

JUDICIAL POLITICS & LAW AND SOCIETY OUTLINE

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JUDICIAL POLITICS I: POLITICAL SUPPORT FOR JUDICIAL REVIEW

William Landes and Richard Posner, “The Independent Judiciary in an Interest-Group Perspective” (1975)

1. Legislators will support judicial review to make credible commitments

- a. Transaction costs necessitate institutions to make credible commitments:
 - i. If one adopts an interest-group perspective and conceives of legislation as “sold” by political parties and “bought” by the prospective statutory beneficiaries, it becomes clear that both the parties and the beneficiaries have much to gain by ensuring the durability of the resulting legislation.
 - ii. both actors “may have incurred substantial costs that would not prove worthwhile if the legislation were to be altered unfavorably or repealed within a few months or years.” If the political waters turn sour on a given legislative majority, the danger is that the subsequent political coalition will repeal the costly statutory edifice constructed by said majority.
- b. Partisan actors have an incentive to establish an independent judiciary
 - i. to enforce legislative commitments in accordance with the intentions of the parties to the statutory bargain against the potentially recalcitrant preferences of subsequent political forces
- c. Courts have an incentive to adopt an originalist jurisprudence
 - i. the fact that courts stand little chance of resisting purse- or sword-driven court-curbing if they “are not valued highly” provides judicial actors with an incentive to adopt an originalist interpretive stance, since only if they “entrench the original understanding of the “contract”” will they serve as a politically valuable institution for the enforcement of credible commitments

J. Mark Ramseyer, “The Puzzling (In)dependence of Courts” (1994)

1. Legislators will support judicial review to hedge against electoral uncertainty

- a. Electoral conditions for the support of judicial review:
 - i. “Only where [partisan actors] rate (i) the likelihood of continued electoral government high and (ii) the likelihood of their continued victory low might they provide independent courts.” In this view, stable partisan competition emerges as an important necessary condition for the political construction of judicial independence.
- b. Empirical application: Japan vs. the US:
 - i. Ramseyer highlights the negligible role that the constitutional text plays in explicating variation in judicial independence between the United States and Japan. While post-war Japan possesses a constitutional architecture that substantively mirrors that of the US (as the text was partially imposed upon the Japanese by American occupying forces), the Liberal Democratic Party (LDP)’s four-decade hegemonic rule endowed it with minimal incentives to support judicial independence when compared to the mercurial electoral prospects of its partisan American counterparts.

Tom Ginsburg, *Judicial Review in New Democracies* (2003)

1. Constitution-makers will provide for judicial review as a form of insurance

- a. The insurance logic of judicial review:
 - i. If, during the constitution-writing process, a political party emerges as hegemonic and expects to be able to maintain control of the constitutional apparatus of the fledgling democratic regime, its incentive to support judicial review is minimized.
 - ii. Conversely, when political power is more fragmented and long-term electoral prospects are uncertain, the empowerment of a counter-majoritarian force within the political system becomes more lucrative.
 - iii. Hence, to explicate why freshly democratized states entrench judicial review within their newly-drafted constitutional texts, we need to conceive judicial review as a form of political insurance: “By serving as an alternative forum in which to challenge government action, judicial review provides a form of insurance to prospective electoral losers during the constitutional bargain”
- b. Empirical application: Countries following a regime transition to democracy and a constitution-writing process that subsequently had multi-party electoral systems were more likely to provide for a strong, independent

judiciary than countries in a similar situation that subsequently had two-party electoral systems.

- i. Ginsburg's measurement strategy falls back on the notion that "the political configuration in the first election after the adoption of the court is a reflection, albeit an imperfect one, of the true extent of diffusion before adoption of the constitution."

Matthew Stephenson, "When the Devil Turns" (2003)

1. Adding nuance to Ginsburg's insurance theory

- a. Conditions necessary for legislators to support judicial review as a focal point resolution to the problem of institutional design:
 - i. Sufficient partisan competition
 - ii. Judicial moderation
 - iii. Long-term risk aversion on the part of political elites
- b. Empirical application: Stephenson subsequently conducts an ordered probit regression using 1995 data from 153 countries and finds a strong correlation between partisan competition and judicial independence

Ran Hirschl, "The Political Origins of Judicial Empowerment through Constitutionalization" (2002)

1. Judicial review entrenches the interests of hegemonic elites

- a. The hegemonic preservation thesis: "conscious judicial empowerment is likely to occur (a) when the judiciary's public reputation for political impartiality and rectitude is relatively high and (b) when the courts are likely to rule, by and large, in accordance with the cultural propensities and policy preferences of the traditionally hegemonic elites."
 - i. "Influential coalitions of domestic neoliberal economic forces (e.g., powerful industrialists and economic conglomerates given added impetus by global economic trends) may view constitutionalization of rights (especially property, mobility, and occupational rights) as a means to promote economic deregulation and to fight what its members often understand to be harmful "large government" policies of the encroaching state."
- b. Empirical application: Judicial empowerment in Israel in the 1990s
 - i. "Well aware of the backlash eroding its hegemony, representatives of the Ashkenazi secular bourgeoisie in the Knesset, in cooperation with economic and legal elites, initiated and promoted Israel's 1992 constitutional revolution in order to transfer the main locus of political

struggle from parliament, local government, and other majoritarian decision-making arenas to the Supreme court, where their ideological hegemony is under less of a challenge.”

- c. Empirical application: Canada’s Charter of Rights and Freedoms of 1982
 - i. Enacting the Charter “stemmed primarily from political pressure to preserve the institutional and political status quo and to fight the growing threats to the Anglophone establishment and its dominant Protestant, business-oriented culture by the Quebec separatist movement and by other emerging demands for provincial, linguistic, and cultural autonomy that stem from, among other things, the dramatic changes in Canada's sociodemographic composition over the last five decades.”
- d. Empirical application: New Zealand’s Bill of Rights Act of 1990
 - i. “The driving force behind the 1990 constitutionalization of rights in New Zealand was a coalition of the disparate sections of a threatened elite seeking to preserve its power and economic actors who were pushing for neoliberal economic reforms.”

James Rogers, “Information and Judicial Review” (2007)

1. **Legislatures support judicial review because it transmits important information**
 - a. Why legislatures want information: Legislatures want to make sure that the laws they pass are appropriate to achieving the legislature’s purpose. In other words, legislatures have an interest in making sure that the legislation they pass is achieving the desired ends in practice
 - b. Judicial review transmits information to the legislature: There are three reasons why courts have an informational advantage when considering the empirical consequences of a statute:
 - i. The Court reviews legislation chronologically after the legislature has acted
 - ii. The role of the Court’s “standing” and “ripeness” doctrines implies that courts will acquire a different type of information in judicial proceedings relative to that acquired in legislative proceedings.
 - iii. It is easier for the Court to strike down an enacted law when it is empirically inappropriate than for the legislature to repeal the law
 - c. Game-theoretic model findings:
 - i. The Legislature tolerates judicial policy making because it cannot deny independence to the Court when it has divergent policy preferences without also eliminating informative judicial review when the Court has convergent preferences

- ii. As long as the Court is not too political, when the Legislature loses to judicial policy-making it more than makes up from the informational service that the court provides in helping the legislature to secure its own policy goals
- iii. When the Legislature is very uncertain about the appropriateness of its enactment, the court is unconstrained by strategic considerations

Howard Gillman, “How Political Parties Can Use the Courts to Advance Their Agendas” (2002)

1. *Lochner*-era judicial review was supported to entrench economic nationalism

- a. Argument: “I demonstrate that the increased power, jurisdiction, and conservatism of federal courts during [1875-1891] was a by-product of Republican Party efforts to promote and entrench a policy of economic nationalism during a time when that agenda was vulnerable to electoral politics.”
 - i. This is not unlike entrenchment via delegation to executive agencies: “the expansion of federal judicial power in the late-nineteenth century is best understood as the sort of familiar partisan or programmatic entrenchment that we frequently associate with legislative delegations to executive or quasi-executive agencies.”
- b. The empirical application: Judicial empowerment in the late 19th century
 - i. “Much of the expansion of power resulted from the passage of two key pieces of legislation—the Judiciary and Removal Act of 1875 and the Evarts Act of 1891—that were part of the Republican Party’s efforts to restructure national institutions better to facilitate national economic development ... The more familiar parts of this political agenda involved currency policy, tariff policy, and (eventually) national bureaucratic expansion.”
 - ii. “The expansion of federal administrative capacity became necessary only after economic nationalists were successful at promoting large-scale enterprise by extending more reliable legal institutions to investors and producers who operated within a national market. Federal judges became the principal agents of this agenda after Republicans in the national government retooled the federal judiciary by changing its jurisdiction, reforming its structure, and staffing courts with judges who were reliable caretakers of this new mission.”
 - 1. “The construction of this market required sympathetic supervision of individual transactions rather than general regulative or administrative capacity.”

2. Judges were “a remarkably similar, if not insular, social group” that was closely tied to “powerful political and economic actors, ... trained and experienced at the bar, steeped in the revered common law, and coming largely from the ranks of the corporate elite.”

