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DECISION-MAKING IN A DEMOCRACY: THE SUPREME COURT AS A NATIONAL POLICY-MAKER

Robert A. Dahl*

TO CONSIDER THE SUPREME COURT OF THE UNITED STATES strictly as a legal institution is to underestimate its significance in the American political system. For it is also a political institution, an institution, that is to say, for arriving at decisions on controversial questions of national policy. As a political institution, the Court is highly unusual, not least because Americans are not quite willing to accept the fact that it *is* a political institution and not quite capable of denying it; so that frequently we take both positions at once. This is confusing to foreigners, amusing to logicians, and rewarding to ordinary Americans who thus manage to retain the best of both worlds.

I

A policy decision might be defined as an effective choice among alternatives about which there is, at least initially, some uncertainty. This uncertainty may arise because of inadequate information as to (a) the alternatives that are thought to be "open"; (b) the consequences that will probably ensue from choosing a given alternative; (c) the level of probability that these consequences will actually ensue; and (d) the relative value of the different alternatives, that is, an ordering of the alternatives from most preferable to least preferable, given the expected consequences and the expected probability of the consequences actually occurring. An *effective* choice is a selection of the most preferable alternative accompanied by measures to insure that the alternative selected will be acted upon.

No one, I imagine, will quarrel with the proposition that the Supreme Court, or indeed any court, must make and does make policy decisions in this sense. But such a proposition is not really useful to the question before us. What is critical is the extent to which a court can and does make policy decisions by going outside established "legal" criteria found in precedent,

* Eugene Meyer Professor of Political Science, Yale University; author, A Preface to Democratic Theory (1956) and other works.

statute, and constitution. Now in this respect the Supreme Court occupies a most peculiar position, for it is an essential characteristic of the institution that from time to time its members decide cases where legal criteria are not in any realistic sense adequate to the task. A distinguished associate justice of the present Court has recently described the business of the Supreme Court in these words:

> It is essentially accurate to say that the Court's preoccupation today is with the application of rather fundamental aspirations and what Judge Learned Hand calls "moods," embodied in provisions like the due process clauses, which were designed not to be precise and positive directions for rules of action. The judicial process in applying them involves a judgment . . . . that is, on the views of the direct representatives of the people in meeting the needs of society, on the views of Presidents and Governors, and by their construction of the will of legislatures the Court breathes life, feeble or strong, into the inert pages of the Constitution and the statute books.[1]

Very often, then, the cases before the Court involve alternatives about which there is severe disagreement in the society, as in the case of segregation or economic regulation; that is, the setting of the case is "political." Moreover, they are usually cases where competent students of constitutional law, including the learned justices of the Supreme Court themselves, disagree; where the words of the Constitution are general, vague, ambiguous, or not clearly applicable; where precedent may be found on both sides; and where experts differ in predicting the consequences of the various alternatives or the degree of probability that the possible consequences will actually ensue. Typically, in other words, although there may be considerable agreement as to the alternatives thought to be open [(a)], there is very serious disagreement as to questions of fact bearing on consequences and probabilities [(b) and (c)], and as to questions of value, or the way in which different alternatives are to be ordered according to criteria establishing relative preferability [(d)].

If the Court were assumed to be a "political" institution, no particular problems would arise, for it would be taken for granted that the members of the Court would resolve questions of fact and value by introducing assumptions derived from their own predispositions or those of influential clienteles and constituents. But, since much of the legitimacy of the Court's decisions rests upon the fiction that it is not a political institution but exclusively a legal one, to accept the Court as a political institution would solve one set of problems at the price of creating another. Nonetheless, if it is true that

[1] Frankfurter, The Supreme Court in the Mirror of Justices, 105 U. of Pa. L. Rev. 781, 793 (1957).

the nature of the cases arriving before the Court is sometimes of the kind I have described, then the Court cannot act strictly as a legal institution. It must, that is to say, choose among controversial alternatives of public policy by appealing to at least some criteria of acceptability on questions of fact and value that cannot be found in or deduced from precedent, statute, and Constitution. It is in this sense that the Court is a national policy-maker, and it is this role that gives rise to the problem of the Court's existence in a political system ordinarily held to be democratic.

Now I take it that except for differences in emphasis and presentation, what I have said so far is today widely accepted by almost all American political scientists and by most lawyers. To anyone who believes that the Court is not, in at least some of its activities, a policy-making institution, the discussion that follows may seem irrelevant. But to anyone who holds that at least one role of the Court is as a policy-making institution in cases where strictly legal criteria are inadequate, then a serious and much debated question arises, to wit: Who gets what and why? Or in less elegant language: What groups are benefited or handicapped by the Court and how does the allocation by the Court of these rewards and penalties fit into our presumably democratic political system?

II

In determining and appraising the role of the Court, two different and conflicting criteria are sometimes employed. These are the majority criterion and the criterion of Right or Justice.

