Introduction

Had Americans "Stopped Understanding about the Three Branches"?

On 3 March 2009, former Justice Sandra Day O'Connor, as a guest on *The Daily Show with Jon Stewart*, voiced concerns about a perceived rising tide of anti-judicial hostilities:

> What I became aware of increasingly in those last years [since my retirement] was all the criticism of judges across America. We heard a lot from Congress and in state legislatures, we heard a lot about activist judges, didn't we – secular godless humanists trying to tell us all what to do – I mean that was what we were hearing. And I just didn't see it that way. And, I thought perhaps a lot of Americans had stopped understanding about the three branches of government.

That O'Connor, a Reagan appointee, would warn against this antagonism is notable. For, while hostilities toward judges and courts have, over time, known no particular partisan color, during the 1990s and early 2000s such anger was voiced primarily by a conservative insurgency that made inroads to power with Ronald Reagan in 1980.[1] Around that time, Republican national platforms began to give vent to anti-judge tirades. Republican members of Congress have since followed with court-curbing bills, and a conservative legal movement has developed, making its judicial preferences widely known.[2]

[1] Accusations of judicial activism are not limited to one side of the political spectrum. While conservatives criticized the Court as "imperial" following *Roe*, liberals have assailed the Court for its *Lochner*-era jurisprudence and accuse the Rehnquist and Roberts Courts of conservative judicial activism. See Laura Kalman, *The Strange Career of Legal Liberalism* (New Haven: Yale University Press, 1996) and Thomas Keck, *The Most Activist Supreme Court in History: The Road to Judicial Conservatism* (Chicago: University of Chicago Press, 2004). Although one scholar has noted, "Everyone seems opposed to judicial activism, yet no one agrees what it means," judicial activism usually connotes the act of reaching beyond the question involved in the case to rule according to personal substantive views. See Viet Dinh, "Threats to Judicial Independence, Real or Imagined," *Georgetown Law Journal* 95 (2007), 938–9.

[2] Party platforms are discussed in subsequent chapters. For a summary of court-curbing legislation, see Citizens for Independent Courts, *Uncertain Justice: Politics and America's Courts*

By 1996, some congressional Republicans contemplated impeaching federal judges.[3] These threats escalated when some called for impeaching Reagan-appointed Justice Anthony Kennedy.[4] In 2005 and 2006, the conservative interest group, the Family Research Council, sponsored "Justice Sunday" telecasts dedicated to showing "how activist judges … threaten our nation's future" and suggesting that Christian values were increasingly in conflict with judicial rulings.[5] Former Representative Tom DeLay (R-TX) summed up the complaint: "moral values that have defined the progress of human civilization for millennia are cast aside in favor of those espoused by a handful of unelected, lifetime-appointed judges."[6]

These telecasts followed Congress's manipulation of judicial process in the battle over Terri Schiavo's life. Schiavo, a woman in a vegetative state, presented the Republican majority with the opportunity to champion its "culture of life" against the Court-sponsored presumption of choice.[7] Schiavo's husband

(New York: Century Foundation Press, 2000), 131–47. Examples of recent legislation include the Judicial Transparency and Ethics Enhancement Bill of 2006, which created an Inspector General of the Judicial Branch, a congressional officer charged with financial oversight of the judiciary. This bill followed jurisdiction-stripping legislation passed in the 108th session of the House, "Safeguarding Our Religious Liberties Act," preventing federal courts from hearing cases involving the Ten Commandments, Pledge of Allegiance, and marriage. Another bill, the "Life-Protecting Judicial Limitation Act of 2003," had similar aims with respect to hearing abortion cases. The Constitution Restoration Act restricted federal jurisdiction on multiple fronts, including in matters relating to belief in God, excluded foreign legal principles from having relevant bearing on constitutional interpretation, and provided for removal of federal judges ignoring jurisdictional limitations imposed by the act. On the rise of a conservative legal movement and its objections to George W. Bush's nomination in 2005 of Harriet Meiers to the Supreme Court, see Steve Teles, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law* (Princeton: Princeton University Press, 2008), 1.

