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The Supreme Court is at least nominally a court but in some respects is certainly a legislative body. That it is a court and should act like one is the theme of many contemporary critical analyses of its performance, particularly those by institutional conservatives.[1] That the Supreme Court makes policy, and should, is the basic theme of many other observers, particularly institutional innovationists.[2] Along a somewhat distinct axis of differentiation, the Supreme Court's character as a court is central to the thought of most legal scholars, while its character as a policymaking body is central to the approach of most political scientists and journalists.[3]

In this essay I do not argue for a choice between these views. Quite the contrary, I propose to accept both of them as true, because I think both are true. What I hope to show is that some interesting and possibly constructive ideas suggest themselves upon acceptance of the premise that the Court is a legislature.

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[1] *See, e.g.*, A. BICKEL, THE LEAST DANGEROUS BRANCH (1962); P. KURLAND, POLITICS, THE CONSTITUTION, AND THE WARREN COURT (1970); L. LUSKY, BY WHAT RIGHT? (1975).

[2] *See, e.g.*, A. BERLE, THE THREE FACES OF POWER (1967); C. BLACK, THE PEOPLE AND THE COURT (1960); Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169 (1968).

[3] *See, e.g.*, W. MURPHY, ELEMENTS OF JUDICIAL STRATEGY (1964); C.H. PRITCHETT, THE AMERICAN CONSTITUTION (2d ed. 1968).

By a "legislature," I mean a body whose chief function in government is to formulate general rules of law that primarily reflect the notions of utility and value held by its members. Such a body is to be distinguished from a trial court, which applies law received from legally superior sources; from an administrative agency, which, in its rulemaking capacity, formulates policy only within the limits of its organic statute; and from a "traditional" appellate court, which, in formulating law, is guided primarily by precedent. By "policy," I mean the specific social purposes that a legislative body seeks to fulfill through its enactments. These definitions are not watertight, but they will suffice to indicate the tendency of my argument.

I

THE LEGALITY OF THE SUPREME COURT AS A LEGISLATURE

The Constitution abounds with indications that the Supreme Court is indeed a court.[4] What may thus be called the plain meaning of that document the Court has buttressed with its own interpretation.[5] Finally, in the Judiciary Act of 1789 and in subsequent pronouncements, Congress has reiterated that the Supreme Court is just what its name suggests.[6] Indeed, so

[4] "[S]upreme Court" is the name originally given to it (U.S. CONST. art. III, § 1), one that still attaches. Article III vests in the Court the "judicial Power of the United States" (*id.*), in a document that in terms distinguishes that power from "legislative Powers" (*id.* art. I, § 1). The power conferred on the Court refers to "Cases" and "Controversies" in "Law and Equity" (*id.* art. III, § 2, cl. 1), terms that unequivocally suggest an adjudicative tribunal in the mold of English antecedents and state counterparts. The term "Jurisdiction" is used to describe the authority in question (*id.* cl. 2). The officials who exercise it are referred to as "Judges" and are given the security in office uniquely associated with the judiciary—tenure during "good Behaviour" (*id.* § 1). Under all accepted canons for the construction of legal documents, the inference is compelling that, in the intendment of the Constitution, the Supreme Court is a court.

[5] Some interpretations so closely followed upon the Constitution's adoption as to come within the principle of contemporaneous construction. In these pronouncements, the Justices indicated that giving advisory opinions (*see* note 19 *infra*) and attending to administrative responsibilities (*see* Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792), *discussed in* note 19 *infra*) were both beyond the powers conferred on them. The results and the language of these dispositions plainly indicate that the Supreme Court thought itself to be a court. And it is perhaps worth noting that the Court has never departed from this interpretation, notwithstanding its long history, the variousness in political views of those who have been Justices, and the repeated assertions by others that the institution was behaving as something else.

[6] What is now known as the Judiciary Act of 1789 was entitled, with a redundancy interpretable only as a device of emphasis, "An Act to establish the Judicial Courts of the United States." Act of Sept. 24, 1789, ch. 20, 1 Stat. 73. The Act provided for the Supreme

unequivocal are the legal authorities on this point that anyone advancing a different view must rely almost entirely on inference. Nevertheless, there is an evidentiary basis for inference.

It is a historical fact that the Constitutional Convention seriously entertained proposals for a Council of Revision, a body empowered to review legislation and to veto or amend in appropriate circumstances.[7] Had the proposed Council been directly modeled on the precedent of the English Privy Council, its powers would have included both that of reversing judgments in particular cases and that of nullifying legislation on the ground of invalidity.[8] In one version suggested at the time of the Constitutional Convention, the membership of the Council was to include Justices of the Supreme Court, thus creating an *ex officio* connection between the legislative and judicial functions.[9]

The fact that these proposals were rejected is usually advanced as strong evidence that the Supreme Court was not intended to be a Council of Revision or the repository of the powers associated with such a tribunal.[10] Yet the action of the Constitutional Convention in rejecting the proposal for a Council of Revision has to be appraised in full historical context and with regard for the familiar political phenomenon that a proposal can be rejected *eo nomine* while being substantially adopted in content. In this perspective, it is significant that one argument against the proposed Council was that its function could be performed by the judiciary in the course of adjudication.[11] In the end, the Convention did not adopt the proposal for a Council of Revision, but neither did it explicitly confer on the judiciary the authority to declare legislation invalid. The Convention's silence in the latter

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Court, staffed it with a "chief justice" and five "associate justices" (*id.* § 1), and prescribed for it a set of procedures. These procedures were drawn from common law and equity, embodying such terms as "judgment," "decree," and "writ." The functions of the Court were to be performed by means of devices such as the writ of error (*id.* § 22) and the writs of prohibition and mandamus (*id.* § 13), thus plainly implying that it was part of a court system. Subsequent legislation concerning the Supreme Court reveals a similar interpretation, although it must be acknowledged that Congress has occasionally wavered in this interpretation, as will be noticed in a moment. But for the most part in its legislative pronouncements, Congress has accepted the view that the Supreme Court is a court.

[7] For the most intensive discussion, see R. BERGER, CONGRESS V. THE SUPREME COURT 47-119 (1969). *See* J. GOEBEL, JR., 1 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 208-10 (P. Freund ed. 1971).

[8] *See* J.H. SMITH, APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS 523-653 (1950).

[9] J. GOEBEL, JR., *supra* note 7, at 208.

[10] *See, e.g.*, R. BERGER, *supra* note 7, at 341-43.

[11] *Id.* at 50, 55, 57.

respect is now taken as an implicit but unmistakable recognition of the power of judicial review.[12] That is fair enough, at least given subsequent history. But making that inference does not foreclose the inference that the Convention, in implicitly affirming the legitimacy of judicial review, also implicitly affirmed the version of judicial review that tended toward the function of a Council of Revision.[13] After all, there was at the time no settled view of the concept and proper scope of judicial review,[14] any more than there has been since.