Every policy dispute can be tested, at least in principle, by the majority criterion, because (again: in principle) the dispute can be analyzed according to the numbers of people for and against the various alternatives at issue, and therefore according to the proportions of the citizens or eligible members who are for and against the alternatives. Logically speaking, except for a trivial case, every conflict within a given society must be a dispute between a majority of those eligible to participate and a minority or minorities; or else it must be a dispute between or among minorities only.[2] Within certain limits, both possibilities are independent of the number of policy alternatives at issue, and since the argument is not significantly affected by the number of alternatives, it is convenient to assume that each policy dispute represents only two alternatives.[3]

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2 Provided that the total membership of the society is an even number, it is technically possible for a dispute to occur that divides the membership into two equal parts, neither of which can be said to be either a majority or minority of the total membership. But even in the instances where the number of members is even (which should occur on the average only half the time), the probability of an exactly even split, in any group of more than a few thousand people, is so small that it may be ignored.

3 Suppose the number of citizens, or members eligible to participate in collective decisions, is n. Let each member indicate his "most preferred alternative." Then it is obvious that

If everyone prefers one of two alternatives, then no significant problem arises. But a case will hardly come before the Supreme Court unless at least one person prefers an alternative that is opposed by another person. Strictly speaking, then, no matter how the Court acts in determining the legality or constitutionality of one alternative or the other, the outcome of the Court's decision must either (1) accord with the preferences of a minority of citizens and run counter to the preferences of a majority; (2) accord with the preferences of a majority and run counter to the preferences of a minority; or (3) accord with the preferences of one minority and run counter to the preferences of another minority, the rest being indifferent.

In a democratic system with a more or less representative legislature, it is unnecessary to maintain a special court to secure the second class of outcomes. A case might be made out that the Court protects the rights of national majorities against local interests in federal questions, but so far as I am aware, the role of the Court as a policy-maker is not usually defended in this fashion; in what follows, therefore, I propose to pass over the ticklish question of federalism and deal only with "national" majorities and minorities. The third kind of outcome, although relevant according to other criteria, is hardly relevant to the majority criterion, and may also be passed over for the moment.

One influential view of the Court, however, is that it stands in some special way as a protection of minorities against tyranny by majorities. In the course of its 167 years, in seventy-eight cases, the Court has struck down eighty-six different provisions of federal law as unconstitutional,[4] and by interpretation it has modified a good many more. It might be argued, then, that in all or in a very large number of these cases the Court was, in fact,

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the maximum number of most preferred alternatives is n. It is equally obvious that if the number of most preferred alternatives is more than or equal to $n/2$, then no majority is possible. But for all practical purposes those formal limitations can be ignored, for we are dealing with a large society where the number of alternatives at issue before the Supreme Court is invariably quite small. If the number of alternatives is greater than two, it is theoretically possible for preferences to be distributed so that no outcome is consistent with the majority criterion, even where all members can rank all the alternatives and where there is perfect information as to their preferences; but this difficulty does not bear on the subsequent discussion, and it is disregarded. For an examination of this problem, consult Arrow, Social Choice and Individual Values (1951).

[4] Actually, the matter is somewhat ambiguous. There appear to have been seventy-eight cases in which the Court has held provisions of federal law unconstitutional. Sixty-four different acts in the technical sense have been construed, and eighty-six different provisions in law have been in some respects invalidated. I rely here on the figures and the table given in Library of Congress, Legislative Reference Service, Provisions of Federal Law Held Unconstitutional By the Supreme Court of the United States 95, 141-47 (1936), to which I have added United States v. Lovett, 328 U.S. 303 (1946), and United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955). There are some minor discrepancies in totals (not attributable to the differences in publication dates) between this volume and Acts of Congress Held Unconstitutional in Whole or in Part by the Supreme Court of the United States, in Library of Congress, Legislative Reference Service, The Constitution of the United States of America, Analysis and Interpretation (Corwin ed., 1953). The difference is a result of classification. The latter document lists seventy-three acts held unconstitutional (to which Toth v. Quarles, supra, should be added) but different sections of the same act are sometimes counted separately.

defending the rights of some minority against a "tyrannical" majority. There are, however, some exceedingly serious difficulties with this interpretation of the Court's activities.

