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Six Notions of 'Political' and the United States Supreme Court

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Six different notions of 'political' are commonly used in discussions of the US Supreme Court. All six are familiar, but the distinctions among them are seldom carefully drawn. The six are: (1) purely definitional, in the sense that the Supreme Court, as an appellate court of last resort inevitably authoritatively allocates values; (2) empirical, in the sense that litigants use the Court to try to achieve their political purposes; (3) influence seeking, in the sense that the justices have a natural desire to prevail in arguments within the court; (4) prudential, in the sense that the justices frequently consider the probable consequences of their decisions; (5) policy-oriented, in the – usually pejorative – sense that justices are said to use the Court and the law as a cover for pursuing their own policy and other goals; and (6) systemic, in the sense that the Court's decisions frequently, as a matter of fact, have consequences for other parts of the American political system. These six notions are considered in the context of recent abortion decisions.

It is a commonplace to observe that the US Supreme Court is 'political'. But this tells us little about the institution and its members, because there are at least six analytically separable ways in which the Court is political. It is only by being aware of the Court's potentially very different roles that any rounded judgement about its place in the American constitutional system or about the performance of individual justices can be made. It is strange that the standard literature, although several of these roles may in fact be described, does not discriminate at all explicitly between the various senses in which the Court may be said to be political.[1]

I do not pretend that my categorization will reveal facets of the Court of which scholars in the field were unaware. On the contrary, each separate section will rehearse familiar themes with which these scholars would be quite comfortable. But, taken together, the six notions of 'political' that I want to examine provide for the first time an explicit disaggregation of the various ways in

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[1] I have looked at most of the major textbooks on the Supreme Court. None of them disaggregates the concept 'political', although many do cover several of the aspects I shall be discussing. The consequence is that a confusion arises not only as to how far it is possible, conceptually, for the Court to be apolitical but also as to how best it should carry out its functions. Political scientists are implicitly aware of most of these issues; popular commentators, politicans and many legal academics seem to be much less so. An excellent instance is the recent collection of essays edited by Charles M. Lamb and Stephen C. Halpern, *The Burger Court: Political and Judicial Profiles* (Urbana and Chicago: University of Illinois Press, 1991). No distinctions are made between the different political roles played by the justices and virtually no differentiation between what is political and what is judicial. Even David O'Brien's fine general text (*Storm Center: The Supreme Court in American Politics* (New York: Norton, 1986)), although it covers most of the notions to which I want to draw attention, only implicitly disaggregates the concept of 'political' into its constituent parts.

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which the Court can be said to be political. Like M. Jourdain's discovery in Molière's *Le Bourgeois Gentilhomme* that for forty years he had been speaking prose without knowing it, I am merely drawing attention to something important which may seem unexceptionable, once it has been spelled out.

General propositions have a greater immediacy when set within a specific context and so I have chosen to weave the saga of the abortion controversy into the general arguments I wish to make. Abortion is clearly a political issue of high saliency and it is also clearly a matter of dispute, the resolution of which has been sought in large part in the federal courts. Litigants have attempted to prevail by persuading a majority of the justices that *their* interpretations of the constitution are correct. When the Supreme Court agreed to hear *Webster* v. *Reproductive Health Services* in 1988, no fewer than seventy-eight *amicus curiae* briefs were submitted, thus eclipsing the record previously held by *Regents of the University of California* v. *Bakke*, the first of the affirmative action cases.[2] The interaction of politics and law could hardly be more obvious. Examination of this issue illustrates very well the complex reality of the Court as a political institution and provides an ideal vehicle for the exercise in clarification with which I am here concerned.

I

The first notion is essentially definitional. Although there is no universal agreement over what constitutes the essence of politics, there is a general acceptance that politics in the state is the process through which competing choices over public policy are made and which legitimates the exercise of state power to enforce those choices. As Justice Robert Jackson wrote in the last months of his life, 'any decision which confirms, allocates, or shifts power . . . is . . . political, no matter whether the decision be reached by a legislative or a judicial process'.[3] He wrote this in 1954, two years before David Easton's seminal article in *World Politics* was published, in which he introduced the ugly but accurate formulation, that politics encompasses the behaviours which produce for a political unit 'the authoritative allocation of values'.[4] This stresses the twin essence of a political decision: its authoritative status and its normative nature as a choice between competing values.

Courts of last resort throughout most of the world issue judgments which are authoritative and for the most part normative in the sense that they represent a choice between different judgements which cannot be resolved by applying

[2] *Webster* v. *Reproductive Health Services*, 109 S.Ct. 3040 (1989); *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978).

[3] Robert H. Jackson, *The Supreme Court in the American System of Government* (Cambridge, Mass.: Harvard University Press, 1955), p. 55.

[4] David Easton, 'An Approach to the Analysis of Political Systems', *World Politics*, 9 (1956–7), 383–400.

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universally accepted standards of measurement.[5] Judging in appellate courts is not about measuring the length of a piece of string, which a tape measure will resolve to everybody's satisfaction. Only rarely are decisions simple, technical applications of the law; on the contrary, most involve exacting choices between existing precedents, between competing rights, often between the rival claims of different but equally legitimate bodies. Precisely because these disputes require judgement, rather than measurement, such problem cases reach a country's highest court.

It was the consequences of this *fact* which upset people when the Supreme Court handed down its decision in *Roe* v. *Wade*.[6] The opinion is long and the decision in fact more complex than is often assumed. In simple terms, Justice Harry Blackmun asserted that there was a constitutional right of privacy broad enough to encompass a woman's right to an abortion, but that this right was not absolute and had to be balanced against the state's interest in protecting the woman's health and potential life. The precise balancing between the rival claims of state and individual was based upon a division of pregnancy into three trimesters, in each of which there was a different balance, the divisions being largely dictated by medical factors. The very act of examining the Texan abortion statute against constitutional claims inevitably and unavoidably asserted the propriety of at least considering the possibility of double-guessing a legislative decision. In the majority of cases before the Supreme Court, the judgement of politicians is left in place, but it was not in *Roe* v. *Wade*. This decision became famous because it upset people and galvanized them into action. But my point is that, even if the dissenters had had their way, power would still have been exercised because values would still have been authoritatively allocated. Definitionally, the Court always has been, and necessarily always will be, political.

It just does not make sense, therefore, for anybody to claim that the Court should not be political, should not disturb the current distribution of power and rights. In a centralized, party-dominated state, such as in China or the Soviet Union in years past, or in some Third World autocracy, the courts may indeed be expected to forgo the 'prerogative of choice' by towing the government line. But that is not possible in the United States. Legitimate authority is so widely diffused, between the individual states and the federal government and between the several parts of the federal government itself, that it is impossible for justices merely to 'take the government line' and act as nothing more than a formal agency of legitimation. Even the Court's harshest critics do not imagine that the Court can properly become a political eunuch in this way. So, the first, definitional notion makes it impossible for the Court not to be political at least in this formal sense.

