

Cambridge University Press

052182415X - Legislative Deferrals: Statutory Ambiguity, Judicial Power, and American Democracy

George I. Lovell

Frontmatter

[More information](#)

---

## Legislative Deferrals

*Statutory Ambiguity, Judicial Power, and American Democracy*

Why do unelected federal judges have so much power to make policy in the United States? Why were federal judges able to thwart apparent legislative victories won by labor organizations in the *Lochner* era? Most scholars who have addressed such questions assume that the answer lies in the judiciary's constitutionally guaranteed independence, and thus worry that insulated judges threaten democracy when they stray from baseline positions chosen by legislators. This book argues for a fundamental shift in the way scholars think about judicial policy making. Instead of simply seeing judges as rivals to legislators, scholars need to notice that legislators also empower judges to make policy as a means of escaping accountability. The first book-length study of legislative deference to the courts, *Legislative Deferrals* offers a dramatic reinterpretation of the history of twentieth-century labor law and shows how attention to legislative deferrals can help scholars to address vexing questions about the consequences of judicial power in a democracy.

George I. Lovell is Assistant Professor of Political Science at the University of Washington, Seattle. He has published articles in *Studies in American Political Development* and *Constitutional Commentary* and reviews in *Ethics* and the *Law and Politics Book Review*. He has held teaching positions at the University of Maryland and the College of William and Mary.

Cambridge University Press

052182415X - Legislative Deferrals: Statutory Ambiguity, Judicial Power, and American Democracy

George I. Lovell

Frontmatter

[More information](#)

# Legislative Deferrals

*Statutory Ambiguity, Judicial Power, and  
American Democracy*

GEORGE I. LOVELL

*University of Washington*



**CAMBRIDGE**  
UNIVERSITY PRESS

Cambridge University Press  
052182415X - Legislative Deferrals: Statutory Ambiguity, Judicial Power, and American  
Democracy  
George I. Lovell  
Frontmatter  
[More information](#)

---

PUBLISHED BY THE PRESS SYNDICATE OF THE UNIVERSITY OF CAMBRIDGE  
The Pitt Building, Trumpington Street, Cambridge, United Kingdom

CAMBRIDGE UNIVERSITY PRESS  
The Edinburgh Building, Cambridge CB2 2RU, UK  
40 West 20th Street, New York, NY 10011-4211, USA  
477 Williamstown Road, Port Melbourne, VIC 3207, Australia  
Ruiz de Alarcón 13, 28014 Madrid, Spain  
Dock House, The Waterfront, Cape Town 8001, South Africa  
<http://www.cambridge.org>

© George I. Lovell 2003

This book is in copyright. Subject to statutory exception  
and to the provisions of relevant collective licensing agreements,  
no reproduction of any part may take place without  
the written permission of Cambridge University Press.

First published 2003

Printed in the United States of America

Typeface Sabon 10/13 pt. System L<sup>A</sup>T<sub>E</sub>X 2<sub>ε</sub> [TB]

*A catalog record for this book is available from the British Library.*

*Library of Congress Cataloging in Publication Data*

Lovell, George I.  
Legislative deferrals : statutory ambiguity, judicial power, and American democracy /  
George I. Lovell.

p. cm.  
Includes bibliographical references and index.

ISBN 0-521-82415-X (hbk)  
1. Political questions and judicial power – United States. 2. Judge-made law –  
United States. 3. Legislative power – United States. 4. Separation of powers –  
United States. I. Title.

KF5130 .L68 2003  
342.73'052-dc21 2002074059

ISBN 0 521 82415 X hardback

Cambridge University Press

052182415X - Legislative Deferrals: Statutory Ambiguity, Judicial Power, and American Democracy

George I. Lovell

Frontmatter

[More information](#)

