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Gerald Rosenberg

THE ROAD TAKEN: ROBERT A. DAHL'S *DECISION-MAKING IN A DEMOCRACY: THE SUPREME COURT AS A NATIONAL POLICY-MAKER*

*Gerald N. Rosenberg**

One of the deep, dark secrets of the academic world is how small the audience is for our scholarship. Most academics hope that their colleagues will read what they write, but they know that collegiality goes only so far. There is always the fallback of assigning one's own work in class, but there is something unsatisfying in having it read under duress. The hard truth is that the half-life, let alone the full-life, of most scholarly articles is very short.

This may be particularly true for law review articles. In 1957, when the *Journal of Public Law* published Robert Dahl's Article,[1] there were 259 law reviews, publishing multiple volumes per year, each containing multiple articles.[2] In 2001, forty-four years later, the number of law reviews has increased dramatically to 842.[3] With several thousand law review articles published every few months, only very few gain more than passing notice.

Despite the overwhelming number of law review articles, Dahl's *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker* has been continually read and cited, and at an increasing rate. Over the course of its life, it has been cited hundreds of times.[4] For example, in the 1960s, it was cited at least twenty-eight times, or approximately 2.8 times per year. In the next decade, the number of citations increased to at least forty-eight, increasing the rate to 4.8 citations per year. In the 1980s, the Article was cited sixty-two

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1 Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957) ("*Decision-Making in a Democracy*").

2 *See* "List of Periodicals Indexed," INDEX TO LEGAL PERIODICALS (Aug. 1955-July 1958) 5-9 (Dorothea A. Flaherty ed., 1958).

3 *See* H.W. Wilson, *Index to Legal Periodicals & Books: Journal USA, available at* http://www.hwwilson.com/journals/iilp.htm (last modified Feb. 28, 2001).

4 Citation indexes are not precise, and a manual search of the *Social Science Citation Index* produced somewhat different results from a computer search. *See infra* note 5. However, the trends are the same.

times, or 6.2 per year. And in the 1990s, four decades after its initial publication, it was cited at least 125 times in scholarly articles, or approximately 12.5 times per year. That trend held for the year 2000, in which there were at least thirteen citations to it.[5] In 1976, nineteen years after its publication, it inspired a critical essay in the *American Political Science Review*.[6] It is read and taught around the country, for example, in graduate and law school seminars taught by Professors Lee Epstein and Jack Knight at Washington University and by me at the University of Chicago and Northwestern University School of Law.[7]

How can this be? At first glance, the Article seems an unlikely candidate for this level of attention. It is neither lengthy nor incredibly detailed. To the contrary, it is relatively short, covering only seventeen pages with just thirty-one footnotes, less than two per page. Was its author an eminent authority on the Supreme Court? He wasn't. Robert Dahl, although an eminent political theorist, was neither a lawyer nor trained as a scholar of the judiciary. This Article was his first (and last) piece of writing on the U.S. Supreme Court. Did the Article dazzle its readers with high-powered technical skills? Once again, the answer is no, unless straight-forward logic, counting, and simple cross-tabulations fit the definition of high-powered.

Finally, perhaps the Article was flawless? Again, the answer is no. Dahl made several questionable assumptions,[8] excluded from his analysis a great deal of data arguably relevant to his research question,[9] and reached some conclusions that were neither supported by the data he presented nor by the subsequent literature.[10] Why, then, is the Article so influential?

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[5] *See* Institute for Scientific Information, *Web of Science, Citation Databases, available at* http://webofscience. com (last visited Mar. 26, 2001).

[6] Jonathan D. Casper, *The Supreme Court and National Policy Making*, 70 AM. POL. SCI. REV. 50 (1976).

[7] Further, the Article played an important role, and was repeatedly cited, in a 2000 Ph.D. Dissertation on the High Court of Argentina. Gretchen Helmke, Ruling Against the Rulers: Court-Executive Relations in Argentina Under Dictatorship and Democracy (2000) (unpublished Ph.D. dissertation, University of Chicago) (on file with author).

[8] These include his equating of a national majority with a lawmaking majority in Congress, and his assumption that the lawmaking majority lasts for four years after enactment of legislation. *See* Dahl, *supra* note 1, at 284, 287.

[9] *See, e.g.*, Casper, *supra* note 6, at 54-60 (noting that Dahl excluded both statutory interpretation, where the Court upholds the constitutionality of federal law but interprets it in a particular way, and decisions invalidating state law which, like *Miranda* and *Brown*, can arguably have a major impact on national policy).

