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Chapter 3

The Supreme Court and the National Political Order: Collaboration and Confrontation

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Introduction

As Martin Shapiro emphasized throughout his career, courts are part of the national political order. It would be surprising, then, to discover in a stable political system that courts were strongly at odds with the rest of that order for an extended period. Yet the institution of judicial review itself seems to *require* that constitutional courts sometimes set themselves against other parts of the political order. How can we understand judicial review as part of a stable political system?[1]

In this chapter I describe several ways in which the U.S. Supreme Court in the twentieth century contributed to the construction of the political order by means of judicial review.[2] The basic idea is simple. The Supreme Court can act against *parts* of the political system while at the same time collaborating with other parts.[3] A collaborative Court helps build a stable political order by helping some parts of the system destabilize other parts as a preliminary to the construction of a new system. A collaborative Court also can strengthen the normative case for judicial review, limiting the sting of the charge that judicial review is necessarily countermajoritarian.[4]

I develop my argument by examining several episodes in twentieth-century constitutional history: the New Deal and its aftermath in the Roosevelt Court, the Warren Court and its relation to the Great Society, and the Rehnquist Court during and after the Reagan Revolution. We can use the idea of a collaborative Court to illuminate some important features of each period, although much lies untouched by that idea.

Three Collaborative Courts

The history of the Court's response to the New Deal is so familiar that I simply sketch its outlines as a prelude to examining the Roosevelt Court as a

collaborative Court. A majority of the Supreme Court's justices initially regarded many of the statutory innovations of the New Deal as constitutionally suspect. At best, the statutes took on existing due process and federalism doctrine extremely aggressively. The statutes assumed that, applied in the economic emergency of the Depression, federalism doctrine would justify substantially more national action than the national government had engaged in only a few years earlier, and that due process doctrine would justify substantially more regulatory action than governments at any level had engaged in. At worst, the statutes leaped over constitutional bounds separating the proper sphere of the national government from that of the states, and separating executive decision making from legislation.

The Court's first responses to the New Deal- and Depression-related legislation were lukewarm acceptances, but soon the Court's view changed. In 1937 the Court invalidated several statutes—not all of which were intrinsically important to the New Deal agenda as of that date—on grounds that the Roosevelt administration regarded as posing severe threats to statutes that *were* important, most notably the National Labor Relations Act and the federal Fair Labor Standards Act. Roosevelt responded with the famous Court-packing plan, and although the plan itself failed in Congress, Roosevelt ended up packing the Court anyway, as he appointed dedicated New Dealers to fill vacancies created by retirements from the Court.

The Roosevelt Court was a collaborative one. Of course, it upheld expansive exercises of national and state regulatory power against challenges that might have succeeded a decade or two earlier. Justice Felix Frankfurter, regarded by many as the Roosevelt Court's intellectual leader, articulated a jurisprudential theory of judicial deference to legislatures that was compatible with the New Deal program. New Dealers, and before them progressives, were primarily concerned about judicial interference with legislation in the interest of working people. Frankfurter's theory can be understood as premised on a vision of the legislative process as one of interest group pluralism. Labor's accomplishments during the New Deal (and earlier) showed that the courts could defer to legislatures seen as the locations for interest group bargaining because labor interests did well enough there.

But deference alone does not make a collaborative Court. In its generalized form, deference offers a normative rather than political account of judicial review. Collaboration, in contrast, can involve either deference to legislatures or confrontations with some of them, depending on the political requirements of the governing national coalition. Sometimes collaboration will mean that courts will have to invalidate legislative action—sometimes

action by city councils or state legislatures, sometimes actions by a prior generation's Congress.

Deference—or, as it came to be called, judicial restraint—easily degenerates into an abandonment of judicial review itself, as it did in some of Frankfurter's more extreme formulations.[5] Linking Frankfurter's theory of deference to interest group pluralism exposes the major fault line in making deference a generalized approach. Perhaps labor interests did well enough in interest group bargaining, but not every interest group that liberals were concerned with did. Couple a more limited theory of deference predicated on interest group pluralism with an account of the defects of the pluralist system, and one could develop an account of judicial review as a collaboration with interest group pluralism.

The Roosevelt Court did just that. It became a collaborative Court as it developed the implications of the famous footnote 4 in *United States v. Carolene Products*.[6] The text the footnote was attached to offered a standard account of judicial deference to legislative judgment. The footnote said that deference sometimes might be abandoned. The occasions for more aggressive judicial review were when a statute was challenged as violating a specific rights-protecting provision of the Constitution, or as impairing the political processes that allow the repeal of unwise legislation, or as targeted at minorities because of prejudice against them. The "footnote 4" jurisprudence was the specific form the Roosevelt Court used to theorize its collaboration with the New Deal.

Treating judicial review as an institution that linked deference and protection of minorities within a broader framework of interest group pluralism solved another problem Shapiro identified. As he put it, the Roosevelt Court had captured the last bastion of opposition to the New Deal. Its members then had to decide whether to dismantle with weapons inside the citadel, or to turn those weapons against their enemies.[7] The justices might have thought, though, that there *were* no enemies to be fought any more, after the New Deal's successes. Yet anyone familiar with military campaigns knows that there is always work to be done after the major fighting ends. Pockets of resistance hold out, supporters of the defeated army may try to bide their time until conditions seem ripe for a new assault, and even those who supported the initial victory might be uncertain about efforts to extend the territory under control—or, to drop the military metaphor, to expand the scope of the New Deal's programs.