---

*For my parents,*

*Adrienne and Michael Lovell*

Contents

<i>Acknowledgments</i>	<i>page</i> ix
<i>Preface</i>	xiii
1 Rethinking Judicial Policy Making in a Separation of Powers System	I
2 False Victories: Labor, Congress, and the Courts, 1898–1935	42
3 “As Harmless as an Infant”: The Erdman Act in Congress and the Courts	68
4 Killing with Kindness: Legislative Ambiguity, Judicial Policy Making, and the Clayton Act	99
5 The Norris-LaGuardia Act, for Once: Learning What to Learn from the Past	161
6 Legislative Deferrals and Judicial Policy Making in the Administrative State: A Brief Look at the Wagner Act	217
7 Conclusion	252
<i>Reference List</i>	265
<i>References</i>	270
<i>Index</i>	279

Cambridge University Press

052182415X - Legislative Deferrals: Statutory Ambiguity, Judicial Power, and American Democracy

George I. Lovell

Frontmatter

[More information](#)

## Acknowledgments

I have received help from some extraordinary people as I worked on this book. The book was first a dissertation, and each member of my dissertation committee provided very valuable advice when requested and, more importantly, trusted me enough to let me work it out on my own without close supervision. Kim Lane Scheppelle's enthusiasm and energy attracted me to the public law subfield and gave me a sense of direction at the beginning. Her continued support and encouragement has sustained me to the end. John Kingdon's ideas and guidance also played an important role. This project was prompted in part by a comment he made on a paper for his introductory seminar on American government, and he has continued to support the project (and helped me to remember deadlines) as I have embarked on a teaching career. Doug Dion inspired me to do work on American political history and political development. The first step toward producing this book was a paper I wrote for Doug's graduate seminar in American political development. Doug helped me with sources and with crucial ideas about measurement and strategic interaction as he oversaw that project from its initial rough formulation through publication. Terrence McDonald also made a number of very helpful and important suggestions. Other teachers at Michigan played important roles by offering encouragement, advice on research design and sources, and help with thinking about institutions and American politics. They include Martha Feldman, Mark Brandon, Hanes Walton, Jr., Kent Jennings, Ann Lin, Tom Green, and Brian Simpson. Perhaps most importantly, the graduate students in the public-law reading group at the University of Michigan provided social and intellectual companionship that made it possible to develop this project. The regular members of the group were Julie Novkov,

Cambridge University Press

052182415X - Legislative Deferrals: Statutory Ambiguity, Judicial Power, and American Democracy

George I. Lovell

Frontmatter

[More information](#)

Jeannine Bell, Steve Dow, Joan Sitomer, Bob Stein, Ellen Andersen, Paula Denney, Michael Sherman, and Michelle Berger.

I also received advice and assistance from several Washington, D.C., area scholars. Daniel Ernst of Georgetown Law provided very useful advice and much appreciated encouragement. The late Stuart Kaufman was very generous with his encyclopedic knowledge of the Gompers-era AFL and helped me with sources at the AFL-CIO archive. Michael Singer helped with access to libraries and gave me an intellectual home by including me in seminars at his International Rule of Law Center at George Washington University. Lee Sayrs of the George Meaney Center provided help with archival sources, as did librarians at the Law Library of Congress.

A special and complicated debt is owed to Mark Graber. Mark sought me out as a shy graduate student to express interest in my work, and later provided me access to libraries and even gave me his teaching job for a year. He has offered valuable advice at several stages of the project and provided a detailed set of helpful comments on the entire manuscript. Most importantly, he took the time to help me to see that my work was original and different from his own. He is one of the kindest and most unselfish scholars I have ever known.

I also owe a special debt to Victoria Hattam. Her extraordinary book, *Labor Visions and State Power*, ignited my interest in problems of state structure and labor's development. Professor Hattam deserves special thanks for responding to an overly rabid attack that I made on her book with a very thoughtful and constructive essay from which I continue to learn.

My colleagues and students at the College of William and Mary provided much stimulation and insight as the dissertation slowly evolved into this book. New colleagues at the University of Washington have provided an ideal environment for finishing. Michael McCann deserves special thanks. At a particularly frustrating stage, Michael's interest and support reignited my desire to get the argument right. Michael provided very valuable advice on the entire manuscript and has been particularly helpful with choices about framing. Special thanks to Stuart Scheingold, Mike Lovell, Jeannine Bell, and Mark Smith for comments on chapters during the late stages.