[10] *See infra* notes 114-17 and accompanying text.

The answer, I suggest, is three-fold. First, Dahl asks questions of fundamental importance to the study of the Supreme Court. Most basically, he asks what the role of the Supreme Court is, and more particularly, focuses on whether the Supreme Court serves as a protector of minorities against majorities. Second, the Article is careful, well thought-out, and well-written. Its methodology is clear, its assumptions explicit, and its key decisions laid bare for readers to challenge. Third, the points that Dahl makes can be seen as precursors of, or contributors to, a plethora of research trajectories. In many ways, he suggested the research road to be taken by future generations of judicial scholars. While I will concentrate most of my remarks on this aspect of his Article, I start with the first two points.

I. ASKING QUESTIONS OF FUNDAMENTAL IMPORTANCE

In 1957, a typical question about the U.S. Supreme Court might be, "what is its job, and how does it do it?" The standard answer, the legal realists to the contrary notwithstanding, was that the Court's job was to decide cases and to do so in such a way that provided stability in the law. Judicial decisions were to be based on the legal texts involved, be they the Constitution or statutes, and on the Court's past decisions. The so-called "legal process" school, emanating from the Harvard Law School, was in vigorous health; it stressed the importance of legal process and contrasted it to the political process of the other branches.[11] The Court was independent from Congress and the Executive, enabling the Justices to focus on the legal materials before them. The Court's job was, in a phrase, to be and act as a legal institution.

By 1957, it also seemed apparent that the Supreme Court had taken on another role: protecting minorities against majority tyranny. Nowhere was this clearer than in its emerging civil rights decisions of the 1940s and 1950s, culminating, at the time Dahl wrote, in the 1954 *Brown v. Board of Education* decision.[12] In addition, the Court had begun to carve out a "preferred position" for free speech,[13] granting constitutional protection, for example, to the refusal

[11] The key text of the "school" was the never-published HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (4th tentative ed. 1958) (unpublished manuscript); *see also* MORTON J. HORWITZ, THE TRANSPORTATION OF AMERICAN LAW, 1870–1960, at 254 (1992); Gary Peller, *Neutral Principles in the 1950s*, 21 U. MICH. J. L. REF. 561, 571 (1988).

[12] 347 U.S. 483 (1954).

[13] Jones v. Opelika, 316 U.S. 584, 608 (1942), *rev'd on reh'g*, 319 U.S. 103 (1943) (Stone, J., dissenting) ("The Constitution by virtue of the First and Fourteenth Amendments, has put those freedoms [of speech and religion] in a preferred position."); *see also* Palko v. Connecticut, 302 U.S. 319, 326-27 (1937) (recognizing

of religious minorities to salute the flag.[14] As Dahl put it, "One influential view of the Court . . . is that it stands in some special way as a protection of minorities against tyranny by majorities."[15]

Dahl did not jump onto the bandwagon of conventional thinking by assuming that the Court looked only at legal materials or that it protected minorities against majority tyranny. He saw these as questions to be examined. As I will argue below, in conceiving of the Court as a political as well as a legal institution, Dahl challenged conventional thinking.[16] In not accepting conventional wisdom, in asking what the role of the Court was and whether it protected minorities against majority tyranny, Dahl showed there was a different way of understanding the role of the Supreme Court.

II. A CAREFUL, WELL THOUGHT-OUT, AND CLEARLY WRITTEN ARGUMENT

In order to test the claim that the Court protected minorities against majorities, Dahl needed some way of measuring majority opinion. Given inherent difficulties in interpreting election outcomes, and the lack of survey research data for most of the history of the United States, Dahl concluded that "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.'"[17] Given this, Dahl argued that unless he made "*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,"[18] he couldn't answer the question. He then presented a key assumption: a "lawmaking majority" in Congress could serve as a proxy for a "national majority."[19] But congressional lawmaking majorities don't last forever. Aware of this, Dahl made the further assumption that a lawmaking

"freedom of thought, of speech" is the "matrix, the indispensable condition, of nearly every other form of freedom").

[14] *See* West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943), *rev'g* Minersville Sch. Dist. Bd. v. Gobitis, 310 U.S. 586 (1940). The Court's protection of political speech critical of the government should not be overstated. For a critical review of its record in the context of anti-Vietnam War protests, see Gerald N. Rosenberg, *The Sorrow and the Pity: Kent State, Political Dissent and the Misguided Worship of The First Amendment, in* THE BOUNDARIES OF FREEDOM OF EXPRESSION AND ORDER IN A DEMOCRATIC SOCIETY 17 (Thomas R. Hensley ed., 2001).