Deference where interest group pluralism worked well coupled with the footnote 4 jurisprudence was a combination that could be used to challenge

the remaining resistance to the New Deal. The last criterion in footnote 4 was clearly adapted to address the condition of apartheid in the South, although as a theory it had a broader reach. From Roosevelt's point of view, the South was a problem for the New Deal, because Southern Democrats in Congress were a significant element in the anti–New Deal, conservative coalition that obstructed his legislative agenda. Roosevelt first took on the Southern Democrats directly, intervening in primary elections in an attempt to substitute Southern New Dealers for Southern obstructionists. His effort failed. But lawyers in the Department of Justice saw the possibilities—constitutional and political—opened up by the footnote 4 jurisprudence. Building on earlier precedents, they challenged the Southern white primary and became increasingly receptive to appeals from African Americans to intervene against white terrorism of the African American community.[8]

The Supreme Court's white primary decision in 1944 aligned the Court with this effort.[9] Notably, the decision was somewhat innovative doctrinally. In 1935 the Supreme Court upheld a white primary conducted, as the Court saw it, entirely without the participation of state government.[10] A 1941 decision arising out of an investigation of corruption in Huey Long's Louisiana gave the justices a chance to reconsider. The decision held that Congress had the power to regulate primary elections for national office, a holding that undermined the earlier holding that primary elections were outside the scope of "state action." By 1944 the Court was willing to overrule the 1935 decision, leading its author, who remained on the Court, to lament in a dissent that the earlier decision turned out to be like a limited railway ticket, "good for this day and train only."[11]

The Roosevelt Court collaborated with the political branches of the national government in other ways. The Roosevelt Court began to develop a First Amendment law protecting people's right to conduct demonstrations in public spaces in a case that pitted the Congress of Industrial Organizations, an important Roosevelt supporter, against Jersey City's antilabor mayor Frank "I am the Law" Hague.[12] The configuration of parties there was largely an accident, although in retrospect it certainly seems symbolic. More important, the Roosevelt Court extended the public forum doctrine in important cases upholding the rights of labor unions to engage in picketing, against claims, traditionally recognized by state courts, that picketing involved a tortious interference with the employers' business relations.[13] The Roosevelt Court contributed to the construction and deepening of the political coalition supporting New Deal programs in Congress and in the executive branch. It was a model of a collaborative Court.

The Warren Court was collaborative as well, this time with the Great Society's civil rights agenda and, more generally, with its challenge to a sort of traditionalism associated with the "Southern way of life" but dispersed more widely throughout the country. It is relatively easy—easier than in the case of the Roosevelt Court—to come up with specific examples of direct collaboration. For example, one provision in the Voting Rights Act of 1965 directed the Department of Justice to bring a lawsuit challenging the use of poll taxes as voter qualifications.[14] The Justice Department sued Texas, Alabama, and Mississippi, and the federal district courts in Texas and Alabama struck down the poll tax. At the Supreme Court the Attorney General had Solicitor General Thurgood Marshall present the government's anti–poll tax position by appearing as amicus curiae in a pending private lawsuit.[15] The Court agreed with the government and held the poll tax unconstitutional.

More dramatic were the maneuverings the Court went through to avoid interfering with the sit-in demonstrations that had become the hallmark of the civil rights movement. The Court faced a doctrinal difficulty. The sit-ins protested discrimination by owners of lunch counters and other private businesses. Generally, state law did not *require* the businesses to refuse to serve African Americans. But in the South, neither did state law prohibit such discrimination. The Constitution, though, had been interpreted since the *Civil Rights Cases* in 1883 to bar only discrimination by state actors or under color of state law. The doctrinal structure of the sit-in cases was that the sit-inners occupied places at lunch counters, were directed to leave the by owner, and then were arrested for violating general state trespass laws. Those trespass laws were not themselves discriminatory. The doctrinal problem then was to locate state action when private owners invoked general nondiscriminatory trespass laws as a basis for seeking police assistance to protect their rights as property owners.

There were some obvious, but far-reaching, theories under which enforcement of a private party's discriminatory wishes was state action. Justice William O. Douglas was attracted to a more limited version of such theories, seeing the sit-in cases as ones in which the private party was acting pursuant to a custom so widespread as to be "almost" lawlike.[16] Most of the Court, though, was unwilling to expand the state action doctrine a great deal. For several years the Court managed to come down on the sit-inners' side without confronting the doctrinal problem directly. In *Garner v. Louisiana*,[17] a majority found that there was no evidence to support the convictions of the peaceful sit-inners for disturbing the peace. It found in

one case that the existence of a city ordinance requiring segregation was enough to overturn the convictions for trespass even though the store owner might have chosen to segregate on his own,[18] and in another case that public statements by city officials condemning sit-ins placed such pressure on store owners that the owners' decisions were, effectively, dictated by the city.[19]

By 1964 the Court could not evade the doctrinal issue any longer—or so it seemed. Having discussed the problem for three years, a majority seemed ready to use a Maryland case to find that trespass convictions were constitutionally permissible when store owners really did act on their own discriminatory preferences. The Court prepared to issue its decision in May 1964, at a time when Congress was engaged in a prolonged debate over adopting the Civil Rights Act of 1964, which included provisions that would have made unlawful discrimination in the places of public accommodation the sit-ins had focused on.