[5] Richard Hodder-Williams, 'Courts of Last Resort', in Richard Hodder-Williams and James Ceaser, eds, *Politics in Britain and the United States: Comparative Perspectives* (Durham, NC: Duke University Press, 1986), pp. 142–72.

[6] *Roe* v. *Wade*, 410 U.S. 113 (1973) at 153.

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II

The second notion is empirical. Americans have traditionally litigated to achieve political ends. This may be explained by a peculiarly dominant legal culture in the days of the Republic's conception, or by a 'higher law' tradition which challenges the untrammelled sovereignty of legislatures, or by a formal structure in which the Constitution is the supreme law, or even by the sheer fecundity of lawyers.[7] Whatever the case, the end result is clear. The Constitution can be seen as a resource, by business men at the turn of the century to ward off the limitations of regulation, by the civil rights community more recently to liberalize the practices of conservative state governments. So individuals go to court to pressurize governments, and interest groups have increasingly sponsored or assisted in such suits to enhance their own concerns.[8] In short, Americans *use* the courts for their political purposes.[9] Because different justices may resolve the same dispute in a different way, it matters, therefore, who sits on that Court. The extraordinary, indeed unprecedented, interest-group involvement in the failed nomination of Judge Bork makes abundantly clear how important the composition of the Court is to political activists.[10]

It is not the case that justices of the Supreme Court, in the manner of an Americanized law commission, sought out some anomaly in the Constitution and created *Roe*; the case originated a long way from Washington and it came to them through the congressionally ordained procedures for appellate review.[11] Linda Coffee and Sarah Weddington, the young Dallas lawyers who instigated the litigation, were consciously looking for a plaintiff to challenge Texas's restrictive abortion laws of which they personally disapproved.[12] With

[7] Lawrence M. Friedman, *A History of American Law* (New York: Simon & Schuster, 1975); Edward S. Corwin, 'The "Higher Law" Background to American Constitutional Law', *Harvard Law Review*, 42 (1928–9), 149–85, 365–409; Jethro K. Lieberman, *The Litigious Society* (New York: Basic Books, 1981).

[8] Most obviously the NAACP as recorded in Richard Kluger, *Simple Justice* (New York: Knopf, 1976) and the ACLU as recorded in Samuel Walker, *In Defence of American Liberties: A History of the ACLU* (New York: Oxford University Press, 1990). But conservatives in the past and increasingly in the present are also deeply involved; see Clement E. Vose, *Constitutional Change: Amendment Politics and Supreme Court Litigation since 1900* (Lexington, Mass.: Lexington Books, 1972); and Lee Epstein, *Conservatives in Court* (Knoxville: University of Tennessee Press, 1985).

[9] Richard Hodder-Williams, 'Litigation and Political Action: Making the Supreme Court Activist', in Robert Williams, ed., *Explaining American Politics: Issues and Interpretations* (London: Routledge, 1990), pp. 116–43.

[10] Richard Hodder-Williams, 'The Strange Story of Judge Robert Bork and a Vacancy on the Supreme Court', *Political Studies*, 36 (1988), 613–37; Ethan Bronner, *Battle for Justice: How the Bork Nomination Shook America* (New York: W. W. Norton, 1989); Patrick B. McGuigan and Dawn M. Weyrich, *Ninth Justice: The Fight for Bork* (Washington, DC: Free Congress Research and Education Foundation, 1990).

[11] Cf. Robert Jackson's comment that the Court is by nature a 'substantially passive instrument, to be moved only by the initiative of litigants' (*The Supreme Court*, p. 12).

[12] Marian Faux, *Roe* v. *Wade: The Untold Story of the Landmark Decision that Made Abortion Legal* (New York: Macmillan, 1988). See also Fred W. Friendly and Martha J. H. Elliott, *The Constitution: That Delicate Balance* (New York: Random House, 1984), pp. 202–8.

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no expectation of prevailing in the Texan legislature, they turned to the courts. Norma McCorvey, the Jane Roe of *Roe* v. *Wade,* was carefully checked out for suitability. Her role was marginal, yet essential: she had to provide, as Article III of the Constitution requires, 'a case or controversy' in the first place and thereafter not to withdraw in the long process from the initial filing of the case on 3 March 1970 to the final judgement on 22 January 1973. In fact, involvement was limited almost exclusively to the lawyers and their advisers. The limited extent of McCorvey's personal stake in the litigation is reflected in her discovery of victory virtually by accident, when a friend, as a matter of common feminine interest, drew her attention to a newspaper's reporting of the decision.[13]

However, there was no inevitability about the Court's addressing the core issue of the constitutional protection, if any, for abortion. The popular American belief that one can appeal right to the Supreme Court is only partly true. Although there used to be some exceptions (and even these have recently been removed), the Court has for over half a century exercised discretion in deciding which cases to review, through the granting of a writ of *certiorari.* Litigants may appeal; but they have no right to expect that their appeal will be decided.[14] A man did once pursue all the way to the Supreme Court his claim that his right to travel was unconstitutionally infringed by 'No Left Turn' restrictions but the Court chose not to grant *certiorari.*[15] And this was true also of the initial abortion cases; the Court declined earlier opportunities to review the issue, although Justice William Douglas was keen to face the question earlier than his colleagues.[16] The justices, as they sift the *cert* petitions day by day, year by year, observe a new legal problem as it emerges. That happened when the Court involved itself in reapportionment litigation; a steady increase in cases in the lower courts, often decided in different ways, persuaded a majority

[13] Friendly and Elliott, *The Constitution*, p. 207.

[14] Cf. Chief Justice Taft's comments to Congress in 1925: 'Litigants have their rights sufficiently protected by a hearing or trial in courts of first instance and by one review in an intermediate appellate Federal Court. The function of the Supreme Court is conceived to be not the remedying of a particular litigant's wrong, but the consideration of cases where decisions involve principles, the application of which is of wide public or governmental interest' (quoted in John Schmidhauser, *The Supreme Court: Its Politics, Personalities and Procedures* (New York: Holt, Rinehart, 1960), p. 122); or Chief Justice Fred Vinson addressing the American Bar Association in 1949: 'To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolutions will have immediate importance far beyond the particular facts and parties involved' (quoted in Walter F. Murphy and Herman C. Pritchett, eds, *Courts, Judges and Politics*, 1st edn (New York: Random House, 1961), p. 55).

[15] William Brennan, Jr, 'The National Court of Appeals: Another Dissent', *University of Chicago Law Review*, 40 (1973), 478.