Keith Whittington, ““Interpose Your Friendly Hand:” Political Supports for the Exercise of Judicial Review by the United States Supreme Court” (2005)

1. The “overcoming obstructions” theory of judicial review

- a. The argument: “When current elected officials are obstructed from fully implementing their own policy agenda, they may favor the active exercise of constitutional review by a sympathetic judiciary to overcome those obstructions and disrupt the status quo.”
 - i. The source of fragmentation is American federalism: “The American political system is fragmented horizontally within governments as well as vertically between layers of government. This fragmentation—across branches, across legislative chambers, and within legislative chambers—frequently obstructs those seeking to alter the status quo.”
 - ii. The logic: “For individual legislators, their constituents may be sharply divided on a given issue or overwhelmingly hostile to a policy that the legislator would nonetheless like to see adopted. Party leaders, including presidents and legislative leaders, must similarly sometimes manage deeply divided or cross-pressured coalitions...When faced with such issues, elected officials may actively seek to turn over controversial political questions to the courts so as to circumvent a paralyzed legislature and avoid the political fallout that would come with taking direct action themselves.”
- b. The conditions necessary for the argument to hold:
 - i. Courts often be ideologically friendly to the governing coalition.
 - ii. Judicial review is actually useful to current political majorities.
- c. The observable implications of the theory:
 - i. Judges should be selected on the basis of being “activist” insofar as they embrace national policy preferences
 - ii. The encouragement of specific judicial action consistent with the political needs of coalition leaders
 - iii. The congenial reception of judicial action after it has been taken
 - iv. The public expression of generalized support for judicial supremacy in the articulation of constitutional commitments
- d. Empirical application: The Kennedy Administration and civil rights

- i. The Kennedy administration embraced the Warren court's civil rights jurisprudence because of an "overcoming constraints" logic:
 1. "In 1960, the Kennedy brothers likewise feared that becoming entangled in the civil rights issues would cost the party more votes than it would gain... Though approving the inclusion of a civil rights plank in the party platform, the Kennedy administration was determined not to "endorse a frontal assault against the segregation system."

Keith Whittington, *Political Foundations of Judicial Supremacy* (2007)

1. Affiliated Presidents actively support judicial authority

- a. The affiliated president's logic in support of judicial review: "The affiliated leader supports judicial activism because he does not expect it to be used against himself... The Supreme Court has often used the power of judicial review to bring states into line with the nationally dominant constitutional vision." By being free of the "jumble of legislative and electoral politics," the Court is often better able to move the coalition's constitutional agenda forward.
- b. The necessary conditions for the politics of affiliation: (1) Appointments, (2) Political supports (in defense of friendly courts from attack), (3) Contextual supports (the fact that federal judges are drawn from a sociologically similar pool as elected officials), (4) a coherent constitutional component to the regime.
- c. Affiliated regimes protect courts from attack: "elected officials can protect friendly courts from court-curbing legislation, allowing the Court to be activist with little fear of political reprisal... In the early 20th century, Progressives responded to the *Lochner* Court by frequently proposing a variety of court-curbing measures that were promptly buried in conservative congressional committees."
- d. Examples: Harry Truman, John F. Kennedy

2. Preemptive Presidents defer to judicial authority

- a. The preemptive president will rarely openly oppose the court: "The preemptive president is likely to be in opposition to the Court and its understandings of the Constitution as well as to other elected officials and the dominant ideology... Unable to pursue the politics of reconstruction, however, the preemptive leader will see little benefit and much danger in the path of maximal resistance and will refrain from issuing a direct challenge to the judicial authority."
- b. The preemptive president may sometimes align itself with the court: "In their political weakness, preemptive presidents may seek alliances with the

courts. Despite their particular disagreements with judicial doctrine, preemptive presidents may find themselves attempting to bolster judicial authority...to the extent that the courts take the law seriously. The relative insulation of the judiciary from normal political pressures... prevents it from being a mere instrument of the dominant regime.” Hence preemptive presidents may find themselves “attempting to borrow from the authority of the courts in order to hold off their political adversaries.”

c. Examples: Andrew Johnson, Richard Nixon, Jimmy Carter

3. **Reconstructive Presidents actively challenge judicial authority**

a. Reconstructive presidents emerge during realigning elections: “at every turn in national policy where the cleavage between the old order and the new was sharp, the new President has faced a judiciary almost wholly held over from the preceding regime...[which has] been an estranging influence between the Court and the great Presidents.”

b. Reconstructive presidents challenge inherited constitutional understandings, and in so doing they “find the judiciary to be an intrinsic challenge to their authority... the heightened constitutional sensitivity of these presidents is likely to make contemporary judicial actions unusually salient.”

c. Reconstructive presidents supplant judicial authority: “The president and the judiciary compete over the same constitutional space, with the authority of presidents to reconstruct the inherited order supplanting judicial authority to settle disputed constitutional meaning.”

i. In the politics of reconstruction, the judiciary is portrayed as itself highly politicized.

d. Examples: Thomas Jefferson, Andrew Jackson, Abraham Lincoln, and Franklin Roosevelt

John Ferejohn and Charles Shipan, “Congressional Influence on Bureaucracy” (2007)

1. **Judicial review may increase congressional influence on bureaucracy**

a. A sequential model statutory policymaking: There are five actors: An agency, a legislature, a legislative committee, a court, and an executive. The legislature is assumed to be a unicameral body that delegates the supervision of the agency to a committee with the authority to initiate legislation changing the policy from the agency proposal; if such a proposal emerges from committee, it is considered “open rule,” meaning that it may be freely amended on the floor; the resulting legislation is implemented unless the executive vetoes it. The sequence is as follows:

i. Agency implements policy

ii. Court upholds/strikes down policy

- iii. Legislative committee decides whether to initiate overriding legislation
- iv. [Assuming committee introduces legislation] legislature deliberates, amends, and votes on proposal [legislature will not introduce a bill that will be vetoed by the president]
- b. Assumptions:
 - i. we can arrange the preferences of the foregoing actors in a unidimensional policy space
 - ii. The actor's preferences are monotonic, in the sense that an actor prefers a policy closer to their ideal point to one that is farther from their ideal point.
 - iii. Perfect information exists and actors are unwilling to have their proposal overturned
- c. The model results:
 - i. The introduction of judicial review either does not alter the agency's policymaking discretion or it forces the agency to be more responsive to legislative preferences.
 - ii. The introduction of an executive veto either has no impact on the agency's policymaking discretion or it can force the agency to adopt a policy aligned more closely to congressional preferences.
- d. Implications: In all of these cases, the effect of introducing judicial review is either to leave the outcome un- changed or shift it toward the chamber median. In this respect, the court increases the responsiveness of the agency to the chamber. Thus, even if the institution of judicial review is backward-looking, its effect can be to increase the responsiveness of the policy outcome to the current Congress

JUDICIAL POLITICS II: THE ATTITUDINAL MODEL

C. Herman Pritchett, "The Roosevelt Court: Votes and Values" (1948)

1. Studying SCOTUS voting blocs by assessing range of agreement

- a. The focus: determining the average range of agreement, where the average range of agreement is the average of each justice's range of agreement
 - i. A justice's range of agreement: calculate his rate of agreement with each other justice as a percent of the non-unanimous opinions in which they both participated, then take the difference between the highest and lowest rates for this justice.

2. Two voting blocs surface to reveal justices' policy preferences

- a. Judges vote on the basis of policy preferences: The SCOTUS's divisions on personal liberty and economic regulation reflect judges' divergent policy preferences and the fact that judges vote on these preferences.
- b. Supportive evidence of an ideological cleavage: Judges' political alignment is consistent across types: Those on the left of personal liberty issues vote to the left on economic issues, too.
- c. Evidence against an activist-restraint cleavage: Judges have sufficient leeway in basically every decision such that their personal values will inevitably exercise a "controlling influence."

3. Model specifics

- a. A focus on non-unanimous opinions: Studying non-unanimous opinions—particularly, the rates of agreement between pairs of justices—reveals the development of distinct blocs of justices (From 1931-5, there were 3 distinct blocks: the left (Stone, Cardozo, Brandeis), the center (Hughes, Roberts), and the right (VanDevanter, Sutherland, Butler, McReynolds).)
- b. A justice's range of agreement reveals their extremism: centrist (low range) or an extremist (high range)
- c. Voting blocs became more defined following the "switch in time:" In the 1936 term, when the Court finally accepted the New Deal, the Court's blocs became more defined, as indicated by an increase in the average range of judicial agreement (from 55 to 68)
 - i. Since 1942, extremes of agreement and disagreement among justices have gradually decreased
- d. Personal liberty/economic cases spur the most divergence:
 - i. Personal liberty cases: the Court is divided in to two wings: a right (less sympathetic to personal liberties claims) and a left (more sympathetic). Further, the judges on each wing tend to vote similarly across different kinds of personal liberty issues (civil liberties, rights of criminal defendants)
 - ii. Economic cases: (business and labor regulation): The left wing tends to be more pro- federal regulation and more pro-labor than the Court average, while the other justices tend to fall below the Court average.

Jeffrey Segal and Harold Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (2002)

4. SCOTUS Justices are relatively unconstrained policymakers

- a. Judges as policymakers: "While *Bush v. Gore* may appear to be the most egregious example of judicial policy making, we suggest it is only because of its recency. Our history is replete with similar examples, although perhaps none as shamelessly partisan." Policymaking is not a "subversive activity;"

it merely entails “choosing among alternative courses of action, where the choice binds the behavior of those subject to the policy maker’s authority.”

