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Judicial Review and Party Politics

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COMMENT

JUDICIAL REVIEW AND PARTY POLITICS

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It has been suggested that intrusion upon legislative policy by judicial review "is a consequence of that fragmentation of political power which is normal in the United States. No cohesive majority, such as normally exists in Britain, would permit a politically irresponsible judiciary to usurp decision-making [policy] functions, but, for complex social and institutional reasons, there are few issues in the United States on which cohesive majorities exist."[1] When they do exist, as in the recent tidal wave of anti-communism, the Supreme Court is not apt to test its strength against them. Rather it practices a judicious self-restraint.[2]

Distinguishing between parliamentary and popular majorities, another commentator finds support in Australian experience for this view of the relation between judicial and political policy-making. Australian courts have been able to override their national legislature, it is said, because they have had the support of cohesive popular majorities. Conversely, we are told, judicial review does not exist in Britain because there, in contrast to Australia, monolithic legislative majorities reflect solid popular majorities.[3]

No doubt, as these comments suggest, judges like the rest of us are sensitive to public opinion. A more adequate explanation of policy-making via judicial review in the United States and Australia (and its absence in Britain) may lie in the special character of their respective political party systems. Could it be that "judicial supremacy" and irresponsible political parties are related phenomena? This at least seems clear: court intrusion upon national policy has thrived in the United States only in periods of unusual weakness in our party system. To explore this thought is the purpose of the present essay.

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1. Roche, *Judicial Self-Restraint*, 49 AM. POL. SCI. REV. 762, 771 (1955).
2. *Id., passim.* To date no act of Congress dealing with the communist menace has been held unconstitutional. With the decline of McCarthyism, however, the Court seems to have become bolder in guarding civil liberty via procedural devices that do not require constitutional commitments. See McCloskey, *The Supreme Court Finds a Role: Civil Liberties in the 1955 Term*, 42 VA. L. REV. 735 (1956). Of course, the Court does not risk so much when it turns a decision on non-constitutional grounds. Such decisions may be readily "reversed" by the political branches of government.
3. Vile, *Judicial Review and Politics in Australia*, 51 AM. POL. SCI. REV. 386 (1957).

Our classic age of judicial legislation on a national scale came between the Civil War and 1937. It arose with the decline of sectional politics and ended with the advent of what Arthur Holcombe calls "the new" urban politics.[4] In short, judicial supremacy *vis-a-vis* national policy seems to have prospered only in a transitional interlude between two dynamic political party systems. That this is not mere coincidence is indicated by the fate of judicial pretension before and after the period in question. Thus the checkmating of incursions upon national policy by the Marshall and Taney Courts while sectionalism reigned is matched only by the humiliation of the "nine old men" who challenged the vigorous new urban politics of our day.

Frederick Turner and his followers have shown how in the early days shifting alignments of Northeast, West and South, each with a distinctive economy and culture, provided the key to national policy. As Turner put it:

> We in America are in reality a federation of sections rather than of states. State sovereignty never was influential except as a constitutional shield for the section. In political matters the states act in groups rather than as individual members of the Union. They act in sections and are responsive to the respective interests and ideals of the sections. They have their sectional leaders, who, in Congress and party conventions, voice the attitude of the section and confer and compromise their differences, or form sectional combinations to achieve a national policy and position.[5]

Between the Constitutional Convention and the Civil War four major sectional combinations successively came into being. Then, indeed, brokerage in regional interests was the nub of American statesmanship. An alliance of the agrarian West and South under Jefferson's leadership in 1800 replaced the Federalist combination of commercial Northeast and planter South. Revitalized in 1828 by the Jacksonians, this Democratic coalition dominated politics until slavery made such an alignment untenable. Then the West turned to the Northeast to form the modern Republican Party—a most tenacious alliance as Professor MacMahon has suggested, because its cold economic bargains were cemented with the sentimentality of brotherhood in arms.