Joel Grossman provided constructive comments on the entire manuscript. Karen Orren, Maxwell Chibundu, Jo Shaw, Sujit Choudry, Neal Devins, Larry Becker, David Jones, John Gilmour, David Dessler, Brie Gertler, Nitsan Chorev, and Brooke Livingston all provided comments on

Cambridge University Press

052182415X - Legislative Deferrals: Statutory Ambiguity, Judicial Power, and American Democracy

George I. Lovell

Frontmatter

[More information](#)*Acknowledgments*

xi

early pieces of the manuscript and valuable conversation about the ideas expressed here. Thanks also to Lew Bateman of Cambridge University Press for his interest and understanding. I must also acknowledge that I would not have finished the book if not for the outstanding baristas at Victrola in Seattle, who provided much needed stimulation and maintained a wonderful place to work.

Portions of chapters 1 and 3 have been adapted from “‘As Harmless as an Infant’: Deference, Denial, and *Adair v United States*,” *Studies in American Political Development* 14 (Fall 2000): 212–233.

Financial support was provided by the Gerald Ford Fellowship and a Rackham One Term Dissertation Fellowship at the University of Michigan; two faculty summer research grants at the College of William and Mary; and a junior faculty development grant from the University of Washington.

The most important and complicated debts are owed to Carrie Cihak and to my parents, Adrienne and Michael Lovell. Carrie has been a constant source of emotional and intellectual support from beginning to end. Carrie has suffered through countless drafts and redrafts and has been almost always willing to talk with me about this project. More than anyone else, Carrie thought about, challenged, and helped me to develop the ideas expressed here.

It has been enormously valuable for me to have two outstanding teachers as parents. This book is dedicated with love and appreciation to two people who have been forever willing to support and nurture my interest in learning, even when that interest has taken me on some odd detours and been expressed in strange ways.



Cambridge University Press

052182415X - Legislative Deferrals: Statutory Ambiguity, Judicial Power, and American Democracy

George I. Lovell

Frontmatter

[More information](#)

## Preface

During the first round of oral arguments in the 2000 Presidential election cases, the United States Supreme Court took part in a gripping discussion regarding the Florida Supreme Court's recent rulings on the counting of disputed presidential ballots. The central question in that discussion was whether the Florida court's interpretation of state election statutes was consistent with policy choices made by Florida's legislature before the election. During an exchange with Gore attorney Laurence Tribe, Justice Antonin Scalia drew one of the few laughs in the tense proceedings when he ridiculed Tribe's suggestion that Florida's legislature had wanted state courts to play an important role creating the boundaries for resolving post-election disputes. Scalia provoked the laughter by commenting: "I mean – maybe your experience with the legislative branch is different from mine, but in my experience they are resigned to the intervention of the courts, but have certainly never invited it." In the face of the ensuing laughter, Tribe quickly backpedaled by expressing agreement with Scalia ("I have to say that my experience parallels that") and attempting to change the subject. Unwilling to let the point drop, Scalia interrupted again to dismiss the suggestion that legislatures would want to give the courts policy-making responsibilities by saying, "I just find it implausible" (*New York Times*, December 2, 2000, A12).

This book makes an empirical inquiry into the processes through which federal judges and legislators make policies in the American constitutional system of separation of powers. Among other things, I find that Scalia's claim that legislators never invite judges to intervene in policy disputes is dead wrong. The book documents several important cases where legislators deliberately empowered judges to make important policy decisions

Cambridge University Press

052182415X - Legislative Deferrals: Statutory Ambiguity, Judicial Power, and American Democracy

George I. Lovell

Frontmatter

[More information](#)

and provides some important reasons for thinking that legislators routinely invite the “intervention” of the courts by creating conditions that allow judges to make policy.