- b. Four conditions allowing SCOTUS justices to be unconstrained:
 - i. Americans treat the Constitution as the fundamental law of the land and a benchmark from which to assess the legitimacy of all government action
 - ii. Americans’ adherence to the principle of limited government engenders distrust of government and politicians from which judges remain immune
 - iii. The American federal structure, with a vertical division of powers between state and federal government and a horizontal separation of powers between the three branches, requires the adjudication of inter-governmental conflict
 - iv. The Supreme Court in *Marbury v. Madison* bestowed this settlement authority upon itself, and this role for the Court has since become entrenched

5. Segal and Spaeth’s Attitudinal Model

- a. Thesis of the attitudinal model: the Supreme Court decides disputes in light of the facts of the case vis-a-vis the ideological attitudes and values of the justices. Simply put, Renhquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he was extremely liberal.” Its central concept is that of an “attitude,” which comprises a relatively enduring “interrelated set of beliefs about an object or situation. For social action to occur, at least two interacting attitudes, one concerning the attitude object and the other concerning the attitude situation must occur”
- b. Decisionmaking depends on goals, rules, and situations:
 - i. by goals, we mean that judges are outcome-oriented
 - ii. by rules, we mean that the choices available to judges depend on the rules of the game (the institutional environment)
 - iii. by situations, we mean, most centrally, the facts of the case at hand

6. Empirical Evidence in support of the attitudinal model

- a. Empirical coding: (based on post-WWII SCOTUS case law data)
 - i. Coding judicial attitudes (IV): “the judgments in newspaper editorials that characterize nominees prior to confirmation as liberal or conservative insofar as civil rights and liberties are concerned”
 - ii. Coding liberal/conservative decisions (DV): “whether a liberal decision is issued in a civil liberties case (where a liberal decision is measured as one that is (1) pro-person accused or convicted of a crime; (2) pro-civil liberties or civil rights claimant; (3) proindigent; (4) pro-Indian; or is (5) antigovernment in due process and privacy”
- b. Empirical results:

- i. logistic regression results find that the facts of search and seizure cases significantly affect the decisions of the Supreme Court, “but on that point the attitudinal model does not differ from the legal model.”
 - 1. Facts pushing the Court in more liberal direction (finding the search unreasonable): the person being searched has a property interest (i.e., the search is conducted in a home, business, car, or on one’s person), and the police conducted a “full” search rather than a more limited one.
 - 2. Facts pushing the Court toward the “conservative” direction, admitting the evidence in question: the police had a warrant, conducted the search incident to a lawful arrest or after such an arrest, and there existed exceptions to the warrant requirement.
- ii. Once this dependent variable is regressed on the facts of the case and the measure of the policy preference of justices, the latter is highly statistically significant: In fact, attitudes alone predict 70% of outcomes in search and seizure cases
- iii. when Congressional preferences, using two rational choice models of preference aggregation, are incorporated into the regression, they do not significantly predict the outcome of statutory cases (controlling for justices’ policy preferences).

7. Against the “Legal Model”

- a. Thesis of the legal model: While it comes in many shades, “what typically connects these variants together is the belief that, in one form or another, the decisions of the Court are substantially influenced by the facts of the case in light of the plain meaning of statutes and the Constitution, the intent of the Framers, and/or precedent”
- b. Weaknesses of the legal model:
 - i. Legal provisions cannot be mechanically applied: “English as a language lacks precision...legislators and framers of constitutional language typically fail to define their terms...one statutory or constitutional provision or court rule may conflict with another...[and] identical words in the same or different statutes need not have the same meaning”
 - ii. Legislative intent is often indecipherable: legislative intent, following Kenneth Arrow’s impossibility theorem establishing that every method of preference aggregation violates at least one principle required for reasonable and democratic decisionmaking, is frequently “meaningless”
 - iii. Precedent is clearly not binding: Judges frequently disagree over what constitutes precedent (is it the decision plus the material facts, or the underlying principle on which the case was decided?), and even when the precedent is clear, they possess four legal tools to sidestep it:

1. *obiter dicta* (the argument that the precedent relates to surplus language from a previous case, and hence does not bind)
2. distinguishing a precedent (by asserting that the facts of the case are so different that the precedent no longer binds)
3. limiting a precedent
4. overruling a precedent

8. Against the “Rational Choice/Strategic Model”

- a. Thesis of the rational choice model: “Supreme Court justices strategically deviate from their ideal points in order to prevent the legislative override of their decision. In short, “if the Court exercised rational foresight, it would not always choose its ideal point;” rather, it will “construe legislation as close to its ideal point as possible without getting overturned by Congress.”
- b. Weaknesses of the rational choice model:
 - i. It assumes that Court justices possess perfect information regarding Congressional preferences
 - ii. It assumes that Congressmen face no transaction costs in seeking to override a Court precedent
 - iii. It assumes a world of statutory interpretation, rather than one of constitutional review where the Court possesses the final say
 - iv. It does not consider the Court’s ability to react and respond to Congressional action
 - v. It treats judicial preferences as exogenous even though, as Dahl (1957) argued, it is unlikely that the President and Senate will consistently appoint justices who deviate from their own preferences

Jonathan Kastellec, “The Statistical Analysis of Judicial Decisions and Legal Rules with Classification Trees” (1997)

1. Segal and Spaeth’s Logit Models do not capture how Justices decide cases

- a. The logic approach: “the weight of facts are simply added together based on their presence or absence in a given case; that is, the presence of certain facts will push a case toward one classification, while the presence of other facts will pull it toward another classification.” Additionally, there is an “assumption is that the presence or absence of multiple case facts has an additive, rather than interactive, effect”

2. The preferable model: Classification trees

- a. The classification tree: A legal rule is defined as a “sorting device” capable of dividing facts into distinct classes. “a classification tree will first split the data into regions based on the variable that minimizes the heterogeneity in the resulting two groups. The tree will continue to split the data, recursively, as long as doing so reduces the heterogeneity in the data. The result of this

process results in a tree that is possibly very large and may overfit the data. Thus, it is usually necessary to ‘prune’ the tree, using a criterion that favors parsimonious trees.”

b. Benefits of approach:

- i. Does the best job of “capturing the structure of legal rules” produced by judicial decisions, and can “increase our understanding of legal doctrine”
- ii. Displays “the hierarchical and dichotomous nature of judicial decision making... hierarchical in that often the answer to an initial question (e.g., Did the police have a warrant?) will lead a judge down a certain path, and dichotomous in that the answers to the questions considered under the law frequently have a yes/no answer
- iii. Variable interaction: “the classification tree procedure will inherently reveal key interactions among all predictor variables”

3. **Empirical Application**

- a. The Data: Search and seizure cases decided by SCOTUS (1962-1984) & confessions cases decided by Courts of Appeals (1946-1981)
- b. The DV: Following Segal and Spaeth (2002), response variable is the direction of the Court’s decision in each case: it can either find the search in question ‘reasonable’ (a conservative decision) or ‘unreasonable’ (a liberal decision).
- c. Results: By matching the tree branches with results of actual search and seizure cases, we can unearth the operative legal rules that apply to search and seizure cases (by matching the percentage of cases where the decision aligns with a classification tree)

Barry Friedman, “Taking Law Seriously” (2006)

1. **A critique of positive political science generally, and attitudinalists specifically**

- a. They are inattentive to the “normative bite” of the law: Political scientists are embroiled in intra-disciplinary squabbles (asking, for ex. “Attitudinal model or strategic rational choice?” rather than “How much of behavior is explained by each model, under what circumstances, and why?”
 - i. Political scientists should instead specific phenomenon matters for our understanding/ the design of courts/law head on. After all, even identifying something as a question worth researching involves some kind of normative commitment.
- b. They do not understand the operation of the law: Segal and Spaeth (2002) focus too heavily on outcomes and not enough on the content of opinions, giving a distorted view of what judges actually decide when they decide a case. Similarly, they often misinterpret what it would mean for law to “have

- an effect” on judicial behavior because they don’t understand the internal norms of law (for example, how precedent would figure into a decision if it were to play a significant role)
- c. Their data collection is biased: Focus on cases the Court decides on merits, excluding those the Court refuses to hear; focus on published rather than unpublished decisions; focus on decided cases, without taking account of a possible “settlement effect”; focus on civil liberties cases the most likely to exhibit ideological voting

JUDICIAL POLITICS III: THE STRATEGIC MODEL

Lee Epstein and Jack Knight, *The Choices Justices Make* (1998)

1. SCOTUS Justices are strategic actors

- a. The thesis of the strategic model: “justices may be primarily seekers of legal policy, but they are not unsophisticated characters who make choices based merely on their own political preferences. Instead, justices are strategic actors who realize that their ability to achieve their goals depends on a consideration of the preferences of others, of the choices they expect others to make, and of the institutional context in which they act.”
- b. The preferences of judges: “a major goal of all justices is to see the law reflect their preferred policy positions”
- c. Interdependence requires strategic action: “a Supreme Court justice must make interdependent choices that take account of the preferences of (1) his/her fellow justices, (2) the executive branch or the legislature, (3) the public.”
- d. What is law? “The law, by this account, constitutes the slow accretion of myriad bouts of “short-term strategic decision-making.”