The action of the Convention regarding the Council of Revision and judicial review can thus be construed simply as a postponement of the issue of the judiciary's function in lawmaking. Any such overt role for the judiciary was then, as now, politically controversial. An explicit provision on the subject would have added to the burden of political initiative that the proponents of the Constitution well knew was already formidable. In this light, Hamilton's famous defense of judicial review in No. 78 of *The Federalist*[15] can be viewed as seeking to insure that the Constitution's silence was not negatively construed and, more strongly, as ascribing a broad meaning to a concept whose connotation had been unresolved at the drafting stage. Both are familiar techniques of legal argument in the interpretation of legislation.

The evidence that the Supreme Court was not intended to be a legislative body thus consists of (a) legislative history, (b) only a fragment of which is preserved, (c) concerning an intensely debated issue, (d) on which compromise was possible by silence as well as by expression, (e) dealing with a nebulous legal concept, (f) in the face of almost total uncertainty in the political situation, current and future. Drawing a conclusion from such circumstances is surely as much a matter of faith or projection as of induction. It must at least be conceded that the legislative history

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[12] *See* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 9 & n.34 (2d ed. 1973) [hereinafter cited as HART & WECHSLER].

[13] It is of course true that the debate in the Constitutional Convention sought to distinguish the power to veto legislation from the power to find legislation unconstitutional in an adjudication. *See* R. BERGER, *supra* note 7, at 50-69. But then as now the distinction could not be clearly drawn. Moreover, the political consideration supporting the two concepts is the same—fear of pernicious laws. *See* 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 78 (1911) (remarks of George Mason).

[14] *See generally* Nelson, *Changing Conceptions of Judicial Review: The Evolution of Constitutional Theory in the States, 1790-1860*, 120 U. PA. L. REV. 1166 (1972).

[15] THE FEDERALIST No. 78, at 521, 524-26 (J. Cooke ed. 1961).

of article III is compatible with the Supreme Court having powers going well beyond those of a conventionally defined court.

Contemporaneous legal construction of the judicial power conferred in the Constitution inclines in the same direction. On this point, the Judiciary Act of 1789 is both a legislative enactment and a gloss on the Constitution. Section 25 of that Act *defined* the Supreme Court's powers of appellate review over state court decisions "where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States . . . or . . . the validity of a statute of, or an authority exercised under any State."[16] The Judiciary Act thus simultaneously implied that the state courts could pass upon the validity of federal legislation and other federal action, that the Supreme Court could pass upon the correctness of such state court decisions, and that the Supreme Court could, at least as against state courts, authoritatively expound the meaning of the Constitution.

The Judiciary Act of 1789 also gave the Supreme Court power of appellate review over the lower federal courts.[17] Reading this power along with that concerning review of state court decisions leads compellingly to the inference that there was similar authority to pass upon the validity of legislative enactments in litigation arising in the federal courts. These powers are certainly legislative in some sense. At the very least, section 25 of the Judiciary Act of 1789, quoted above, empowered the Supreme Court to act as a Council of Revision so far as concerns maintaining the legal structure of federalism.[18]

It is also worth considering the implications of early requests that the Supreme Court render advisory opinions and that the lower federal courts perform administrative functions. The Justices declared both tasks to lie outside the judicial power.[19] But

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[16] Act of Sept. 24, 1789, ch. 20, § 25, 1 Stat. 73.

[17] *Id.* § 22.

[18] The terms of the authority conferred by § 25 include only questions of "validity," which implies nothing more than a power to compare the text of the Constitution with the text of the subordinate legal authority and to nullify the latter when it is discrepant with the former. But a study of M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), for example, suggests that the power involves a decisional process going beyond analysis of texts.

[19] While Secretary of State, Thomas Jefferson, considered a strict constructionist, presented to the Supreme Court a request for an advisory opinion (*see* Letter from Thomas Jefferson to Chief Justice Jay (July 18, 1793), in 3 CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 486 (H. Johnston ed. 1891)) based on questions submitted by President Washington (*see* 10 WRITINGS OF GEORGE WASHINGTON 542-45 (J. Sparks ed. 1836)). The Court declined in a letter to the President. *See* Letter from Chief Justice Jay to President

such invitations surely would not have been extended if there were not good reason for thinking that the Court had authority to accept them.

Nevertheless, no clear definition of the legal powers of the Supreme Court had emerged before 1803. That, of course, was the year when *Marbury v. Madison* [20] was decided. In *Marbury*, the Court asserted the power to determine the constitutionality of an act of Congress. According to Chief Justice Marshall, this power derives from the judicial function of having to decide a case according to law, the Constitution being supreme and displacing all inconsistent law. Put differently, the Court concluded that the power to review the constitutionality of a statute is simply an incident of the judicial function of arriving at judgment in a litigated case.[21] That proposition is the foundation of the concept of the Court as a court rather than a legislative body.

If Marshall's assertion is taken in context, however, it is not so innocuous. For while the opinion in *Marbury* disclaimed any authority beyond that supposedly necessary to judicial office, the Court was also doing and saying other things. It held invalid a statutory enactment of Congress—the most sovereign expression of the legislative function. Beyond this, the Court, in measured dicta, asserted its authority to adjudge the legality of actions taken

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Washington (August 8, 1793), in 3 CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY, *supra*, 488-89. *See generally* HART & WECHSLER, *supra* note 12, at 64-70. Thus the Court's response was itself advisory.

The significance of the Court's early position concerning administrative functions is a little more remote but not *de minimis*. The question arose in connection with a federal statute providing that the lower federal courts should examine and make recommendations concerning the worthiness of applicants for veterans' pensions for service in the Revolutionary War. The Supreme Court's decision—again advisory—was that judges should not undertake this function because it involved subordination of the judges to the administrative authority of the Executive. *See* Hayburn's Case, 2 U.S. (2 Dall.).409 (1792). But in enacting the statute Congress obviously had thought that federal judges could exercise administrative functions along with judicial ones. *Cf.* Hartog, *The Public Law of a County Court; Judicial Government in Eighteenth Century Massachusetts*, 20 AM. J. LEGAL HIST. 282 (1976) ("sessions courts" exercising judicial and administrative powers at local level). Hence, it is inferable that in the mind of Congress the judiciary was invested, or could be invested, with mixed powers, judicial and administrative. If so, it is also inferable that the judiciary could possess other mixtures of powers, perhaps judicial and legislative. Furthermore, about this time John Jay was acting at once as Chief Justice and chief negotiator of the treaty with Great Britain—the latter an executive responsibility entailing at least quasi-legislative powers. Jay's role, however, was much criticized. *See* J. GOEBEL, JR., *supra* note 7, at 747.

[20] 5 U.S. (1 Cranch) 137 (1803).

