



The Supreme Court and Partisan Realignment: A Macro- and Microlevel Perspective.; The Judicial Response to the New Deal: The U.S. Supreme Court and Economic Regulation, 1934-1936.

Review Author[s]:
Lee Epstein

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Little v. Barreme (1804), decided one year after *Marbury*, illustrates this point quite well. In it, Marshall reviews a proclamation by President John Adams regarding the seizure of vessels sailing to and from French ports and holds that Adams exceeded the statutory authority granted him by Congress. Consequently, the captain who followed Adams's orders was liable in court for the unauthorized seizure. Franck makes no mention of this case, which sheds light not only on Marshall and the early precedents for the political-question doctrine but also on the willingness of American courts to hold the president and executive officers accountable for their actions in foreign affairs.

Congressional Research Service

LOUIS FISHER

The Supreme Court and Partisan Realignment: A Macro- and Microlevel Perspective. By John B. Gates. Boulder: Westview, 1992. 253p. \$55.00.

The Judicial Response to the New Deal: The U.S. Supreme Court and Economic Regulation, 1934-1936. By Richard A. Maidment. New York: Manchester University Press, 1992. 159p. \$59.95.

For scholars of legal processes, the New Deal period was more than a significant event. It was of vast importance to the development of the field of inquiry. Prior to that time, political scientists tended to view the Supreme Court as a strictly legal body, whose members were immune from the pressures of ordinary politics. A vivid example comes from Robert E. Cushman's review (in the *American Political Science Review*) of the 1936 term, one of the most eventful in the Court's history. After the Court struck down a number of New Deal laws in 1935 and 1936 (typically by 5 to 4 or 6 to 3 votes), President Roosevelt retaliated with a plan to appoint one new member for every sitting justice over 70 years old. By 1937, however, the Court itself removed the need for the plan by narrowly upholding recovery legislation—the so-called “switch in time that saved nine.” Yet Cushman reports the most tumultuous of periods in the mildest of terms. He begins reasonably enough: “The 1936 term . . . will probably be rated a notable one” (p. 278), then notes Roosevelt's landslide election, the president's reorganization plan, and the Court's validation of New Deal legislation (albeit by split votes). But the final sentence of the first paragraph is jarring: “These facts are spread upon the record as part of the background of the Court's work. No suggestion is made as to what inferences, if any, may be drawn from them.” The balance of the article is dedicated to a wholly doctrinal analysis of important constitutional litigation, with no weight given to political or ideological forces.

Despite Cushman's interpretation, we now identify this very period as one that profoundly changed the course of the study of legal decision making. A generation of scholars beginning with C. Herman Pritchett (in the 1940s) through Jeffrey A. Segal and Harold J. Spaeth (1993) spotted what Cushman may have had missed, namely, that justices are not necessarily apolitical decision makers engaged in mechanical jurisprudence. Rather, they come to the Court with well-developed values and attitudes that they work to etch into the law. The early attitudinalists interpreted the deep judicial divisions over New Deal programs to mean that the law was not nearly the guiding light that Cushman and

others had claimed. (If the justices were simply following precedent, then why did dissents emerge as a common occurrence?) It was no coincidence that the behavioral revolution's envelopment of the judicial field occurred shortly after the New Deal period.

Legal scholars of a somewhat different inclination also owe their start to the New Deal, for it was the justices' treatment of New Deal programs that renewed important debates over the role of the Court in a democratic society. In his seminal work, Robert A. Dahl (1957) argues that while the Court may have the potential to play a major role by checking the activities of the other institutions, it almost never takes on this function. Rather, the Court usually legitimates the actions of the executive and legislature. And if it does not (as during the New Deal period, when it was full of holdovers from previous Republican administrations), the elected branches often retaliate by proposing legislation to overturn the Court's ruling. Eventually and for various reasons, in Dahl's way of thinking, the Court comes to share the views of the ruling regime, as it did during the latter part of the 1930s. Others, including Jonathan D. Casper (1976), defend quite the opposite perspective, arguing (among other things) that Dahl's study rested heavily on the anomalous New Deal period.

Placed within this context, it is not at all surprising to find yet another generation of scholars who are intrigued with the New Deal period or at least who view it as a useful tool to explore larger theoretical constructs. As its title suggests, Maidment's book centers specifically on the period, using it as a window through which to view judicial decision making. Gates's book, which fits quite squarely with those works seeking to explore the role of the Court in a democratic society, encompasses a longer span of time. It considers not solely the New Deal but four realigning eras defined by critical elections: (1) the Civil War realignment (1837-78), (2) partisan realignment in the 1890s, (3) the New Deal realignment (1911-45), and (4) the critical elections of 1960 and 1964. Despite these distinct foci and significant variation in research approaches and analytic strategies, these works are quite complementary. Both shed new light on complex phenomena and, more important, question whether legal scholars have characterized the New Deal period aptly.

Maidment's work presents a direct challenge to the attitudinal school of judicial decision making. While scholars working within this model (and its early variants) view the 1930s as a turning point, a time when the justices evinced nonconsensual behavior that analysts could explain in left-right terms, Maidment suggests quite the converse. Being fully cognizant of the attitudinal perspective of judicial decision making, he does not hearken back to the days of Cushman; yet he strongly and persuasively argues that ideology was not the only—or even the overriding—explanation of the Court's initial hostility to New Deal legislation. Despite the fact that the justices were often divided over the constitutionality of the programs, Maidment suggests: “They agreed over the broad issues of constitutional interpretation and over the essential nature of the judicial function. They had a common view of the process for evaluating the constitutionality of legislation and used mutually-agreed modes of reasoning and argument in carrying out this evaluation” (p. 142). This process, in Maidment's view, clearly “was not a political decision-making process. It was a legal and judicial

process. The judges made their decision within a reference of legal rules and these legal rules provided both guidance and limitation to the exercise of judicial power" (p. 146).