2. Empirical evidence in favor of the strategic model

- a. Data:
 - i. All 1983 term cases that were orally argued and listed in Justice Brennan’s register (157 cases in total)
 - ii. Landmark cases decided during the Burger Court years (1969-1985, or a total of 125 cases)
 - iii. the case files of Justices Marshall and Brennan, who served during the entire Burger Court years; of Justice Powell (including docket books, and conference notes from 1972 onwards), and Justice Brennan’s conference notes and docket books
- b. Justices bargain with each other:

- i. Justices bargain over whether or not to grant *certiorari*: Given the Rule of Four, which allows four justices to grant *certiorari*, justices face an interdependent choice
 - 1. the threat of a dissenting opinion from a *certiorari* decision altered the Court's decision in about 23 percent of cases in which it was leveraged (enough to be a credible threat)
- ii. Justices bargain on the merits of the case: ““after the opinion writer sends a first draft of an opinion to the full Court.” Specifically, they issue “bargaining statements:”
 - 1. Bargaining statements were issued 70 percent of the time in landmark cases, and 47 percent of the time over the course of the 1983 term
 - 2. Separate writings, which include (1) concurrences in judgment, (2) regular concurrences, (3) concurrences in part and dissents in part, (4) dissents, or (5) memoranda opinions, are also used as bargaining tools
 - 3. Overall, separate writings were produced and then retracted or altered in nearly 20 percent of cases - a phenomena that cannot be explained by the attitudinal model
- c. Justices engage in forward thinking, anticipating the decisions of their colleagues and preemptively adjusting their own choices
 - i. As another Justice put it, “I might think that the Nebraska Supreme Court made a horrible decision, but I wouldn't want to take the case, for if we take the case and affirm it, then it would become precedent”
- d. Justices manipulate the agenda
 - i. The norm that the Chief Justice speaks first during conference deliberations following oral arguments provides him with the opportunity to manipulate the agenda. If the Chief Justice believes that he will be outnumbered, he may seek to refocus debate on a different dimension of the case where a more favorable outcome is possible.
 - 1. A qualitative coding of the Powell, Marshall, and Brennan papers finds that agenda manipulation attempts are made in approximately 17 percent of cases
- e. Justices engage in strategic opinion-writing
 - i. “Given the requirement of a majority for the establishment of precedent and the fact that it would be difficult to imagine any case in which the opinion writer fully agreed with the majority on every point, all opinions of the Court are, to greater and lesser degrees, the product of strategic calculations.”
 - 1. Comparing the policy and rationale articulated by the opinion writer in the first circulation with that contained in the

published opinion reveals that Justices substantially altered their opinion in 45 percent of 1983 term cases and 65 percent of landmark cases

- f. Justices are responsive to the preferences of governmental actors
 - i. Justices respond to the likely actions of other governmental actors because they (1) obtain information about other actors' positions; (2) are attentive to those positions; and (3) their beliefs about the positions of external government actors affect the choices they make.
 - 1. Justices are likely audiences of national media sources like everyone else, and *amicus curiae* briefs delineate the preferences of other government actors 78 percent of the time
 - 2. Evidence from Powell and Brennan's papers suggests that justices discuss the preferences of other government actors in some 46 percent of constitutional cases and 70 percent of non-constitutional cases
 - 3. Cases like *Marbury v. Madison* underscore the fact that the "external constraint of the separation of powers system is in fact operative in some constitutional cases"
- g. Justices are responsive to broader social values
 - i. Consider the joint opinion issued in *Planned Parenthood v. Casey* authored by Justices O'Connor, Kennedy, and Souter: "A decision to overrule Roe's essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy and to the Nation's commitment to the rule of law. It is therefore imperative to adhere to the essence of Roe's original decision, and we do so today."
 - ii. Adherence to precedent (*stare decisis*) is a tool strategically leveraged by justices to nurture the social perception that they are bound by preexisting law: "Why would justices feel compelled to invoke precedent . . . especially when many other justifications exist? The answer is clear. The justices' behavior is consistent with a belief that a norm favoring precedent is a fundamental part of the general conception of the function of the Supreme Court in society at large"

Georg Vanberg, "Legislative-Judicial Relations: A Game-Theoretic Approach to Constitutional Review" (2001)

1. The conditionally credible threat of legislative non-compliance

- a. Legislatures' noncompliance threat will not be credible if:
 - i. There exists sufficient public support for the court generally or for its decision to make an attempt at noncompliance unattractive

- ii. Voters are able to monitor legislative responses to judicial rulings effectively and reliably
- b. Legislative supremacy over courts is the equilibrium outcome if the policy environment is not transparent, such that it is difficult for the public to monitor legislative compliance with court rulings
- c. Judicial supremacy over legislatures is the equilibrium outcome if two conditions are met:
 - i. There is legislative transparency, such that the public can monitor legislatures' compliance with court rulings
 - ii. The probability that the court will be hostile to legislative preferences is sufficiently low
 - 1. If this condition is not met, the result is "autolimitation," whereby the legislature does not pass the legislation that it predicts will be struck down by the hostile court
- d. A "jousting" equilibrium will emerge (where the legislature evades an annulment by an assertive court) if the likelihood that the policy environment is transparent must be low enough to induce the legislature to risk an evasion attempt but high enough for the assertive court to risk annulling the statute
- e. Implications of the game-theoretic analysis:
 - i. The bargaining powers of court and legislature depend on the transparency of the environment in which they act
 - ii. The court becomes less deferential and more powerful as the support it can expect from the public in a confrontation with the legislature increases
- f. Empirical application: logit analysis of German Federal Constitutional Court
 - i. Data: All cases decided by the German Federal Constitutional Court, including those that resulted in the annulment of federal statutes, from 1983 through 1995
 - ii. Transparency of the policy environment: is measured by the complexity of the policy area
 - 1. complex: social insurance, economic regulation, taxation, federal budget issues, etc.
 - 2. noncomplex: Institutional disputes, family law, individual rights, etc.
 - iii. Logit model results: The German court appears to be systematically more likely to annul a statute when the likelihood that it is acting in a transparent environment is higher. "Transparency has a significant effect on the level of judicial deference."

Anna Harvey and Barry Friedman, “Pulling Punches: Congressional Constraints on the Supreme Court’s Constitutional Rulings, 1987-2000” (2006)

1. Selection bias in extant scholarship

- a. Lack of evidence of a Congressionally constrained court is due to selection bias: If the hypothesis of a constrained court is true, then the justices will have few incentives to accept for review those cases that challenge congressional laws that the Court’s median justice thinks cannot be struck in the current political environment. By extension, litigants will have few incentives to challenge such laws in that context. Both limitations may result in a sample of cases being heard by the Court each term whose outcomes will systematically understate the Court’s responsiveness to the elective federal branches.”
- b. Remedy: Look at congressional statutes, not to cases accepted by SCOTUS

2. Empirical findings

- a. Data: “In total, we followed the fate of 3,725 laws over a range of 1 to 14 years. An observation thus consists of law i observed in year t ; we have 29,755 observations in all.”
- b. DV: Whether a law was struck down by the SCOTUS
 - i. 22/3725 laws were struck down between 1987 and 2000
- c. IV: Ideological distance between the SCOTUS and Congress (either committee, or majority party, or median congressional member)
- d. Model: Poisson regression (note: this doesn’t account for overdispersion!)
- e. Findings: The predicted probability that a 1987 statute would be struck increases by 278% immediately following the 1994 congressional elections
- f. Implications: “Our finding of congressional constraint in constitutional cases raises significant concerns about studies that assume that votes in such cases are unconstrained [i.e. Segal and Spaeth 2002].”

Jeffrey Lax and Charles Cameron, “Bargaining and Opinion Assignment on the US Supreme Court” (2007)

3. The model of opinion assignment

- a. Opinion-writing is costly, endowing the assigner with an advantage: “the policy impact of an opinion depends partly on its persuasiveness, clarity, and craftsmanship-its legal quality...producing higher quality opinions requires costly time and effort both for the opinion writer and counter-writers who contest the opinion. In the model, this effort cost creates a wedge the assignee can exploit to move an opinion away from the median justice’s most preferred policy without provoking a winning counter-opinion. Then, in the assignment model, the Chief Justice (or other assigner) anticipates the

outcomes of the bargaining game and strategically assigns opinions in order to best achieve his/her policy goals.”

4. **The sequence of bargaining on the SCOTUS**

- a. Initial conference vote: There is a preliminary ‘straw’ vote by the Justices on the disposition of the instant case, which establishes the initial majority.
- b. Opinion assignment: The Chief Justice, if he is a member of the initial majority, assigns the opinion to a justice in the initial majority. If not, the senior justice in the initial majority assigns it.
- c. Initial majority opinion: The assignee writes and circulates a draft opinion.
- d. Responses to the majority opinion: Justices in the minority can respond, writing and circulating an opinion designed to attract a majority away from the initial majority. Or, members of the minority may simply dissent.
- e. Final vote: The justices “vote” for the assignee’s majority opinion draft by joining it or they can join some other opinion (if any). With majority support, the winning opinion becomes the official majority opinion.

5. **Strategic opinion assignment: assigning to the more extreme justice**

- a. Premises:
 - i. A centrist assignee will not need to invest much in quality. A non-centrist assignee will need to invest more in quality if he/she wants to draw the policy away from the median.
 - ii. The greater willingness of a more extreme opponent to contest the assignee’s opinion forces the assignee to craft a more moderate, higher quality opinion
- b. Results: The Chief Justice (or other assigner) to favor writers who are more extreme ideologically than he. By assigning to a more extreme justice, the assignor can ensure that the ideological placement of the opinion can be closer to the assignor’s own ideal point, given the moderating influence of bargaining
 1. Both these features will lead the Chief Justice (or other assigner) to favor writers who are more extreme ideologically than he/she is himself/herself. By assigning to a more extreme justice, the assignor can ensure that the ideological placement of the opinion can be closer to the assignor’s own ideal point, given the moderating influence of bargaining

Jeffrey Mondak and Shannon Smithey, “The Dynamics of Public Support for the Supreme Court” (1997)

1. **Activist SCOTUS can maintain high and stable public support**

- a. The public does not respond in unison or en masse to SCOTUS decisions: Divisions by race (Gibson and Caldeira 1992; Jaros and Roper 1980),

- partisanship (Adamany and Grossman 1983), political activism (Adamany and Grossman 1983; Tanenhaus and Murphy 1981), religion (Franklin and Kosaki 1989), and commitment to democratic values (Caldeira and Gibson 1992) condition public response to the Court and its decisions.”
- b. SCOTUS can maintain stable public support by aligning with majority interests/values most of the time: “Individuals who are vehemently opposed to a decision this year may back the Court next year when memory of the case fades, and either value-based regeneration or a favorable ruling wins them over.”
 - i. Building a reservoir of support: “Because the institution is linked to basic democratic values, and because most rulings are consistent with majority preferences, the Court is well-positioned to withstand the shocks that accompany its most controversial edicts”
 - c. Empirics: (analysis of public opinion of “confidence” in the SCOTUS from 1972-1994)
 - i. Higher percentages of public support for SCOTUS than for Congress of the President during observed period and “Support for the Supreme Court also appears more stable than support for the other two institutions in that the Court’s peaks and valleys seem more moderate than those of Congress and the executive branch.”