Justice William J. Brennan was alarmed at the prospect of a decision upholding the sit-inners' convictions, which he believed, probably correctly, would be taken in Congress to show that discriminatory store owners had the Constitution on their side. Brennan invented a new theory that avoided all the federal constitutional questions. He pointed out that Maryland had adopted an antidiscrimination statute after the state supreme court had upheld the sit-inners' convictions for trespass, and suggested that the state courts might conclude that the new statute somehow immunized the sit-inners from prosecution for actions taken *before* the statute was adopted. This was, at the least, an exceedingly creative reading of the Maryland and general common law precedents that Brennan invoked, but it was enough to get rid of the case and keep the Court from interfering with the progress of the Civil Rights Act through Congress.[20]

Lucas A. Powe sees the Warren Court's actions in a much wider range of cases as "an assault on the South as a unique legal and cultural region,"[21] pointing out that the Warren Court's most celebrated free speech decisions came in cases implicating civil rights. Similarly, Powe argues that the Warren Court decisions striking down organized prayer in public schools, despite coming from Northern states, were a challenge to the pervasive religiosity that characterized the South as a region. Powe recognizes, though, that the Warren Court expressed a vision of the Constitution that went beyond the South. Indeed, he describes the Warren Court as a collaborative one: "the Court was a functioning part of the Kennedy-Johnson liberalism of the mid and late 1960s. . . . The Warren Court seemed to combine Kennedy's rhetoric with Johnson's ability to do the deal."[22]

The Great Society was not simply the New Deal at age thirty, however. The Great Society continued to take interest group pluralism seriously. But it contained a strand deriving more substantially from the pre–New Deal progressives than the New Deal itself did. That strand was a commitment to policy making by an elite of professional specialists. The professionalization of reformism was reflected to some extent in an initially subtle, then grossly apparent, shift in interest groups themselves. During the 1960s interest groups began to transform themselves from organizations that derived their positions on public policy questions from the views of their members and then presented those positions to Washington policy makers into organizations whose professional leaders developed positions on public policy questions and then presented those positions to their members, who in turn placed pressure on Washington policy makers.

The Warren Court's criminal procedure revolution is probably the most important component of the Warren Court's collaboration with the professionalized reform movement in the Great Society. Powe and others have pointed out, correctly, that the criminal procedure revolution was intimately connected to the civil rights revolution. The Warren Court and its liberal supporters understood that African Americans were the primary victims of abusive police practices. Many major criminal procedure decisions involved minority defendants, a fact that the justices were of course aware of. The criminal procedure revolution was more than a civil rights revolution, though. It was a professionalist revolution too. Seen in the most general terms, the Warren Court's criminal procedure revolution gave criminal justice professionals—chiefs of large departments and prosecutors—the tools they needed to make sure that officers on the line adhered to the norms of policing understood as a profession.

Miranda v. Arizona is exemplary.[23] Generally taken as a challenge to standard police practices, Chief Justice Earl Warren's opinion in *Miranda* presented itself as articulating a "best practices" requirement. *Miranda* was actually a group of cases, one of which was a federal prosecution. At the oral argument Solicitor General Thurgood Marshall was asked what agents of the Federal Bureau of Investigation did when they arrested someone. Marshall described the warnings agents gave, and followed up with a more detailed letter to the Court after the argument. Warren's opinion emphasized that the warnings the Court required were only slightly different from

the ones the FBI already gave. In Warren's eyes, then, the Miranda warnings would push local police forces to a point nearly reached already by the most professional police agencies.

The Warren Court's "stop and frisk" decision, *Terry v. Ohio*, had an identical managerial focus.[24] Warren's opinion was built around two propositions. First, what mattered was how to regulate the conduct of police officers on the street. Second, the only tool the courts had for regulating was the exclusion of evidence at subsequent trials. But, Warren observed, many police-citizen confrontations did not result in trials anyway. As a result, courts could do little to regulate those confrontations. Rather, police chiefs would have to train their offers to interact appropriately with citizens. And on a lower level of generality, Warren's opinion relied on the professional judgment of the experienced police officer in the case at hand to demonstrate why well-trained and experienced officers could be expected to balance well the public interests in law enforcement and privacy. The Warren Court's criminal procedure decisions were managerialist in their effort to use constitutional law as a tool for regulating the behavior of line officers—street-level police officers and ordinary prosecutors—to create or support a rationalized, rule-bound bureaucracy. In doing so, the decisions were part of a project of collaboration with the professional elites that were part of the Great Society coalition.