[21] *Id.* at 177-80.

by officials of the Executive.[22] With the assumption of these powers, the Court could well say "[i]t is emphatically the province and duty of the [judiciary] to say what the law is."[23] This dictum made unambiguous the Court's claim to an authority that has subsequently been conceded to it. That is the authority to pronounce what the law "is" in a universal sense, not merely as a rule of decision, and with definitiveness, not merely as an expositor coordinate with the other two branches of government.[24]

The decision in *Marbury v. Madison* may not sustain the proposition that the Supreme Court is a legislative body, but it certainly sustains the broadest claims of authority ever made by or on behalf of the Supreme Court or any other court. Whatever that authority might be called, it is what makes the Supreme Court a unique legal institution. It is also the central subject of all subsequent discussions of the Court's proper province. A rose by any other name.[25]

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[22] *Id.* at 162-73. The import of the latter assertion has to be considered in conjunction with the authority to determine the constitutionality of legislation. If the legality of an executive official's conduct can be reviewed by the Court, and if in determining its legality the Court can disregard a statute, the effect on executive authority is "chilling." *Cf.* Wood v. Strickland, 420 U.S. 308, 322 (1975) (school board member liable for damages for "bad faith" violation of student's constitutional rights). After *Marbury* every public official—hence everyone through whom government might attempt to act—faced the prospect of personal liability if his conduct exceeded either the authority purportedly conferred by statute or the authority which, in the opinion of the Court, a statute could validly confer under the Constitution. *Cf.* Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804) (captain of American frigate liable for damages following detention of Dutch vessel pursuant to executive order to detain certain American vessels).

[23] 5 U.S. (1 Cranch) at 177.

[24] *See* United States v. Nixon, 418 U.S. 683 (1974). This is a formidable combination of authority—to declare the law beyond what the Legislature has said it is and beyond what the Executive thinks it is. Perhaps equally important, the case in which the power was appropriated, *Marbury v. Madison,* was in fact a thinly disguised contrivance of litigation, both in its initiation and in the necessity for making the pronouncements that were made. The matter in *Marbury* went to judgment without definite factual premises (either by factfinding or through demurrer) or adversarial argument, elements said to be the distinctive features of the judicial process. Hence, it was neither a case, because there were no definite facts, nor a controversy, because there was no bilateral disputation by interested parties. The position that constitutional judicial review is only a product of adjudication is thus compromised by the circumstance that the case establishing that form of lawmaking lacked the rudiments of adjudication. If the requirement of a justiciable controversy is what differentiates the adjudicative from the legislative, it has to be recognized that *Marbury v. Madison* reduced that requirement to a formality.

[25] Congress has from time to time explicitly recognized the legislative character of the Supreme Court, sometimes forgetfully. Such, for example, was the situation in Muskrat v. United States, 219 U.S. 346 (1911). There an act of Congress prescribed a suit to obtain a determination of the validity of legislation governing the property rights of a certain group of Indians. Act of Mar. 1, 1907, ch. 2285, 34 Stat. 1015. The Act was held to be an unconstitutional attempt to elicit an advisory opinion from the courts. Muskrat v. United

The argument that legally the Court is not a legislative body is thus at least legally debatable. Perhaps even those who would most narrowly define the Court would concede that their position is not textually demonstrable. Yet this is not the end of the matter. The proposition that the Court is not a legislative body is usually sustained—like all answers to important legal questions—by political arguments. The essence of these arguments is that the Court "is" not a legislative body because undesirable practical consequences would follow if it were.

II

THE POLITICAL LEGITIMACY OF THE SUPREME COURT AS A LEGISLATURE

The argument most commonly advanced against the Court's being a legislature begins with the fact that the court is not democratically elected.[26] From this indisputable point the inference is drawn, often as though it necessarily followed, that it is un-

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States, 219 U.S. at 361-62. (One interpretation of the holding is that the Act constituted an improper interference with the Court's authority to determine when and in what terms it would exercise its legislative reviewing function.) At any rate, the sky did not fall, or even slightly darken. The test case was simply recast in conventional form—that is, essentially like *Marbury v. Madison,* as a suit against a government official in contemplation that the validity of the legislation would be drawn into issue by the official's defense to the suit. The desired determination by the Supreme Court was duly obtained. *See* Gritts v. Fisher, 224 U.S. 640 (1912).

More recently, various expediting provisions have been enacted by Congress and sustained by the Court as vehicles for obtaining prompt determination of the constitutionality of important legislation. For example, Buckley v. Valeo, 424 U.S. 1, 11-12 (1976), upheld such a provision in the Federal Election Campaign Act, 2 U.S.C. § 437(h) (1976). The Court did find, however, that plaintiffs had a sufficient personal stake in the outcome to fall within the article III limits. *Id. Cf.* Blanchette v. Connecticut Gen. Ins. Corp. (Regional Rail Reorganization Act Cases), 419 U.S. 102 (1974) (expedited review of Special Court determination of constitutionally fair and equitable compensation to rail lines under Regional Rail Reorganization Act of 1973, 45 U.S.C. § 743(c) (Supp. V 1975)). Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649 (1976), oddly, is like *Muskrat* in that it involved a suit prescribed in a special statute (Act of July 24, 1968, Pub. L. No. 90-424, § 2, 82 Stat. 424) to determine the property rights of a group of Indians. Note may also be taken of the plethora of recent legislation combining broad if often vacuous delegation of rulemaking powers to an administrative agency with generous opportunity for compendious judicial review. *See, e.g.,* Associated Indus. of N.Y. State, Inc. v. United States Dep't of Labor, 487 F.2d 342 (2d Cir. 1973); Stewart, *The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decisionmaking: Lessons from the Clean Air Act,* 62 IOWA L. REV. 713 (1977). The resulting judicial proceedings may not be purely legislative, but neither do they bear much more than formal resemblance to proceedings by writ of error.

[26] *See, e.g.,* A. BICKEL, *supra* note 1, at 16. *But see* Rostow, *The Democratic Character of Judicial Review,* 66 HARV. L. REV. 193 (1952).

desirable to promulgate legislation—legislation of any kind—in a nondemocratic forum. But this conclusion is neither self-evident, logically inevitable, nor an accurate summary of our legislative institutions. We need not dwell on the question whether legislatures are "democratic" in any sense of the word—that is, whether legislators are essentially similar to the citizenry in background, outlook, predispositions, and value preferences; whether citizens have equal effect in selecting the legislature; whether legislatures give equal weight to the interests of all citizens; *et cetera*.[27] It is sufficient to note that most legislation emanating from legislatures in modern times is chiefly the product of committees and experts, and sometimes committees of experts.[28] The same is true of administrative agencies, which produce the bulk of contemporary legislation. Of course, it can be said that through various mechanisms internal to legislatures and external to administrative agencies, the "general will" is somehow made to infuse statutes and administrative regulations so that they are withal the product of a democratic process. But even if that is so, it has to be demonstrated why, by some comparable mechanism, the "general will" does not also infuse decisional lawmaking in courts. On the other hand, if, as many critics complain, neither Congress nor the agencies adequately express public sentiment, it is hard to see why the Supreme Court should be subject to special criticism because it also does not express that sentiment.