The book also tries to account for the fact that Scalia and Tribe, who disagree about almost everything else, are both willing to express agreement with the misleading claim that legislators never want judges to make policy. I argue that conservatives like Scalia, liberals like Tribe, and almost all judges and judicial scholars in between rely on the same theoretical framework to understand judicial power and judicial decision making in the American separation of powers system. This framework, which I will explain in considerably more detail in Chapter 1, is the foundation for a wide range of competing theories and models that address questions about the exercise of institutional power in the American constitutional system. The framework imagines that independent branches compete with each other for influence over policy and assumes that outcomes produced by elected legislators are more democratic than outcomes produced by unelected federal judges. The framework leads scholars and judges to address policy controversies by trying to identify the intent or meaning of choices made by elected legislators. The framework also makes it seem “implausible” that legislators would want judges to make policy because it imagines that elected legislators pursue their policy preferences by trying to minimize the powers of rival judges whose preferences are less constrained by electoral processes.

Given that thinkers as different as Scalia and Tribe publicly agree that legislators do not invite judges to make policy, my claim that legislators often invite such intervention should be quite shocking. In reality, however, it is not. At least one leading scholar has already carefully documented the importance of legislative deference to the courts as an important source of judicial power. Mark Graber’s path-breaking 1993 article documents the importance of legislative deference in three important constitutional cases and makes some sophisticated theoretical claims that can help scholars to understand such deference and uncover additional cases where deference occurs. Far from being the observation of a single academic commentator, the fact that legislators deliberately leave important policy issues for judges to decide has also been the subject of commentary in mainstream media sources like the *New York Times* and *Washington Post* (Greenhouse 1998, Bardash 1998). More generally, much that is known about the way legislators make decisions suggests that Scalia’s claim that legislators never invite the courts to decide substantive issues of policy is itself quite “implausible.” Members of Congress very often empower

Cambridge University Press

052182415X - Legislative Deferrals: Statutory Ambiguity, Judicial Power, and American Democracy

George I. Lovell

Frontmatter

[More information](#)*Preface*

xv

actors in the executive branch and state governments to decide substantive policy issues. Legislators are obviously willing in such instances to trade control over policy outcomes for the practical and political benefits of shifting responsibility to other actors. It seems exceptionally unlikely that legislators who routinely pursue their goals by empowering independent actors in the agencies and states would *never* find it advantageous to empower judges. Legislators may have less control over judges than over state or executive branch officials, but that lack of control can sometimes make deference to the courts a politically attractive option to legislators.

Nevertheless, commentators who have drawn attention to legislative deference to the courts have faced an uphill struggle as they have tried to convince scholars and judges to take legislative deference more seriously as a source of judges' policy-making powers. Ironically, it is precisely because anomalous cases like the ones uncovered by Graber and others are *not* shocking that the importance of such cases has not yet been widely recognized. The real problem for those who want to establish the importance of such cases is not that they are "implausible," but that taking such cases seriously would require scholars to question the fundamental assumptions of a shared theoretical framework that they rely on to understand judicial policy making and separation of powers. The basic idea of that conventional framework is that outcomes created by elected legislators form a democratic baseline against which to evaluate outcomes produced by other branches, and thus that unelected judges have a responsibility in most cases to make choices that match the legislative baseline. That framework is so powerful and useful that those who rely on it have been reluctant to undermine it. The result is that scholars and judges would rather ignore legislative deference to the courts than confront the theoretical complications that would result from acknowledging deference. As I show in Chapter 1, the strategy of ignoring deference can be strained and awkward. Many scholars notice in passing that legislators sometimes make choices that empower the courts to make policy decisions, but then develop theories of judicial policy making or measures of judicial power that cannot make any sense of such cases.

The reluctance of judges and scholars to take legislative deference more seriously is understandable. For example, if Scalia and Tribe were to conclude that the Florida legislature deliberately empowered judges to make substantive policy choices as they resolved election disputes, they would be left without any familiar means of constructing legal arguments in favor of their positions. The tendency of judges and scholars to stick to the framework allows them to resolve many thorny policy issues more

Cambridge University Press

052182415X - Legislative Deferrals: Statutory Ambiguity, Judicial Power, and American Democracy