[15] Dahl, *supra* note 1, at 282.

[16] *See infra* Part III.A.

[17] Dahl, *supra* note 1, at 283.

[18] *Id.*

[19] *Id.* at 284.

majority lasts for four years.[20] Finally, he divided congressional legislation into two categories: "those involving legislation that could reasonably be regarded as important *from the point of view of the lawmaking majority* and those involving minor legislation."[21] With this framework, Dahl had a test for the claim that the Court protects minorities. He examined what happens when the Court invalidates both major and minor policies, controlling for the length of time between enactment and invalidation.

One strength of this approach lies in its clarity and transparency. It is an elegant piece of social science research. The reader can easily see what Dahl is doing and why he is doing it, and thus can critically evaluate it. In footnotes eleven and twelve, for example, Dahl includes the cases he coded, allowing the interested reader to reach her own conclusion about the accuracy of his coding.[22] Readers can, and have disagreed with his assumption that a national lawmaking majority lasts for four years.[23] But, because he is open about empirical problems, clear about what he is doing, and explicitly aware of the strengths as well as the weaknesses of it, the reader is provided with the tools necessary to make her own assessment.

Dahl's approach to the Supreme Court was empirical. That is, Dahl understood that questions about the role of the Court were not only philosophical and jurisprudential, but also empirical, to be tested by historical and factual examination. Though an eminent political theorist, his initial response to the claim that the Court protects minorities against tyrannical majorities was to test it empirically. He wrote that this view of the role of the Court is beset with "difficulties that are not so much ideological as matters of fact and logic."[24] Throughout the Article, Dahl looked to see what empirical evidence was available that might help resolve his research questions. By bringing simple and straight-forward empirical evidence to bear on questions of fundamental importance, Dahl demonstrated the power and importance of empirical work on the Court.[25]

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[20] *Id.* at 287.

[21] *Id.*

[22] *Id.* at 287-89 nn.11-12.

[23] *See, e.g.*, Casper, *supra* note 6, at 53, 56.

[24] Dahl, *supra* note 1, at 283.

[25] Dahl, of course, was not the first scholar to do empirical work on the Court. C. Herman Pritchett's pathbreaking study of the Roosevelt Court was published in 1948, and the legal realists before that time had done empirical work on trial courts. C. HERMAN PRITCHETT, THE ROOSEVELT COURT (1948). For a sampling of these legal realists' work, see WILLIAM W. FISHER ET AL., AMERICAN LEGAL REALISM (1993); LAURA KALMAN, LEGAL REALISM AT YALE (1986); JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND

Dahl's argument is clear, as is his writing. When he writes, for example, that the "Supreme Court is inevitably a part of the dominant national alliance,"[26] there is no question as to where he stands. The reader completes the Article knowing that Dahl's answer to the question of whether the Court can protect minorities is a clear no. The Article is also written with a style and grace that makes it a pleasure to read, an element missing from so much modern social science and legal writing. For example, in discussing the appointment of Supreme Court Justices, Dahl writes that, "Presidents are not famous for appointing justices hostile to their own views on public policy."[27] Later in the Article, Dahl addresses the claim that the Court has done more to protect basic liberties than he has admitted. His conclusion to the discussion is memorable: "[I]t 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."[28]

III. DAHL AS PRECURSOR OR CONTRIBUTOR TO A PLETHORA OF RESEARCH TRAJECTORIES

For an article to be well done, it is necessary that it ask a good research question and attempt to answer it in a sensible and clear way. For an article to be repeatedly cited, and for six decades and counting, it has to do more. *Decision-Making in a Democracy* does more. It not only offers a vision of the role of the Supreme Court, but in so doing, it also opens up a host of research questions. While Dahl was not the only author to raise many of these points, he did so in a way that caught the attention of and intrigued now several generations of judicial scholars. The remainder of this Article highlights five areas for which Dahl's views either set the stage, or contributed to, further work.

A. The Supreme Court As a Political As Well As a Legal Actor

As I noted in the first part of this Article, when Dahl focused on the Supreme Court the prevailing scholarly view saw the Court as a legal institution. Conceiving of the Court as a legal institution, judicial scholars worked within that framework, doing mostly conventional doctrinal work.

EMPIRICAL SOCIAL SCIENCE (1995). Dahl's empirical work stood out, however, because of its simplicity and the importance of the research question that it addressed.