[3] Dinh, 934–5. See Alison Mitchell, "Clinton Pressing Judge to Relent," *New York Times*, 22 March 1996; Ian Fisher, "Gingrich Asks Judge's Ouster for Ruling Out Drug Evidence," *New York Times*, 7 March 1996, B4; Laurie Kellman, "Republicans Rally 'Round Judge-impeachment Idea; Constitution Would Be Violated, Foes Say," *Washington Times*,13 March 1996, A1; Linda Greenhouse, "Judges as Political Issues: Clinton Move in New York Case Imperils Judicial Independence, Bar Leaders Say," *New York Times*, 23 March 1996, A4.

[4] In 2005, some Republicans threatened to bring impeachment charges against Justice Anthony Kennedy, since his positions in some decisions including decriminalization of consensual homosexual sex placed him at odds with the more conservative wing of that party. See Jason DeParle, "In Battle to Pick Next Justice, Right Says Avoid a Kennedy: Conservatives See Him as a Turncoat on the Bench," *New York Times*, 27 June 2005, A1.

[5] http://www.sourcewatch.org/index.php?title=Justice_Sunday. The full-page ad in the *New York Times* depicts a young man looking quizzically at a gavel and at a Bible, thereby suggesting that, increasingly, citizens are confronted with supporting either allegedly activist judicial rulings or Christian values.

[6] Thomas Edsall, "Conservatives Rally for Justices; Leaders Ask for Nominees Who Will End Abortion and Gay Rights," *Washington Post*, 14 August 2005, A02.

[7] The presumption of choice extends beyond abortion jurisprudence. In *Cruzon v. Director, Missouri Department of Health* 497 U.S. 261 (1990), the Supreme Court declared a right to refuse medical treatment under the due process clause. Five justices agreed that it covered the refusal of food and water to the point of death.

sought removal of her feeding tube while her parents sued to keep it in place. When the state court refused to grant the restraining order, Congress transferred jurisdiction to the federal district court.[8] Republicans appeared to serve notice that judicial opinions contrary to the policy aims of their majority were not to be countenanced.[9]

And yet, even as the antagonism against courts and judges has accelerated since the 1990s, scholars argue that judicial power has remained intact: the heightened level of anti-court agitation in recent years appears mostly to have fallen flat. Few pieces of legislation curbing judicial power have passed, and those that have belie their sponsors' aggressive rhetoric by only nibbling at the edges of jurisdiction.[10] Moreover, the Supreme Court, for all of its more recent controversial rulings – on federalism, abortion, voting rights, gay rights, eminent domain, and campaign finance – is said to maintain a level of public esteem higher than the elected branches.[11] The ambiguity surrounding these hostilities extends to the "Justice Sunday" speakers themselves. Anyone listening carefully would have heard them couple their assaults on the legitimacy of

[8] The legislation transferring jurisdiction from the state to the federal court was "An Act for the Relief of the Parents of Theresa Marie Schiavo," PL- 109–3, 119 Stat. 15. Abby Goodnough and Carl Hulse, "Despite Congress, Woman's Feeding Tube Is Removed," *New York Times*, 19 March 2005, A1; and "Terri Schiavo Has Died," 31 March 2005, http://www.cnn.com/2005/LAW/03/31/schiavo/index.html. While the action could be considered bi-partisan, the vote indicates a heavy tilt toward Republican support: 156 Republicans and 47 Democrats favored the jurisdictional transfer while 53 Democrats and 5 Republicans voted against it. Charles Hulse and David Kirkpatrick, "Congress Passes and Bush Signs Legislation on Schiavo Case," *New York Times*, 21 March 2005, A1.

[9] On Republican hostilities toward the judiciary, particularly from evangelical interest groups, see Mark C. Miller, *The View of the Courts from the Hill* (Charlottesville: University of Virginia Press, 2009), 105–33.

[10] In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act, which limited federal courts' jurisdiction to consider habeas corpus challenges in state courts. PL-104–132, 110 Stat. 1214 (1996). That year Congress also passed the Illegal Immigration Reform and Immigrant Responsibility Act, which prevented federal court review of an Immigration and Naturalization Service final order to deport a person convicted of a crime. PL-104–208, 110 Stat. 3009 (1996). In 2006, Congress passed the Military Commissions Act (MCA) (PL-109–366, 120 Stat. 2600 [Oct. 17, 2006]) in response to *Hamdan v. Rumsfeld* (2004), which ruled that military commissions trying detainees at Guantanamo Bay violated the Uniform Code of Military Justice and the Geneva Convention. William Glaberson, "In Shift, Justices Agree to Review Detainee's Case," *New York Times*, 30 June 2007, A1.