But no sooner had Northeast and West accomplished their immediate purpose (defeat of the "slave power") than economic tension threatened to tear them apart. The Granger, Greenback, Alliance, Populist and Free Silver movements, were an open manifestation of a long and persistent agrarian rebellion largely within the reigning Republican coalition. When before the Civil War the major elements in a political bloc fell out, sectional realignment was promptly accomplished. Discordant tensions were neutralized and mounting pressures

4. HOLCOMB, THE NEW PARTY POLITICS (1933).

5. TURNER, THE SIGNIFICANCE OF SECTIONS IN AMERICAN HISTORY 50 (1932).

were relieved in a series of shifting sectional accommodations. The end result was national policy. Resort to the judiciary for the solution of national policy problems was superfluous and, when attempted, was immediately suppressed by violent political reaction. But the Civil War and its aftermath destroyed the vitality of sectional politics. The accord which the Republicans effected at Chicago in 1860 was the last of the great sectional realignments. This may be a clue to the peculiar success of judicial supremacy *vis-a-vis* Congress in the years that followed.

Plainly the rigidity of post-bellum sectionalism springs from the Civil War itself. Even the churches, despite protestations of brotherly love, remained divided regional bodies. The agrarian South and West had formerly supported each other in national politics. After the war each had its grievances against the "money power" of the Northeast.

> If the South were readmitted to the Union, Southern and Western men would inevitably unite their strength and arrange a national policy which would serve their [agrarian] interests. Andrew Johnson, in spite of his loud talk during the early months of his presidency, represented the promise and guarantee of such a combination. Hence the bitter struggle to impeach him. Industrial men succeeded by a campaign of hatred both in defeating Johnson and in holding the South out of the Union for a decade. Meanwhile, industrialism made its position secure.[6]

Thaddeus Stevens saw the problem quite plainly in economic terms. As he put it in the House of Representatives in January, 1876,

> I am now confining my argument to Negro sufferage in the rebel states. . . . The white Union [*i.e.*, Republican] men are in a great minority in each of those states. With them the blacks would act in a body . . . the two united would form a majority. . . . It would assure the ascendency of the Union Party. . . . If impartial sufferage is excluded in the rebel states then everyone of them is sure to send a solid rebel representative delegation to Congress, and to cast a solid rebel electoral vote. They with their kindred Copperheads of the North would always elect the President and control Congress. . . . Now you must divide them between loyalists, without regard to color, and disloyalists, or you will be perpetual vassels of the *free-trade*, irritated, revengeful South. (Emphasis added.)

Unlike those who had actually done the fighting, General Sherman observed, politicians were ready to "prolong the war ad infinitum." Commenting upon the Greenback "heresy," Hayes wrote Blaine in 1876 that the Republican Party's "strong ground is the dread of the Solid South, rebel rule, etc., etc. I hope you will make these topics prominent in your speeches. It leads the people away from 'hard times' which is our deadliest foe." Garfield approved this advice as "sound strategy."[7] As late as 1884 a wit supposed that the Republicans

6. DODD, WOODROW WILSON AND HIS WORK 61 (1932).
7. SHERMAN & SHERMAN, SHERMAN LETTERS 248 (1894). See also CALDWELL,

"might wring one more president from the folds of that battle-stained garment," the bloody shirt. Significantly every successful Republican candidate for the presidency from Appomattox to Manila Bay was both a westerner and a former "hero" of the Union Army. The GOP had won a lasting hold on the affections of the North because for many it seemed to have been the instrument of Providence in preserving the nation in a time of crisis.[8]

In short, extraneous sentiments blocked the free play of geo-economic forces and, by impairing the resilience of sectional politics, crippled it as the effective arbiter of national policy. The South had been neutralized politically by an emotional barrier that defied economic expediency. Western agriculture was wedded incompatibly to Northeastern business in a union which neither could dominate by mere political devices.[9] Their differences, *i.e.*, national policy, had to be settled at another level. Here was an entree for judicial mediation on a grand scale. The judges simply filled a political vacuum that resulted from the ossification of sectional politics.

In the seventy-two years preceding the Civil War only two acts of Congress suffered judicial veto. There can be no doubt that just as the "rich and well-born" Federalists disliked democracy, they also shunned popular political parties (factions) and plainly contemplated judicial review to protect their special interests from popular legislation. Apparently they anticipated the present thesis as to the relation between popular government, political parties and judicial review. In any case when the Federalists lost political control of the nation and sought to make good that loss through a carefully packed Supreme Court, they encountered capable political opposition, particularly the Chase Impeachment. As J. Q. Adams observed:

> [T]he [Jeffersonian] assault upon Judge Chase, . . . was unquestionably intended to pave the way for another prosecution, which would have swept the Supreme Judicial Bench clean at a stroke.[10]

Plainly moved by this response to *Marbury v. Madison* "the great Chief Justice" wrote a strange and doubtless tongue-in-cheek apologia:

JAMES A. GARFIELD: PARTY CHIEFTON 249 (1931); HAMILTON, BIOGRAPHY OF JAMES G. BLAINE 422 (1895).