[26] Dahl, *supra* note 1, at 293.

[27] *Id.* at 284.

[28] *Id.* at 292.

Dahl, however, took a different view, presented in the first two sentences of his Article:

> 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.[29]

Today this point may seem so obvious as to hardly merit mention. And one might have thought that in the wake of *Brown*, and the storm of criticism it created while Dahl was writing, viewing the Court as a political institution would have been nothing extraordinary. But it was. Dahl's claim was not simply that the Court was a legal institution whose decisions occasionally had political ramifications (like *Brown*). Rather, Dahl argued that it had to be understood as a political institution working with legal tools.

Viewing the Supreme Court as a political institution opened up vast areas of research. Scholars could ask not only conventional doctrinal questions about Court decisions, but also the same sorts of questions asked about other political institutions. In viewing the Supreme Court as a political institution, Dahl could ask about the Supreme Court a "serious and much debated question" asked of all political institutions:

> Who gets what and why? Or in less elegant language: What groups are benefitted 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?[30]

These are crucial questions in understanding the role and impact of any institution, but until Dahl's Article, they were not being asked of the Supreme Court. For example, there was no systematic study of the impact of Supreme Court decisions until 1969, when Theodore Becker introduced an edited collection of implementation studies.[31] Donald Horowitz's classic argument that courts are structurally ineffective policymakers didn't appear until 1977,[32] and my work, which argued that, absent a set of unlikely conditions, the Supreme Court is structurally constrained from furthering the interests of racial

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[29] *Id.* at 279 (emphasis added).

[30] *Id.* at 281.

[31] THE IMPACT OF SUPREME COURT DECISIONS: EMPIRICAL STUDIES (Theodore L. Becker ed., 1969); *see also* THE IMPACT OF SUPREME COURT DECISIONS: EMPIRICAL STUDIES (Theodore L. Becker & Malcolm M. Feeley eds., 2d ed. 1973).

[32] DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977).

minorities and other relatively disadvantaged groups, was not completed until 1991.[33] Dahl was ahead of us all. Dahl concluded that the Court was not effective in protecting the "fundamental conditions of liberty."[34] He went further, concluding that, "By itself, the Court is almost powerless to affect the course of national policy."[35] By viewing the Supreme Court as a political institution, Dahl raised the question of its impact.

Similarly, there was little or no work on which "groups are benefited or handicapped by the Court." While David Truman had raised the question of interest group pressures on the judiciary previously, he did so in only one chapter in a lengthy book that focused on interest groups, not courts.[36] It wasn't until the 1960s that major works began to examine interest group involvement with courts.[37] Again, in changing the lens through which the Court was seen, Dahl brought these political questions to judicial scholarship.

It wasn't long after Dahl's Article appeared that Robert G. McCloskey published *The American Supreme Court*.[38] In this book, McCloskey presented an overview of Supreme Court history, from its founding through the 1950s. Like Dahl, McCloskey viewed the Court as a political institution.[39] The Supreme Court has become successful, McCloskey argued, because it "learned to be a political institution and to behave accordingly."[40] He echoed Dahl's argument about the Court being powerless to single-handedly affect the course of national policy, excoriating it for its decisions like *Dred Scott* and those

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33 GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991).

34 Dahl, *supra* note 1, at 292.

35 *Id.* at 293.

36 DAVID B. TRUMAN, THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION 479-98 (1951).

37 *See, e.g.*, CLEMENT E. VOSE, CAUCASIANS ONLY (2d ed. 1967) (examining the litigation strategy of civil rights groups to invalidate restrictive covenants in the transfer of residential property); Nathan Hakman, *Lobbying the Supreme Court—An Appraisal of "Political Science Folklore,"* 35 FORD. L. REV. 15 (1966). In 1974, Marc Galanter published his now classic study, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOCIETY REV. 95 (1974). Twenty-five years later, *Law & Society Review* revisited the issue. Special Issue, *Do the "Haves" Still Come Out Ahead?*, 33 LAW & SOCIETY REV. 803 (1999).

38 ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT (1960).

39 *Id.* at 225.