George I. Lovell

Frontmatter

[More information](#)

comfortably, but that tendency is not without costs. In the 2000 election cases, the framework led Scalia and Tribe on a quest to identify baseline policy choices that Florida's legislature had never made. That quest forced them to downplay the extent to which the Florida electoral statutes had deliberately created conditions that made it more likely that judges would make substantive policy judgments in post-election disputes. The Florida legislature had delegated important decisions to local electoral officials, but had also included provisions in the election statutes stating that a wide range of parties could file lawsuits in state courts challenging the decisions made by those local officials. Those provisions were the reason state judges were in a position to influence the vote-counting process. Moreover, the legislature also included in the statute a provision stating that the judge hearing such suits "may fashion such orders as he or she deems necessary to ensure that each allegation in the complaint is investigated, examined, or checked, to prevent or correct any alleged wrong, and to provide any relief appropriate under such circumstances" (Florida Statutes, Title IX, 102.168(8)). This provision seems like a straightforward invitation to the courts to invoke flexible equity powers in election conflicts. Such provisions make it difficult to believe that legislators wanted to minimize the role of the courts. A legislature jealously guarding policy prerogatives and wary of the influence of the courts would never have included such open-ended, judge-empowering provisions in the election law.

The conventional theoretical framework creates problems that go beyond Florida's election statutes. The more general problem is not simply that cases where legislators deliberately empower the courts are poorly understood, but also that ignoring such cases has meant that scholars fail to ask and answer a variety of important questions about institutional interaction and institutional development. The framework has meant that scholars pay a great deal of attention to questions about how judges do or should make decisions in particular cases, but very little attention to important questions about how judges end up in a position to resolve policy issues. To answer such questions, scholars would have to make more of an effort to understand how well legislators anticipate judicial decisions, how legislators who expect judicial "interference" adjust their behavior, and how legislators themselves attempt to shape the role played by judges.

This book, the first to look in detail at congressional decisions that defer to the courts and at the implications of such decisions for democratic accountability, attempts to break the pattern of denial. I make a

Cambridge University Press

052182415X - Legislative Deferrals: Statutory Ambiguity, Judicial Power, and American Democracy

George I. Lovell

Frontmatter

[More information](#)*Preface*

xvii

conscious effort to undermine the conventional framework by making questions about whether and why legislators invite judges to become policy makers central to my analysis of interbranch policy making. I also uncover the often hidden assumptions of the dominant framework, show why those assumptions do not fit cases involving legislative deference, and explain why judicial decisions cannot be evaluated without paying more attention to legislative deference as a source of judicial power. The heart of the book is an exploration of four case studies that together provide several examples of legislative deference to the courts, as well as examples of more conventional interactions between Congress and the courts. My detailed examination of the case studies leads to some preliminary theory building about legislative deference. The findings show that even if legislative deference to the courts is a relatively uncommon phenomenon, scholars who rely on the dominant theoretical framework and ignore such deference will produce distorted accounts of judicial power.

The book presents a somewhat unusual combination of very detailed information about cases and very abstract theoretical claims about institutional processes and democratic accountability. Many of the theoretical claims cut across familiar divisions that scholars typically use to orient their commentary on judicial policy making, including divisions based on scholars' political orientations (e.g., liberal versus conservative), methodological perspectives (e.g., behaviorist versus rational choice versus historical institutionalist), and subject matter and focus (e.g., statutory versus constitutional interpretation, judicial decision making in individual cases versus longer term institutional and political development). Because the approach is unusual and the targets broad, it is worth sorting out three distinct levels of analysis in the presentation.

The first, least general level is my analysis of the cases. My four cases are federal labor statutes passed between 1898 and 1935, a crucial period of institutional development in American history. The cases are the Erdman, Clayton, Norris-LaGuardia, and Wagner acts. I chose these cases because many scholars of American political development and American courts have recently used these same cases to argue that the institutional and political autonomy of the judiciary allowed judges to have an important influence on the development of both public policies and political movements. Such scholars argue that judges used their independence to obstruct and distort more democratic processes in the legislative branch. In this study, I try to establish precisely the opposite conclusion. I argue that the ability of judges to influence policies was dependent on earlier choices made in the legislature and thus that the decisions that judges made

Cambridge University Press

052182415X - Legislative Deferrals: Statutory Ambiguity, Judicial Power, and American Democracy

George I. Lovell

Frontmatter

[More information](#)

xviii

Preface

cannot be fairly understood as successful reversals of a robust democratic process in the legislative branch. By deliberately selecting cases that other scholars have used to establish the importance of independent judicial power, I hope to increase the impact of my finding that judicial power is dependent on choices made by legislators.