[11] On public approval of the Court, see Gregory Caldeira, "Neither the Purse nor the Sword: The Dynamics of Public Confidence in the United States Supreme Court," *American Political Science Review* 80 (1986), 1209–26; Roger Handberg, "Public Opinion and the United States Supreme Court, 1935–1981," *International Social Science Review* 59 (1984), 3–13; Richard Lehne and John Reynolds, "The Impact of Judicial Activism on Public Opinion," *American Journal of Political Science* 22 (1978), 896–904; Joseph Tanenhaus and Walter Murphy, "Patterns of Public Support for the Supreme Court: A Panel Study," *Journal of Politics* 43 (1981), 24–39; Barbara Perry, *The Priestly Tribe: The Supreme Court's Image in the American Mind* (Westport, CT: Praeger, 1999), 5; and H. W. Perry, Jr., and L. A. Powe, Jr., "The Political Battle for the Constitution," *Constitutional Commentary* 21 (2004), 641–96.

independent judicial authority with a plea to advance conservative policy aims on the bench by confirming John Roberts and Samuel Alito.[12] If these conservatives voiced hostility to judicial power in principle, it would appear that they were not wholly committed to restraining its practical exercise.

I. Courts, Parties, and the Politics of Opposition

The central question of this book is how can the recurrence of anti-judicial hostilities over American history be squared with repeated scholarly and journalistic assessments that judicial power has grown, is secure, and is even supreme. Inter-branch relations are not always or even frequently hostile. Madisonian claims of ambition countering ambition not withstanding, much scholarship has shed light on how inter-branch relations are, if not always cordial, at least politically strategic and often cooperative such that the judicial authority is empowered to serve the needs of the elected branches.[13] But, even as we might differentiate between hostile actions meant to curb judicial power and actions to enhance that power, we should also attend to how manifestation of hostilities have changed over time, and what that change may tell us about American political and constitutional development more generally. At stake are not only questions of whether, how, and why judicial power has been and continues to be politically constructed, but also how instances of antagonism toward judges and courts have changed over time in ways that serve partisan objectives and, ironically, may maintain judicial power to further partisan ends.

Contrary to more common claims that these attacks have never succeeded or that they never succeeded after a certain time, I show that courts have never been insulated from attack.[14] Rather, what has changed over time is the nature of antagonism. This book traces and explains this shift; the

[12] Justice Sunday II on 14 August 2005 was, in part, a rally to support the appointment of Roberts; Justice Sunday III on 8 January 2006 was, in part, a rally to support the appointment of Alito.

[13] For James Madison's claim, "Ambition must be made to counteract ambition," see *Federalist 51*. Recent scholarship on how judicial power is constructed to serve the interests of the majority party controlling Congress, the presidency, or both includes Howard Gillman, "How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875–1891," *American Political Science Review* 96 (September 2002), 511–24; Keith Whittington, *Political Foundations of Judicial Supremacy* (Princeton: Princeton University Press, 2007); and Justin Crowe, "Cooperation over Conflict: Congress and the Court in American Political Development," presented at the 2010 New England Political Science Association Annual Meeting, Newport, Rhode Island, 23 April 2010.

[14] Charles Black remarked, "the strongest claim of judicial review's historically attested legitimacy would point to the fact that it has been under attack continuously since its beginning, but that the attacks have always failed." Black, *The People and the Court* (New York: MacMillan, 1960), 183. On the assumption that Congress has not successfully curbed judicial power since Reconstruction, see Lee Epstein and Thomas Walker, *Constitutional Law for a Changing America*, 4th ed. (Washington, DC: Congressional Quarterly Press, 2000).

explanation takes the legitimacy of holding differing views of the Constitution's meaning as its central point.