[16] For the story of that case, see Peter Irons, *The Courage of Their Convictions: Sixteen Americans Who Fought Their Way to the Supreme Court* (New York: Free Press, 1988), pp. 253–80. The judgement of the district court against Jane Hodgson was affirmed under *Hodgson* v. *Randall*, 402 U.S.967 (1971), but 'Mr Justice Douglas is of the opinion that probable jurisdiction should be noted and the case set for argument'.

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of the justices that the time had come to reconsider the whole question of the Constitution's application to apportionment.

Much the same occurred with the issue of abortion. Sarah Weddington was not the only lawyer with a client prepared to challenge restrictive abortion laws. In the autumn of 1970, there were already five such challenges on the Court's docket; there were more than twenty before three lower federal courts; and eleven states had cases in their own courts.[17] The academic journals, noted by the justices' law clerks, were also beginning to carry articles on the subject and newspapers had already started to cover the issue as a constitutional as well as a moral matter.[18] Thus, the constitutionality of abortions was placed upon the public agenda in a way that no justice could fail to notice.

Not only was the quantity of such litigation rising, the decisions being handed down were often contradictory. In September 1969, the Californian Supreme Court had held, in *People* v. *Belous*, that part of the state's abortion statute was unconstitutionally vague;[19] in November, the District Court for the District of Columbia struck down part of the DC's abortion law.[20] In 1970 a federal court in Wisconsin, by contrast, upheld a state law against the same claim of unconstitutional vagueness that had convinced the Californian judges and District Judge Gesell in Washington.[21] Surveying the scene below, the Court felt it time to address the issue. *Roe* chanced to be the vehicle for that review.

It is somewhat disingenuous, however, to presume that the Court is at the mercy of a litigious American public. The discretionary *certiorari* authority does permit the Court to close the door on issues it feels inappropriate to take, and there have been several technical formulae, like the wonderfully malleable 'political question' doctrine, used over the years.[22] Such self-abnegation could return, as indeed seems to have occurred in death penalty cases, where the Court now routinely refuses to hear many cases which would have been reviewed in the 1970s. But the fundamental expectations of the American people, to the discomfort of conservative lawyers, are that the judicial branch is obligated to fulfil its judicial function when citizens properly bring claims, however novel, into the federal courts. This does not mean that they have the right to *win* (although many litigants act as though that were the case), but they do have the opportunity to try and convince judges.

To the extent that a majority of the justices accept this responsibility, de

[17] Ruth Roemer, 'Abortion Law Reform and Appeal: Legislative and Judicial Developments', *American Journal of Public Health*, 61 (1971), 502.

[18] The critical path-breaking article was Roy Lucas, 'Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes', *North Carolina Law Review*, 46 (1968), 730–78.

[19] *People* v. *Belous*, 71 Cal 2d 954, 458 P2d 194.

[20] *United States* v. *Vuitch*, 305 F.Supp. 1032 (1969), reversed by the Supreme Court in *United States* v. *Vuitch*, 402 U.S. 62 (1971), on the grounds that the DC law was *not* unconstitutionally vague.

[21] *Babbitz* v. *McCann*, 310 F.Supp. 293 (E.D. Wis. 1970).

[22] *Baker* v. *Carr*, 369 U.S. 186 (1962); Phillippa Strum, *The Supreme Court and 'Political Questions': A Study in Judicial Evasion* (University: University of Alabama Press, 1974).

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Tocqueville's oft-quoted observation that 'scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question' remains correct.[23] The second notion of political, therefore, draws attention to the involuntary way in which the Constitution has historically been used by political actors as one of their many political resources. As litigation has increased in importance as a political strategy in recent decades, the Court has been drawn more obviously and more inevitably into the political domain.

The first, definitional, notion leaves the Court no room for manoeuvre. The second, although it makes the Court and its members reactive rather than proactive, nevertheless leaves room for some self-abnegation. The Court can, and does, find ways not to reach the substance of a litigant's complaint. But this immediately takes us into troublesome waters. On the one hand, the more a Court accepts the correctness of claims against government, the more obviously and visibly is it setting out authoritatively a set of values to govern the affairs of men and women. On the other hand, some would argue that the less a Court protects the individual against governmental action, the less it performs one of its fundamental functions in the American system of limited government. Either way, it is political in the first sense; either way also, it has been drawn into the political process in the second, empirical, sense.

III

The next three notions relate to the processes of decision making within the institution of the Supreme Court. Justices are human enough to want their conceptions of the Constitution to prevail and, as individuals, they seek to persuade their colleagues to agree with them. I distinguish this natural wish to prevail in the intellectual argument (and hence in the substantive outcomes) from a goal-oriented priority, the motive force is supposed to be only personal policy preferences. I shall return to this latter possibility later. The papers of retired justices make it quite clear that attempts are regularly made to influence the votes of colleagues; but the greatest effort is expended on influencing the rationale of the Court's decision set forth in the opinion of the Court.[24] Sometimes influence at this stage can change votes and hence constitutional law itself.[25] It is also well known that the Chief Justice can, and does, exercise his power to nominate, when he is in the majority, the author of the majority opinion and thus can affect the jurisprudential underpinning, and hence reach, of a decision.[26]

The resources at a justice's disposal vary from case to case and from person to person. There is, of course, sheer intellectual power; there is flattery; there

[23] Alexis de Tocqueville, *Democracy in America* (New York: Doubleday, 1969), p. 281.

[24] Walter F. Murphy, *Elements of Judicial Strategy* (Chicago: University of Chicago Press, 1964).

[25] Bernard Schwartz, *The Unpublished Opinions of the Warren Court* (New York: Oxford University Press, 1985); J. Woodford Howard, 'On the Fluidity of Judicial Choice', *American Political Science Review*, 62 (1968), 43–56.

[26] O'Brien, *Storm Center*, especially chap. 5.

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is the appeal to friendship and loyalty; there is an implicit threat to dissent or to write a concurring opinion; there is the readiness to create a rival coalition to confront the opinion writer.[27] Some justices have been more ready and adept than others at this kind of influence, but few have altogether eschewed the opportunity to shift the authoritative utterances of the Court towards their way of thinking.

Roe v. *Wade* illustrates this admirably. The Conference which discussed this case (and its companion case *Doe* v. *Bolton*)[28] did not reach clear conclusions. Indeed, Chief Justice Warren Burger apparently intended the cases to be vehicles for establishing new principles to reduce the flood of cases originating from disputes involving state law that contributed so much to the Court's expanding docket; he hoped that the Court would require such cases to run the full gamut of state courts before being reviewed by the Supreme Court.[29] Apparently, that issue had been disposed of earlier in the Conference and so the issue facing the justices was suddenly abortion itself. Such are the quirks of accident.