More fundamentally, to say that the Supreme Court is undemocratic in its composition and procedure is to beg the essential question: What kinds of lawmaking institutions will best promote the substantive goals summed up by the shorthand "democracy"? For it is substantive goals—like moral equality, private autonomy, and general economic well-being—that define "democratic" when that term describes a community rather than a particular political institution.[29]

The failure to distinguish between democratic means and democratic ends leads pointlessly round and round: A country is democratic that has democratic institutions. Our country *is* democratic; therefore the exercise of legislative powers by the Supreme

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[27] Well-selected references on these and related questions appear in D. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1975), and Choper, *The Supreme Court and the Political Branches: Democratic Theory and Practice*, 122 U. PA. L. REV. 810 (1974).

[28] *See* R. FENNO, CONGRESSMEN IN COMMITTEES (1973).

[29] *See* Bishin, *Judicial Review in Democratic Theory*, 50 S. CAL. L. REV. 1099 (1977).

Court *must be* democratic.[30] As a matter of rhetoric this achieves the desired compatibility between judicial lawmaking and democratic credo. But it does so by expanding "democratic process" beyond the point where that concept has any meaning at all. Such dissipation of meaning seems to inhere in all arguments along this line, but perhaps nowhere more transparently than in Dean Rostow's attempt to harmonize judicial review and procedural democracy: "The task of democracy is not to have the people vote directly on every issue, but to assure their ultimate responsibility for the acts of their representatives, elected or appointed."[31] Such a formulation, I submit, would permit every form of regency or oligarchy to be called democratic as long as the ruler could argue that the *ultimate* (with no regard to the *proximate*) responsibility for his acts resided in the people. What government does not so pretend?

If such approaches are abandoned and the assumption made that there could be a (substantively) democratic country governed by a (procedurally) undemocratic set of institutions, fundamental concepts of democracy can be preserved. It is not obvious that the only path to the goals of a democratic polity is a wholly democratic legislative process—meaning one that approximately expresses majoritarian sentiment at any given time. By way of comparison, we employ quite "undemocratic" institutions to conduct adjudication, education, industry, and military operations.[32] I have already noted that many of our legislative institutions are not "democratic" in composition. Is it possible that despite—or because of—our overt commitment to electoral democracy in one or two of the three branches of government,[33] there is a need in such a society as ours to assign some fundamental policy decisions

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[30] Alternatively, it may be asserted that the Supreme Court is *not* democratic, therefore our country *must not be* democratic.

[31] Rostow, *supra* note 26, at 197.

[32] Rostow refers to admirals and generals. *Id.* He did not take the further step of noticing that all but a few holders of public and private office in this country are selected by some procedure other than popular election. Bickel argues:

> [A]dmirals and generals and the like are most often responsible to officials who are themselves elected and through whom the line runs directly to a majority. . . . [S]o long as there has been a meaningful delegation by the legislature to administrators, which is kept within proper bounds, the essential majority power is there . . . .

A. BICKEL, *supra* note 1, at 19-20. The concept of delegation thereby performs the task of connecting meritocratic functionaries to a democratic electorate.

[33] Whether it is the President or Congress or both that is chosen via "democratic" procedures need not be inquired into on this occasion.

to a council of elders and not the town meeting? Unless that question is answered in the negative, there is simply no basis for asserting that a body operating through nondemocratic processes is necessarily an inappropriate repository of legislative authority in a polity that has democratic substantive objectives.[34]

A second political argument against considering the Supreme Court to be a legislature is that, as a means of developing legal rules, case-by-case legal decisionmaking is superior to the process of generalization involved in legislation.[35] Again, this proposition is neither self-evident, demonstrable, nor even inherently plausible. As a matter of experience, it may be acknowledged that there are many cases in which the Supreme Court was aided by having a particular set of facts at hand. But surely it must be conceded that there are also many cases in which the Court had serious difficulty precisely because it was being asked to decide a question of broad incidence in the context of a single and possibly aberrant instance.[36] Indeed, the Court's sometimes employed practice of waiting until a particular type of problem has been several times considered in the courts below indicates the value of having a cluster of fact variations before trying to formulate a rule for cases of any given type.

As a matter of epistemology, the argument for case-by-case decisionmaking seems plainly untenable. A case cannot be rationally decided except by reference to some external framework of generalization, whether of received law, life experience, ideology, or whatever. Whether the framework should consist exclusively or primarily of received law, or should incorporate more general normative principles—and if so, which ones—is debatable. Indeed, the choice of framework is usually the critical point in the process of decision.[37] Moreover, the argument for case-by-case decisionmaking merely presumes that the event of an *actual* occurrence necessarily leads to a better formulated rule. Why does not a suppositious case, or set of such cases, equally suffice? That, after all, is the technique used by legislatures and in academic

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[34] Judge Learned Hand said that "it would be most irksome to be ruled by a bevy of Platonic Guardians." L. HAND, THE BILL OF RIGHTS 73 (1958). If Judge Hand is considered to have been himself a member of the Guard, his opinion that its rule is irksome to the governed is not based on first-hand experience.

[35] *See* HART & WECHSLER, *supra* note 12, at 66-67.

[36] *See, e.g., In re* Gault, 387 U.S. 1 (1967).

[37] *See* B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

legal analysis. Indeed, in a strict sense, the Supreme Court depends on suppositions of fact, for it takes its facts from another source, the lower courts. Correlatively, the pronouncements of the Supreme Court are legally significant, to everyone except the immediate litigants, with regard to the supposed facts before the Court and not those that may actually have transpired. And finally, if a court does want to apprehend the consequences of what it is doing, the last thing it should do is focus solely on the facts before it: They are a prologue.[38]

The argument for case-by-case decisionmaking by the Supreme Court thus defies the reality of the Court's institutional position and takes incomplete account of the epistemology of legal reasoning. What then is the point of the argument for case-by-case decisionmaking? It may simply involve converting a proposition ostensibly concerned with the rationality of decisionmaking into one actually concerned with the proper scope of judicial lawmaking. The argument can be reconstructed as follows:

(1) The Court should decide in terms of the specific facts before it (ostensibly because that makes for greater rationality);

(2) If the Court decides in terms of the specific facts before it, the legal categories it can construct will be relatively narrow, because a category is narrow in proportion to the number of specifications in which it is formulated ("rotten apples" is a narrower category than "apples" and much narrower than "fruit").

(3) Thus, if the Court confines itself to "particular facts," it can work only limited changes in the law in any given decision.

Moreover, if it is a norm or rule that the Court *should* decide in terms of the specific facts before it, then two other consequences further narrow the scope of the Court's rulemaking. First, language in an opinion may subsequently be abandoned or repudiated when, as the phrase goes, it was "unnecessary" to the decision. This permits the Court to retract a proposition that on further consideration appears unwise as originally formulated. Second, parties seeking judicial legislation will be forced to limit their contentions to situations whose specific characteristics are very similar to ones already recognized in existing decisions. This in turn will limit the scope of the legal questions in the Court's intake, with a corresponding reduction in the scope of its output.

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[38] *Compare* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) *with* Milliken v. Bradley, 418 U.S. 717 (1974).