Collaboration may be a complex project, though, and is often incomplete and imperfect. The Warren Court's decisions on juvenile justice illustrate one form of complexity. The juvenile court system originated as a project of the new profession of social work, assisted by lawyers who conceptualized their job as a helping profession as well. The juvenile justice system was self-consciously antilegal, focusing on helping its clients through highly discretionary interventions. The Warren Court began to subject this system to the rule of law, in a way inconsistent with the social work norms that had animated the system. Justice Abe Fortas, the quintessential Great Society justice, wrote the Court's decision in *In re Gault*,[25] holding that the Constitution required juveniles to be given standard criminal procedure rights of notice, counsel, and confrontation. Yet by the time *Gault* was decided, even professional social workers had begun to question whether, as one recent history puts it, the "realities of juvenile incarceration" matched "the rehabilitative rhetoric of progressive juvenile jurisprudence."[26]

Justice Thurgood Marshall, reflecting a similar division within the Great Society coalition, wrote the prevailing opinion, and Fortas the dissent, in *Powell v. Texas*,[27] rejecting a constitutional challenge to the criminalization

of public drunkenness. Fortas argued that punishing public drunkenness was unconstitutional because drunkenness was a condition that the victim had no control over—a standard theme in liberal criminal jurisprudence. In rejecting Fortas's argument, Marshall nonetheless invoked a progressive theme. For Marshall, what mattered was to ensure that criminal law focus on eliminating the "root causes" of crime. Noting that American society had dramatically failed to do so in the context of public drunkenness by refusing to develop facilities for treating alcoholics, Marshall regarded criminalization as a humane second-best response.

A final example of the complexity of the Warren Court's collaboration with the Great Society is the due process revolution in public assistance. As with criminal procedure, the Court's concern—like that of elite professionals—was that low-level bureaucrats exercised discretion, often in a discriminatory manner, in their ordinary interactions with recipients of public assistance. The Warren Court's solution, again like that of elite professionals, was to impose due process requirements and rules. As William Simon later pointed out, though, this strategy, however compatible with the views of elite professionals in the 1960s and early 1970s, made the welfare system particularly vulnerable to retrenchment.[28] The Warren Court's proceduralism was insensitive to the substance of the rules low-level bureaucrats were to apply, and when retrenchment came it meant that those bureaucrats could not exercise discretion in favor of recipients.

The Roosevelt and Warren Courts illustrate two elements of the idea of a collaborative Court. First, and more apparent on the surface, the collaboration is with a *national* political system that confronts resistance or indifference at the state and local level. The collaboration, one might say, is geographical: the Court collaborates with a national political system as that national system grapples with problems arising from the fact that the United States is a federal nation. Second, and less apparent, the Roosevelt and Warren Courts were in a position to be collaborative Courts because the national political system had an agenda with which the Courts could collaborate.

The geographical element of collaboration, as developed so far, means that the idea of collaborative Court will not work well when we consider the relation between the Supreme Court and the *national* political institutions—the president and Congress. By definition, judicial review of legislation means that the Court sets itself *against* what the legislature and executive have done. A Court can collaborate with the president and Congress against state and local governments, but with whom can the Court

collaborate against a president and Congress that share a common political agenda? Pure deference would seem the only possibility, but, as I noted at the start, pure deference is incompatible with the idea of judicial review. One possibility is to switch from geographic to temporal collaboration. That is, a Court can collaborate with *today's* national political institutions against what is left over from a prior political system, most notably, laws enacted under the prior system that have the characteristic of being not merely unenactable today but actually contrary to the principles animating today's system.

We might see the Supreme Court of the early 2000s as engaged in this type of collaboration.[29] That Court collaborated with a political system characterized by either divided government or narrow majorities within a unified government, and polarized political parties. Procedural rules in Congress meant that, budget and tax matters aside, only legislation that had substantial bipartisan support could be adopted. This meant, in turn, that aside from tax reductions insulated from these procedural rules, Congress and the president found it impossible, for all practical purposes, to enact measures of the type characteristic of the New Deal and Great Society political systems. Collaborating with the system of the early 2000s entailed cleaning up the statute books by eliminating laws that could not be enacted under the prevailing conditions.

The Rehnquist Court's federalism decisions have been far more limited in their impact than some critics suggest. But in nearly every case, what the Court invalidated was a provision reflecting the policies preferred by a political coalition that could not be reassembled today. Consider the civil remedy provision of the Violence Against Women Act, held unconstitutional in *United States v. Morrison*.[30] The Violence Against Women Act reflected the deepening of the antidiscrimination agenda, exemplified as well by the Americans With Disabilities Act (ADA), in the 1980s and early 1990s. Although the question remains open, it seems to me defensible to assert that the deepening had ended by the late 1990s, leaving behind some degree of commitment to an antidiscrimination agenda that reached beyond the traditional areas of race, national origin, and religion. The congressional reaction to *Morrison* seems to me to support that assertion. Congress reauthorized the Violence Against Women Act, appropriating even more money to support programs assisting women who are victims of domestic violence. The invalidation of the civil remedy provision, in contrast, attracted a great deal of attention in the legal academy, but almost none in Congress.

The Rehnquist Court's decisions giving the ADA narrow interpretations provide probably the best example of temporal collaboration. The act

was adopted in 1990 with bipartisan support. By the time the Rehnquist Court got around to interpreting the act, the national political system had changed. It seems quite unlikely that an act placing substantial regulatory burdens on businesses could be enacted today, and yet that is what the ADA does. The Rehnquist Court collaborated with the political system in place by reducing the costs of complying with the ADA, giving narrow interpretations to the act's coverage provisions, and casting aspersions on the act's requirement that employers accommodate their employees' disabilities.[31]