Tom Clark, *The Limits of Judicial Independence* (2011)

1. The SCOTUS care about diffuse support

- a. Diffuse support: As opposed to specific support, which “refers to public approval of decisions in individual cases, diffuse support refers to broad support for the Court as an institution. Judicial legitimacy, or diffuse support, is generally considered to represent a court’s normative authority to make a binding decision.” It can become a “resource on which the Court can draw in order to gain compliance with decisions for which the public may not have specific support.”
- b. Congressional attacks are signals of diffuse support: When “Congress engages in political attacks on the Court, the Court will interpret those attacks as signals about waning public support for, and confidence in, the Court.” Research (Gibson and Caldeira 1995) shows that when diffuse public support declines, the public will increasingly support efforts to politically sanction the court.
- c. Hence the SCOTUS will be sensitive to court-curbing legislation: “I focus explicitly on the introduction of legislation that threatens to restrict, remove, or otherwise limit the Court’s power, which I call Court-curbing legislation.” Why focus on court-curbing legislation?

- i. It is a very visible form of political attacks, and there is evidence that Justices pay attention to Court-curbing proposals in Congress
- ii. Court-curbing legislation is plausibly tied to public opinion, and Clark assumes that the SCOTUS is sensitive to its level of diffuse public support
- iii. Court-curbing legislation wields a powerful set of Constitutional tools, including setting the SCOTUS' jurisdiction, altering the size/term of the Court, or impeaching members of the Court

2. Court-curbing and SCOTUS behavior: Conditional self-restraint

- a. Historical trends: A content analysis of all court-curbing legislation from 1878 to 2008 reveals that from 1877 to 1940 Court-curbing was clearly a weapon utilized by liberals; since 1945, Court-curbing has become primarily a weapon used by ideological conservatives
- b. Court curbing is most likely to be introduced when SCOTUS approval is lowest: Logistic regression finds that when the Court is lowest in public opinion polls, the effect of ideological divergence between a legislator on the introduction of Court-curbing legislation is greatest.
- c. Conditional Self-Restraint by the SCOTUS: Random effects and fixed effects regressions find that as more Court-curbing bills are introduced in Congress by liberal members, the justices vote more liberally.

JUDICIAL POLITICS IV: IDEAL POINT ESTIMATION

Andrew Martin and Kevin Quinn, "Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the US Supreme Court, 1953-1999." (2002)

1. The Model

- a. A Bayesian, dynamic linear model using Markov Chain Monte Carlo methods
 - i. Attitudinal model, for justices' 'votes' in cases are seen "as a function of [their] policy preferences"
 - ii. Authors emphasize the importance of historicizing judges by giving them "assumed prior distribution on the ideal points." "Assuming that each justice's ideal point at time t is independent of her ideal point at t-1...does not seem plausible to us, as surely justices demonstrate at least some stability in their attitudes over time."

2. Application: SCOTUS Justices' Ideal Points Change Over Time

- a. "many justices do not have temporally constant ideal points," but instead change over time

- i. This answer is contrary to conventional judicial politics wisdom, which says, “The occasional anomaly notwithstanding, most jurists evince consistent voting behavior over the course of their careers.”
- ii. This also means that in certain periods, the median justice has shifted from one justice to another even when the composition of the Court has not altered dramatically.
- iii. Additionally, the location of the median shifts from year to year, even when the median justice remains the same

Tom Clark and Benjamin Lauderdale, “Locating Supreme Court Opinions in Doctrine Space.” (2010)

1. The argument: An opinion’s reasoning best conveys its ideology

- a. Precedents can distinguish court opinions from each other: “a central feature of legal argumentation is the use of precedent to justify a decision.” if one opinion affirms a precedent from group A, a second opinion affirms a precedent from group B, and a third opinion affirms precedents from both groups A and B, then it is reasonable to identify the latter opinion as “between” the former two.
- b. The logic: An opinion’s reasoning best conveys its ideology: This is the most impactful output of an opinion: “Supreme Court opinions are important precisely because of the doctrine - or law - that they make. After all, the Court does not just announce the result of its vote; rather, it offers an opinion - often more than one - with reasoning, justification, and principles of law. It is this part of the Court’s decision - the reasoning, justification, and principles of law - that is binding on lower courts and other institutions. In fact, it is this part of a Supreme Court decision in which political scientists are usually- at least implicitly – interested.”

2. The Model I: Ideological Position of Court Opinions

- a. Assumptions:
 - i. First, each opinion can be located along a single policy dimension;
 - ii. Second, the more proximate an opinion is to a given precedent, the more likely it is to affirm it (producing a “positive” citation), whereas the farther an opinion is to a given precedent, the more likely it is to dispute it (producing a “negative” citation)
 - iii. Third, that “directionality” does not matter
- b. Coding: on the basis of hand-coding precedents cited in a subset of Court opinions as either “positive” or “negative” citations: “Positive citations include instances of reliance on a standard or logic that was followed or developed in a precedent, or analogizing from the facts of the instant case to

- the facts of the precedent. Negative citations include distinguishing a precedent from the instant case, declining to follow a precedent, or contrasting the current case with the precedent”
- c. Output: Bayesian model predicts the probability of an opinion positively citing a precedent espousing a precedent as a function of its ideological distance to said opinion
3. **The Model II: Ideal Point Estimation of Justices**
 - a. Assumptions: Justices will not join a majority opinion which they oppose
 - b. Coding: Dichotomous coding of whether a justice joins a majority opinion, after it has been situated in ideological space in Model I
 - c. Output: The authors first leverage the previous method to orient Court opinions in unidimensional policy space. They then aggregating all of the justice’s votes related to the opinions within their dataset to compute the justice’s ideal point. For example, justices that are particularly likely to join majority opinions that Clark and Lauderdale’s citation method suggests are liberal opinions will have more liberal ideal points.
 4. **Empirical Application: The median majority coalition member gets his way**
 - a. Application: Post-war search/seizure (n=851) and freedom of religion opinions (n=217)
 - i. For each of these opinions, non-procedural precedents were coded as either “positive” or “negative” citations: “Positive citations include instances of reliance on a standard or logic that was followed or developed in a precedent, or analogizing from the facts of the instant case to the facts of the precedent. Negative citations include distinguishing a precedent from the instant case, declining to follow a precedent, or contrasting the current case with the precedent”
 - b. The authors test three models:
 - i. The median justice model: which asserts that “because the median is pivotal in any vote, all opinions will be located at the median justice’s preferred policy”
 - ii. The author monopoly model: which asserts that “the opinion author should have some degree of influence over the opinion location”
 - iii. The median of the majority coalition model, which “predicts that the median member of the majority coalition will control the locations of opinions”
 - c. The median majority coalition model wins
 - i. In some 70 to 82% of search/seizure and freedom of religion cases, respectively, the majority opinion was congruent with the ideal point of the median member of the majority coalition
 1. Conversely, 28 to 54% of majority opinions could be distinguished statistically from the ideal point of their author

2. 20 to 36% of the majority opinions could be statistically distinguished from the ideal point of the Court's median justice

LAW AND SOCIETY I: DISPUTING AND LITIGATING

William Felstiner, Richard Abel, and Austin Sarat, "The Emergence and Transformations of Disputes: Naming, Blaming, Claiming..." (1981)

1. The transformation perspective: Disputes as social constructs

- a. Argument: To describe the emergence and transformation of disputes, we need to treat disputes not as things, but as social constructs. Specifically, The transformation perspective directs our attention to the transformation of an unperceived injurious experience into a perceived injurious experience. The parties to a conflict are central agents, as well as objects, of the transformation process. In a healthy social order, barriers inhibiting the emergence of grievances and disputes are dismantled, thereby allowing claims for redress.
- b. Step 1- Naming: saying to oneself that a particular experience has been injurious
- c. Step 2- Blaming: The transformation from perceived injurious experience to grievance. "By including fault within the definition of grievance, we limit the concept to injuries viewed as violation of norms and as remediable."
- d. Step 3- Claiming: when someone with a grievance voices it to the person or entity believed to be responsible and asks for some remedy. A claim is transformed into a dispute when it is rejected in whole or in part. Rejection need not be expressed by words- delay may be perceived as resistance

2. Transformed perspectives via disputes

- a. Transformed perspectives need not be accompanied by observable behavior: "The content of the dispute can be transformed in the mind of the disputant, although neither the lawyer nor the opposing party knows about the shift"
- b. Transformed perspectives are unstable: "since transformations may be nothing more than changes in feelings, and feelings may change repeatedly"
- c. Transformed perspectives are reactive: "Since a dispute is a claim and a rejection, disputes are reactive by definition- a characteristic that is readily visible when parties bargain or litigate. But reactivity occurs also at the earlier stages, as individuals define and redefine their perceptions of experience and the nature of their grievances in response to the communications, behavior, and expectations of a range of people"