I do not wish to be understood as saying that the Court should make legal pronouncements in broader categorical terms rather than narrower ones. I only say that the appropriate breadth of its pronouncements about law is determined neither by considerations of "rationality" nor by the "nature" of the judicial process. It is determined instead by estimates of how broadly and how rapidly the Court should perform its legislative function. This, in turn, depends on estimates of how intelligently the Court can gauge the practical and normative significance of what it is doing in the matter at hand and what effect a decision will have on related matters in the future. After all, opposite the Scylla of undue breadth is the Charybdis of merely ad hoc decisions.[39] Hence, if the point is that the Court's product is poor policy in substance, it is tangential to argue that it may have been poor in adjudicatory form.

A third political argument for the proposition that the Supreme Court should behave as though it were a court is that otherwise political oppression or embarrassment might result. This argument may involve contradictory political predictions. On the one hand, it is foreseen that the Court, if accorded broad legislative jurisdiction, would impose on the community requirements that would not have been imposed by a properly constituted legislature. What is feared, in short, is oligarchical rule. Alexander Hamilton[40] and Alexander Bickel[41] both argued that this possibility is remote, and our national history tends to support them. The other political prediction has greater force. It is that the Court, if accorded broad legislative jurisdiction, might pronounce requirements that the community would reject and thereupon also reject the authority of the Court, and with it the authority of law itself. What is feared in this prediction is not oligarchy, but anarchy and ensuing tyranny. Fear of such a consequence is not baseless, as indicated by the reactions to the decisions in *Dred Scott v. Sandford,*[42] *Carter v. Carter Coal Co.,*[43] and *Brown v. Board of Education.*[44] And contemplation of such a consequence perhaps best explains the behavior of the Supreme Court in reaching the decisions in *Ex parte McCardle,*[45] *Korematsu*

[39] Wechsler, *supra* note 37, at 10-20.
[40] THE FEDERALIST No. 78 (A. Hamilton) 521, 523 (J. Cooke ed. 1961).
[41] A. BICKEL, *supra* note 1.
[42] 60 U.S. (19 How.) 393 (1857).
[43] 298 U.S. 238 (1936).
[44] 347 U.S. 483 (1954). *See* P. KURLAND, *supra* note 1, at 23-32.
[45] 74 U.S. (7 Wall.) 506 (1869).

v. United States,[46] and *Dennis v. United States,*[47] for example. Better to compromise a legal principle, as Professor Bickel suggested, than to jeopardize the mechanism of legal principle itself.[48]

The argument thus is a counsel of political prudence. There is a paradoxical aspect to the position, because it implicitly acknowledges that the Court should be concerned with what people think about it—a proposition inconsistent with the idea that the Court should be apolitical. Bypassing this conundrum, however, the point of the argument is that if the Court behaved as a proper court, it would thereby nurture respect and sustain its authoritativeness in the public mind. Wrapped up in this argument, but not always made explicit, is a model of a "proper court." The model is one of a traditional appellate court, understood as a court that moves slowly, by degrees, and without a substantive strategy. Further down in this corpus of thought is perhaps the idea that, if this technique is used, people will not notice that the Court is legislating. What is clear, however, is that the argument is not "neutral": It advocates conservatism both in style and in substance on the ground that political self-destruction will follow for the Court if it acts otherwise.

It may be conceded that the Court, so far as possible, should exhibit a conservatism of style—that is, it should move by degrees, with forewarning through dicta, and with subtle rhetorical art, as it goes about reshaping the law. Operating this way may indeed fool some of the people all of the time, *et cetera,* and at any rate keep the Court's technical critics in a more even-tempered frame of mind. More importantly, movement by degrees allows the community to absorb and adjust to new norms before they become fully operative, just as legislation should have hearings before it is enacted.

But it is not equally clear that substantive conservatism is the Court's best policy at all times and in all things. On this question, opinion inclines in many directions. Of course it is true that, when the Court changes the law and a large part of the country opposes the change, then the Court risks its reputation. It is also true, however, that when the Court refuses to change the law—moves not at all but adheres to established legal principles—it may also risk its reputation, as it did in the 1930's. More fundamentally,

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[46] 323 U.S. 214 (1944).

[47] 341 U.S. 494 (1951).

[48] *But see* Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review,* 64 COLUM. L. REV. 1 (1964).

unwavering conservatism could cumulate in a less obvious but more insidious result: Atrophy. It is clear, at least, that the accuracy of any prediction in this respect is itself a political question. From the viewpoint of those who have to resolve the question—the members of the Supreme Court—it is a matter of political judgment.

The problem of the Court's political prudence therefore cannot be that the Court should not employ a "prudential" strategy—that it should not undertake to gauge the public acceptability of its alternatives in courses and styles of policymaking. Instead, the point has to be that the Court's prudential strategy should be well-informed in substance and skillfully executed. This should also characterize the strategies of other political actors, the President and Congress for instance, or cabinet members and heads of agencies. The important question is therefore: What is different about the Supreme Court?

What is different about the Court is not that it can neglect the task of sustaining political support for itself. The difference is that the Court must sustain political support without the political mechanisms normally available to political agencies, such as the power to spend or tax and to appoint or discharge. This problem—building and maintaining political support—is simply the reverse side of the problem of "accountability," which is what all commentators on the Court are concerned about. If the problem is viewed this way, the political arguments concerning the role of the Supreme Court go not so much to denying that it may legislate as to articulating what kind of legislative body it is or should be. That is a difficult question, but surely no less intelligible than comparable ones asked about the Presidency and Congress. No doubt it can be answered only in terms that are inevitably transient. But even transient answers are possible only if the question is accepted as open to inquiry.

The political argument that the Supreme Court "is" a court thus may be simply this: The Supreme Court should think of itself as a court because otherwise it will mishandle its legislative functions. But once this argument is stated, it has to be restated as follows: What are the proper limitations on a legislative body that is thought of as a court?

This question is troublesome precisely because the Court is also a court. Indeed, it is the Supreme Court. As such it has authority not merely to pronounce the law but also to arbitrate finally how that law is to be construed and applied. And so if we accept the fact that the Supreme Court is a legislative body, there

appears to be no agency to subject it to judicial review—to assure its subordination to the law. If the essence of the rule of law is the ubiquity of such subordination, then the Court's exercise of legislative powers is itself a violation of the rule of law. This, in essence, is the constitutional basis of the argument that the Court "is" not a legislative body: It would be constitutionally intolerable if it were.

There are two interconnected responses to this concern. The first, advanced by Charles Black[49] and Herbert Wechsler,[50] is that Congress and the President subject the Court to review via the power they possess to modify the Court's jurisdiction. While this power has been rarely used, it has not infrequently been adverted to when the Court has seemed to venture beyond its proper bounds. Whether the power is strictly legislative, or is itself a form of extraordinary appellate review wherein Congress judges the Court according to the Constitution is a question that might be worth examining. But however the power to revise the Court's jurisdiction might be characterized, it is ever present and the Court knows it.