III

One problem, which is essentially ideological in character, is the difficulty of reconciling such an interpretation with the existence of a democratic polity, for it is not at all difficult to show by appeals to authorities as various and imposing as Aristotle, Locke, Rousseau, Jefferson, and Lincoln that the term democracy means, among other things, that the power to rule resides in popular majorities and their representatives. Moreover, from entirely reasonable and traditional definitions of popular sovereignty and political equality, the principle of majority rule can be shown to follow by logical necessity.[5] Thus to affirm that the Court supports minority preferences against majorities is to deny that popular sovereignty and political equality, at least in the traditional sense, exist in the United States; and to affirm that the Court *ought* to act in this way is to deny that popular sovereignty and political equality *ought* to prevail in this country. In a country that glories in its democratic tradition, this is not a happy state of affairs for the Court's defenders; and it is no wonder that a great deal of effort has gone into the enterprise of proving that, even if the Court consistently defends minorities against majorities, nonetheless it is a thoroughly "democratic" institution. But no amount of tampering with democratic theory can conceal the fact that a system in which the policy preferences of minorities prevail over majorities is at odds with the traditional criteria for distinguishing a democracy from other political systems.[6]

Fortunately, however, we do not need to traverse this well-worn ground; for the view of the Court as a protector of the liberties of minorities against the tyranny of majorities is beset with other difficulties that are not so much ideological as matters of fact and logic. If one wishes to be at all rigorous about the question, it is probably impossible to demonstrate that any particular Court decisions have or have not been at odds with the preferences of a "national majority." It is clear that unless one makes *some* assumptions as to the kind of evidence one will require for the existence of a set of minority and majority preferences in the general population, the view under consideration is incapable of being proved at all. In any strict sense, no adequate evidence exists, for scientific opinion polls are of relatively recent origin, and national elections are little more than an indication of the first preferences of a number of citizens—in the United States the number ranges between about

5 Dahl, A Preface to Democratic Theory, c. 2 (1956).
6 Compare Commager, Majority Rule and Minority Rights (1943).

forty and sixty per cent of the adult population—for certain candidates for public office. I do not mean to say that there is no relation between preferences among candidates and preferences among alternative public policies, but the connection is a highly tenuous one, and on the basis of an election it is almost never possible to adduce whether a majority does or does not support one of two or more policy alternatives about which members of the political elite are divided. For the greater part of the Court's history, then, there is simply no way of establishing with any high degree of confidence whether a given alternative was or was not supported by a majority or a minority of adults or even of voters.

In the absence of relatively direct information, we are thrown back on indirect tests. The eighty-six provisions of federal law that have been declared unconstitutional were, of course, initially passed by majorities of those voting in the Senate and in the House. They also had the president's formal approval. We could, therefore, speak of a majority of those voting in the House and Senate, together with the president, as a "lawmaking majority." It is not easy to determine whether any such constellation of forces within the political elites actually coincides with the preferences of a majority of American adults or even with the preferences of a majority of that half of the adult population which, on the average, votes in congressional elections. Such evidence as we have from opinion polls suggests that Congress is not markedly out of line with public opinion, or at any rate with such public opinion as there is after one discards the answers of people who fall into the category, often large, labelled "no response" or "don't know." If we may, on these somewhat uncertain grounds, take a "lawmaking majority" as equivalent to a "national majority," then it is possible to test the hypothesis that the Supreme Court is shield and buckler for minorities against national majorities.

Under any reasonable assumptions about the nature of the political process, it would appear to be somewhat naive to assume that the Supreme Court either would or could play the role of Galahad. Over the whole history of the Court, on the average one new justice has been appointed every twenty-two months. Thus a president can expect to appoint about two new justices during one term of office; and if this were not enough to tip the balance on a normally divided Court, he is almost certain to succeed in two terms. Thus, Hoover had three appointments; Roosevelt, nine; Truman, four; and Eisenhower, so far, has had four. Presidents are not famous for appointing justices hostile to their own views on public policy nor could they expect to secure confirmation of a man whose stance on key questions was flagrantly at odds with that of the dominant majority in the Senate. Justices are typically men who, prior to appointment, have engaged in public life and

have committed themselves publicly on the great questions of the day. As Mr. Justice Frankfurter has recently reminded us, a surprisingly large proportion of the justices, particularly of the great justices who have left their stamp upon the decisions of the Court, have had little or no prior judicial experience.[7] Nor have the justices—certainly not the great justices—been timid men with a passion for anonymity. Indeed, it is not too much to say that if justices were appointed primarily for their "judicial" qualities without regard to their basic attitudes on fundamental questions of public policy, the Court could not play the influential role in the American political system that it does in reality play.

The fact is, then, that the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States. Consequently it would be most unrealistic to suppose that the Court would, for more than a few years at most, stand against any major alternatives sought by a lawmaking majority. The judicial agonies of the New Deal will, of course, quickly come to mind; but Mr. Roosevelt's difficulties with the Court were truly exceptional. Generalizing over the whole history of the Court, the chances are about one out of five that a president will make one appointment to the Court in less than a year, better than one out of two that he will make one within two years, and three out of four that he will make one within three years. Mr. Roosevelt had unusually bad luck: he had to wait four years for his first appointment; the odds against this long an interval are four to one. With average luck, the battle with the Court would never have occurred; even as it was, although

TABLE 1

The Interval Between Appointments to the Supreme Court.

