4th Realignment (1929-1936)	66%	62%	65%	71%
Average	60%	61%	63%	67%

* Time periods are drawn from earlier discussion in Funston (1975), Beck (1976), and Canon and Ulmer (1976).

** The pre-realignment and post-lag averaged cover the four years immediately prior to the electoral realignment periods and the first four years after the lag period. The realignment or critical periods and lag periods are described in the text.

In Table Two below, the examination seeks to determine whether the Court was systematically less supportive (i.e., more activist) toward the government during realignment and lag years as compared to nonrealignment and nonlag years. Basically, the table displays whether the Court's treatment of the government positions in a particular term was above or below the aggregate average of sixty-two percent in favor of government stands. Theoretically, the perfect relationship would show all nonrealignment/nonlag years on or above the average, with the realignment/lag terms below it. However, as Table Two illustrates there was not a significant difference in Court activity during the respective realignment and lag periods. Thus, on a term by term basis the Court's role is best explained as that of legitimator of political change.[52] This determination is appropriate even though the aggregate patterns reported here do conceal significant and wide variations of the individual terms.[53] Whatever the intraperiod variation, the fact is that on the whole the differ-

52. This legitimator or "yeasayer" role of the Supreme Court is supported by a comparison of lag periods with their respective prior time periods. For example, when the New Deal captured the Court through the replacement of several older justices (i.e., by Justices Black and Reed) and intense political pressure, ("the switch in time saves nine") the Court's role became that of annointer. H.C. PRICHETT, THE ROOSEVELT COURT (1948).

53. Such as in the 1933-40 lag period, where the range of values was from forty-eight percent (48%) support for the government in the 1935 Court term as contrasted with the eighty-three percent (83%) in the 1939 Court term.

ence in the level of Court activity is not that striking or inconsistent.

TABLE 2

COURT ACTIVITY PATTERNS IN REALIGNMENT AND LAG TIME PERIODS

		Realignment yearly average				Lag yearly average		
		below mean*	above or on the mean			below mean	above or on the mean	
Court Terms	Nonrealignment	52% (65)	48% (60)	100%	Non lag	50% (62)	50% (61)	100%
	Realignment[1]	47% (15)	53% (17)	100%	Lag[2]	53% (18)	47% (16)	100%
	(N=157) chi square = .2677 Yule's Q = .102				(N=157) chi square = .068 Yule's Q = −.05			

*$\bar{X}$ = 62%

[1] 1821-1828, 1853-1860, 1889-1896, 1929-1936

[2] 1829-1836, 1861-1865, 1897-1909, 1933-1940

At this point the analysis shifts to consider whether declines in Court support levels for the government correspond with instances of judicial review. This is done since earlier approaches by Dahl and Funston used the power of judicial review as their measure of Court behavior.[54]

Prior to the 1930's judicial review was a relatively rarely used weapon in the Court's arsenal.[55] Thus, the hypothesis adopted here is that when the Court signifies its disagreement with the legislative majority by striking down a statute as unconstitutional, a decrease in the Court's aggregate level of support for the governments position will also occur. The two main decisional options—a declaration of unconstitutionality, or the rejection of the government's position as litigant without a finding of unconstitutionality—will most dramatically evidence the Court's lack of support. The former is of course more extreme and final, but both are re-

54. *See supra* notes 9, 10, 18, 19, 22, 23 and 24 and accompanying text.

55. ABRAHAM, *supra* note 30; Handberg, *Judicial Review and the Supreme Court: An Accelerating Curve*, 2 NOVA L.J. 1, 3-4 (1978).

lated events rather than disjointed behavior. In any event, in order to isolate this relationship, this anlaysis compares the Court's term support rate with whether or not a congressional statute was declared unconstitutional during that Court term. Thus, for the aforementioned hypothesis to hold true, when Court support levels fall below the mean, instances of judicial review, more precisely findings of unconstitutionality, should occur.