To most of the justices, it looked as though there were four, perhaps five, votes to strike down some at least of the challenged Texas and Georgia statutes, but no single rationale was held even by the putative majority.[30] On the following day, Burger circulated the assignment list, which astonished and angered Douglas, then the senior Associate Justice. It seemed as though Burger had, against the traditions of the Court, made assignments even in the cases where he was not part of the majority. Douglas fired back an angry memorandum.[31] Burger admitted his errors on two cases, but stood his ground on the abortion cases, arguing, not without some justice, that the voting was so unclear that it was best for a draft opinion to be written by the undecided Justice Harry Blackmun. He added, ominously for Douglas, that the cases were 'quite probable candidates for reargument'. This was precisely what Douglas feared. Justice Potter Stewart, Douglas believed, was a weak reed; he had, after all, dissented in *Griswold* v. *Connecticut*, the case which had found a statute banning the sale of contraceptives an unconstitutional invasion of personal privacy and which ultimately did indeed provide a constitutional foundation for the final abortion opinion.[32] Douglas was doubtful about Blackmun's position; he was sure that Burger wanted to uphold the state laws, as he knew Justice Byron White also did. The two new Nixon nominees (Justices Lewis Powell and William Rehnquist) had not heard oral argument and so had taken no part in

[27] Excellent examples of all these are to be found in Joseph P. Lash, ed., *From the Diaries of Felix Frankfurter* (New York: Norton, 1975).

[28] *Doe* v. *Bolton*, 410 U.S. 179 (1973).

[29] Bob Woodward and Scott Armstrong, *The Brethren: Inside the Supreme Court* (New York: Simon & Schuster, 1979), p. 165.

[30] The next paragraphs draw heavily on Bernard Schwartz, *The Unpublished Opinions of the Burger Court* (New York: Oxford University Press, 1988), which broadly confirms the account published earlier in Woodward and Armstrong, *The Brethren*, pp. 165–89, 229–40.

[31] Melvin I. Urofsky, ed., *The Douglas Letters* (Bethesda, Md: Adler & Adler, 1987), p. 181.

[32] *Griswold* v. *Connecticut*, 381 U.S. 479 (1965).

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the disposition of the case at this stage, but Douglas was sure that they had been carefully chosen to cut back on any expansive reading of the due process clause of the Fourteenth Amendment.[33]

As the months passed, the silence from Blackmun's chambers on the abortion cases worried the three most liberal members of the Court. When his draft opinion finally emerged, those who had voted to strike down the state laws (and they included Stewart despite Douglas's fears) were dismayed; although Blackmun was prepared to find them unconstitutional, he wanted to do so on the grounds that they were too vague.[34] Brennan promptly sent Blackmun a memorandum calling upon him to meet the 'core constitutional question' head on; he asserted that four of the justices (himself, Douglas, Stewart and Justice Thurgood Marshall) thought it had been agreed that 'the Constitution required the invalidation of abortion statutes save to the extent they required an abortion to be performed by a licensed physician within some limited time after conception'.[35] Douglas, having read Brennan's note, sent one of his own reiterating the same points. Blackmun, however, was faced not only by pressure from the liberal wing. More dangerously, White's draft dissent effectively demolished Blackmun's argument that the statutes should be struck down on vagueness grounds and this, Blackmun felt, might well drive from his majority Stewart, for whom the logic and precedential bases of an opinion were always important;[36] and Burger, whose position was strengthened not only by his status as chief but also by his long-standing personal connection with Blackmun, was lobbying for reargument on the grounds that so important an issue should be heard by a full nine-man court.[37]

This alarmed Brennan and Douglas. They immediately changed their positions and pushed for the opinion to come down that Term exactly as it stood. The votes were there, they argued, and the cases had been thoroughly examined. Douglas's note to Blackmun was entirely political in my third sense, mixing flattery with pragmatism:

> Those two opinions of yours in *Texas* and *Georgia* are creditable jobs of craftsmanship and will, I think, stand the test of time. While we could sit around and make pages of suggestions, I really don't think that is important. The important thing is to get them down ... Again, congratulations on a fine job. I hope the 5 can agree to get the cases down this Term, so that we can spend our energies next Term on other matters.[38]

Douglas's disingenuous praise for an opinion for which he had little time did not work. Blackmun himself has become too involved in the cases to go

[33] On Rehnquist, see Sue Davis, *Justice Rehnquist and the Constitution* (Princeton, NJ: Princeton University Press, 1989).

[34] Schwartz, *The Unpublished Opinions*, pp. 120–40.

[35] Schwartz, *The Unpublished Opinions*, p. 144.

[36] The full draft dissent is printed in Schwartz, *The Unpublished Opinions*, pp. 141–3.

[37] The two justices had been best man at each other's weddings. There is some suggestion that, by 1971, their relations were less cordial: Woodward and Armstrong, *The Brethren*, pp. 173–4.

[38] Urofsky, ed., *The Douglas Letters*, pp. 183–4.

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public with White's powerful dissent hanging over him. Still a relative newcomer and increasingly hurt by the popular sobriquet applied to him and Burger – 'the Minnesota Twins' – he wanted to write an opinion that would mark him out as an effective justice with a mind of his own. He was also emotionally involved in the whole issue as a result of his close links with the medical fraternity as counsel to the Mayo Clinic, and he wanted more time to think the arguments through.[39] So he, too, suggested that there should be reargument. Rehnquist and Powell, who had joined the Court in January and felt they were entitled to participate in this particular question, voted for reargument. Once White had agreed, there were five votes for reargument and the liberal justices had lost their battle.

Ironically, however, they won the war. Blackmun spent much of the summer of 1972 researching the abortion issue and, when the Conference reconsidered the issue in the autumn after reargument, the voting was not only clearer, it was also decisive. While Rehnquist joined White in dissent, Powell joined the old majority, to which Burger attached himself reluctantly. Furthermore, Blackmun's opinion was strikingly different from that which he had circulated in May; on this occasion he did face the core controversy and, although weighed down with medical exegesis and detours into peripheral issues, his opinion unequivocally asserted the fundamental right of a woman in the first trimester of pregnancy, after consultation with her physician, to decide whether or not to carry a foetus to term. If *Roe* v. *Wade* had come down in the summer of 1972, it would have been a minor opinion, a footnote to theses on the 'void for vagueness' doctrine and remembered more for White's hatchet job of decimation than Blackmun's cautious opinion. In 1971, in *United States* v. *Vuitch* the Court had reversed a Washington DC district court's judgement that the city's abortion statute was too vague to pass constitutional muster; but who now remembers the *Vuitch* decision?[40] As it happened, the liberals' political failure was turned into triumph and Burger's political success into partial defeat.