Using previously overlooked records, I show how participants in the legislative process (legislators, labor leaders, lobbyists for employers' organizations) tried to anticipate the reactions that judges would have to legislative proposals. The evidence shows that participants were aware that choices made in Congress before legislation passed would influence subsequent decisions by judges. Nevertheless, participants deliberately made strategic choices that they expected to empower judges to exercise discretion and set policies. I conclude that the ability of judges to shape labor policies cannot be read as a sign of the independent power of judges to reverse the will of elected legislators.

My case studies show how legislators use a variety of means to empower judges to make labor policy. They sometimes empower judges by including provisions in statutes that assign to judges broad and important enforcement and oversight responsibilities. (Much like the Florida legislature did in the provision inviting judges to provide "any relief appropriate under such circumstances.") More intriguingly, legislators sometimes deliberately include ambiguous language in statutes that allows judges to make policy choices as they resolve interpretive controversies about the meaning of the ambiguous language. I call the cases where legislators empower the courts through deliberately ambiguous statutory language *legislative deferrals* to the courts. I find that the legislators who create deferrals portray them as attempts to establish clear policies, and also that the judges who interpret such statutes claim (less convincingly) that their resolution of the interpretive controversy matches the intent or purpose of Congress. Such posturing has made the judicial decisions in these cases look in retrospect like reversals of legislative choices. However, the evidence in my cases shows that participants in the legislative process understood that features of the statutes would provide opportunities for judges to influence policy, and that participants nevertheless rejected alternative legislative proposals that they expected to limit judicial discretion.

Uncovering participants' expectations about judicial reactions is difficult because the participants in the legislative process all have incentives to be deceptive as they pursue strategies that shift responsibility and blame to judges. Nevertheless, it is possible to find evidence about anticipated reactions by carefully tracing the development of competing legislative

Cambridge University Press

052182415X - Legislative Deferrals: Statutory Ambiguity, Judicial Power, and American Democracy

George I. Lovell

Frontmatter

[More information](#)*Preface*

xix

proposals. I can show, for example, that legislators deliberately made statutory language more ambiguous after clearer proposals that gave less discretion to judges failed to pass in Congress.

Taken together, the conclusions from my case studies support a dramatic reinterpretation of the labor politics of the time period. My analysis suggests that earlier scholars have overestimated labor's political success in the legislative branch, and that as a result they have overestimated the importance of judicial power. Such findings call into question the view of the "Lochner era" as a period when conservative judges repeatedly reversed the progressive outcomes of more responsive legislative processes in legislatures. My important findings about the widely studied labor cases make a very strong case for paying close attention to legislative deference as a source of judicial power.

In addition to making claims about particular cases and a particular time period, the book makes contributions at two other, more general, levels of analysis. At a second level, the book challenges conventional assessments of the relationships between electoral controls and institutional processes in the American constitutional system of separation of powers. More conventional studies are obsessed with instances where undemocratic and unaccountable courts appear to thwart victories won through political activities in the "democratic" branches. Conventional studies treat judicial decisions that appear to reverse legislative goals as though legislators (and voters) watch helplessly from the sidelines as unaccountable judges use fixed institutional powers to subvert democratically supported policies. By uncovering the important ways in which electoral pressures on Congress lead legislators to empower judges, the account here suggests that the conventional divide between "democratic" and "counter-majoritarian" branches is too simplistic to capture the complexity of the institutional mechanisms that provide accountability within a separation of powers system. Understanding legislative deference to the courts reveals that judicial policy making can be responsive to electoral controls in ways that conventional scholars ignore. At the same time, such cases show that Congress is less responsive and permeable than those same scholars assume.