Finally, Table Three below, represents a relationship between the Court's aggregate support level and its proclivity to declare legislation unconstitutional.[56] In this table when the Court's aggregate support pattern falls below the mean score, the level of Court willingness to strike down legislation increased. The findings here are important, because they demonstrate how the Court systematically rejected governmental activity, generally, as opposed to only certain isolated and episodic instances. The results indicate a strong linkage between instances of judicial review and statutory interpretation. This situation exists because as govern-

TABLE 3*

COMPARISON OF THE EXERCISE OF JUDICIAL REVIEW AND STATUTORY INTERPRETATION

		Post Civil War Government Success	
		on or below mean[1]	above mean
Court Terms[2]	unconstitutional	62.5% (30)	37.5% (18)
	none occurred	35.6% (16)	64.4% (29)

chi square = 6.747, $p < .01$
Yule's Q = .503
n = 93

* Cases drawn from Henry J. Abraham, *The Judicial Process* 3rd Ed. (New York: Oxford University Press, 1975), Table 9, pp. 288-293.

[1] $\bar{X} = 63\%$

[2] Court Terms refers to whether a congressional statute was in fact held unconstitutional or not during the term. Each term is coded as a yes (unconstitutional) or no (none occurred).

56. Table 3 uses the aggregate mean for the 1865 to 1958 time period because of the paucity of cases of judicial review prior to the Civil War (only two). During the Civil War, the Court shed its reluctance, comparatively speaking, to use its power of judicial review therefore allowing a more detailed analysis of the general conditions attached to the exercise of judicial review. This allowed a more detailed analysis of the general conditions attached to the exercise of judicial review.

ment losses increased at the statutory interpretation level, the Court became more predisposed to exercise its authority and declare statutes unconstitutional. Although it is difficult to determine which occurence was the catalyst for the other, it is clear that these acts appear strongly interrelated. Moreover, most probably the two events are mutually reinforcing.

CONCLUSION

The present analysis demonstrates, at least at an aggregate level, that the Supreme Court as an institution has been immersed in the political currents of the day. Apparently, there is a broad range of factors which influence the individual justices to engage in what is termed judicial activism and restraint. However, although individual ideological and personal traits may have influenced a justice's inclination toward certain behavior, the opportunities for any such activity were heavily influenced by the political environment.

This Article has statistically illustrated that the Court has been linked to the dominant political forces of the day. Furthermore, the findings have revealed that the primary role of the Court in this context was to legitimize governmental power. When evidenced, the Court's resistance to change was normally a short-lived experience, usually an accomodation solidified when the inevitable changes in the Court's membership occurred. Obviously, the Court at times opposed the political tide, but such efforts were often futile or successful only on issues of limited importance. Thus, delay or goal modification seem to establish the Court's most successful weapons, especially when such interference was supported by political and social forces within the American society.[57]

The Court's behavior can be interpreted differently depending upon individual ideological perspectives. That is, the Court may be perceived as supporting the government nearly two thirds of the time and thus serves as a yeasayer or in other words, maintains a posture of judicial restraint. Conversely, the focus can be on the one-third of the cases which the government lost, therefore, engaging the Court in judicial activism as a naysayer. One thing is certain, however, the Court's bias has been to support the dominant political coalition and not waste valuable institutional resources on the losers.[58] Although restraint is more likely to occur

57. Adamany, *Legitimacy*, *supra* note 16, at 846.

58. The difficulty, historically, is that those being "protected" are often those least in apparent need of protection. In fact, one could argue that the Court's only

than activism, it should always be noted that justices in the short term can distort the balance because of their personal interest in particular issues or goals.

consistent historical passion for an oppressed minority has been when the oppressed are the economic overdog. The Court's most visible and politically dangerous acts have occurred in defending individual and corporate government regulation. In civil liberties cases, the Court's more usual ploy has been that of statutory interpretation as in the gyrations relative to the Smith Act. The Court's function is that of referee among competing interests but the Court should be an unbiased referee.