- d. Transformed perspectives are complicated: “disputing is a process involving ambiguous behavior, faulty recall, uncertain norms, conflicting objectives, inconsistent values, and complex institutions”
- e. Transformed perspectives via courts specifically: “Courts... may transform the content of disputes because the substantive norms they apply differ from rules of custom or ordinary morality, and their unique procedural norms may narrow issues and circumscribe evidence”
 - i. Alternatives to courts: In between courts and psychotherapy there are many other dispute institutions- arbitration, mediation, administrative hearings, and investigations- that use ingredients of each process in different combinations but always effect a transformation

Marc Galanter, “Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change” (1974)

1. The Advantage of “Repeat Players”

- a. The repeat player vs. the one-shotter: the RP is a larger unit and the stakes in any given case are smaller. OSs are usually smaller units and the stakes represented by the tangible outcome of the case may be high relative to total worth.
 - i. The one-shotter attempts to maximize tangible gain in the immediate case. They will be willing to trade off the possibility of making “good law” for tangible gain
 - ii. The repeat-player is interested in maximizing his long-term tangible gains, and thus may accept a loss in time t in order to go for rule gain (changing the broader rules) to gain in times $t+n$
- b. The advantages of repeat players:
 - i. They have advance intelligence
 - ii. They develop expertise and access to specialists
 - iii. They have opportunities to facilitate informal relations with institution incumbents
 - iv. They have an easier time credibly committing themselves in bargaining
 - v. They can play the odds
 - vi. They can play for rules as well as immediate gains
 - vii. They can play for rules in litigation itself, where an OS is unlikely to
 - viii. Via expertise, they are better able to discern which rules are likely to penetrate and which are likely to be symbolic, and can target their resources at influencing the development of the former
 - ix. They are better able to mobilize the resources necessary to secure the penetration of favorable rules

2. A Taxonomy of litigation

- a. One-shotter vs. one-shotter: most deal with divorces and insanity hearings. There are few appeals, few test cases, little expenditure of resources on rule-development. Legal doctrine is likely to remain remote from everyday practice and popular attitudes
- b. Repeat-player vs. one-shotter: this comprises most of the litigation that occurs. The law is used for routine processing of claims by parties for whom the making of such claims is a regular business activity
- c. One-shotter vs. repeat-player: these are infrequent- usually personal injury cases which are distinctive in that free entry to the arena is provided by the contingent fee.
- d. Repeat-player vs. repeat-player: mostly, there isn't much litigation: the expectation of continued mutually beneficial interaction would give rise to informal bilateral controls

3. Lawyers serving one-shotters: Generalists that don't stand a chance

- a. They make up the "lower echelons" of the legal profession. They tend to have problems mobilizing a clientele and encounter professional barriers that forbid solicitation, advertising, referral fees, etc.
- b. They provide uncreative legal services: Due to the episodic and isolated nature of the relationship with particular OS clients, tend to elicit a stereotyped and uncreative brand of legal services

4. Lawyers serving repeat-players: Specialists with a distinct advantage

- a. Specialized lawyers may, by virtue of their identification with parties, become lobbyists, moral entrepreneurs, proponents of reforms on the parties' behalf. They come in three main types:
 - i. Specialized by field of law (patent, divorce)
 - ii. Specialized by the kind of party represented (house counsel, for ex.)
 - iii. Specialized by both field of law and side or party (personal injury plaintiff, criminal defense, labor, etc.)

5. Limits on judicial impact

- a. Courts are not equipped to assess the impact or penetration problem (lack monitoring, surveillance, or securing enforcement)
- b. Built-in limits on applicability due to the piecemeal character of adjudication
- c. Judicial outcomes are more likely to be at variance with the existing constellation of political forces than decisions arrived at in forums lacking in similar insulation

6. Options to one-shotters in a legal market dominated by repeat players

- a. Inaction: not making a claim or complaint- this is often done by those lacking information
- b. Exit: withdrawal from a situation or relationship by moving, resigning, severing relations, finding new partners, etc.

- c. Unofficial control system: where disputes are handled outside the official litigation system. Some are officially appended to the official system, and some are independent in norms and sanctions or illegal

7. **Options for reform (to improve one-shotters' chances)**

- a. Rule-change
- b. Improvement of institutional facilities: would expedite processing claims such that there is timely full-dress adjudication of every claim put forward. Decrease in delay would lower costs for claimants
- c. Improvement of legal services in quantity and quality: This lowers costs, removes the expertise advantage, produces more litigation with more favorable outcomes for have-nots
- d. Improvement of strategic position of have-not parties: reorganizing the have nots into coherent groups that have the ability to act in a coordinated fashion, play long-run strategies, benefit from high-grade legal services, and so forth. They can be aggregated into RPs. Example: Public interest law, which
 - i. Via the class action lawsuit, raises the stakes for a RP, reduces his strategic position, and gives RP advantages to claimants
 - ii. Via community organizing, seeks to create a unit (tenants, consumers) which can play the RP game
 - iii. Can strategically use "test-cases" to achieve rule-change

LAW AND SOCIETY II: LITIGATION AND IMPACT

Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (1991)

1. **The contingent court**

- a. The SCOTUS will usually be unable to produce autonomous, large-scale social reform. Here, social reform means "policy change with nationwide impact" affecting national-scale groups as well as changes in bureaucratic and institutional practice nationwide."
- b. Three constraints that must be jointly overcome for SCOTUS to produce significant social reform:
 - i. Constitutional rights are limited (to overcome this constraint, there must be significant precedent to support social change)
 - ii. Judicial dependence is often an impediment (to overcome this constraint, the Court needs the support of powerful Congressional actors and the President)

- iii. The judiciary's inability to implement and enforce its judgments (to overcome this constraint, the Court needs support from some, or non-opposition from all, citizens)
 - c. And at least one of four conditions must obtain for the SCOTUS to produce social change:
 - i. There are incentives for political elites to comply with the court
 - ii. There are costs facing political elites for not complying
 - iii. The court's decision can be implemented via private market forces
 - iv. Officials key to administering the decision are already willing to act and see the Court's decision as a tool to further their existing reform agenda
 - d. This means the court will seldom stray from majoritarian political currents: many of the conditions for effective Court action depend on the support of majoritarian elements of the government— citizens, legislators, presidents, politically appointed bureaucrats, etc. Thus, even if the Court wants to oppose popular opinion, it generally can't effectively do so.
- 2. **Key empirical case study: *Brown v. Board of Education***
 - a. The case showcases the court's inability to promote autonomous social change:
 - i. 1954 unanimous ruling by the Warren Court to desegregate schools
 - ii. Fewer than 2% of all public schools are desegregated over the next several years
 - iii. Desegregation only occurs when President Johnson and the Democratically-controlled Congress pass the 1964 Civil Rights Act and begin to place substantial pressure on southern states to comply with *Brown*.

Michael McCann, *Rights at Work* (1994)

- 3. **Litigation provides empowering, identity-constituting experiences**
 - a. The argument: Via a case study of the pay equity movement's legal mobilization in the 1970s and 1980s, McCann's demonstrates how litigation can provide empowering, identity-constituting experiences for social movement participants even when it fails to produce large-scale, top-down changes in public policy. Although the struggle for pay equity emerged following women's increasing participation in the labor market, within unions, and via the feminist movement, it was ultimately the turn to litigation that had the most profound and long-lasting impact on female workers. While early courtroom victories were quickly replaced by repeated defeats following the rise of the conservative legal movement in the 1980s, the beneficial legacy of legal mobilization was profound.

b. Providing Politicizing Experiences

i. Activists are not born - they are forged by social experience. Most of the pay equity activists interviewed by McCann “recounted...remarkably parallel stories about specific politicizing experiences that transformed them into committed activists.” In particular, McCann found that a “large majority” of his interviewees “credited the [*County of Washington v. Gunther*] decision and other early cases as primary educational cues that generated their own initial personal interest and involvement in the cause”

1. *County of Washington v. Gunther*: SCOTUS “extended substantial support to the pay equity idea ...While refusing to explicitly endorse the comparable worth idea, the majority’s willingness to extend Title VII provisions to cover discrimination among different jobs opened a potentially large crack in the door to future legal claims

c. Legitimizing Claims via Rights Discourse

i. “Rights discourse empowered women workers by enabling them to “name” – i.e. to identify and criticize – hierarchical relations in familiar, “sensible” ways.” Hence the pay equity movement was able to strategically draw on a language imbued with legitimacy to advance its claims. As economist and pay equity advocate Heidi Hartmann noted, “once the idea of comparable worth or pay equity could be framed by lawyers in terms of rights against wage discrimination, it took on a lot of credibility and power”

d. Forging Political Opportunities and Raising Expectations

i. Early courtroom victories enabled pay equity activists to reference litigation “as a tactical resource to raise expectations among women workers that wage reform was possible. As a result, legal action greatly enhanced the opportunities for effective political organizing around the pay equity issue” (ibid: 48). Rights discourse empowered women to “imagine an act in light of rights that have not been formally recognized or enforced.” “New hopes and possibilities opened up by early litigation were translated into a generative force at the grassroots level.”

e. Cultivating an Enduring Legal Consciousness

i. McCann’s interviewees “repeatedly emphasized. . . that perhaps the single most important achievement of the movement has been the transformations in many working women’s understandings, commitments, and affiliations - i.e., in their hearts, minds, and social identities” (Ibid: 230). In particular, union activists repeatedly spoke “in enthusiastic and expansive terms” about how the benefits of legal

mobilization for pay equity “transcended “mere” economic redistribution.”