Interval in Years	Per Cent of Total Appointments	Cumulative Per Cent
Less than 1	21	21
1	34	55
2	18	73
3	9	82
4	8	90
5	7	97
6	2	99
—	—	—
12	1	100
Total	100	100

Note: The table excludes the six appointments made in 1789. Except for the four most recent appointments, it is based on data in the Encyclopedia of American History 461-62 (Morris ed., 1953). It may be slightly inaccurate because the source shows only the year of appointment, not the month. The twelve-year interval was from 1811 to 1823.

7 Frankfurter, op. cit. supra note 1, at 782-84.

the "court-packing" proposal did formally fail, by the end of his second term Mr. Roosevelt had appointed five new justices and by 1941 Mr. Justice Roberts was the only remaining holdover from the Hoover era.

It is to be expected, then, that the Court is least likely to be successful in blocking a determined and persistent lawmaking majority on a major policy and most likely to succeed against a "weak" majority; e.g., a dead one, a transient one, a fragile one, or one weakly united upon a policy of subordinate importance.

IV

An examination of the cases in which the Court has held federal legislation unconstitutional confirms, on the whole, our expectations. Over the whole history of the Court, about half the decisions have been rendered more than four years after the legislation was passed.

TABLE 2

Percentage of Cases Held Unconstitutional Arranged by Time Intervals Between Legislation and Decision.

Number of Years	New Deal Legislation %	Other %	All Legislation %
2 or Less	92	19	30
3 - 4	8	19	18
5 - 8	0	28	24
9 - 12	0	13	11
13 - 16	0	8	6
17 - 20	0	1	1
21 or More	0	12	10
Total	100	100	100

Of the twenty-four laws held unconstitutional within two years, eleven were measures enacted in the early years of the New Deal. Indeed, New Deal measures comprise nearly a third of all the legislation that has ever been declared unconstitutional within four years after enactment.

TABLE 3

Cases Holding Legislation Unconstitutional Within Four Years After Enactment.

Interval in Years	New Deal		Other		Total	
	No.	%	No.	%	No.	%
2 or Less	11	29	13	34	24	63
3 to 4	1	3	13	34	14	37
Total	12	32	26	68	38	100

It is illuminating to examine the cases where the Court has acted on legislation within four years after enactment—where the presumption is, that is to say, that the lawmaking majority is not necessarily a dead one. Of the twelve New Deal cases, two were, from a policy point of view, trivial; and two, although perhaps not trivial, were of minor importance to the New Deal program.[8] A fifth[9] involved the NRA, which was to expire within three weeks of the decision. Insofar as the unconstitutional provisions allowed "codes of fair competition" to be established by industrial groups, it is fair to say that President Roosevelt and his advisers were relieved by the Court's decision of a policy they had come to find increasingly embarrassing. In view of the tenacity with which Mr. Roosevelt held to his major program, there can hardly be any doubt that had he wanted to pursue the major policy objective involved in the NRA codes, as he did, for example, with the labor provisions, he would not have been stopped by the Court's special theory of the Constitution. As to the seven other cases,[10] it is entirely correct to say, I think, that whatever some of the eminent justices might have thought during their fleeting moments of glory, they did not succeed in interposing a barrier to the achievement of the objectives of the legislation; and in a few years most of the constitutional interpretation on which the decisions rested had been unceremoniously swept under the rug.

The remainder of the thirty-eight cases where the Court has declared legislation unconstitutional within four years of enactment tend to fall into two rather distinct groups: those involving legislation that could reasonably be regarded as important *from the point of view of the lawmaking majority* and those involving minor legislation. Although the one category merges into the other, so that some legislation must be classified rather arbitrarily, probably there will be little disagreement with classifying the specific legislative provisions involved in eleven cases as essentially minor from the point of view of the lawmaking majority (however important they may have been as constitutional interpretations).[11] The specific legislative provisions in-

8 Booth v. United States, 291 U.S. 339 (1934), involved a reduction in the pay of retired judges. Lynch v. United States, 292 U.S. 571 (1934), repealed laws granting to veterans rights to yearly renewable term insurance; there were only twenty-nine policies outstanding in 1932. Hopkins Federal Savings & Loan Ass'n v. Cleary, 296 U.S. 315 (1935), granted permission to state building and loan associations to convert to federal ones on a vote of fifty-one per cent or more of votes cast at a legal meeting. Ashton v. Cameron County Water Improvement District, 298 U.S. 513 (1936), permitting municipalities to petition federal courts for bankruptcy proceedings.

9 Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

10 United States v. Butler, 297 U.S. 1 (1936); Perry v. United States, 294 U.S. 330 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); Railroad Retirement Board v. Alton R. Co., 295 U.S. 330 (1935); Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935); Rickert Rice Mills v. Fontenot, 297 U.S. 110 (1936); Carter v. Carter Coal Co., 298 U.S. 238 (1936).