Maidment reaches this startling conclusion about the 1930s by considering the justices' opinions in several state cases (e.g., *Nebbia v. New York* 1934) and those directly centered on New Deal legislation. The form of the analysis is an intensive, contextual investigation, which relies on the Court's records, manuscript collections, and some secondary sources. I shall leave it to other readers to determine whether or not his interpretation of the records is sufficiently persuasive. (For what it is worth, I found it sufficiently intriguing to rethink conventional treatments of the period.) But surely, if consensus favors Maidment's position, then the study of judicial decision making from a political perspective (an approach that finds its genesis in the New Deal period) rests on a shaky foundation.

Gates's *The Supreme Court and Partisan Realignment* is a tour de force study of the Court's role in partisan realignments, with its theoretical grounding located primarily in Dahl's study and the work it generated. More specifically, for all four eras (which constitute the major chapter divisions), he tests five expectations flowing from the now-vast literature on the subject:

1. In the years surrounding party polarization and realignment, the critical issues will be found in the cases of state and federal policy invalidation.
2. The salient state policies declared unconstitutional in each period arise from states whose partisan or ideological character is different from the partisan majority on the Supreme Court.
3. The number of salient state and federal policies will significantly increase following a critical election and continue until a majority of the justices are replaced.
4. The Supreme Court will decide salient cases or realigning cases nonunanimously more often than other invalidation cases and more often than all cases decided with opinion.
5. In cases related to the realigning issues before critical elections, the justices' partisan affiliation will be a significant and powerful predictor of their votes in cases raising the salient, or realigning, political questions. (pp. 22–25)

To consider these expectations, Gates amassed a data set consisting of the 743 Supreme Court decisions from 1837 to 1964 declaring federal and state policies unconstitutional, which he coded by issue and by votes. Gates also enlivens his discussion of the data with more historical and contextual analyses of the various periods.

Gates's study and findings are vast and detailed, and all students of the judicial process should read the work. At virtually every turn of the page, I learned something. Nevertheless, several of his conclusions merit particular attention because they either confirm the conventional wisdom or force us to reconsider it. First, and most generally, Gates disputes Dahl's characterization of the Court as merely a reinforcer of majoritarian interests. In particular, his analysis of cases in which the Court struck down state legislation (which, as Casper pointed out, Dahl failed to consider) leads him to conclude: "A wider range of evidence supports a much broader and more complex impact on national policy making. If realignments are the fundamental means of 'tension manage-

ment,' . . . then Supreme Court policy making is much more important to the course of national politics than portrayed by Dahl's classic study" (p. 168).

Next, and of even greater interest, are his conclusions about the two roles often ascribed to the Court before and after realignments. While some scholars assert that the Court is often "an ally of the majority party before critical elections," Gates finds only mixed support for this proposition: "Before 1860, 1896, and 1964, . . . the Supreme Court handed down several decisions that fueled partisan debate and controversy on the realigning questions" (pp. 174–75). At the same time and contrary to conventional wisdom, the "important role of shaping the majority party's response to the critical issues before realignment is less clear in the years preceding 1932." While Gates finds that the Court "reinforced" the laissez-faire position of the Republican party, "it was not until the clash between the Court and the Democratic party in 1934 and 1935 that partisan passions were aroused." Indeed, Gates reaches a conclusion with which Maidment would surely agree: "In 1934, the Court gave a signal that it might uphold the innovative New Deal measures in *Nebbia*." Another finding concerns the role that some analysts suggest the Court plays after critical elections: it will make policy in conflict with the designs of the new government. Once again, Gates finds mixed support for this proposition, with the notable exception of the New Deal period: "The evidence of conflict following the critical election of 1932 is unequivocal: The Supreme Court struck down thirteen provisions of New Deal legislation and provoked a Supreme Court crisis comparable to the reaction to *Dred Scott*" (p. 174).

The virtues of Maidment's and Gates's works are clear. Both marshal a good deal of evidence that forces us to rethink traditional understandings of the Court. Moreover, the volumes renew our appreciation of the New Deal and its utility (or lack thereof) as a mechanism by which to view legal phenomena. Why they achieved these ends has much to do with their holistic substantive approaches to the Court's docket. Many analysts limit their studies to federal cases, but not Maidment and Gates. Both considered cases in which the Court dealt with state legislation—an approach that adds enormously to the credibility of their stories.

Finally, it is tempting to write that the strengths of one are the weaknesses of the other: Maidment's adept and in-depth treatment of arguments and doctrine is somewhat lacking in Gates's effort; Gates's careful use of data to evaluate his hypotheses is missing in the Maidment study. But such comparisons strike me as unfair to the authors; for both, in their ways, do an extraordinary job in elucidating the phenomena they seek to study. And we, the readers, are treated to a feast of substantive information, not to mention original thinking. I commend both.

Washington University, St. Louis

LEE EPSTEIN

Labor's Capital: The Economics and Politics of Private Pensions. By Teresa Ghilarducci. Cambridge: Massachusetts Institute of Technology Press, 1992. 213p. \$35.00.

Pension funds constitute one of the most important pillars of the U.S. economy, with pension funds owning two-fifths of all bonds and one-quarter of total equity.