The second response is that, within the foregoing limitation, the ancient query, "Who judges the judges?," can be answered by saying, "They judge themselves." All political institutions, in fact, engage continuously in a process of self-examination and redirection. They try to bring to bear their faculties of reflection, teaching, action, and forbearance in such a way as to inhibit and counterbalance destructive and foolish tendencies within the institution itself. This is not regarded as a sufficient safeguard in most political institutions, hence the system of checks and balances. But it is not impossible to imagine that an institution might be so constituted that within wide limits it could safely be made an exception. Such an institution would be ultimately accountable in the same way that an individual is ultimately accountable—not by processes of external assessment but by the process of self-judgment and self-control.

The creation of such a self-regulating institution is concededly dangerous, even if "least dangerous."[51] Since, by hypothesis, such an institution would normally be beyond external

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[49] Black, *The Presidency and Congress*, 32 WASH. & LEE L. REV. 841, 846 (1975).

[50] Wechsler, *The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and the Logistics of Direct Review*, 34 WASH. & LEE L. REV. 1043, 1048 (1977).

[51] *See* A. BICKEL, *supra* note 1.

legal control, the key to securing its conformity to governing norms—its institutional superego, so to speak—would have to be found in its composition and procedure. The idea that effective control of political power can be achieved by rules of composition and procedure underlies the larger governmental structure of which the Court is a part. What else do "checks and balances" represent? The constitutional problem posed by the structure of the Supreme Court as a legislature can thus be viewed as analogous to the constitutional problem posed by the structure of the government as a whole: If the institution is not subjected to regulation by some external legal authority,[52] can it be subjected to regulation by rules governing its composition? It is that kind of rule, after all, that largely determines the functioning of legislatures.[53] It will require another occasion to develop fully this way of looking at the problem, but a preliminary view can be offered.

III

THE COMPOSITION OF THE SUPREME COURT

The Supreme Court's composition is fixed partly by rules but largely by conventions. The resultant norms may be grouped as follows.

1. *Plural Membership*

The Court is to be composed of at least two and probably three members. This follows because the Constitution implicitly refers to a multiple-member body[54] and a two-person body would lack a rule of decision unless it accorded precedence to one of its members or adopted the rule that a tie results in taking no action.

The plural composition of the Court is an important determinant of its political characteristics. Conventional wisdom recog-

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[52] As of course the Supreme Court is. *See* Choper, *supra* note 27, at 848-55, and references therein.

[53] My reference is to the rules that govern how a legislator is nominated and elected and what are his powers in office. The rules of this kind respectively governing the Parliament of Great Britain and the United States Congress, for example, are very different. The resultant differences in how these two legislative bodies operate can perhaps best be appreciated by analyzing the details of the legislative process in each of them. *Compare* R. FENNO, *supra* note 28 *with* COMMITTEE APPOINTED BY THE LORD PRESIDENT OF THE COUNCIL, THE PREPARATION OF LEGISLATION, CMND. NO. 6053 (1975).

[54] *See* U.S. CONST. art III § 1 (referring to "Judges, both of the supreme and inferior Courts").

nizes that a multimember entity is a poor instrument for executive functions. Quite likely this is because a single mind has much lower transaction costs in receiving and transmitting information, has no internal conflicts over status and privilege that can confound its programs, and has a unified concept of its constituencies and the array of their interests. There is probably more to it than this. But whatever the reasons that make a plural entity a poor executive instrument, they also mean that such an entity has special properties as an author of policy.

A group requires some minimum of open communication to reach a decision, thus limiting the possibilities for surprise and deception in formulating policy. It is also necessary that its members adhere to a more or less coherent set of rules concerning participation and assent within the group and a more or less homogenous concept of constituency interests, lest the group be immobilized by its cross-purposes. The effect of these internal constraints is to require a large common denominator in the policy alternatives that the group can seriously consider. This large common denominator in policy orientation, by the same token, assures wider acceptability of policy product.

The significance of these attributes of plural membership increases geometrically as the size of the group increases, at least as long as its size does not exceed that of a "small group." In the Judiciary Act of 1789, Congress declared that the Supreme Court would consist of at least six members (a quorum being four),[55] so that any decision required three votes and a conclusive decision required four. The number subsequently was increased, reaching nine in 1837, where it has since remained except for a brief period during and after the Civil War.[56] The "court packing" fight of 1937[57] appears to have established that the size of the Court will continue at nine as long as the Republic survives. Perhaps that is the largest "small group" that can function over time without internal differentiation or specialization. Hence, nine may be an optimal size if the aim is an entity that can function only with continuing internal consensus as to its office.

2. *Life Service in Office*

Subject to the requirement of "good behaviour," the Constitution entitles the members of the Supreme Court to serve for life.

[55] Act of Sept. 24, 1789, ch. 20, § 1, 1 Stat. 73.

[56] *See* HART & WECHSLER, *supra* note 12, at 38.

[57] *See* G. GUNTHER, CONSTITUTIONAL LAW 167-71 (9th ed. 1975).

The Constitution does not require a person upon becoming a Justice to take a vow that he or she will never return to some other vocation. Indeed, the first appointees to the Supreme Court did not regard themselves as thus bound and there have been occasional modern exceptions, notably Justice Hughes's entry into presidential politics, Justice Byrnes's recruitment to wartime service, Justice Jackson's temporary assignment as prosecutor at Nuremberg, and Justice Goldberg's translation to the United Nations. All but the last of these deviations evoked substantial criticism, however, as did Chief Justice Warren's undertaking responsibility for the investigation of the Kennedy assassination.[58] It may be stretching things to say that a rule has been established, yet it does seem fair to say that the norm, though perhaps still emergent, has become that membership on the Supreme Court is the last stage of a career. This goes rather beyond the Constitution's stipulation that a Justice may not be removed except by impeachment.[59]

The rule of life service not only protects incumbents against ouster from office but also protects the office against exploitation by incumbents. Hence, except for the requirement of "good behaviour," service on the Supreme Court must be undertaken without regard to reward or penalty other than the voice of criticism. An office so defined is both weaker and stronger than other political offices. It is weaker because its incumbent has nothing to give—no patronage to confer, no preferments to grant. Unlike other political officials, a Justice has also lost the ability to reduce uncertainty about the future by making promises concerning it; having already made a promise that fully commits his own future, he has none left for exchange. He is a lame duck from the moment he is sworn in. That leaves him bereft of the kind of political capital that most politicians continually struggle to protect.

What a life incumbent has gained, of course, is immunity from the blandishments of the regular political marketplace. This adds to the moral force of a Justice's decisions by giving credence

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[58] *See* Acheson, *Removing the Shadow Cast on the Courts,* 55 A.B.A.J. 919 (1969); Frank, *Conflict of Interest and U.S. Supreme Court Justices,* 18 AM. J. COMP. L. 744 (1970); McKay, *The Judiciary and Nonjudicial Activities,* 35 LAW & CONTEMP. PROB. 9 (1970). *Cf.* ABA CODE OF JUDICIAL CONDUCT, CANON 5G (judge should not accept extrajudicial political appointment). *But cf.* Wheeler, *Extrajudicial Activities of the Early Supreme Court,* 1973 SUP. CT. REV. 123 ("obligation" of extrajudicial activities for early Supreme Court Justices).