11 United States v. Dewitt, 9 Wall. (U.S.) 41 (1870); Gordon v. United States, 2 Wall. (U.S.) 561 (1865); Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893); Wong Wing v. United States, 163 U.S. 228 (1896); Fairbank v. United States, 181 U.S. 283 (1901); Rassmussen v. United States, 197 U.S. 516 (1905); Muskrat v. United States, 219

volved in the remaining fifteen cases are by no means of uniform importance, but with one or two possible exceptions it seems reasonable to classify them as major policy issues from the point of view of the lawmaking majority.[12] We would expect that cases involving major legislative policy would be propelled to the Court much more rapidly than cases involving minor policy, and, as the table below shows, this is in fact what happens.

TABLE 4

Number of Cases Involving Legislative Policy Other than Those Arising Under New Deal Legislation Holding Legislation Unconstitutional Within Four Years After Enactment.

Interval in Years	Major Policy	Minor Policy	Total
2 or Less	11	2	13
3 to 4	4	9	13
Total	15	11	26

Thus a lawmaking majority with major policy objectives in mind usually has an opportunity to seek for ways of overcoming the Court's veto. It is an interesting and highly significant fact that Congress and the president do generally succeed in overcoming a hostile Court on major policy issues.

TABLE 5

Type of Congressional Action Following Supreme Court Decisions Holding Legislation Unconstitutional Within Four Years After Enactment (Other than New Deal Legislation).

Congressional Action	Major Policy	Minor Policy	Total
Reverses Court's Policy	10[a]	2[d]	12
Changes Own Policy	2[b]	0	2
None	0	8[e]	8
Unclear	3[c]	1[f]	4
Total	15	11	26

Note: For the cases in each category, see footnote 13.

U.S. 346 (1911); Choate v. Trapp, 224 U.S. 665 (1912); Evans v. Gore, 253 U.S. 245 (1920); Untermyer v. Anderson, 276 U.S. 440 (1928); United States v. Lovett, 328 U.S. 303 (1946). Note that although the specific legislative provisions held unconstitutional may have been minor, the basic legislation may have been of major policy importance.

12 Ex parte Garland, 4 Wall. (U.S.) 333 (1867); United States v. Klein, 13 Wall. (U.S.) 128 (1872); Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895), rehearing granted 158 U.S. 601 (1895); Employers' Liability Cases, 207 U.S. 463 (1908); Keller v. United States, 213 U.S. 138 (1909); Hammer v. Dagenhart, 247 U.S. 251 (1918); Eisner v. Macomber, 252 U.S. 189 (1920); Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920); United States v. Cohen Grocery Co., 255 U.S. 81 (1921); Weeds, Inc. v. United States, 255 U.S. 109

It is particularly instructive to examine the cases involving major policy. In two cases involving punitive legislation enacted by Radical Republican Congresses against supporters of the Confederacy during the Civil War, the Court faced a rapidly crumbling majority whose death knell as an effective national force was sounded with the election of 1876.[14] Three cases are difficult to classify and I have labelled them "unclear." Of these, two were decisions made in 1921 involving a 1919 amendment to the Lever Act to control prices.[15] The legislation was important, and the provision in question was clearly struck down, but the Lever Act terminated three days after the decision and Congress did not return to the subject of price control until World War II, when it experienced no constitutional difficulties arising from these cases (which were primarily concerned with the lack of an ascertainable standard of guilt). The third case in this category successfully eliminated stock dividends from the scope of the Sixteenth Amendment, although a year later Congress enacted legislation taxing the actual income from such stock.[16]

The remaining ten cases were ultimately followed by a reversal of the actual policy results of the Court's action, although not necessarily of the specific constitutional interpretation. In four cases,[17] the policy consequences of the Court's decision were overcome in less than a year. The other six required a long struggle. Workmen's compensation for longshoremen and harbor workers was invalidated by the Court in 1920;[18] in 1922 Congress passed a new law which was, in its turn, knocked down by the Court in 1924;[19] in 1927 Congress passed a third law, which was finally upheld in

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(1921); Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922); Hill v. Wallace, 259 U.S. 44 (1922); Washington v. Dawson & Co., 264 U.S. 219 (1924); Trusler v. Crooks, 269 U.S. 475 (1926).