Some Descriptive Complexities

The idea that the Supreme Court should be a collaborative Court describes important episodes in constitutional history, but it requires an important qualification: Sometimes collaboration is impossible. I explore two variants of the impossibility of collaboration, one quite general and the other historically contingent. The general variant of impossibility has a specific institutional form. A Court cannot be a collaborative Court on questions of the separation of powers. Initially it might seem that that claim must be wrong. After all, in every separation of powers case, the Court takes the side of one or the other contending institutions. In holding that Congress has the power to create an independent counsel with power to investigate high officials without being subject to the president's control, for example, the Court sides with Congress against the president.[32] In holding that congressional creation of rights in ordinary citizens to sue to enforce environmental laws intrudes on the president's duty to take care to enforce the law, the Court sides with the president against Congress.[33]

The appearance of taking sides is misleading, however, for at least two reasons. First, it is often difficult to determine which side is favored by a decision invalidating or upholding a statute against a separation of powers challenge. Presidents sought the power to veto individual items in comprehensive budget bills, and members of Congress resisted. Whether a line-item veto would actually strengthen the president is quite unclear, with much depending on the way a line-item veto power would affect bargaining between the president and powerful members of Congress in repeated interactions. In striking down the Line Item Veto Act, did the Court side with Congress or with the president?[34]

Second, and probably more important, the Supreme Court has the opportunity to consider separation of powers challenges only after legislation has actually been enacted—which is to say, after *both* Congress and the

president have agreed that the statute is desirable as a matter of public policy (and, of course, politics).[35] In such circumstances, judicial intervention is necessarily confrontational rather than collaborative. The statute embodies a deal struck between the president and Congress. To achieve the deal, each side might have had to compromise on questions of principle with respect to the statute itself. And, importantly, to achieve the deal each side might have had to compromise on some *other* item of legislation, having expended political capital on this one. Further, the deal struck with respect to the statute has implications for other deals that might be struck in the future. Judicial invalidation of the statute on separation of powers grounds undoes the bargain.

Of course, to the extent that deals between the president and Congress reflect the balance of political power between them, the two sides will have the incentive, and most likely the ability, to work around what the Court has said, achieving in substance what the invalidated statute achieved in a different form. But reaching the same point again, albeit in a new form, takes time and political energy away from other legislative and executive projects. Sometimes that will mean that the bargain will simply fall off the political agenda, displaced by other, apparently more important issues. In such situations, the Court will have displaced the policy compromises reached by the other components of the national political system. This sort of displacement might be collaborative in the temporal sense, if the balance of political power between Congress and the president has shifted between the time the statute was enacted and the time it is invalidated. Recent developments in statutory design reduce the time between enactment and the exercise of the power of judicial review. Over the past decade or so, Congress and the president have increasingly provided for fast track judicial review of statutes about which there are serious constitutional doubts. Such review makes it likely that the balance of political power will be unchanged by the time the Supreme Court considers the constitutional challenge. And if that balance is unchanged, the Court's displacement of policy compromise will be confrontational rather than collaborative.

It will be helpful to pause here to identify some themes about the relationships among institutions that my analysis suggests. First, and probably most obviously, the process of nominating and confirming justices is likely to produce justices who tend to side with the presidency in separation of powers controversies. A Senate jealous of Congress's prerogatives might block a president from nominating an extreme pro-executive justice, but the president's advantage in setting the agenda by nominating a particular person strongly

suggests that any nominee—and appointee, after confirmation—will be closer to the president's position than to the Senate's.[36]

Second, it is important to emphasize that the interactions I have described between the Court and the other branches, and in particular the presidency, are systematic and not necessarily intentional. That is, I do not claim that the justices actually say to themselves that they are adopting a position *because* it is offered to them by the president. Rather, in the main they adopt the positions they do because those positions seem to them constitutionally correct. Each justice has or develops what some political scientists call a constitutional vision, a way of looking at constitutional law that gives them the sense that they are resolving constitutional controversies in accordance with the law, not their personal preferences. Some presidents, particularly forceful ones, have their own constitutional visions, and they try to nominate justices who, they believe, share those visions. This, too, induces the tendency of justices to side with the presidency.

Third, not everyone has a comprehensive constitutional vision, or holds whatever vision he or she has with the same degree of strength. This differential commitment to a constitutional vision generates some of the interactions between institutions. So, for example, the Roosevelt Department of Justice developed creative civil rights theories as part of the administration's assault on Southern conservatives, but the Roosevelt appointees accepted only some of the initiatives. Similarly, the Warren Court took the initiative in *Brown v. Board of Education*, and the Eisenhower Department of Justice only half-heartedly endorsed desegregation, acting forcefully only in the Little Rock school crisis when national authority, including that of the president, was directly challenged.

Collaboration is impossible in another way. There may be nothing for the Supreme Court to collaborate *with*. That is, a collaborative Court cooperates with the other elements of the national political system to advance the central political projects of those elements. But sometimes the other elements simply do not have a central project. Consider the standard periodization of the Warren Court, which identifies a first Warren Court lasting from Warren's appointment to the early 1960s, and a second Warren Court that began in 1962 and extended for some years after Warren's retirement.[37] The second Warren Court is the one to which scholars and the public refer in discussing the (unmodified) Warren Court. The reason is that history's Warren Court was a collaborative Court, working with the president and Congress in developing a constitutional law appropriate to the Great Society. In contrast, the first Warren Court faced a Republican president, Dwight

Eisenhower, who was somewhat reluctantly committed to a program of refusing to roll back the accomplishments of the New Deal, and a Congress controlled nominally by Democrats but actually by a coalition of Republicans and Southern Democrats. These institutions had no central ideological project around which a coherent constitutional agenda could develop. The president and Congress were committed to anticommunism and keeping the New Deal alive. The former commitment placed some limits on what the first Warren Court could do, but otherwise these commitments gave the Court little to work with.