We do not possess the documentation to unravel the processes by which later abortion cases came to be decided and the opinions came to be written in the way that they have been. But it is possible to read between the lines. Let me start with *Thornburgh* v. *American College of Obstetricians and Gynecologists*,[41] decided in the last days of Warren Burger's chief justiceship. It is clear that the Court was deeply, even bitterly, divided. White's dissent is harsh, even by his sometimes acerbic standards. More significantly still, his opinion, which Rehnquist joined, stated quite plainly: 'In my view, the time has come to ... overrule [*Roe* v. *Wade*]'.[42] Burger's shift from upholding *Roe* against

[39] Woodward and Armstrong, *The Brethren*, pp. 183–9.

[40] *United States* v. *Vuitch*, 402 U.S. 62 (1971).

[41] *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986).

[42] *Thornburgh*, at 788.

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most challenges to dissent in this case reflected Solicitor-General Charles Fried's invitation to the Court to rethink the principles of *Roe* itself.[43]

Read John Paul Stevens's concurring opinion, however, and he seems to be talking specifically to White in the way he praises, quite unnecessarily, the logic which had led White to be part of the majority that had enunciated a right to privacy in *Griswold*:

> I have always had the highest regard for his view on the subject. In this case, although our ultimate conclusions differ, it may be useful to emphasize some of our areas of agreement in order to ensure that the clarity of certain fundamental propositions not be obscured by his forceful rhetoric.[44]

Here I think he began his attempt to build a consensus between the outright overrule apparently sought by Rehnquist and White and the outright refusal to countenance any regulations in the first semester, which the majority apparently preferred. Stevens had never been happy with the idea that abortion might be a fundamental right and hence eligible for heightened judicial scrutiny if in any way constrained. So he went out of his way to praise the logic which led White to be part of the *Griswold* majority, hoping to wean him away from outright overruling of *Roe* which Stevens accepted as a long-standing precedent.

Three years later *Webster* was decided.[45] Some at least of Stevens's hopes seem to have borne fruit. Rehnquist's opinion, in which White joined, no longer publicly sought to overrule *Roe* (indeed, it cited with approval past precedents from which he and White had dissented);[46] its attack on *Roe* basically incorporated Justice Sandra Day O'Connor's powerful argument against the trimester formula in *Akron*, in which she had argued that medical advances had set that particular part of the *Roe* opinion 'on a collision course with itself';[47] it seemed to be a move towards building, although it did not yet create, a new consensus which might embrace Sandra Day O'Connor (who had joined the Court in 1981) and John Paul Stevens (who had joined the Court two years after *Roe* had been decided). Both were ready to countenance regulations limiting any absolute right to an abortion but were unprepared to overrule so enduring a precedent. Justice Antonin Scalia, a new Reagan nominee, had written a withering attack on O'Connor's refusal to address *Roe* head on, which almost certainly made it less likely that she would in the immediate future vote to overrule and thus reduced the chances of putting together a majority to overturn *Roe*. In 1990 this last presumption gained credence from

[43] See Lincoln Caplan, *The Tenth Justice: The Solicitor General and the Rule of Law* (New York: Knopf, 1987), pp. 135–54.

[44] *Thornburgh*, at 772–3.

[45] *Webster* v. *Reproductive Health Services*, 109 S.Ct. 3040 (1989).

[46] *Webster*, at 3058: 'This case affords us no reason to revisit the holding of *Roe* ... and we leave it undisturbed. To the extent indicated in our opinion, we would modify and narrow *Roe* and succeeding cases'.

[47] *Akron* v. *Akron Center for Reproductive Health*, 462 U.S. 416 (1983), at 452–75, where White and Rehnquist supported her emphatic preference for using an 'undue burden' test in abortion cases.

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O'Connor's vote in *Hodgson* v. *Minnesota* which struck down a Minnesota regulation as unduly burdensome;[48] it is noticeable that Justice Anthony Kennedy's dissent, in which Rehnquist and White joined, does not mention even the possibility of overruling *Roe*. Stevens effectively had his five votes at last in *Ohio* v. *Akron Center for Reproductive Health*,[49] when Kennedy's opinion concentrated on the balance of interests between the state and the pregnant woman. To the extent that this balancing exercise favoured regulation, Scalia's vote could be counted in addition. The notion that abortion in the first trimester was a 'fundamental' right was ignored and thus the possibility of states involving themselves in regulating the early stages of pregnancy was enhanced. But O'Connor and Stevens, at least, were prepared to weigh the 'burden' or regulation against the 'right', even if attenuated, of abortion and find against the regulation. *Ohio* may yet be seen as more significant than *Webster*, because it may have created a new majority on the abortion issue and new principles by which to judge state regulations.

Time will doubtless throw light on the intra-court discussions which lay behind the judgements and opinions on abortion in 1989 and 1990 and the role that Stevens played in them. It seems clear enough to me that the emerging majority, divided though it was over how to deal with the constitutional claims involved in abortion cases, was nevertheless trying to build a more acceptable consensus, even if that meant shifting absolutist positions to accommodate the positions of Stevens and O'Connor. It is entirely possible that Rehnquist has been a party to this accommodation.[50] The politics of negotiation and compromise, the very stuff of the executive and legislative branches, are alive and well in the judicial branch.

It is difficult to see how, in a collegiate Court, it could be otherwise. Justice Felix Frankfurter used to complain at the lack of intellectual argument in his day and inveigh against the tactics of his opponents in their attempts to build majorities for their judicial positions, but he himself lobbied more assiduously than most.[51] Nothing has changed. With only a small handful of exceptions, justices have been used to competing for, and exercising, power and they retain their competitive instincts when on the Court. Putting on the robe does not obliterate their human desire to prevail. So my third sense of 'political' refers to the behaviour of justices, akin to the behaviour of others in small groups where tasks have to be performed, by which they seek to ensure

[48] *Hodgson* v. *Minnesota*, 110 S.Ct. 2926 (1990).

[49] *Ohio* v. *Akron Center for Reproductive Health*, 110 S.Ct. 2972 (1990).

[50] Several observers of the Court in the late 1980s felt that Rhenquist would be able to lead the Court more effectively than Burger, partly because of his genial disposition and partly because of his intellect, and they observed that Rehnquist was becoming more centrist, presumably in order to marshall the Court better. The hard evidence for this view, however, is not strong. See David W. Rohde and Harold J. Spaeth, 'Ideology, Strategy and Supreme Court Decisions: William Rehnquist as Chief Justice', *Judicature*, 72 (1988–9), 247–50.

[51] Lash, ed., *From the Diaries of Felix Frankfurter*.

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that a majority of the Court accepts their view of the correct disposition of a case and its jurisprudential underpinnings.