8. SCHLISINGER, NEW VIEWPOINTS IN AMERICAN HISTORY 273 (1934).

9. This Republican "combination, though strong enough to win the Presidency, did not possess the strength needed to control Congress under normal conditions. Hence, the frantic efforts of the Republican leaders, first to extend their power into the South by means of Negro votes and later to strengthen themselves in the West by the admission of new states and the cultivation of Western interests. . . . But Populism ruined Republican hopes in the West as the failure of Negro suffrage ruined them in the South. . . ." Holcombe, *Present Day Characteristics of American Political Parties*, THE AMERICAN POLITICAL SCENE 19 (1938).

10. 3 FORD, THE WRITINGS OF JOHN QUINCY ADAMS 106-08 (1914).

> I think the modern doctrine of impeachment should yield to an appellate jurisdiction in the legislature. A reversal of those legal opinions deemed unsound by the legislature would certainly better comport with the mildness of our character than [would] a removal of the Judge who has rendered them unknowing of his fault.[11]

Never thereafter, though he was to be on the bench for another thirty years, did Marshall, or any member of his Court, ever challenge another act of Congress.[12] *Marbury v. Madison* was born before its proper day; a sport doomed to languish until new political conditions generations later offered a more congenial environment. The Jeffersonian combine of South and West was too potent to be defeated from the bench by the old-guard Federalists. Significantly the latter resorted after the Chase affair not to judicial review, but to the Hartford Convention which by its resolutions confirmed J. Q. Adams' observation that "the alarm and disgust of the New England Federalists at Mr. Jefferson's anti-judiciary doctrines and measures . . . were one of the efficient causes which led to the project of separation and a Northern Confederacy."[13]

Not until the *Dred Scott* case in 1857 did the Supreme Court again venture to assert its supremacy over the national political processes. The repercussions of that fiasco again indicate that relationship between a vigorous political system and judicial review. The Democratic Party had dominated national policy since 1800 and "slavocracy" had come to control the Democratic Party. Their latest victories had been the Fugitive Slave Law, the Kansas-Nebraska Act and the tariff reform

11. 3 BEVERIDGE, THE LIFE OF JOHN MARSHALL 177 (1916).

12. Stuart v. Laird, 5 U.S. (1 Cranch) 299 (1803), involved a congressional measure which Marshall and his associates privately thought unconstitutional, "but they had not the courage [after *Marbury v. Madison*] to adopt the heroic course." BEVERIDGE, *op. cit. supra* at 122. The validity of national legislation was questioned by counsel in Marshall's Court on at least fourteen occasions after *Marbury v. Madison*. The apparent futility of such efforts no doubt discouraged others, *e.g.*, United States v. The William, 28 Fed. Cas. 614 (No. 16700) (D. Mass. 1808). Of course, Marshall's Court did invalidate several state laws, much to the annoyance of the Jeffersonians. But invalidation of a state measure is not apt to precipitate national political reaction on a scale comparable to that involved by judicial intrusions upon national policy. It was one thing, for example, for the Federalist Court to strike down such narrowly local policies as those involved in Dartmouth College v. Woodard, 17 U.S. (4 Wheat.) 518 (1819), and Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810). It doubtless would have been something very different—or so Marshall apparently felt—for the Court to have vetoed the crucial national policy involved in *Stuart v. Laird*. To put the matter differently: it would have been extremely difficult for the Jeffersonians to make a national political issue out of the management of Dartmouth College, or Georgia's unusual problem in the Yazoo land transaction—or the highly popular decision in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824). On the other hand Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), and the resulting constitutional amendment suggests that the Court may not with impunity strike down local interests which have intense political support in all or many states.

13. See *Letter to the Citizens of the United States in 1829*, ADAMS, DOCUMENTS RELATING TO NEW ENGLAND FEDERALISM 162 (1905).

of 1857. But in *Dred Scott* they overreached themselves. Abraham Lincoln exploited that blunder in the famous debates with Douglas. At Freeport he forced from his opponent the fatal doctrine that tore the South from the West and broke the Democratic Party. Promptly thereafter a realignment of sectional forces brought Northeast and West together in a winning combination that carried Lincoln to the White House and overrode the *Dred Scott* decision. Once again resilient sectionalism had frustrated a judicial venture into the national policy preserve.