Today, holding differing views about the meaning of the Constitution or modalities of interpretation used to uncover that meaning is more common than it was at the moment of Founding or through much of the nineteenth century.[15] Our constitutional culture has developed over two centuries to allow for such disagreement to occur without threatening the stability of the republic.[16] However, such a pluralistic constitutional culture has not always characterized American experience. Furthermore, holding differing views about the Constitution's meaning is a manifestation of a broader perspective toward political opposition. And, for much of this country's first century, the legitimacy and loyalty of such stable, formed, and permanent opposition was not fully granted by elected officials.[17]

By legitimate opposition, I mean that those in power accept a stable outgroup as natural, unavoidable, and manageable. As discussed in later chapters, although early recognition of this idea is evident in James Madison's *Federalist 10* and in writings by Martin Van Buren, the Founding generation tended to associate stable and permanent opposition with civil unrest and constitutional instability. Consequently, they sought mechanisms to minimize if not squash it altogether; diluting this threat by enlarging the size of the republic, as Madison advocated in *Federalist 10*, was one such mechanism.

[15] Philip Bobbit, *Constitutional Fate: Theory of Constitutionalism* (New York: Oxford University Press, 1982), 3–8. See also Sotirios Barber and James E. Fleming, *Constitutional Interpretation: The Basic Questions* (New York: Oxford University Press, 2007), 64–188.

[16] I adopt Reva Siegel's definition of "constitutional culture" as "the understandings of role and practices of argument that guide interactions among citizens and officials in matters of the Constitution's meaning." (3) Siegel argues that the Civil War was a turning point in how disagreements about constitutional meaning would be vocalized; after the war, "those who disagree about the Constitution's meaning must advance their views without resort to violent coercion." (30) I seek to uncover the processes that made this turn from coercion and toward persuasion possible. Siegel, "Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA," *California Law Review* 94 (2006), 1323–419.

[17] While one of my aims is to demonstrate this shift from the illegitimacy of opposition to the idea that stable opposition could be loyal, I do not argue against a reversal. Rhetoric and behavior during the 2009–10 debate on health insurance reform included manifestations of the illegitimacy of opposition such as political violence (e.g., racial and homophobic epithets and vandalism against congressional members' offices) to pursuing legal arguments similar to nullification. These events led economist Paul Krugman to note how some within the Republican Party do not accept the legitimacy of opposition: "For today's G.O.P. is … a party in which paranoid fantasies about the other side – Obama is a socialist, Democrats have totalitarian ambitions – are mainstream. And, as a result, it's a party that fundamentally doesn't accept anyone else's right to govern." Krugman, "Going to Extreme," *New York Times*, 26 March 2010, A27. Paranoia and conspiracy are – as evaluated in Chapters 2 and 5 – indicators of the illegitimacy of opposition. On recent political violence, see Phillip Rucker, "Lawmakers Concerned as Health-Care Overhaul Foes Resort to Violence," *Washington Post*, 25 March 2010, A1. On the resurgence of nullification, see E. J. Dionne, "The New Nullifiers," *Washington Post*, 25 March 2010, A21.

Loyal opposition refers to those in power not only viewing out-group mobilization as a natural effect of democratic politics – that is, as legitimate – but also understanding that its potential to gain power through electoral procedures does *not* destabilize or threaten the Constitution. I suggest that we do not see this idea take strong root until Abraham Lincoln's presidency and not bloom fully until after Reconstruction.

Former Vice President Al Gore's 2000 concession speech helps make the concepts of legitimate and loyal opposition less abstract:

> Almost a century and a half ago, Senator Stephen Douglas told Abraham Lincoln, who had just defeated him for the presidency, "Partisan feeling must yield to patriotism. I'm with you, Mr. President, and God bless you." Well, in that same spirit, I say to President-elect Bush that what remains of partisan rancor must now be put aside, and may God bless his stewardship of this country. Neither he nor I anticipated this long and difficult road. Certainly neither of us wanted it to happen. Yet it came, and now it has ended, resolved, as it must be resolved, through the honored institutions of our democracy.[18]

Gore's comments summarize the political norm of loyal opposition as the stabilizing element of democratic elections and transitions of power.