At a third, most general level of analysis, the book challenges the way scholars conceptualize interaction among the different branches of government. While conventional theoretical frameworks incline scholars to see interaction between branches as conflicts between independent strategic actors seeking to pursue well-defined policy preferences, I find that the appearance of conflict between independent branches frequently masks

Cambridge University Press

052182415X - Legislative Deferrals: Statutory Ambiguity, Judicial Power, and American Democracy

George I. Lovell

Frontmatter

[More information](#)

xx

*Preface*

more cooperative interaction between interdependent branches. Dropping the assumption of conflict complicates the task of understanding interaction among branches. However, it also makes it possible to uncover important forms of interaction that are invisible to scholars who look at the same processes as though they are strategic games among independent actors pursuing sharply defined policy preferences.

This book is the first to make an extended empirical inquiry into legislative deferrals to the courts, why they occur, and the effects that deferrals have on accountability and institutional development. Because it focuses on a series of cases in a single policy area and involving many of the same principal decision makers, the study is able to explore the long-term effectiveness of deference as a political strategy and to explain how deference can both help and hurt the outside organizations seeking to use electoral processes to produce changes in policies. Because the cases straddle a period of tremendous institutional change, the cases provide variation on a number of important institutional and political variables.

The book is not, however, an attempt to offer the final word on legislative deference to the courts. Because the motives that lead legislators to defer to the courts also lead legislators to use deception to disguise deferrals as clear policy choices, it is necessary to examine and interpret a tremendous amount of contextual information before concluding that a statute is or is not a legislative deferral. The detailed analysis required to code cases makes it impossible to explore legislative deference across a large population of cases. Because I can only look at a small number of cases, I am not able to draw any precise conclusions about how often deferrals occur in other policy areas and time periods. Moreover, the theoretical claims that I make about the characteristics of legislative deference are preliminary and made in a spirit that I hope invites additional empirical inquiry and refinement. Nevertheless, it is possible to draw three important general conclusions based on the case studies presented here: 1) deferrals occur in some very important and highly contested policy areas, 2) legislators are quite likely to have both motive and opportunity to defer to the courts in a much larger number of cases, and thus 3) scholars should pay much more attention to legislative deference as a source of judicial power before attempting to characterize judicial power as a threat to democratic accountability.

Several features of this study help to support these three conclusions. The factors that I identify as the reasons legislators defer to the courts in these cases are all factors that are likely to occur in a much larger number of cases. Moreover, I show that the empirical methods most scholars use



Cambridge University Press

052182415X - Legislative Deferrals: Statutory Ambiguity, Judicial Power, and American Democracy

George I. Lovell

Frontmatter

[More information](#)*Preface*

xxi

to analyze interbranch interaction make it likely that they will have misinterpreted cases involving deference to the courts. Those methods make deferrals look like cases that fit the conventional framework, and therefore lead scholars to ignore the sources of evidence that make it possible to recognize deferrals and distinguish them from cases that better fit the conventional framework. By demonstrating the success of my alternative methods, this study suggests both that there is very good reason to think that the cases I look at here are not the only important cases where legislators defer to the courts, and that there is little reason to think that legislative deference to the courts is a rare or uncommon phenomenon.

While it is important for the purposes of this study to establish that deferrals do sometimes occur in important cases, it is not crucial to establish exactly how often they occur. The crucial question is not whether the conventional framework accurately describes more cases of interbranch interaction than a framework that takes deference more seriously. The small number of deferral cases uncovered here demonstrates that the conventional framework systematically obscures important features of interbranch interaction. Thus, even if cases involving legislative deference to the courts are less common than cases that fit the more conventional framework, it is still important to acknowledge and account for cases where legislators defer to the courts.

The book has two introductory chapters that precede the presentation of empirical evidence. Chapter 1 explains and challenges the dominant theoretical framework by uncovering its core assumptions and showing how those assumptions are challenged by the possibility of legislative deference to the courts. Chapter 2 introduces the case studies, sets the historical context, and explains how the findings here challenge the leading interpretations of the same cases. Chapters 3 through 6 consider my four case studies in chronological order. The concluding Chapter 7 reviews some of the conclusions about deferrals that emerge across the cases and explains some of the advantages of paying more attention to deferrals.