13a Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895); Employers' Liability Cases, 207 U.S. 463 (1908); Keller v. United States, 213 U.S. 138 (1909); Hammer v. Dagenhart, 247 U.S. 251 (1918); Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922); Trusler v. Crooks, 269 U.S. 475 (1926); Hill v. Wallace, 259 U.S. 44 (1922); Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920); Washington v. Dawson & Co., 264 U.S. 219 (1924).

b Ex parte Garland, 4 Wall. (U.S.) 333 (1867); United States v. Klein, 13 Wall. (U.S.) 128 (1872).

c United States v. Cohen Grocery Co., 255 U.S. 81 (1921); Weeds, Inc. v. United States, 255 U.S. 109 (1921); Eisner v. Macomber, 252 U.S. 189 (1920).

d Gordon v. United States, 2 Wall. (U.S.) 561 (1865); Evans v. Gore, 253 U.S. 245 (1920).

e United States v. Dewitt, 9 Wall. (U.S.) 41 (1870); Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893); Wong Wing v. United States, 163 U.S. 228 (1896); Fairbank v. United States, 181 U.S. 283 (1901); Rassmussen v. United States, 197 U.S. 516 (1905); Muskrat v. United States, 219 U.S. 346 (1911); Choate v. Trapp, 224 U.S. 665 (1912); United States v. Lovett, 328 U.S. 303 (1946).

f Untermyer v. Anderson, 276 U.S. 440 (1928).

14 Ex parte Garland, 4 Wall. (U.S.) 333 (1867); United States v. Klein, 13 Wall. (U.S.) 128 (1872).

15 United States v. Cohen Grocery Co., 255 U.S. 81 (1921); Weeds, Inc. v. United States, 255 U.S. 109 (1921).

16 Eisner v. Macomber, 252 U.S. 189 (1920).

17 Employers' Liability Cases, 207 U.S. 463 (1908); Keller v. United States, 213 U.S. 138 (1909); Trusler v. Crooks, 269 U.S. 475 (1926); Hill v. Wallace, 259 U.S. 44 (1922).

18 Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920).

19 Washington v. Dawson & Co., 264 U.S. 219 (1924).

1932.[20] The notorious income tax cases[21] of 1895 were first somewhat narrowed by the Court itself;[22] the Sixteenth Amendment was recommended by President Taft in 1909 and was ratified in 1913, some eighteen years after the Court's decisions. The two child labor cases represent the most effective battle ever waged by the Court against legislative policy-makers. The original legislation outlawing child labor, based on the commerce clause, was passed in 1916 as a part of Wilson's New Freedom. Like Roosevelt later, Wilson was somewhat unlucky in his Supreme Court appointments; he made only three appointments during his eight years, and one of these was wasted, from a policy point of view, on McReynolds. Had McReynolds voted "right," the subsequent struggle over the problem of child labor need not have occurred, for the decision in 1918 was by a Court divided five to four, McReynolds voting with the majority.[23] Congress moved at once to circumvent the decision by means of the tax power, but in 1922 the Court blocked that approach.[24] In 1924 Congress returned to the engagement with a constitutional amendment that was rapidly endorsed by a number of state legislatures before it began to meet so much resistance in the states remaining that the enterprise miscarried. In 1938, under a second reformist president, new legislation was passed, twenty-two years after the first; this a chastened Court accepted in 1941,[25] and thereby brought to an end a battle that had lasted a full quarter-century.

The entire record of the duel between the Court and the lawmaking majority, in cases where the Court has held legislation unconstitutional within four years after enactment, is summarized in Table 6.

TABLE 6

Type of Congressional Action After Supreme Court Decisions Holding Legislation Unconstitutional Within Four Years After Enactment (Including New Deal Legislation).

Congressional Action	Major Policy	Minor Policy	Total
Reverses Court's Policy	17	2	19
None	0	12	12
Other	6*	1	7
Total	23	15	38

*In addition to the actions in Table 5 under "Changes Own Policy" and "Unclear," this figure includes the NRA legislation affected by the *Schechter Poultry* case.

20 Crowell v. Benson, 285 U.S. 22 (1932).
21 Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895).
22 Nicol v. Ames, 173 U.S. 509 (1899); Knowlton v. Moore, 178 U.S. 41 (1900); Patton v. Brady, 184 U.S. 608 (1902); Flint v. Stone Tracy Co., 220 U.S. 107 (1911).
23 Hammer v. Dagenhart, 247 U.S. 251 (1918).
24 Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922).
25 United States v. Darby, 312 U.S. 100 (1941).

Thus the application of the majority criterion seems to show the following: First, if the Court did in fact uphold minorities against national majorities, as both its supporters and critics often seem to believe, it would be an extremely anomalous institution from a democratic point of view. Second, the elaborate "democratic" rationalizations of the Court's defenders and the hostility of its "democratic" critics are largely irrelevant, for lawmaking majorities generally have had their way. Third, although the Court seems never to have succeeded in holding out indefinitely, in a very small number of important cases it has delayed the application of policy up to as much as twenty-five years.