Peaceful rotations in office, as occurred between John Adams and Thomas Jefferson after the contested election of 1800 and as followed the 2000 election, are necessary but not sufficient indicators that opposition is considered legitimate. A more complete assessment hinges on how new leadership treats those who have lost power. Jefferson's aim, discussed in Chapter 3, to *absorb* the opposition and *minimize* its voice, suggests the illegitimacy of opposition. By contrast, Abraham Lincoln's exhortations to southern Democrats, reviewed in Chapter 5, to try again in the next election rather than secede – to remain loyal by using their voice rather than exiting the Union – indicate that he considered his political opposition not only legitimate but also loyal.[19]

Assumptions that stable opposition is illegitimate or disloyal carry a particular stance toward constitutional interpretation. They allow for an interpretation to be framed as anti-constitutional, that is, as undermining the republic. Therefore, as ideas about opposition shift over time, parallel shifts likely took place in constitutional culture, namely, granting the legitimacy of differing takes on the Constitution's meaning. Examining change in hostilities toward judicial authority points to the need to probe not only the relationship between the limits of nineteenth-century constitutional culture and the republic's collapse into Civil War but also the relationship between courts and the primary institution of organized opposition in American politics, namely, political parties.[20]

[18] Albert Gore, Jr., "2000 Presidential Concession Speech," delivered 13 December 2000.

[19] Albert Hirschman, *Exit, Voice, and Loyalty*, new ed. (Cambridge: Harvard University Press, 2006).

[20] I respond to Gillman's (2002) call to assess how the simultaneous development of courts and parties affected one another:

> We might encourage students of party politics or delegation of powers to focus more attention on the ways in which executives and legislators use judges as extensions of

The relationship between courts and parties, and its periodic renegotiation, lies at the heart of political and constitutional development. To link this changing perspective on opposition politics to the politics of manipulating judicial authority, I suggest that politicians' gradual recognition of legitimacy and loyalty of opposition altered their perceptions of courts and parties in tandem, ultimately influencing their outlooks on the value of judicial power and how that power could be manipulated.

Courts and parties have always had an uneasy relationship in American politics. Historians have recorded the Jeffersonians' drive toward judicial impeachments, the Civil War Republicans' zeal for jurisdiction stripping, and Franklin D. Roosevelt's ill-fated Court-packing initiative. These episodes seem to illustrate a recurrent pattern of insurgent parties newly ensconced in power confronting entrenched judges of the old regime in cataclysmic showdowns. And they have figured in empirical and normative theorizing primarily through the idea of "countermajoritarian difficulty."[21] The concept summarizes the power of unelected judges to overrule laws passed by the elected branches. This paradigm of inter-branch dynamics renders judicial power an unchanging dilemma for American democracy, which inevitably follows from the structure of the federal branches. As such, it obscures important differences among successive instances. Rather than seek out and explain what is new in each episode, scholars, operating from this model, have viewed these confrontations as enduring emblems of American governance.[22]

I recast this history by focusing on courts and parties' *changing relationship to one another*, primarily by focusing on the process through which ideas

conventional political or policy agendas. Conversely, students of law and courts might be encouraged to locate the scope and direction of judicial decision making into a broader analysis of party systems and partisan control of those institutions that are responsible for the jurisdiction and the staffing of courts. (522)

Ronald Kahn and Ken Kersch called for inquiry into the "relationship between law and politics by refusing to isolate questions involving legal doctrines and judicial decisions and the special qualities of courts as decision-making units from the consideration of developments elsewhere in the political system – be they in ideologies, elite and popular political thought, social movements, or in formal institutions, such as Congress, the presidency, state and federal bureaucracies, and state and federal court decisions." Kahn and Kersch, eds., *The Supreme Court and American Political Development* (Lawrence: University Press of Kansas, 2006), 13. Perry and Powe (2004) note the stultifying scholarly disconnect between these two institutions: "Focusing on political parties is not something legal academics tend to do.... When it comes to constitutional analysis, they fall off the radar screen." (643)

[21] Alexander Bickel coined the phrase "countermajoritrarian difficulty" in his *The Least Dangerous Branch* (New Haven: Yale University Press, 1986), 16. Erwin Chemerinsky refers to the concept as the "dominant paradigm of constitutional law and scholarship" in his "The Supreme Court, 1988 Term – Forward: The Vanishing Constitution," 103 *Harvard Law Review* 43 (1989), 61. Barry Friedman calls it an "academic obsession" in his "The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five," 112 *Yale Law Journal* (2002), 153.