In contrast to its two thwarted assertions of supremacy in the seventy-two years before the Civil War, the Court struck down seventy-six congressional measures and emasculated others in a like period (1865-1937) thereafter. But cold statistics hardly tell the story. After its first coup the Court had not seen fit to strike again for more than fifty years. Its second coup brought ugly repercussions which few thought the Court could ever out-live. Yet in a decade beginning only eight years after the *Dred Scott* catastrophe the Justices vetoed not less than eight acts of Congress. Significantly the principal issues that came before the high Court after 1865 involved clashes of interest between major partners in the dominant political alliance—businessman, grain farmer and laborer. As Wilfred Binkley demonstrates, Lincoln's Republican Party had been an agrarian-labor alliance, but the adoption of it in Grant's day by powerful Eastern capitalist interests gave it incongruous economic-sectional wings.[14] Because of the bloody shirt this incongruity was resolved not by sectional realignment as in 1800, 1828 and 1860, but by intra-party litigation. Judicial review replaced sectional politics as the prime arbiter of national policy.

> In spite of the Court's condemnation of the theory that "parties have an appeal from the legislature to the courts," powerful interests from the time of the Civil War were encouraged by the trend of decisions to carry to the Supreme Court all cases lost in Congress, and the power of judicial review came more and more to resemble a political veto. But there was opposition within the Court itself to being cast in the role of censor. Led by the brilliant and forceful [Mr. Justice] Miller, it resisted for a few years the ceaseless pressure of creditors, bondholders, railroads, and coupon-clippers. The first ominous rumble of what lay in the future was heard in the famous *Legal Tender Cases*.[15]

For a time it was touch and go. If business interests prevailed via judicial supremacy in the first round of the paper money controversy,

14. BINKLEY, AMERICAN POLITICAL PARTIES: THEIR NATURAL HISTORY 296 (1943). Compare the capture of the Democratic Party by the slave-owners in earlier days.

15. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 41 (1941).

agrarianism as reflected in congressional policy won in the second.[16] But by the mid-nineties the Court, and through it "business," had achieved a dominant position. The Interstate Commerce Act of 1887, the Sherman Act of 1890 and the Income Tax Act of 1894 had all germinated on the western plains. They were the produce of a long agrarian political struggle against the excesses of the American industrial revolution. What had taken years to achieve the Court destroyed in a matter of months. The income tax was invalidated.[17] The antitrust act and the railroad legislation were emasculated.[18] Simultaneously "government by injunction" sprang up to keep labor "in its place."[19] In short, carefully exploited emotions of the Civil War and Reconstruction went far to sustain an uneasy alliance between agrarian West and industrial Northeast, while judicial review insured the supremacy of business interests within that "dominant" combination.[20]

That the Supreme Court had achieved a new role in American government was not unnoticed by astute contemporary observers. As President Hadley of Yale saw it in 1908,

> the fundamental division of powers in the Constitution of the United States is between the voters on the one hand and property owners on the other. The forces of democrary on the one side, divided between the executive and the legislature, are set over against the forces of property on the other side with the judiciary as arbiter between them.[21]

To make good its new role the Court needed new tools. Thus the interregnum between our two political party systems was perhaps the most "creative" era in the development of American constitutional law. Due process acquired a substantive economic content.[22] Liberty of contract and laissez faire became the law of the land.[23] The labor injunction was invented.[24] The concept of property was expanded by the myth of "fair value."[25] New meaning for an antiquarian constitutional phrase gutted hopes for fiscal reform.[26] What Holmes called an "invisible radiation" (dual federalism) was discovered in the tenth amendment: a radiation which somehow restricted even expressly

16. Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1869); Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1870).
17. Pollack v. Farmers Loan & Trust Co., 157 U.S. 429 (1895).
18. United States v. E. C. Knight Co., 156 U.S. 1 (1895); Texas Pacific Ry. v. ICC, 162 U.S. 184 (1896); ICC v. Texas Pacific Ry., 167 U.S. 479 (1897).
19. *In re* Debs, 158 U.S. 564 (1895).
20. See note 9 *supra*.
21. 64 THE INDEPENDENT 837 (1908).
22. See, *e.g.*, Adair v. United States, 208 U.S. 161 (1908). State power, of course, was crippled by the same device.
23. *Ibid.*
24. *In re* Debs, 158 U.S. 564 (1895).
25. For a history of the rise and fall of the "fair value myth" see Hale, *Utility Regulation in the Light of the Hope Natural Gas Case*, 44 COLUM. L. REV. 488 (1944).
26. Pollack v. Farmers Loan & Trust Co., 157 U.S. 429 (1895).

delegated national powers.[27] But these new vehicles of policy—to be used or ignored in the Court's discretion—were the creatures of their age. Not one of them survived the political vacuum in which they were born!