[59] *See* R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS (1973); Ervin, *Separation of Powers: Judicial Independence,* 35 LAW & CONTEMP. PROB. 108 (1970); Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History,* 36 U. CHI. L. REV. 665 (1969).

to the supposition that there was nothing in them for him. It is a personal aspect of the notion that the Court should be impartial, and in an impure political world, that can be a considerable resource.

Perhaps it should be added that another kind of preoccupation with the future can intrude itself into the mind of a servant for life. This is an inappropriate concern for the verdict of history. History is inevitably narcissistic and probably is inherently biased in favor of conspicuous performance. Neither characteristic befits lions under the throne. To have policymaking power of which one cannot (as a practical matter) be divested is worrisome enough to others; to exercise it through egocentric indulgence could degenerate into official insolence or something worse. This suggests that appointments to the Court should be made from among persons whose other ambitions in life appear already to have been fulfilled, like the appointed members of the House of Lords. Perhaps we are now tending in that direction.

3. *Proficiency in Law and Practical Affairs*

It has never been a legal requirement that Supreme Court Justices be lawyers, but it is an unbroken convention. Given the Court's policymaking process, it is a practical necessity that a Justice be a lawyer. Much of the Court's business actually requires application of existing substantive law and all of it involves a good deal of procedural law. Without technical knowledge of these subjects, a Justice would have difficulty identifying precisely what policy questions are involved in the cases before him and whether and how their resolution could be procedurally advanced or postponed. The confirmation proceedings on Harold Carswell established that professional competence as well as legal training is a component of fitness for appointment to the Court.[60] That and the reestablishment of the American Bar Association peer review procedure[61] may even have settled the point that a modicum of legal proficiency is a necessary if not sufficient qualification for the office.

What is also required is substantial experience in roles of high responsibility, if sometimes low visibility, in managing affairs of power.[62] Again, this is not a rule of law but a result of practical

[60] *See* R. HARRIS, DECISION (1971).

[61] *See* N.Y. Times, Nov. 14, 1975, at 1, col. 6.

[62] *See generally* Kurland, *The Appointment and Disappointment of Supreme Court Justices*, 1972 LAW & SOC. ORD. 183, 183-214.

necessity. On the one hand, a political celebrity is an unlikely candidate for the Supreme Court precisely because he is too "political." On the other hand, a potential appointee does not get on the "short list" for the Supreme Court unless he is able to withstand the scrutiny of the Attorney General and the Senate Judiciary Committee, to say nothing of the President. To pass this test, he must have suitably impressed them, or someone who can provide a convincing voucher. Specifically, he must have proven himself to have discernment in matters of complexity, steadiness in matters of difficulty, and coolness in matters of controversy. These qualities are looked for because they are recognized, by a discriminating group of electors, as being essential in the Supreme Court office.

There are many ways to gain a reputation for having these qualities, but few that are more intensive than the practice of law or politics, or both. And because reputation is not built overnight, extended experience in such a practice is in effect obligatory. It is at any rate a fact that virtually all Supreme Court Justices in the last century have been people trained in the law who have spent their adult lives in law practice, politics, or government, or some combination of these activities. To those of us in the legal profession this may not appear very significant, for we may be inclined to suppose that all rational people think like lawyers. But it is surely plausible that there is a distinctive outlook associated with having spent one's life dealing with the opportunities and perils inherent in matters of power. And surely it is not implausible that people who have had legal training are different from other people in the way they think, on account of self-selection if not the training itself.

Thus, there is reason to suppose that the required qualifications of legal training and experience in practical affairs yield a membership on the Court having a distinctive outlook compared, say, with presidential candidates or leaders of business and labor, not to speak of the average citizen. Available information does not permit precise identification of what these differences are. Nevertheless, it is a fair conjecture that lawyers are usually predisposed to attach special significance, for example, to obligation as compared to opportunity, to historical precedent as compared to present intuition, and to formal similarities as compared to "real" uniquenesses. At the same time, it is a fair conjecture that their experience as counsellors in practical affairs leads lawyers to be particularly aware that in policymaking there are conflicting aims,

multiple levels of discourse, discrepancies between professed and actual goals, and shortfalls in the realization of nearly every purpose. This body of practical knowledge can be of inestimable use in formulating policy.

If the foregoing is a reasonably faithful description of a practiced "legal mind," and if it is an established convention that Supreme Court appointees must have such qualities, then the effect is that the Court's composition is mostly of intellectual conservatives. This may be a startling thesis, given the ongoing national debate on whether the Court's activism has been good or bad. But we should recall Disraeli's dictum that conservative men do not always deem it prudent to pursue conservative measures. Further, John Marshall's example should remind us that at times a radical policy is necessary in the preservative tendency that is the essence of conservatism. For instance, who will say that the Supreme Court's deciding *Brown v. Board of Education* as and when it did was not better for the country than having the desegregation issue fought out in the Senate as, say, a rider to the Tonkin Gulf Resolution?

4. *Constituency*

The Supreme Court has no electoral constituency. Indeed, its lack of such a constituency is taken as a reason why the Supreme Court should not be considered a legislature—on the premise, referred to earlier, that a legislative body is legitimate in a democracy only if it is directly or indirectly elective. Yet if the latter premise is abandoned, it uncovers the question whether a nonelective body can be said to have a constituency.

There is a sense in which every entity exercising political authority has a constituency: The constituency is the group or coalition of groups that is willing to exert itself to see that the entity's political authority is maintained. Hence, the fact that the authority of the Supreme Court enjoys continued recognition is evidence that the Court must have a constituency. But that proposition is not very illuminating, for it holds true as well for the Presidency, the Congress, and the Port Authority of New York and New Jersey. Rather, the matter for inquiry is whether there is an interest or set of interests that particularly sustains the Court, that acts as the Court's special protector, and that generates continued support for the Court's role as a policymaker. This inquiry essentially parallels that concerning the more obvious representative relationship between a Congressman and his district or between a Senator

and his state.[63] That is, does the Supreme Court have a "district" and, if so, where or what is it?

In approaching this question, the rules and conventions governing the relationship between the Supreme Court and its constituency may be considered in two aspects: norms that *disconnect* the Court from those sources of influence having more or less direct ties to the voting electorate at large, and norms that *connect* the Court to particular political interests. Regarding disconnection, a Justice upon assuming office is supposed to have cut any former ties to the constituencies that sustain the Executive and the Legislature. It is also now generally held that a Justice should not serve on policymaking bodies other than the Supreme Court, such as advisory commissions, except those involving judicial procedure and administration.[64] Public reproval of Abe Fortas' acting as informal adviser to President Johnson has apparently established that such a confidential advisory role is equally impermissible because it involves a Justice in policy matters outside the Court's domain. Criticism of Chief Justice Burger's alleged confidential involvement in congressional deliberations has confirmed the point. Further, it has long been settled that no member of the Court should be involved with a political party. Hence, "direct" involvement with the conventionally defined political process is strictly proscribed.