[22] Keith Whittington sees the problem as enduringly cyclic. He has formulated a model of presidential conflict with the federal courts that corresponds to Skowronek's typology of presidential authority; see Whittington (2007).

about opposition changed. In particular, I highlight specific entrepreneurial actions that enabled this relationship to be continuously reevaluated and redefined. While scholars have studied dynamics underlying episodes of presidential and/or congressional manipulation of judicial power, and they have examined how parties have changed over time, they have yet to consider fully how court development and party development link together.[23] Each institution is treated as a separate problem.[24] Or, if they are connected, it is more often than not to bear out Mr. Dooley's aphorism that the Court follows the election returns via the mechanism of presidential nomination and senatorial confirmation. Little attention is paid to whether and how any of the participating institutions or aims of actors within them change over time, how those actors respond to or promote new ideas or aims, or how the development of wholly new agents affects this process.[25]

Connection between judicial and party development is evident in my central claim: anti-judicial animus reflects politicians' changing ideas about the threat posed by formed, stable, and permanent opposition. This animus is motivated by more than just an alleged structural abnormality of an unelected branch in a democracy. We limit our understanding of this hostility and how it has manifested differently over time when we see it only as a static characteristic of American democracy. We ought to think about these inter-branch tensions as changing over time and illustrating shifting imperatives to tame, contain, harness, or otherwise manipulate judicial power. By shining light on change and development rather than recurrence, I show how inter-branch confrontation has turned on the legitimacy and loyalty of opposition, not just on the structural legitimacy of judicial review. Furthermore, this explanation comes into view only when the kind of cross-institutional analysis – as

[23] On presidential-court clashes, see Whittington (2007). On Congress-court relations, see Miller (2009) and Charles Geyh, *When Courts and Congress Collide* (Ann Arbor: University of Michigan Press, 2007). On party development in the electorate and as an organization, see Scott James, *Presidents, Parties, and the State* (New York: Cambridge University Press, 2000); Earl Black and Merle Black, *Rise of Southern Republicans* (Cambridge: Belknap Press of Harvard, 2002); and Daniel Galvin, *Presidential Party Building: Dwight D. Eisenhower to George W. Bush* (Princeton: Princeton University Press, 2009). On party systems, see John Aldrich, *Why Parties?* (Chicago: University of Chicago Press, 1995). On judicial development, see Felix Frankfurter and James Landes, *The Business of the Supreme Court* (New Brunswick, NJ: Transaction, 2007 [1928]); and Justin Crowe, "The Forging of Judicial Autonomy: Political Entrepreneurship and the Reforms of William Howard Taft," *Journal of Politics* 69 (February 2007), 73–87.

[24] Two exceptions are works by Stephen Skowronek and Bruce Ackerman. For Skowronek, courts and parties were the foremost political institutions of the nineteenth-century American state. Ackerman sees entrenched courts and insurgent parties as a recurring dynamic. See Skowronek, *Building a New American State* (New York: Cambridge University Press, 1981); Ackerman, *We the People: Foundations* (Cambridge, MA: Belknap Press of Harvard University, 1991); and Ackerman, "The Living Constitution," *Harvard Law Review* 120 (2007), 1737–812.

[25] Mr. Dooley is the fictional creation of the author and humorist, Finley Peter Dunne (1867–1936), who commented that the Supreme Court follows the election returns.

opposed to studying each institution's development in isolation – that this book attempts is undertaken.

The matter of the opposition's right to rule was not resolved at a single moment, and I tie its gradual resolution to politicians' eventual recognition of the strategic value of judicial power in partisan combat. Along this line of development, I uncover a shift in emphasis: hostilities toward the federal judiciary come to be less about broadly undermining judicial authority and more about targeted harnessing of judicial power for new political purposes. As politicians' perceptions toward opposition changed, their approach toward the judiciary – where opposition could become entrenched due to lifetime appointment – changed in tandem. Therefore, where existing scholarship points to a structural dilemma of eternal recurrence, I point to a developmental transformation. By focusing on development, I highlight entrepreneurial innovation undertaken by particular leaders in defining and redefining the central ideas characterizing American democratic politics and constitutional culture. In short, I am less interested in the repetition of these instances than in what emerges through them.