Meanwhile, endless agricultural depression aggravated the difficulty of the tenuous Republican coalition. Plainly a new sectional alliance was struggling to be born. Hamlin Garland pointed out that "As ten cent corn and ten percent interest were troubling Kansas, so six cent cotton was inflaming Georgia." Mrs. Lease, exhorting farmers to "raise less corn and more hell," declared that "the West and South are prostrate before the manufacturing East." In a great sectional upheaval "the Gracchus of the West," William Jennings Bryan, sought to rally the forces of discontent under the delusively simple emblem of Free Silver. He would use the *Debs* and the *Income Tax* cases, as Lincoln had used *Dred Scott*. The silver issue struck at the very jugular of the "money power" and exposed the deep fissures that divided the awkward Republican sectional coalition. Obviously if Bryan's assault upon judicial supremacy should succeed as had those of Jefferson, Jackson[28] and Lincoln, the special immunities that business had won at the bar against income taxes, anti-trust laws, railroad regulation and labor unions would be jeopardized. But unlike its predecessors in 1800, 1828 and 1860, the revolt of 1896 failed. For the first time in American history the embattled western farmer suffered political defeat. Against him Mark Hanna had deployed the "money power" in the most expensive campaign the nation had ever seen. Bryanism, according to Governor Altgeld of Illinois, was "confronted by all the banks, all the trusts, all the syndicates, all the corporations, all the great papers—by everything that money could buy. . . ."[29] But this and a capricious rise in the price of wheat just prior to the election (thanks to crop failures abroad) did not solve the problems that confronted the American people. Some day the embarrassing issues that Bryan had forced into national politics would have to be faced.

A few weeks after the election, Theodore Roosevelt observed that Bryanism was still a "real and ugly danger and our hold upon the forces that won the victory for us [is] by no means too well assured."[30]

27 See, *e.g.*, Hammer v. Dagenhart, 247 U.S. 251 (1918).

28. President Jackson successfully vetoed the bank measure on constitutional grounds, *inter alia*, notwithstanding McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), which had sustained the constitutional validity of such legislation. The veto message also expressly repudiated the principle of judicial supremacy. It was with respect to Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), that President Jackson is said to have remarked, "Marshall has made his decision, now let him enforce it." Whatever Jackson said, in fact the judgment was not enforced.

29. BROWNE, ALTGELD OF ILLINOIS 296 (1924).

30. MILLIS, THE MARTIAL SPIRIT 58-59 (1931).

The bloody shirt had lost its political efficacy. Could new distractions be found lest South and West see their common interest and unite? By chance or design the decrepit position of the Republicans was bolstered by what Secretary of State Hay called "the splendid little war with Spain." After that Imperialism,[31] World War I and "back to normalcy" helped postpone the evil day.[32]

Having reached a high plateau of power in 1895, the Supreme Court fought for the most part a consolidating action until the mid-1930's. Only in the destruction of labor legislation perhaps did it extend its position.

> By 1933 Attorney General (later Mr. Justice) Jackson observed, the Court was no longer regarded as one of three equal departments among which the powers of government were distributed. Instead, [it was said to be] invested with acknowledged and *supreme* authority, and the whole conservative and property philosophy became oriented around "judicial supremacy."[33]

A premonition of things to come appeared in the Senate's 1930 refusal to confirm the appointment of Judge John Parker to the Supreme Court. His offense had been a faithful adherence as lower court magistrate to the "anti-labor" doctrines of the highest court of the land!

The difficulty was that industrialization had transformed America into a nation of city dwellers and thereby laid the foundation for "new party politics."[34] Labor had replaced the farmer in the nightmares of businessmen. Industry, throttled by the institutions of a pre-industrial economy of scarcity, could not distribute the plentiful products of an "affluent society." Bewildered old-guard observers called it "overproduction." "The Common Man" faced starvation in the midst of plenty. These new horizontal fissures in American life were replacing the old vertical tensions of sectionalism as the nub of national politics. Only the catalyzing magic of an effective political leader was wanting.