IV

The fourth notion of 'political' is a prudential one. I am thinking here of the usage that occurs when we say that a particular course of action would be politic, implying that it would be wise and sensible and is not an unyielding application of pure principle. Good conservatives, I suppose, would argue that such behaviour was principled. But there does remain a distinct thread running through criticism of the Court, especially from the legal community, which distinguishes between legal argument, in which judgement about consequences plays a very minor part, and political argument, which is dominated by calculations of consequences. My fourth notion of 'political' thus draws attention to the dimension of judging which, on occasions, gives considerable weight to calculations of consequence.

Justices are not like nuns, unworldly, cloistered, ignorant of the passions outside, resolutely and consistently principled and answerable only to themselves and their God. Indeed, contact with the 'real world', through good relations with their articulate wives and daughters, almost certainly affected the votes of both Stewart and Blackmun in 1973.[52] Perhaps the most obvious example of the justices struggling to accommodate the law with political realities was the process through which the two *Brown* decisions were made.[53] The Court at the time was deeply fractured and its members represented a range of jurisprudential positions; but the *Brown* decisions were unanimous. All the members were acutely aware of the likely response, especially in the South, to their decision to dispose of the principle of segregation and their deliberations indicate how they tried to square a major policy goal with legal niceties and attempted to fashion a remedy that would be practicable.

It is essential for the survival of the institution that its decisions should be broadly acceptable in the wider community. The justices, if they have not actually taken a standard introductory political science course setting out the Court's role in the American system of government, know full well that it *is* a part of the governmental structure and that its legitimacy depends upon articulating positions which are at the same time in line with popular opinion and seemingly grounded upon the Constitution. The Court has no instruments of coercion; its judgements are merely pieces of paper; it depends upon its continuing status and the people's and politicians' readiness to obey. Nobody was more aware of this reality than Harry Blackmun in January 1973. When decisions are handed down, the author of the Court's opinion normally

[52] Personal communications; Woodward and Armstrong, *The Brethren*, p. 167.

[53] See Bernard Schwartz, *Super Chief: Earl Warren and his Supreme Court* (New York: New York University Press, 1983), pp. 72–127; Kluger, *Simple Justice*, pp. 543–699; Philip Elman, 'The Solicitor-General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946–1960: An Oral History', *Harvard Law Review*, 100 (1986–7), 822–45.

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summarizes in a cursory fashion the finding and basic justification of the decision. In a memorandum of 22 November 1972, Blackmun had reiterated a point he had made in Conference, that 'the decision, however made, will probably result in the Court's being severely criticized' and, just before he circulated the final version of his opinion, he sent round another Memorandum which began, 'I anticipate the headlines that will be produced over the country when the abortion decisions are announced', and he enclosed a copy of the statement he had carefully crafted to explain precisely what the findings of the Court actually were in the hope that 'there should be at least some reason for the press not going all the way off the deep end'.[54]

There are, of course, different views on what a prudential course of action would be. Scalia, for example, has publicly argued that the Court's involvement in the abortion controversy is against the Court's interests: 'Leaving this matter to the political process is not only legally correct, it is pragmatically so. That alone – and not lawyerly dissection of federal judicial precedents – can produce compromises satisfying a sufficient mass of the electorate that this deeply felt issue will cease distorting the remainder of our democratic process'.[55] Douglas, on the other hand, pretended to have no time for pragmatism when pressing for *Roe* to come down in 1972: 'Both [political] parties have made abortion an issue', he wrote in a Memorandum to the Court.

> What the parties say or do is none of our business. We sit here not to make the path of any candidate easier or more difficult. We decide questions only on their constitutional merits. To prolong these *Abortion Cases* into the next election would in the eyes of many be a political gesture unworthy of the Court.[56]

So, the prudential argument can be played both ways; it can be dismissed as demeaning to the truly judicial role of the judge or advanced as a necessary calculation for a prudent judge. It is clear from the justices' private papers that they are as well aware of their lack of obvious democratic legitimacy as are their critics, but they are also aware of the functions imposed upon the Court by the American people. Taking the pragmatic, in one clear sense a

[54] Schwartz, *The Unpublished Opinions*, p. 151.

[55] In *Ohio* v. *Akron Center for Reproductive Health*, 110 S.Ct. 2972 (1990), at 2984. Scalia believes it is both improper *and* impossible for the Court to manage the abortion controversy and, therefore, it ought to withdraw. See, additionally: *Webster* v. *Reproductive Health Services*, 109 S. Ct. 3040 (1989), at 3064, 3065: 'This Court's self-awarded sovereignty over a field where it has little proper business since the answers to most of the cruel questions posed are political and not judicial – a sovereignty which therefore quite properly, but to the great damage of the Court, makes it the object of the sort of organized public pressure that political institutions in a democracy ought to receive ... the fact that our retaining control, through *Roe*, of what I believe to be, and many of our citizens recognize to be, a political issue, continuously distorts the public perception of the role of the Court'; *Hodgson* v. *Minnesota*, 110 S.Ct. 2926 (1990), at 2961: 'The random and unpredictable results of our consequently unchannelled individual views make it increasingly obvious, Term after Term, that the tools for this job are not to be found in the lawyer's – and hence not in the judge's – workbox. I continue to dissent from this enterprise of devising an Abortion Code, and from the illusion that we have authority to do so'.

[56] Urofsky, *The Douglas Letters*, p. 185.

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political, view is sensible and probably essential too. Since the American people have largely in effect devolved the process of amending their eighteenth-century Constitution to the Court, it must retain its image and reputation as an independent arbiter.[57] If that means noting public opinion (and in the 1990s perhaps the resurgence of pro-choice feelings), it is a small price to pay when a legal institution is virtually forced to play so significant a political role in the system.

v

I come at last to the notion in which most popular observations about the political nature of the Court are couched. Here political equates with partisan, but it is also used as the antithesis of legal. Politicians legislate; judges adjudicate. Thus President George Bush, when introducing David Souter as his nominee for a place on the Supreme Court, said: 'I want somebody who will be on there not to legislate from the bench, but to faithfully interpret the constitution'. Although this notion of political, identifying justices with politicians, is the most popular notion, it is also the most elusive.

And it is elusive as a direct result of the peculiar status in which the Supreme Court is generally held. The fundamental purpose of politics is to translate, by whatever constitutional means available, policy goals into law; a fundamental purpose of courts is to establish and enforce those constitutional rules according to law rather than according to personal evaluations of substantive outcomes. Since the Supreme Court is held in high esteem as a court, its errors (to most politically active people that tends to mean its unwelcome decisions) must be due to a failure of some justices' method or of their jurisprudence rather than a failure of the justices to measure up to the behaviour expected of judges in conventional wisdom. Attacks on the Court, therefore, have tended to be couched in the language of principle even though the real animating force is objection to specific decisions. Liberals in the 1930s attacked the Court for its activism because they disliked its partial evisceration of the New Deal; they praised its activism in the 1960s and 1970s for its proper protection of the weak and disadvantaged against the state. Conservatives in the 1930s endorsed the Court's activism because they disliked the extension of governmental regulation of the New Deal; they opposed its activism in the 1970s for the restraints it cast upon governmental action. In the end, the argument usually comes down to 'whose ox is gored'. Principle, therefore, frequently masquerades as self-interest.