The Rehnquist Court through most of its existence faced the same problem. The Reagan Revolution was incomplete, with Democrats retaining control of Congress. Reagan conservatives articulated a new constitutional vision, but interest group and substantive liberalism remained strong. As interest groups proliferated and transformed themselves in the Great Society, they produced a degenerate form of liberalism that was readily susceptible to attacks by conservatives. The Gun Free School Zones Act, which the Supreme Court invalidated in 1995,[38] was a ready poster child for Congress's critics, who called it a statute with little public policy justification that was simply the result of congressional grandstanding. The Supreme Court's reaction to the hypertrophy of interest group liberalism were cases that two scholars described as "Dissing Congress."[39] At the same time, the new conservative order failed to develop the kind of institutional substratum that interest groups had provided for the New Deal and the Great Society.

Congress itself drifted in a conservative direction, but when Newt Gingrich and his allies took over the House of Representatives and the Senate in 1994, they faced a Democratic president who was decidedly to their left and unenthusiastic about developing a constitutional vision compatible with the Republicans' conservatism. The Rehnquist Court's most ardent conservatives certainly would have liked to collaborate with the conservative Congress in developing such a vision, but they did not dominate the Supreme Court. As I have suggested, they were able to engage in temporal collaboration, but in general the Court, like Congress and the presidency, drifted to the right without articulating a new conservative constitutional vision.

Substantive liberalism did not disappear during the Rehnquist years, and indeed, in some ways it was cleansed of some of the interest-group-induced excesses of the Warren Court era. Commitments to equality continued to be important as nondiscrimination norms were extended to persons with disabilities and to gays and lesbians, albeit in less robust forms than such norms had taken at the height of the Warren Court. Even the

somewhat chastened nondiscrimination norms applicable to these groups were consistent with the somewhat chastened nondiscrimination norms the Rehnquist Court applied to discrimination against African Americans and women.

We might see the drift in the Rehnquist Court as one effect of what Stephen Skowronek calls the "waning of political time."[40] According to Skowronek, the time cycle of changes in national political orders has accelerated, giving each president larger opportunities to exercise leadership than earlier presidents had, but posing increasingly difficult choices about *how* to lead. Without a president who addressed and solved the problems posed by the waning of political time, the Rehnquist Court could use only its own resources in developing a constitutional vision. But it lacked sufficient internal coherence to do more than drift to the right.

When collaboration is impossible, what can a Court do? In some ways, pretty much anything it wants. In the separation of powers context, for example, the Court will have allies in one of the political branches whatever it does. Those allies may be a minority, who objected to the compromise reached between Congress and the president and struck down by the Court. But congressional minorities are likely to be in a position to block any retaliation against the Court. When the Court rules in the president's favor, the president is likely to be its ally, again subject to the qualification that the Court will have undone a deal the president thought worth making.

The possibilities for a Court facing a national political system with no central project are probably more interesting. Here the Court can be a truly independent lawmaker, pursuing whatever projects its members can agree on. Of course, the justices may be unable to agree on central projects. This is particularly true because of the fact that justices arrive at and depart from the Court at unpredictable intervals. The nomination and confirmation processes in a political system without a central project may well generate almost random appointees. David Souter may be the most obvious example—a protégé of Warren Rudman, a moderately conservative Northeastern Republican senator, whose representations were sufficient to lead the conservative White House chief of staff John Sununu to reassure nervous conservatives that the appointment would turn out to be completely satisfying to them.

If the justices are able to locate a central project for themselves, they may be able to impose it as constitutional law. But the law they develop will be free-floating, disconnected from the remainder of the national political system. It will have shallow roots, liable to reversal once the national

political system begins to generate a new central project. Here the threats—as yet unfulfilled—by conservatives to overturn the Court's decision upholding Congress's power to impose generally applicable regulations such as wage and hours laws on the states,[41] and the parallel threats by today's minority to overturn the Court's decisions on state immunity from suit,[42] illustrate the potential fluidity of the free-floating lawmaking characteristic of periods when the national political system has no central project. So too does the uncertain course of the first Warren Court's decisions on criminal procedure: the impulse toward liberalism pretty clearly predominated among the justices on that Court, but they were unable to give the first Warren Court a distinctive cast—because, in the terms I have been using, they were engaged in lawmaking in the absence of a central project of the political branches they might collaborate with.

So far I have examined the idea of a collaborative Court and the circumstances under which such a Court might exist. Before turning to normative questions about collaboration and constitutional law, I think it important to add another possibility to the mix. This is the possibility of what might be called an *anti*collaborative Court. Such a Court develops legal rules that come into play only when the Court finds one element in the national political system at odds with another. The model for such rules is the Court's recent law defining when Congress has the power under Section 5 of the Fourteenth Amendment to adopt legislation to enforce the prohibitions in Section 1 of that amendment.[43] According to the Court, exercises of the Section 5 power must have as their predicate the fact of reasonably widespread violations of Section 1 rights by state or local governments.[44] If Congress identifies such violations, it may adopt Section 5 legislation that is congruent with and proportional to the violations. What this means is that Congress must point its finger at, and criticize, state and local governments before it can invoke its Section 5 power. The Court identified the Voting Rights Act of 1965 as a valid exercise of Congress's enforcement power. Notably, though, that statute could be enacted precisely because of a large divergence between national political preferences and practices in a particular region, the segregated South.