When the national economy collapsed Franklin Roosevelt succeeded where Bryan had failed. As Samuel Lubell explained,

> The really revolutionary surge behind the New Deal lay in this coupling of the depression with the rise of a new generation, which had been malnourished on the congestion of our cities and the abuses of industrialism. Roosevelt did not start this revolt of the city. What he did do was to awaken the climbing urban masses to a consciousness of the power in their numbers. . . . In turn, the big-city masses furnished the votes which reelected Roosevelt again and again—and, in the process, ended the traditional Republican [sectional] majority in this country. . . . In the past

31. BRYAN & BRYAN, THE MEMOIRS OF WILLIAM JENNINGS BRYAN 125 (1925).
32. Meanwhile the pressure was somewhat relieved by Roosevelt's "Square Deal," Wilson's "New Freedom," the Progressive Movement and the "farm bloc"—all reaping where Bryan had tilled.
33. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 72 (1941).
34. HOLCOMBE, THE NEW PARTY POLITICS (1933).

> American political realignments have always followed sectional lines. The Revolt of the City, however, has drawn the same class-conscious line of economic interest across the entire country, overriding not only regional distinctions but equally strong cultural differences.[35]

Mr. Hoover was not the first chief executive to lose office via economic depression. But surely no one before F.D.R. had attained the presidency through an election in which functional (as distinct from geographic) cleavage was as clear as it was in 1936 when 61 per cent of the white-collar, 67 per cent of the skilled, 74 per cent of the semi-skilled, and 80 per cent of all organized, workers supported him as did 60 per cent of the middle, and 76 per cent of the lower, income groups.[36]

Could judicial review continue to dominate national policy? With boldness reminiscent of its counter-revolution in the 1890's the Supreme Court struck down virtually the entire New Deal recovery program. Indeed, it went so far that Mr. Justice Cardozo is said to have remarked, "We are no longer a Court." But what judges had achieved under petrified sectionalism, they could not maintain in the face of a vigorous urban politics. Like the great statesman of the old politics of sections (Jefferson, Jackson and Lincoln), the first master of urbanism had his way with the Court. The "Packing Plan" of 1937, like the Chase Impeachment of 1805, failed only in its immediate aspects. The Supreme Court began at once a long and extended retreat from which it has not yet rallied.

If it be urged that six acts of Congress have been struck down since 1936, one answer is that this in itself is something of a post-bellum record.[37] In a corresponding twenty-two year period prior to 1937, for example, thirty national measures had been invalidated. But a mere count of cases does not reveal the extent of the Court's new self-restraint. Pre-1937 judicial vetoes cover the whole broad spectrum of national economic and social policy. The half-dozen post-1936 vetoes are confined to one specialized field—where legislation jeopardizes the right to a fair trial. Surely here courts may be deemed to have some special competence *vis-a-vis* Congress. What meaning is there in the separation of powers, if that principle does not justify judicial review for the protection of the judicial process itself?

In perspective then, American experience suggests that the success of judicial review of national policy varies in close inverse relation to

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35. LUBELL, THE FUTURE OF AMERICAN POLITICS 29, 50 (1951).

36. BINKLEY, AMERICAN POLITICAL PARTIES: THEIR NATURAL HISTORY 380-82 (1943).

37. Trop v. Dulles, 356 U.S. 86 (1958); Reid v. Covert, 354 U.S. 1 (1957); Toth v. Quarles, 350 U.S. 11 (1955); United States v. Cardiff, 344 U.S. 174 (1952); United States v. Lovett, 328 U.S. 303 (1946); Tot v. United States, 319 U.S. 463 (1943).

the efficacy of the political party system.[38] Or to put it differently, judicial "legislation" apparently feeds on defects in the political structure. If, as some insist, public opinion is important in the judicial process, it seems even more important when implemented by dynamic and responsive party machinery. The Supreme Court's only power is its power to persuade. Purse and sword are in other hands. But judicial persuasiveness multiplies when political opposition is lacking or disorganized. On the surface at least, Australian experience with judicial review seems to teach the same lesson and by contrast so does that of Great Britain.[39]

38. As to judicial review of state policy, see footnote 12 *supra.*

39. For a history of the subjugation of the Supreme Court of the Union of South Africa by powerful political forces, see Livingston, *Court and Parliament In South Africa,* 10 PARLIAMENTARY AFFAIRS 434 (1957).