4. **Against “Neo-realist” Portrayals of Litigation as a “Hollow Hope”**

- a. Ignoring the relationality of power: Such a “neo-realist approach...tends to discount the reciprocal, interactive, relational terms of laws constitutive power. By reducing legal agency to judicial elites, the top-down approach obscures the subtle but significant ways that judicial actions shape the strategic landscape within which citizens (including elites) negotiate relations with each other as legal subjects.”
- b. Ignoring indirect effects and complementary strategies: “Likewise, the neo-realist model of impact greatly privileges attention to direct over indirect effects of courts...[as well as a] tendency...to isolate and compare tactics in zero-sum terms”
- c. Ignoring the constitutive effect of litigation: “without directly examining those various meanings, tactics, and goals - i.e. the legal consciousness - of activists themselves, it is rather presumptuous to judge the relative effectiveness of their actions.”
- d. Exaggerating the co-optation of movements by the law: neo-realist accounts greatly “exaggerate” the “ideological cooptation of movement activists by law” and the demobilization resulting from litigations strategies: In fact, “there is little evidence that litigation did in fact undermine grassroots activation anywhere to any significant degree”
- e. Ignoring the duality of law: “People at the “bottom” are used to seeing law in two ways at once. From an “outsider” perspective, they view law critically as an unprincipled source of privileged power. From an “insider” perspective, they adopt an “aspirational” view of law as a potential source of entitlement, inclusion, and empowerment”

Thomas Keck, “Assessing the Impact of Judicial Decisions on LGBT Rights” (2009)

1. Litigation for LGBT rights has been more beneficial than counterproductive

- a. Some backlash to LGBT mobilization in courts has occurred, but that has not been their only or even their most prominent effect.
 - i. Backlash proponents often claim that premature litigation efforts have the effect of derailing a movement’s more cautious campaigns through democratic institutions, but this incremental pattern of state-level policy change has continued without significant interruption-and may even have accelerated-during the period of active SSM litigation
- b. Litigation bolstered support for same-sex marriage: “Aggregating the public support for same sex marriage and civil unions in polls makes clear that a

- position that would have been considered a utopian gay fantasy at the outset of the litigation campaign now receives consistent support from popular majorities”
- c. In the absence of litigation, expansion of LGBT rights has been rare: “Only in Maine and New Hampshire have legislators significantly expanded partnership rights in the absence of local litigation, and even there, they surely did so at least in part because prior, litigation-promoted policy changes in neighboring states had raised the expectations of local gays and lesbians.”
 - d. Litigation does not preclude also leveraging other strategies for social change: “Every litigator is well aware that the struggle for legal reform does not begin and end in the courtroom.”

LAW AND SOCIETY III: CASE STUDY OF US LABOR MOVEMENT

William Forbath, *Law and the Shaping of the American Labor Movement* (2008)

1. **Why no Socialism in America? Because of the Impact of *Lochner* Jurisprudence**
 - a. The impact of law: “in the late 1800s and early 1900s, courts, legal doctrine, legal language, and legal violence played a crucial, irreducible part in shaping the modern American labor movement.”
 - i. “Nowhere else in industrial nations did the judiciary hold such sway over labor relations as in late 1800s to early 1900s America.”
 - b. The effect pre-1990: To cauterize radical claims and the acquisition of legal parlance: “the proliferation of anti-strike/anti-boycott decrees riveted trade unionists' political energies on repealing this judge-made regime. Labor leaders, to try to challenge judge-made law, began to speak and think more and more in the language of the law.” Yet by adopting “a law-inspired, laissez-faire rights talk, they displaced a more radical vocabulary of reform.”
 - i. Case study: the AFL's anti injunction campaigns, which reveal that labor’s leading spokesmen recast an older republican “rights-talk” into common law’s liberal mold, relinquishing a vision of law actively reconstructing the industrial world. Labor did, however, create an alternative constitutional vision built on the antislavery legacy. With time, workers persuaded state and national political elites that the old legal order was untenable and that labor’s exiled constitutional claims demanded recognition
 - c. *Lochner*-era labor jurisprudence, and labor’s alternative constitutional vision: “Courts construed unionization and strikes with interference of employers' property rights and nonunion workers’ liberty of contract. But in

adopting this jurisprudence, however, the courts spurned the alternative vision which held these activities to be the essence of republican freedom- labor activists could argue that Courts were one-sided not just in their treatment of labor, but also of the Constitution.”

- i. Slowly, a growing portion of the political elites came to embrace labor's constitutional vision- by the 1920s, senators/congressmen frequently complained that courts had defined the right to property so as to threaten workers' constitutional freedoms under the 1st and 13th amendments
- ii. Congress and state legislatures alike had their popular constitutionalists and civil libertarians, and they were outraged when “government by injunction” undermined trial by jury and trampled on the first amendment

Karen Orren, Belated Feudalism: Labor, the law, and liberal development in the United States (1991)

1. The resilience of the feudal labor law of master and servant post-Civil War

- a. Argument: “When the US entered industrialization after the Civil War, its politics contained a belated feudalism, and remnant of the medieval hierarchy of personal relations, a network of law and morality- a system of governance- that feudalism conveys. It hadn't been dislodged by the American founding, but remained embedded in American government. It is the missing link between 19th century liberal ideology and 20th century liberal politics.”
- b. The feudal structure of master and servant: There was an unbroken line from labor regulation in Tudor England to labor regulation in Gilded Age America. “The old structure of master and servant continued without major disturbance into an era when other hierarchies of feudalism had been dispersed in new institutions of society and government. The original landholding masters passed their privileges to business owners.”
 - i. Common-law tenets of master and servant sanctioned the employer's authority and bound the worker over time and labor. Common law writs of trespass, assault and battery, and enticement encircled those relations and protected them from outside intrusion.
 - ii. This law was maintained by courts: “Court behavior in the *Lochner* era was a concerted institutional defense of the labor remnant of feudal governance against legislative encroachment.” Judges regulated labor not so much thanks to the Constitution, but extra-constitutionally, for the old common law of master-servant was still

intact, not yet relegated to the legislature. This is why labor's struggles were bound to put them in conflict with the judiciary.

1. "That it was a moral order that judges were protecting, an arrangement of society essential to the whole."

Howard Gillman, *The Constitution Besieged* (2002)

1. In Defense of *Lochner* Era Jurisprudence

- a. *Lochner*-era judges merely channeled predominant political principles at the time: "the standards used by these judges to evaluate exercises of legislative power were not illegitimate creations of unrestrained free-market ideologues, but rather had their roots in principles of political legitimacy that were forged at the time of the creation of the Constitution and were later elaborated by state court judges as they first addressed the nature and scope of legislative power in the era of Jacksonian democracy."
- b. *Lochner*-era judges sought to uphold the well being of the community: "These principles encouraged nineteenth-century judges to uphold legislation that (from their perspective) advanced the well-being of the community as a whole or promoted a true "public purpose" and to strike down legislation that (from their perspective) was designed to advance the special or partial interests of particular groups or classes."
 - i. To the extent that a regulation was considered a valid promotion of the general welfare and not an invalid attempt at unfair class legislation, 19th century judges tended to uphold the law
- c. *Lochner*-era judges channeled founding-era beliefs about the free market: The original founding vision treated the market as "harmonious and liberty loving, and the access to the freehold on the American frontier ensured that those who might find themselves in pockets of dependency would always be able to escape; thus there was little justification for allowing the government to intervene in the conflicts" between competing groups in the market.
 - i. "The Constitution set up a structure...to nurture and protect the social relations produced by capitalism by preventing the state from taking sides in the disputes arising among or between competing classes."
- d. *Lochner*-era judges channeled Jacksonian-era beliefs about government impartiality: "Like the Jeffersonians before them, the Jacksonian coalition was bonded by the belief that it could hold its own in a political and economic system purged of special privilege." Their desire was to "remove restrictions and privileges that had their origin in acts of government."

1. How a fragmented labor policy caused labor and civil rights to clash

- a. The argument: the American State's fragmented labor policy in the mid 20th century caused the labor movement to clash with the civil rights movement, resulting in the integration of labor unions via financially crippling litigation and organized labor's permanent decline. In the 1960s Courts proved eager to integrate labor unions and to enforce civil rights law but, along the way, they largely ignored labor law and undermined workers' ability to collectively bargain. By bleeding labor unions to death via litigation, courts undermined labor power. In so doing, they permanently weakened one of the constitutive pillars of the Democratic Party as well as an organizational structure which, if reformed, could empower African American workers.

2. The dual foundations of Post-New Deal labor policy

- a. The 1935 Wagner Act and the National Labor Relations Board (NLRB): The Wagner Act of 1935, often heralded as the "Magna Carta" of the labor movement, authorized workers to elect their own union representatives, who could negotiate with their employers to obtain binding contracts governing "wages, benefits, hiring and firing, and general workplace conditions." The Wagner Act also created the National Labor Relations Board (NLRB), chartered to protect unionized workers from employer sanctions via cease-and-desist powers. The NLRB claimed, "in many ways correctly," that it lacked jurisdiction over civil rights issues
- b. The 1964 Civil Rights Act and the Equal Employment Opportunity Commission: the Act created the Equal Employment Opportunity Commission (EEOC), "an agency specifically designed to weed out discrimination by both employers and unions." Yet unlike the NLRB, the EEOC lacked "cease-and-desist" and litigation powers," and was "understaffed and underfunded" from the get-go. It was in this context that it relied "on lawyers, sometimes through the Department of Justice but more often private lawyers who filed class-action lawsuits," for enforcement.