V

How can we appraise decisions of the third kind just mentioned? Earlier I referred to the criterion of Right or Justice as a norm sometimes invoked to describe the role of the Court. In accordance with this norm, it might be argued that the most important policy function of the Court is to protect rights that are in some sense basic or fundamental. Thus (the argument might run) in a country where basic rights are, on the whole, respected, one should not expect more than a small number of cases where the Court has had to plant itself firmly against a lawmaking majority. But majorities may, on rare occasions, become "tyrannical"; and when they do, the Court intervenes; and although the constitutional issue may, strictly speaking, be technically open, the Constitution assumes an underlying fundamental body of rights and liberties which the Court guarantees by its decisions.

Here again, however, even without examining the actual cases, it would appear, on political grounds, somewhat unrealistic to suppose that a Court whose members are recruited in the fashion of Supreme Court justices would long hold to norms of Right or Justice substantially at odds with the rest of the political elite. Moreover, in an earlier day it was perhaps easier to believe that certain rights are so natural and self-evident that their fundamental validity is as much a matter of definite knowledge, at least to all reasonable creatures, as the color of a ripe apple. To say that this view is unlikely to find many articulate defenders today is, of course, not to disprove it; it is rather to suggest that we do not need to elaborate the case against it in this essay.

In any event the best rebuttal to the view of the Court suggested above will be found in the record of the Court's decisions. Surely the six cases referred to a moment ago, where the policy consequences of the Court's decisions were overcome only after long battles, will not appeal to many contemporary minds as evidence for the proposition under examination. A

natural right to employ child labor in mills and mines? To be free of income taxes by the federal government? To employ longshoremen and harbor workers without the protection of workmen's compensation? The Court itself did not rely upon such arguments in these cases, and it would be no credit to their opinions to reconstruct them along such lines.

So far, however, our evidence has been drawn from cases in which the Court has held legislation unconstitutional within four years after enactment. What of the other forty cases? Do we have evidence in these that the Court has protected fundamental or natural rights and liberties against the dead hand of some past tyranny by the lawmakers? The evidence is not impressive. In the entire history of the Court there is not one case arising under the First Amendment in which the Court has held federal legislation unconstitutional. If we turn from these fundamental liberties of religion, speech, press and assembly, we do find a handful of cases—something less than ten—arising under Amendments Four to Seven in which the Court has declared acts unconstitutional that might properly be regarded as involving rather basic liberties.[26] An inspection of these cases leaves the impression that, in all of them, the lawmakers and the Court were not very far apart; moreover, it is doubtful that the fundamental conditions of liberty in this country have been altered by more than a hair's breadth as a result of these decisions. However, let us give the Court its due; it is little enough.

Over against these decisions we must put the fifteen or so cases in which the Court used the protections of the Fifth, Thirteenth, Fourteenth and Fifteenth Amendments to preserve the rights and liberties of a relatively privileged group at the expense of the rights and liberties of a submerged group: chiefly slaveholders at the expense of slaves,[27] white people at the expense of colored people,[28] and property holders at the expense of wage earners and other groups.[29] These cases, unlike the relatively innocuous ones of the preceding set, all involved liberties of genuinely fundamental importance, where an opposite policy would have meant thoroughly basic shifts in the distribution of rights, liberties, and opportunities in the United States—

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26 The candidates for this category would appear to be Boyd v. United States, 116 U.S. 616 (1886); Rassmussen v. United States, 197 U.S. 516 (1905); Wong Wing v. United States, 163 U.S. 228 (1896); United States v. Moreland, 258 U.S. 433 (1922); Kirby v. United States, 174 U.S. 47 (1899); United States v. Cohen Grocery Co., 255 U.S. 81 (1921); Weeds, Inc. v. United States, 255 U.S. 109 (1921); Justices of the Supreme Court v. United States ex rel. Murray, 9 Wall. (U.S.) 274 (1870); United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955).

27 Dred Scott v. Sandford, 19 How. (U.S.) 393 (1857).

28 United States v. Reese, 92 U.S. 214 (1876); United States v. Harris, 106 U.S. 629 (1883); United States v. Stanley (Civil Rights Cases), 109 U.S. 3 (1883); Baldwin v. Franks, 120 U.S. 678 (1887); James v. Bowman, 190 U.S. 127 (1903); Hodges v. United States, 203 U.S. 1 (1906); Butts v. Merchants & Miners Transportation Co., 230 U.S. 126 (1913).

29 Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893); Adair v. United States, 208 U.S. 161 (1908); Adkins v. Children's Hospital, 261 U.S. 525 (1923); Nichols v. Coolidge, 274 U.S. 531 (1927); Untermyer v. Anderson, 276 U.S. 440 (1928); Heiner v. Donnan, 285 U.S. 312 (1932); Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935).

where, moreover, the policies sustained by the Court's action have since been repudiated in every civilized nation of the Western world, including our own. Yet, if our earlier argument is correct, it is futile—precisely because the basic distribution of privilege *was* at issue—to suppose that the Court could have possibly acted much differently in these areas of policy from the way in which it did in fact act.