Put more concretely, politicians from the Founding era through the mid-nineteenth century were suspicious of political party and thus of stable opposition because they were long-committed to the notion of one proper constitutional interpretation that was fixed by the popular act of ratification and subsequently discoverable through textual analysis, an interpretive methodology known as textual originalism.[26] Propelled by fears of civil unrest, they insisted on a certain regime unity among governing branches behind one interpretation, and they attacked displays of judicial independence with blunt instruments. Amid the secession crisis of 1860 and 1861 and especially in the wake of the Civil War, politicians – armed with a fuller recognition of the inability to construct one perpetually dominant party, the inevitability of periodic rotation in power, and the need to grant the loyalty of opposition lest civil strife recur – were compelled to concede the legitimacy of multiple equally plausible interpretations of the Constitution. In this new ideational context, they would shift their strategies toward the judiciary, attempting tactics that would not undermine judicial authority but harness it for future policy gains. Their attacks would become more targeted and instrumental, aiming to enlist the Court's legitimacy to secure particular political priorities.

[26] On early American commitments to textual originalism, or the practice of seeking the Framers' intentions through textual analysis, as the only legitimate interpretive methodology, see Howard Gillman, "The Collapse of Constitutional Originalism and the Rise of the Notion of the 'Living Constitution' in the Course of American State-Building," *Studies in American Political Development* 11 (1997), 191–247. Although disagreements on the meaning of the Constitution obviously existed during the republic's first century, "none of the disputants fundamentally rejected the [interpretive] methods of their adversaries." Johnathan O'Neill, *Originalism in American Law and Politics: A Constitutional History* (Baltimore: Johns Hopkins University Press, 2005), 17. See also Kent Greenfield, "Original Penumbras: Constitutional Interpretation in the First Year of Congress," *Connecticut Law Review* 26 (1993), 79–144.

While this book offers a thorough tracing of the gradual change from viewing opposition as illegitimate and disloyal to legitimate and loyal, it should *not* be assumed that the developmental path is unidirectional. More recent qualities of American politics – heightened party polarization in Congress and the electorate; Tea Party anti-government sentiment; accusations that President Obama is a socialist, not born in the United States or, in the words of Newt Gringich, "outside our comprehension" – all open the possibility that a rhetoric of the illegitimacy of one's political opposition is thriving.[27] In the Conclusion, I raise the possibility that contemporary originalism actually fosters this outcome, as it has become a closed system of absolutes. Nevertheless, I am skeptical as to whether the illegitimacy of opposition would ever again rise to heights seen prior to the Civil War and Reconstruction for reasons discussed in Chapter 8 and the Conclusion. In short, while this book critically responds to cyclic notions of American political development by, instead, marking an arc of development toward political and constitutional pluralism, this is not simply a story of a *steady* arc. Although we are on an arc from regime unity and the illegitimacy of opposition toward granting opposition loyalty and the consequent imperative to harness judicial power, this progress is not steady. Multiple steps in that direction are interrupted by periodic and striking steps back; the Roberts Court may represent a retrenchment. And yet, it may be a retrenchment that can only go so far.

Finally, my intention is not only to examine politicians' behavior toward judicial power, for the judiciary is not merely acted upon. A second question is how judges adapted to this changing ideational environment in which multiple differing constitutional interpretations could vie for legitimacy. This context of equally plausible meanings compelled a rationale for why *judicial* renderings should be given more weight. Consequently, from the 1870s onward, legal scholars and judges engaged in a systematic enterprise of constructing jurisprudential history into a clear pattern of judicial supremacy. This process involved a deliberate re-imagining of *Marbury v. Madison* (1803). Scholars found within that ruling an allegedly strong articulation of judicial supremacy from the republic's earliest days.[28] This move in American constitutional development would have profound effects on the dynamics of inter-branch relations and the politically strategic value of deference to judicial authority.

[27] For accusations that Obama was not born in the United States, see Eric Etheridge, "Birther Boom," *Opinionator Online Commentary of the New York Times*, 22 July 2009, http://opinionator.blogs.nytimes.com/2009/07/22/birther-boom/?scp=4&sq=obama%20not%20born%20in%20the%20united%20states&st=cse. For Gingrich's comments that Obama is "so outside our comprehension," see Robert Costa, "Gingrich: Obama's 'Kenyan, Anti-Colonial' Worldview," *National Review Online*, 11 September 2010, http://www.nationalreview.com/corner/246302/gingrich-obama-s-kenyan-anti-colonial-worldview-robert-costa.

[28] Robert Clinton, "Precedent as Mythology: A Reinterpretation of *Marbury v. Madison*," *American Journal of Jurisprudence* 35 (1990), 55.