Further isolation of Justices from electoral politics results from the rules governing tenure on the Court. Since the Justices do not run for reelection, they have no practical need to stay in touch with the political organizations. (In this respect, their situation is quite different from judges whose office is elective.) Moreover, the constitutional provisions governing appointments to the Court, resulting in unpredictability of terms and vacancies, put distance between the Court and the centers of elected political power. Because vacancies cannot be accurately forecast, appointments cannot be lined up. Hence, the mutual expectations between appointing authority and prospective appointee that are involved in a firmly promised appointment do not have opportunity to develop. For the same reason, a President cannot count on an opportunity to reconstitute the Court even if he thinks he has a popular mandate to do so. Then again, once an appointment is made, the appointee retains his position of authority long past the

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[63] *See* D. MAYHEW, *supra* note 27.

[64] *See* note 58 *supra*.

dissolution of the political matrix out of which his appointment arose. The political events expressed in a Supreme Court appointment are thus rapidly obsolescent and the Justices themselves soon become anachronisms with respect to partisan political alignments.

These norms isolating the Court from the electoral constituencies are manifest and well noted.[65] Indeed, they are often advanced as reasons why the Court should not be considered a legislative body—because its members are out of touch. But these rules of isolation can equally be considered as simply appropriate for a peculiar legislative chamber. At any rate, the rigorous isolation required by these norms takes on special significance in considering the other aspect of the constituency issue: norms that *connect* the Court to particular political interests.

The point is simply this: Given the very strong norms isolating the Court from constituencies functioning through the electoral process, a constituency functioning through some non-electoral process could sustain the Court even if the connections between them were relatively weak and diffuse. And this leads to a further point—that in searching for the Supreme Court's constituency we should not expect a tidily defined group. Indeed, because there is no such group, the conclusion often drawn is that the Court has no constituency, and hence that it represents everyone or no one. But surely that is an empty and unsatisfying conclusion. If the Court has a general constituency and not a special one, what has been all the controversy over the Court's political role?

Another analysis concludes that the Court is the protector of minorities. This comes closer, it would seem, but is an interpretation that still leaves much to be desired. For one thing, it may be simply tautological—saying only that an interest seeks refuge in the Court when it cannot get protection from the majoritarian branches. For another, the minority-protection thesis provides no clue as to which minorities the Court will protect, or why. The thesis also takes no account of the circumstance that the Court has not, in fact, provided legal protection for any particular minority over a long period of time; rather it has aided a variety of minorities ranging from federalists to business entrepreneurs to Blacks. It also takes no account of the important role of the Court in resolving conflicts of authority between the executive and legis-

[65] *See* Kurland, *supra* note 62, at 214-18.

lative branches[66] and, especially in times past, between the federal government and the states.[67]

It is difficult to relate the Court's manifest political roles to any definite economic, social, or geographical constituency, as that term is ordinarily understood. Yet trying to identify the Court's political constituency is a way of trying to define its distinctive characteristics as a policymaking body. It may therefore be useful to approach the problem inductively, by identifying the interest groups to which the Court is said to be particularly sensitive or which are specially interested in its product.

As one directs thought along this line, the following groups warrant inclusion in such a category: the lower courts, federal and state; the academic community (especially in law but also in such subjects as political science); the intelligentsia media and the media intelligentsia, meaning the *New York Times, et cetera,* and the syndicated political columnists and broadcast commentators; the organized bar, particularly the American Bar Association; Washington, D.C., lawyers and lobbyists; that part of the practicing bar outside Washington that specializes in federal matters; agency administrators and general counsel at the federal level and their counterparts at the state and local levels; leaders of minority interest groups currently embroiled in judicial lawmaking endeavors; and elective officeholders at all but the lowest levels of government.

In numbers this is not much of a support group but in political potency it is substantial. What these groups have in common is that they consist of policymakers or people trying to influence or analyze policymakers. They are interested in the Court for the same reason they are interested in the Presidency and Congress—because these institutions ultimately determine the directions in which public policy will develop. It seems evident that the Court is correlatively concerned with these groups, although this is not openly acknowledged. At the most elementary level, however, these groups to an important degree determine what the Court is. That is, they proffer questions to the Court and provide it with the immediate and background information that will inform its decisions.[68] They interpret the Court's product for the public and thus determine how the decisions are understood and

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[66] *See, e.g.,* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[67] *See, e.g.,* M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

[68] *See generally* Miller & Barron, *The Supreme Court, the Adversary System, and the Flow of Information to the Justices: A Preliminary Inquiry,* 61 VA. L. REV. 1187 (1975).

whether they will be given much effect.[69] They decide who can be appointed to the Court. They are also judges of the Justices' performance individually and collectively, because they are the writers of contemporary history and the mentors of the historians of the future.

Thinking of these groups as the Court's immediate constituency is complicated by the fact that they have no apparent common identity. Obviously they comprise no geographical constituency, although in fact they are almost exclusively urban and predominantly coastal. They have no common substantive interests except such as accompany membership in the economic upper-middle class. But they have a common interest in their own function in the political system. They are the brokers of power, including ideological power, in a social order characterized by a mixed economy, ethnic and religious diversity, and a profusion of political centers. In short, they share a vested interest in the pluralistic political process itself.

I do not suggest that this group is the Court's sole constituency. The suggestion is merely that this is the Court's immediate constituency. Its members are the people most intensively involved in arguing with the Court about its policy options and decisions and at the same time sustaining it in political argument with the rest of the country.[70]

The common characteristics of this group also serve to indicate the political interest that the Court specially protects. The interest may be defined as that of perpetuating an open political process. It can be thought of as a special interest like business or labor or women or religious sects. Of course, to suggest that those intensely and professionally concerned with preserving an open political process be thought of as a special interest is also to suggest that the concern for perpetuating an open political process is not universally shared.

That point may be conceded. Indeed, it may be affirmed that, as a matter of fact, most of the people most of the time do not have a binding commitment to the open political process. I would surmise that at any given time an open political process is preferred only by a transient minority. All political parties, like all businesses, strive for monopoly; all interest groups try to drown out their opponents and very likely would seek to stifle them if

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[69] *See, e.g.*, K. DOLBEARE & P. HAMMOND, THE SCHOOL PRAYER DECISIONS (1971).

[70] *Compare* P. KURLAND, *supra* note 1 *with* Kurland, *supra* note 59.

not legally restrained; all branches and agencies of government seek ascendancy when confronted by opposition; and summary justice for deviants is probably favored by a clear majority.

The impulses animating these tendencies are kept under control through the law of free speech, due process, equal protection, and separation of powers. But general political support for giving effect to this body of law is often lacking. The definition of these constitutional precepts is the special responsibility of the Supreme Court. Its enforcement efforts are politically sustained chiefly by the interest group previously described. That constituency acts for its own special interests in providing such support, but in doing so it serves as a surrogate for a much larger but indeterminate constituency. That larger constituency includes everyone who might be a beneficiary of the open political process in the future.