VI

Thus the role of the Court as a policy-making institution is not simple; and it is an error to suppose that its functions can be either described or appraised by means of simple concepts drawn from democratic or moral theory. It is possible, nonetheless, to derive a few general conclusions about the Court's role as a policy-making institution.

National politics in the United States, as in other stable democracies, is dominated by relatively cohesive alliances that endure for long periods of time. One recalls the Jeffersonian alliance, the Jacksonian, the extraordinarily long-lived Republican dominance of the post-Civil War years, and the New Deal alliance shaped by Franklin Roosevelt. Each is marked by a break with past policies, a period of intense struggle, followed by consolidation, and finally decay and disintegration of the alliance.

Except for short-lived transitional periods when the old alliance is disintegrating and the new one is struggling to take control of political institutions, the Supreme Court is inevitably a part of the dominant national alliance. As an element in the political leadership of the dominant alliance, the Court of course supports the major policies of the alliance. By itself, the Court is almost powerless to affect the course of national policy. In the absence of substantial agreement within the alliance, an attempt by the Court to make national policy is likely to lead to disaster, as the *Dred Scott* decision and the early New Deal cases demonstrate. Conceivably, the cases of the last three decades involving the freedom of Negroes, culminating in the now famous decision on school integration, are exceptions to this generalization; I shall have more to say about them in a moment.

The Supreme Court is not, however, simply an *agent* of the alliance. It is an essential part of the political leadership and possesses some bases of power of its own, the most important of which is the unique legitimacy attributed to its interpretations of the Constitution. This legitimacy the Court jeopardizes if it flagrantly opposes the major policies of the dominant alliance; such a course of action, as we have seen, is one in which the Court will not normally be tempted to engage.

It follows that within the somewhat narrow limits set by the basic policy

goals of the dominant alliance, the Court *can* make national policy. Its discretion, then, is not unlike that of a powerful committee chairman in Congress who cannot, generally speaking, nullify the basic policies substantially agreed on by the rest of the dominant leadership, but who can, within these limits, often determine important questions of timing, effectiveness, and subordinate policy. Thus the Court is least effective against a current lawmaking majority—and evidently least inclined to act. It is most effective when it sets the bounds of policy for officials, agencies, state governments or even regions, a task that has come to occupy a very large part of the Court's business.[30]

Few of the Court's policy decisions can be interpreted sensibly in terms of a "majority" versus a "minority." In this respect the Court is no different from the rest of the political leadership. Generally speaking, policy at the national level is the outcome of conflict, bargaining, and agreement among minorities; the process is neither minority rule nor majority rule but what might better be called *minorities* rule, where one aggregation of minorities achieves policies opposed by another aggregation.

The main objective of presidential leadership is to build a stable and dominant aggregation of minorities with a high probability of winning the presidency and one or both houses of Congress. The main task of the Court is to confer legitimacy on the fundamental policies of the successful coalition. There are times when the coalition is unstable with respect to certain key policies; at very great risk to its legitimacy powers, the Court can intervene in such cases and may even succeed in establishing policy. Probably in such cases it can succeed only if its action conforms to and reinforces a widespread set of explicit or implicit norms held by the political leadership; norms which are not strong enough or are not distributed in such a way as to insure the existence of an effective lawmaking majority but are, nonetheless, sufficiently powerful to prevent any successful attack on the legitimacy powers of the Court. This is probably the explanation for the relatively successful work of the Court in enlarging the freedom of Negroes to vote during the past three decades and in its famous school integration decisions.[31]

Yet the Court is more than this. Considered as a political system, democ-

30 "Constitutional law and cases with constitutional undertones are of course still very important, with almost one-fourth of the cases in which written opinions were filed [in the two most recent terms] involving such questions. Review of administrative action . . . constitutes the largest category of the Court's work, comprising one-third of the total cases decided on the merits. The remaining . . . categories of litigation . . . all involve largely public law questions." Frankfurter, op. cit. supra note 1, at 793.

31 Rice v. Elmore, 165 F.2d 387 (C.A. 4th, 1947), cert. denied 333 U.S. 875 (1948); United States v. Classic, 313 U.S. 299 (1941); Smith v. Allwright, 321 U.S. 649 (1944); Grovey v. Townsend, 295 U.S. 45 (1935); Brown v. Board of Education, 347 U.S. 483 (1954); Bolling v. Sharpe, 347 U.S. 497 (1954).

racy is a set of basic procedures for arriving at decisions. The operation of these procedures presupposes the existence of certain rights, obligations, liberties and restraints; in short, certain patterns of behavior. The existence of these patterns of behavior in turn presupposes widespread agreement (particularly among the politically active and influential segments of the population) on the validity and propriety of the behavior. Although its record is by no means lacking in serious blemishes, at its best the Court operates to confer legitimacy, not simply on the particular and parochial policies of the dominant political alliance, but upon the basic patterns of behavior required for the operation of a democracy.