It is not hard to understand why Congress might be reluctant to engage in finger-pointing with respect to some problem that is more dispersed throughout the country. One might design rules that would encourage Congress and state governments to work together to eliminate a practice that all agree is troublesome. The Court's Section 5 law, by requiring finger-pointing, pushes *against* that sort of collaboration. Indeed, the fact that state and local governments have begun to take action counts against the constitutionality of what Congress might do to supplement what has already been done.

Some Normative Issues

The possibility that the Court will be anticollaborative raises, in their most acute form, normative questions about the idea of collaboration. A collaborative Court is not merely a participant in a harmoniously operating political system, although it is that. Collaboration between the Court and the political system provides constitutional law with important normative support. The most general difficulty for constitutionalism in a democracy is to explain why the occurrent policy preferences of contemporary majorities should be displaced by contrary policy judgments made, in the first instance, by people long dead and enforced, most immediately, by judges. Sometimes, as with a Footnote 4 jurisprudence, the judges can demonstrate that the policies they are invalidating are in fact not the policies favored by true contemporary majorities. Collaboration provides an additional justification for democratic constitutionalism. This is clearest, of course, in geographical collaborations, where a local majority's preferences are displaced by a national one's.

Still, such collaborations—and collaboration more generally—might seem a strategy for democracy, but not for constitutionalism. For expository purposes, it is helpful to identify forms of collaboration in which the legislature takes some action and the courts go along with the legislature by expanding the coverage of the legislature's actions, as in geographical collaborations. The temporal collaboration I have described involves the reverse process of judicial contraction of legislative action to make it compatible with the preferences of today's political system. But in these forms, collaboration is simply the promotion of the occurrent preferences of today's political system. That is, it is democratic but not obviously constitutionalist.

The normatively more interesting forms of collaboration are those in which we can observe interactions between the courts and the rest of the political system. The national legislative response to the civil rights movement provided a normative justification for the Warren Court's actions, making it possible for that court to deepen commitments incompletely expressed in Congress. As Archibald Cox put it, "the principle of *Brown v. Board of Education* became more firmly law after its incorporation into . . . the Civil Rights Act of 1964."[45] And similarly, legislatures can pick up on constitutional decisions made by the courts, taking those decisions to

express fundamental commitments reaching beyond the precise decisions the courts have made. Here the expansion of legal aid for the poor provides a good example. The Supreme Court held that the Constitution required the provision of legal assistance to criminal defendants unable to hire their own lawyers, and—much later—to people involved in a very narrow class of civil proceedings. Legislatures took these decisions as expressing something important about fundamental fairness, and they expanded programs of legal aid for the poor well beyond the minima demanded by the courts. Collaboration in this interactive way helps *construct* a normative constitutional order out of materials already at hand somewhere in the national political system, albeit not necessarily in the courts in the first instance.

Robert Post and Reva Siegel, in ongoing work, argue that a collaborative Court contributes to democratic constitutionalism in an even deeper way.[46] They begin by arguing that a court that treats constitutional law as completely autonomous from (contemporary) politics deprives constitutionalism of its democratic warrant. But, of course, a court that treats constitutional law as coextensive with occurrent majoritarian preferences deprives that law of its claim to constitutionalism. The interactions between courts and the national political system that take place with collaborative courts allow such courts to acknowledge the connection between constitutional law and politics, thereby making constitutionalism democratic, without forcing them to ratify everything that emerges from the national political system.

Judicial lawmaking when collaboration is impossible raises a normative question as well. It is desirable—although not, I think, strictly necessary—that constitutional law have some connection to the people for whom it is designed. That connection can be made in a number of ways, including through the development of consciousness among the people of their connection to some founding document. Another way is through collaboration between the courts and the political branches in developing constitutional law: the very fact of collaboration connects the courts' constitutional law to the people. Judicial lawmaking when collaboration is impossible eliminates this form of connection, weakening the overall connection between constitutional law and the people. Such lawmaking is not only peculiarly unstable; it also rests on a weaker normative foundation as well.

IN THIS CHAPTER, I developed, although only in a preliminary form, some descriptive and normative aspects of the idea of a collaborative court. Political scientists from Dahl to Shapiro have described in general terms how

constitutional courts are parts of a national political system. The idea of a collaborative Court supplements their descriptions by indicating the roles constitutional courts can play in the dynamics of the political system. Their interactions with the other elements in political systems contribute to the construction and stabilization of different systems over time. In addition, the possibility that a constitutional court can be a collaborative one provides some modest normative support for democratic constitutionalism. Whether the idea of the Supreme Court as a collaborative Court contributes substantially to our understanding of the Court's role in constitutional and political history depends on further explorations, which I hope this chapter may provoke.

Notes

1. My terminology is intentionally imprecise in referring sometimes to a national political order, and more often to a national political system. The difficulty is that those terms, and others—such as *regime*—have connotations that I do not wish to invoke. My imprecision is designed to avoid the connotations.

2. I believe that my argument can be understood as an attempt to work out details of the argument underlying, but not explicitly made in, Robert Dahl's classic article, "Decision-making in a Democracy: The Supreme Court as a National Policy-Maker," *Journal of Public Law* 6 (1957): 279–295.