No serious politician or political commentator disagrees with George Bush's bland statement of principle. The problem arises when attempts are made to operationalize the instruction 'faithfully to interpret the constitution'. It *ought* to be based upon some principles outside the personal predilections of the

[57] Richard Hodder-Williams, 'Making the Constitution's Meaning Fit for the 1980s', in Joseph Smith, ed., *The American Constitution: The First 200 Years, 1787–1987* (Exeter: Exeter University Publications, 1987), pp. 97–110.

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justices themselves. Hence, we have witnessed the search for neutral principles or for a jurisprudence of original intent.[58] Justices with whom there is disagreement can be criticized for employing the wrong set of principles; and that is the normal form of coded attack. But increasingly critics have blamed the wrong decisions, as they see them, on the personal political philosophies of the justices, arguing that they are as goal-oriented as political actors, rather than rule-bound judges, setting out from personally sanctioned policy preferences towards a constitutional justification for them. As one author has put it, the justices use the Constitution 'as a kind of letter of marque authorizing them to set sail at will among laws, striking down any they find displeasing'.[59] Robert Bork more recently has argued that judges who are not limited by textually discoverable rights feel free to invalidate duly enacted laws 'in accordance with their own philosophies'.[60] Both imply not merely that justices are goal-oriented but that those goals are so dominant that legal arguments become no more than *pro forma* wrapping of policy preferences.

It would be wrong to dismiss this view out of hand. The *Brown* decision, although even a strict constructionist like Robert Bork says he supports it, was quintessentially such a political judgment.[61] We know that Robert Jackson had difficulty in discovering a legal path to achieve the end of segregation which he sought.[62] There is little doubt that Douglas, especially in his later years, imposed his conception of liberty on the Fourteenth Amendment without much concern for its intellectual moorings. In the *Roe* saga, too, the position of some of the justices can only be explained in terms of personal preferences. Burger, I would hold, evinced a remarkable degree of consistency, but it was a consistency which was driven by an underlying personal value. He was never fully happy with the broad sweep of parts of Blackmun's *Roe* opinion and his concurring opinion makes this quite clear; for him, there was no place for abortion on demand. He stuck to that through most of *Roe's* progency, often penning a brief concurrence reiterating his position.[63] When *Thornburgh* was decided, and yet a further set of regulations was found to impinge too closely on the fundamental right to choose an abortion, Burger believed, and I think believed correctly, that a majority of the Court as then constituted

[58] Herbert Wechsler, 'Towards Neutral Principles of Constitutional Law', *Harvard Law Review*, 73 (1959–60), 1–35; Edwin Meese III, 'The Attorney-General's View of the Supreme Court: Towards a Jurisprudence of Original Intention', *Public Administration Review*, 45 (1985), 701–4.

[59] Walter Berns, 'The Least Dangerous Branch, but Only If...', in Leonard J. Theberge, ed., *The Judiciary in a Democratic Society* (Lexington, Mass.: Gower, 1979), p. 15.

[60] Robert Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Free Press, 1990), p. 220. See also pp. 115–16: '[In the years since *Roe*] no one, however pro-abortion, has ever thought of an argument that even remotely begins to justify *Roe* v. *Wade* as a constitutional decision ... There is no room for argument about the conclusion that the decision was the assumption of illegitimate judicial power and usurpation of the democratic authority of the American people'.

[61] Richard Maidment, 'Policy in Search of Law', *Journal of American Studies*, 9 (1975), 301–20.

[62] Schwartz, *Super Chief*, p. 89.

[63] See *Roe* v. *Wade*, 410 U.S. 113 (1973), at 207–8; *Maher v. Roe*, 432 U.S. 464 (1977), at 481.

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had in fact reached a point where any limitation on obtaining an abortion in the first trimester would always be found to conflict with a woman's 'fundamental right' and would therefore be unconstitutional; in effect, it seemed to imply protection for abortion on demand;[64] his 'crossing the floor', seen in this light, was a logical step.

Justice Powell, on the other hand, could write a powerful and explicit reaffirmation of *Roe* in one year,[65] only to deny its basic premise (that the right of privacy protected sexual behaviour) three years later, when the Court found 5–4 that Georgia's sodomy law was constitutional.[66] There is evidence that he only changed his mind at the very last moment, almost certainly because *Akron* concerned abortion, the need for which flowed from normal sexual activity, while *Bowyers* concerned sodomy, which to Powell was clearly an abnormal activity.[67]

It is not *necessarily* the case that a justice's vote flows from his policy preferences and precedes a process of legal rationalization. That does, of course, happen on occasions. But different philosophical principles will inevitably dictate different results, so that different policy consequences will follow ineluctably from justices' different jurisprudences. For example, those who see the fundamental role of the Court as the protector of the individual, particularly the unpopular individual, against the power of the state, will necessarily incline towards activism (defined here as a willingness to find unconstitutional the laws and actions of duly elected officials); those who defer to elected officials except where the most egregious breakings of the Constitution have taken place will naturally seem self-restrained.

Each of these jurisprudential positions has strong supporting arguments. In fact, they represent polar positions on a continuum, so that the centre of judicial gravity in the post-New Deal Courts has tended to shift around a moving central bloc of justices. But this does not mean that decisions are not principled. Writing for a majority inevitably involves some coalition building and therefore frequently internal inconsistencies in an opinion (and between opinions).

There is a difficulty in taking seriously the crude presumption that there is an alternative to judging according to subjective criteria. The Constitution is too imprecise, too broadly textured, to allow this, and the Founding Fathers (and their successors who added amendments to the Constitution) left no clear instructions about how their sparse words were to be applied to the facts of contemporary disputes. There is no escaping from the fact that justices must necessarily make choices for themselves when presented with the astonishing array of litigation brought to them by the American people. If political in

[64] *Thornburgh*, at 782–5.

[65] *Akron* v. *Akron Center of Reproductive Health*, 462 U.S. 416 (1973), at 420: 'The doctrine of *stare decisis*, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law. We respect it today and reaffirm *Roe* v. *Wade*'.

[66] *Bowers* v. *Hardwick*, 478 U.S. 186 (1986), at 197–8.

[67] Irons, *The Courage of Their Convictions*, p. 391.

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this final sense implies no more than that a justice must exercise the 'prerogative of choice', then, of course, the justices must be political. But the popular sense implies something more. It implies that that choice was made on improper grounds.