3. The courtroom assault on organized labor

- a. First, courts "called for dramatic action to remedy racial inequality in the labor movement and infringed on labor laws designed to protect union autonomy"
- b. Second, "courts made unions comply with these rulings by allowing civil rights lawyers to bring many discrimination cases to federal court; authorizing the use of class actions; awarding back pay, attorneys fees, and punitive damages to civil rights plaintiffs; and demanding that labor unions and employers pay all these awards."

- c. In effect, courts made it too financially costly for unions not to comply with the Civil Rights Act.
 - d. Long-term unintended consequences: “Judges...quite rightly found unions consistently in violation of the Civil Rights Act. In doing so, however, they ignored labor law, and thus issues such as collective bargaining, majority representation, seniority, and security agreements were not addressed in antidiscrimination law... As a result, unions found themselves in courtrooms with judges who were fairly ignorant of labor law and insensitive to some of the reasons why even the most discriminatory of unions, if reformed, could serve to benefit civil rights causes down the road”
4. **Messy democracy, and a focus on power instead of only on representation**
- a. Messy democracy: “the centrality of courts in the policy-making process is symptomatic of a greater problem in American state development - the inability of the nation to represent all Americans equally through electoral democratic representation.”
 - b. A focus on power and outcomes: when we rely too much on “formal definitions of representation,” as the courts did in the 1960s and 1970s, we lose sight of the fact that “democratic equality will often necessitate action by those who are less directly representative to the public, not because they are removed from public opinion and the tyranny of the majority but because they have incentives to represent both minority and majority groups that are unable to represent themselves effectively...democracy should not be defined simply in terms of representation but also in terms of power and outcome.”

LAW AND SOCIETY IV: MODES OF GOVERNANCE IN THE US

William Novak, *The People’s Welfare: Law and Regulation in Nineteenth-Century America* (1996)

1. **19th century law: local regulations protecting the “well-regulated society”**
- c. This period saw the pervasiveness of regulation in early American versions of the good society; regulations for public safety, then construction of public economy, and the policing of public space, and restraints on public morals, and protections on public health.
 - d. These regulations were construed as “public regulations,” under the power of the state to restrict individual liberty/property for the common welfare\
 - e. From “the state” to local governance: “This book abandons the ideological preoccupation with “the state” and emphasizes the actual day-to-day conduct of governance.” Local self-government: 19th century governance remained decidedly local. Towns, local courts, common councils, and state legislatures

were the basic institutions of governance. “Governance is a constitutive public practice- a technology of public action.”

- f. Against Hartz’ “myth” of 19th-century liberalism and statelessness: This “myth of statelessness” and of “liberal individualism” was conveyed by Louis Hartz’s *The Liberal Tradition in America* (1955). According to this myth, the 19th century was quintessentially Lockean, “suffused with a passion for private right and predestined for market capitalism.”

2. **The spirit of the period: protecting the “people’s welfare”**

- a. The “people’s welfare” defined: “the people’s welfare” is a foundational concept of 19th century America. The welfare of the people is the supreme law. America was a public society, the public interest superior to the private interest. The 19th century understanding of rights is social, positive, and relative. Rights and liberties were secondary, or derivative of, the social obligations of man. This spirit was channeled in locally-ground common law: “The way people order their lives/societies are not revised overnight. we have underestimated the tenacity of the old- the common law, the social obligations of property, the people’s welfare, and public institutions and customs.” Hence,
 - i. Police power was the ability of a state/locality to enact and enforce public laws regulating or even destroying private right, interest, liberty, or property for the common good.
- b. Example of the logic: *Commonwealth v. Alger* (Massachusetts Supreme Court, 1851): “We think it is a settled principle, growing out of the nature of well ordered civil society, that every holder of property... holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to its enjoyment... or injurious to the rights of the community.”
- c. The assumptions underlying the notion of the well-regulated society:
 - i. That man is a social being in society
 - ii. That individual rights are relative and relational
 - iii. That the common law requires a pragmatic, historical methodology
 - iv. That all should be concerned for the people’s welfare
- d. Industrialization brings the demise of the well-regulated society: “an ineradicable strain of dissent, discontent, and dispute accompanying industrialization resulted in the demise of the well-regulated society.”

Robert Ellickson, *Order Without Law* (1991)

1. **The success of norms-based dispute resolution**

- a. Against “legal centrism:” Legal centrism in law and economics assumes, following the Coase theorem, that the presence and distribution of legal

entitlements will consciously impact the bargaining process. Ellickson brings us to Shasta County, California to show us how successful norms-based bargaining can take place without any hint of the law whatsoever.

- b. Against usurping informal social peace for legalized dispute resolution: scholars and politicians alike should be more circumspect when it comes to the passage and enforcement of laws; for not only may many laws fall on deaf ears, others may even be less effective than an informal order already in place. Nonetheless, law is still essential when informal orders fail to pursue particular desired ends and fail to include people outside of the close-knit community

2. **The setting: Shasta County, CA**

- a. The source of disputes in Shasta county: cattle ranches come in two varieties:
 - i. Traditionalists prefer open-range rules, where the cattle can roam free beyond the boundaries of the owner's property
 - ii. Modernists prefer closed-range rules, where the cattle are confined (usually by fences) to the owner's property
- b. The legal regime in Shasta county: open vs. closed range rules
 - i. Open range areas: damages from neighboring cattle must be borne by the injured party (unless the cattle were intentionally herded onto the injured party's property or unless the injured party had constructed a fence up to legal specifications)
 - ii. Closed range areas: damages from neighboring cattle must be borne by the cattle owner.

3. **When social norms trump legalized dispute resolution**

- a. Cattlemen in Shasta County usually resolve their disputes without any recourse to the legal system-and thus achieve order without law. Rather than using the law, Shasta County cattlemen employ a variety of informal norms and enforcement mechanisms to structure and maintain certain modes of community behavior.
- b. Why an aversion to turn to the law?
 - i. It is viewed impersonal and un-neighborly; hence, they generally ignore the law in favor of local norms and means of control, which are all based on a community-oriented and non-hierarchical system of mutual expectations.
 - ii. Most of the cattlemen, when asked, did not even know the content of the relevant laws
 - iii. Repeat-playing in the context of a close-knit community will generally produce informal norms and controls that maximize aggregate welfare and minimizes transaction costs (and do so better than legalized dispute resolution)

1. For example, making the trespassing owner liable in every case avoids the cost of figuring out who is liable by law
- c. Examples of social norms:
- i. If your cattle do substantial damage to someone else's property- whether on an open or closed-range-it is your responsibility to satisfy the injured party
 - ii. Ignore small damages to your property
 - iii. The cost for building a fence should be divided up proportionate to the number of cattle on either side of the fence
 - iv. Allow other cattlemen to pay you back for damages with in-kind payments (e.g. fixing your front porch) rather than money
 - v. Keep rough accounts of who owes who what, rather than keeping exact calculations
 - vi. Above all else, conduct yourself in the spirit of neighborliness.
- d. Examples of informal dispute-resolution:
- i. Self-help (e.g. asking the cattle owner to fix the problem, gossiping about the cattle owner, threatening the cattle owner, or retaliating by herding the owner's cattle away to an inconvenient location, for instance)
 - ii. Informally complaining to a third party (e.g. the Shasta County Cattlemen's Association)
 - iii. The socialization of new cattlemen into the spirit of the county.

Robert A. Kagan, "Adversarial Legalism and American Government" (2005)

1. America's deficient way of law: adversarial legalism

- a. Adversarial legalism: "At bottom, adversarial legalism has been stimulated by the effort to implement and formulate ambitious, transformative policies of activist government through political structures that reflect deep suspicion of concentrated authority." It is comprised of three components:
 - i. Formal legal contestation- invoking legal rights, duties, procedural requirements, backed by the threat of recourse to judicial review
 - ii. Litigant activism - gathering/submission of evidence, articulation of claims dominated by disputing parties/interests, acting through lawyers
 - iii. Substantive legal uncertainty- official decisions are variable, unpredictable, and revisable; hence adversarial advocacy can have substantial impact
- b. The vicious cycle that produces adversarial legalism:
 - i. Americans want government to do more, but governmental power is fragmented and mistrusted.

- ii. So Americans seek to achieve their goals by simultaneously demanding more of government and by fragmenting and regulating it still further.
- iii. Legislatures and courts mandate new goals, benefits, and regulations, yet implementing agencies are constrained by legal requirements and the threat of judicial review.
- iv. Government is doomed to fail, public cynicism grows, and government authority is diminished further.
- c. The pathologies of adversarial legalism: The American policymaking system encompasses, compared to other western governments:
 - i. More complex legal rules;
 - ii. More formal, adversarial procedures for resolving political and scientific disputes;
 - iii. Slower, more costly forms of legal contestation;
 - iv. Stronger, more punitive legal sanctions;
 - v. More frequent judicial review of an intervention into administrative decisions;
 - vi. More political controversy about (and change of) legal rules and institutions
- d. Alternatives to adversarial legalism:
 - i. Negotiation/mediation: dispute resolution through negotiation without lawyers and policymaking through bargaining among legislators representing contending interests. Mediation would include an official third party attempting to induce contending parties to agree on a policy or settlement, without imposing it via law
 - ii. Expert political judgment: these processes are hierarchical, but still informal. Where an official third party controls the process and standards of decision, rendering the decision final.
 - iii. Bureaucratic rationality: The submission/assessment of evidence would be governed by written rules/procedures, and decisions made by carefully trained, apolitical civil servants