3. The term *parts* is only an approximation. It correctly suggests that the divisions may be geographical, but I later discuss divisions that are temporal—that is, between one political system and its predecessor.

4. The argument in this chapter was inspired by reflecting on Robert C. Post and Reva Beth Siegel, "Equal Protection by Law: Federal Antidiscrimination Legislation after *Morrison* and *Kimel*," *Yale Law Journal* 110 (2000): 441–526.

5. See *Dennis v. United States*, 341 U.S. 494, 517 (1951) (Frankfurter, J., concurring in the result). In this opinion, Frankfurter outlined the numerous considerations that had to be balanced in determining whether a sedition prosecution violated the First Amendment and concluded that the Court had to defer to Congress's determination of what the proper balance was.

6. *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

7. Martin Shapiro, "Fathers and Sons: The Court, the Commentators, and the Search for Values," in *The Burger Court: The Counter-Revolution that Wasn't*, ed. Vincent Blasi (New Haven, Conn.: Yale University Press, 1983), 220.

8. Kevin J. McMahon, "Constitutional Vision and Supreme Court Decisions: Reconsidering Roosevelt on Race," *Studies in American Political Development* 14 (2000): 20–50.

9. *Smith v. Allwright*, 321 U.S. 649 (1944).

10. *Grovey v. Townsend*, 295 U.S. 45 (1935).

11. 321 U.S., at 669.

12. *Hague v. CIO*, 307 U.S. 496 (1939).

13. The most important of these cases was *Thornhill v. Alabama*, 310 U.S. 88 (1940).

14. Voting Rights Act of 1965, §10, 79 Stat. 442.

15. *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966). The decision cites the lower court decisions in the Alabama and Texas lawsuits.

16. *Garner v. Louisiana*, 368 U.S. 157, 177–181 (1961) (Douglas, J., concurring).

17. 368 U.S. 157 (1961).

18. *Peterson v. City of Greenville*, 373 U.S. 244 (1963).

19. *Lombard v. Louisiana*, 373 U.S. 267 (1963).

20. After the Civil Rights Act became law, the Court held that one of its provisions did indeed immunize sit-inners from prosecutions under state trespass laws. *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964).

21. Lucas A. Powe Jr., *The Warren Court and American Politics* (Cambridge, Mass.: Harvard University Press, 2000), 490.

22. Ibid., 494.

23. 384 U.S. 436 (1966).

24. 392 U.S. 1 (1968).

25. 387 U.S. 1 (1967).

26. Barry C. Feld, "Race, Politics, and Juvenile Justice: The Warren Court and the Conservative 'Backlash,'" *Minnesota Law Review* 87 (2003): 1447–1577, at 1485.

27. 392 U.S. 514 (1968).

28. William H. Simon, "Rights and Redistribution in the Welfare System," *Stanford Law Review* 38 (1986): 1431–1516.

29. I have developed the argument in more detail in Mark Tushnet, *The New Constitutional Order* (Princeton, N.J.: Princeton University Press, 2003), on which the following paragraphs draw.

30. 529 U.S. 598 (2000).

31. *Sutton v. United Air Lines*, 527 U.S. 471 (1999); *Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001).

32. *Morrison v. Olson*, 487 U.S. 654 (1988).

33. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992).

34. *Clinton v. City of New York*, 547 U.S. 417 (1998).

35. This point has to be qualified by the possibility that a statute was enacted over the president's veto, or that the president, while objecting in principle to the statue, recognized political reality and either let it go into effect without his signature or actually signed it to avoid a veto battle.

36. To some extent the Court's tendency to side with the executive is confirmed by the widely noted role the solicitor general plays in structuring the Court's agenda and offering the Court legal positions that the Court adopts more often than it does positions advocated by other lawyers.

37. For this periodization, see Powe, *Warren Court*.

38. *United States v. Lopez*, 514 U.S. 549 (1995).

39. Ruth Colker and James J. Brudney, "Dissing Congress," *Michigan Law Review* 100 (2001): 80–144.

40. Stephen Skowronek, *The Politics Presidents Make: Leadership from John Adams to George Bush* (Cambridge, Mass.: Harvard University Press, 1993), 442.

41. See *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 580 (1985) (Rehnquist, J., dissenting) (referring to "a principle that will, I am confident, in time again command the support of a majority of this Court"), 589 (O'Connor, J., dissenting) (asserting that "this Court will in time again assume its constitutional responsibility").

42. *Alden v. Maine*, 527 U.S. 706, 814 (1999) (referring to the Court's doctrine as "probably fleeting").

43. I must note that this is the only example I have been able to think of to illustrate the possibility of an anticollaborative Court, and therefore acknowledge that I may be overgeneralizing in suggesting that there is some broader phenomenon of which Section 5 law is simply one illustration.

44. *City of Boerne v. Flores*, 521 U.S. 507 (1997). More precisely, Section Five clearly authorizes Congress to adopt a statute creating a federal cause of action for particular violations of Section One rights. The *Boerne* decision identifies the conditions under which Congress had addressed such violations by remedial schemes that go beyond simply invalidating or imposing liability for particular unconstitutional actions.

45. Archibald Cox, "The Supreme Court, 1966 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights," *Harvard Law Review* 80 (1966): 91–122, at 94.

46. See Post and Siegel, "Equal Protection by Law."