This brings us once again to the central conundrum of the Supreme Court. It is a court, operating according to legal procedures and in the terms of legal discourse, yet it is also a political body in the various senses to which I have drawn attention. It is a hybrid. And the justices themselves reflect that. *Roe* v. *Wade* and its progeny are, in one sense, very poor exemplars of the norm. The issues involved are more politically salient and divisive, more complex and constitutionally more problematic than the great majority of cases decided by the Supreme Court. Too great an emphasis on the abnormal distorts the picture of normality. It is easy to underestimate the degree of unanimity on the Court, to ignore those many cases which are primarily concerned with the working of the appellate system itself and to assume that the Court is all politics and little law. I would argue that the policy implications of the Court's judgements flow, with only a handful of exceptions, from something much more profound, more intellectual, more proper indeed, than personal preferences on discrete policy issues. Whether one favours the underlying principles or not is a very different matter. And from whence those underlying principles are divined is yet another matter.

The popular notion of a political Court is not the figment just of losers' imaginations. The problem for analysts of the Court is to decide on the relative weight to be given to this sense of 'political' when explaining the decisions of the Court. The contemporary call for a more principled jurisprudence is really a call for a *different* principled jurisprudence, as it always has been. For most justices decisions follow an extremely complex interplay of judicial principle and political principle; as with the great majority of citizens, these two are usually entirely congruent so that it is almost impossible to disentangle the one from the other. On occasions they may clash; the affirmative action debate as well as the abortion debate has quintessentially pitted principles against each other. In those circumstances, justices do frequently behave politically in this popular sense. But this should not obscure the many other occasions when they follow internalized jurisprudential principles or act politically in quite a different sense.

VI

The final notion, which I call systemically political, once again draws the Supreme Court's interpretations of the Constitution into the political process. Robert Jackson's facility with the pen has left us several splendidly pithy sayings, which deceive as much as they enlighten. 'We are not final because we are infallible', he once wrote; 'we are infallible because we are final'.[68] But

[68] *Brown* v. *Allen*, 344 U.S. 443 (1953), at 540.

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he was quite wrong. This notion of finality bears little relationship to reality.[69] The Court's opinions, like stones cast into a pond, always produce ripples in the political world; sometimes they are seismic in their consequences.

This was true for *Roe*. It galvanized the pro-life lobby into a variety of actions designed to reverse, or decisively cut back, that decision. The lobby was already in existence, having been formed to challenge the gradual liberalization of abortion laws which was taking place in the states in the late 1960s, and it widened the range of its activities beyond traditional forms of influencing legislators. It organized marches and demonstrations; it kept vigils; it challenged those attempting to have abortions and those who administered them; it attacked clinics; it made clear to candidates that their position on abortion could determine their chances of electoral success; it hounded Blackmun himself and, to a lesser extent, the other justices in the *Roe* majority. Douglas, for example, wrote only half jokingly to Brennan and Blackmun in January 1974: 'On this anniversary week of our decision on Abortion, I am getting about 50 letters a day. I'll be happy to share them with you if you feel neglected'.[70] Despite the massive increase in *legal* abortions, the pro-life lobby was relatively successful in establishing limits on abortion, partly by denying public funds for non-therapeutic abortions and partly by hedging the right about with regulatory constraints.[71]

Webster, like *Roe*, galvanized people into action. The Governor of Florida summoned a special session of the state legislature to pass restrictive legislation, only to find no majority among representatives for his initiative.[72] Legislators in Louisiana and Idaho passed stringent laws only to have them vetoed by the Governors. Ohio legislators decided that there would be no victors in a legislative struggle over fresh abortion laws and agreed to hold off. In Pennsylvania, where restrictive abortion laws had a recent history, there was a clear bipartisan majority ready to pass another restrictive law, but the restrictions were themselves restricted by the Governor's unwillingness to sign any bill which he thought might be unconstitutional. Careful liaison between the governor's mansion and pro-life advocates produced a bill which was not as restrictive as they had hoped or the pro-choice lobby had feared.[73] Even so, a Pennsylvania court then found it unconstitutional.[74] These are but a few examples of the response to *Webster*.

[69] Louis Fisher, *Constitutional Dialogues: Interpretation as Political Process* (Princeton, NJ: Princeton University Press, 1988).

[70] Urofsky, *The Douglas Letters*, p. 187.

[71] About 1.5 million women each year now obtain abortions, representing more than one pregnancy out of four (Hyman Rodman, Betty Sarvis and Joy Bonar, *The Abortion Question* (New York: Columbia University Press, 1987), p. 1); Laurence H. Tribe, *Abortion: The Clash of Absolutes* (New York: Norton, 1990), pp. 151–72.

[72] Tribe, *Abortion*, p. 183.

[73] Thomas J. O'Hara, 'Pennsylvania Catholics and the Abortion Control Act of 1989' (unpublished paper presented to the American Political Science Association Convention, San Francisco, September 1990).

[74] *New York Times*, 14 September 1990.

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We have come full circle. Earlier notions emphasized the reactive nature of the Court as its agenda was constructed by Americans' propensity to litigate some questions but not others. But the Court is also proactive, a political actor which energizes the political system itself. Its decisions are not final, but rather the starting gun for further political competition. The more its cases take on the character of interest group conflict, the more its decisions become yet another part of an ongoing saga. We should not speak of a seamless web, for the Court's actions are clearly discernable moments when the struggle is decisively moved in a definite direction. Just as the Constitution is used as a political resource by political actors in the United States and thus impels the Supreme Court into the political arena, so also the judgements of the Court, relating as they so often do to issues on which there are disparate and vocal views, redefine the political debate and thus elicit responses from affected parties.

VIII

There is no institution quite like the United States Supreme Court. It is, as I have noted, both a court and also an integral part of the American political process. The conventional shorthand pays homage to its political role, but it fails to unravel the complexity of that deceptively simple phrase. In this article I have identified six analytically distinct ways in which the Supreme Court of the United States may properly be described as political. They fall into three distinguishable categories. First is the definitional notion flowing from our understanding of the political system itself and the purposes of politics. Second are the empirical and systemic notions growing out of the actual interface in the United States between law and politics; in a system with multiple points of access, the Court is both reactive, in that it responds to stimuli from the litigating community, and proactive, in that its judgments (whether to affirm or reverse) usually spark off further political action as well as supplementary litigation. Finally are the influencing, pragmatic and partisan notions which relate to the internal processes of decision making within the Court itself. My argument is not merely that all these forms of 'politics' take place and should be recognized, although obviously I do believe that. It is a little more ambitious. Any serious judgment of the Court and its members must address *all* these facets of it. Each in itself raises empirical questions which are often difficult to answer; the extent and intensity of the partisan notion is an obvious case in point. But each also raises important and fascinating normative questions. And those are often the most difficult to answer and give rise to the greatest passions. But they must all be faced if a complete picture of the Supreme Court is even to be sketched out.

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