40 ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 231 (3d ed. 2000) ("MCCLOSKEY THIRD EDITION").

during the 1935-1937 terms when it tried to stop the New Deal.[41] What Dahl had emphasized in a short article, McCloskey ran with in a book.[42]

B. The Relationship Between the Supreme Court and the Other Branches

If the Supreme Court is understood as a political institution, and as a national policymaker, the question naturally arises as to how it relates to other political, policymaking institutions. The conventional and classic view is that the Court is structurally independent from the other branches of the federal government.[43] Indeed, the independence of the judiciary from political control is a hallmark of the American legal system. Institutionally separate and distinct from the other branches of the federal government, the federal judiciary is electorally unaccountable. Federal judges and justices are insulated from the political process through constitutional guarantees of life appointments and salaries that may not be diminished during their terms of office.[44] In theory, this independence, plus the power to hold legislative and executive acts unconstitutional, allows courts to "stand as the ultimate guardians of our fundamental rights."[45] An independent federal judiciary, Chief Justice Rehnquist said in 1996, is "one of the crown jewels of our system of government today."[46]

Dahl did not accept these conventional claims at face value. Rather, he investigated the relationship, asking when, and under what conditions, the Court succeeded or failed against legislative majorities.[47] He found that the Court was not independent from the other branches of the federal government. Rather, he argued:

> [T]he Supreme Court is inevitably a part of the dominant national alliance. As an element in the political leadership of the dominate alliance, the Court of course supports the major policies of the alliance.[48]

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41 *Id.* at 59-64, 113, 117.

42 Like Dahl's Article, *The American Supreme Court*, now forty-one years old, is still going strong. It was re-issued in a second edition in 1994 and a third edition in 2000, which demonstrates its continued importance.

43 *See, e.g.*, THE FEDERALIST NO. 78 (Alexander Hamilton).

44 *See* U.S. CONST. art. III, § 1.

45 Charles A. Horsky, *Law Day: Some Reflections on Current Proposals to Curtail the Supreme Court*, 42 MINN. L. REV. 1105, 1111 (1958).

46 Chief Justice William Rehnquist, Address at American University (Apr. 9, 1996).

47 *See* Dahl, *supra* note 1.

48 *Id.* at 293.

The bulk of Dahl's empirical work supported this argument. First, he found that the Court historically had seldom strayed from the policy wishes of the lawmaking majority, generally failing to protect minorities against majoritarian outcomes.[49] As he noted, by 1957, "[i]n 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."[50] Second, he found that when the Court did stray from the policy wishes of the lawmaking majority, Congress overturned those decisions. In Table 6, he reported that, when the Court invalidated major policy legislation within four years of its enactment, Congress passed new legislation reversing the Court's opinion seventy-four percent of the time.[51] Under the separation of powers doctrine and the Supremacy Clause of the Constitution, the only way for Congress to change a Supreme Court decision invalidating a congressional act on the ground that it violates the Constitution is to amend the Constitution.[52] But, in a stunning rebuke to constitutional lawyers, there is no finding that congressional reversals of Court decisions depend on whether the Court bases its original decision on the Constitution or on statutory interpretation. Dahl suggested, then, that in the face of a determined legislative majority, the Court was both unlikely and unable to go its own way.[53]

A careful social scientist, Dahl qualified this strong claim of judicial dependence by suggesting conditions under which the Court might act independently of the lawmaking majority, for example, when the lawmaking majority was weak or in disarray. The Court, Dahl wrote, 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."[54] This led him to suggest room for the Court to

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[49] *Id.* at 292.

[50] *Id.* It was not until 1965 that the Court first invalidated a congressional act on First Amendment speech grounds. *See* Lamont v. Postmaster Gen., 381 U.S. 301 (1965).

[51] Dahl, *supra* note 1, at 290.

[52] U.S. CONST. art. VI, cl. 2.

[53] *See id.* Dahl refers to the Court's invalidation of congressional attempts to ban child labor in *Hammer v. Dagenhart*, 247 U.S. 251 (1918), and *Bailey v. Drexel Furniture*, 259 U.S. 20 (1922). Calling this the "most effective battle ever waged by the Court against legislative policy-makers," he attributes it to President Wilson's "wasted" appointment of Justice McReynolds who, if he had voted with Wilson's other appointees in *Hammer*, would have provided the fifth vote to uphold the legislation. Dahl, *supra* note 1, at 290. In 1938, Congress again passed legislation banning child labor. This time, the Court upheld it in *United States v. Darby*, 312 U.S. 100 (1941).

[54] Dahl, *supra* note 1, at 286.

succeed in imposing its policies on the polity in times of transition when the "old alliance is disintegrating and the new one is struggling to take control of political institutions."[55] Similarly, when the dominant coalition is:

> [U]nstable with respect to certain key policies . . . the Court can intervene . . . 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 . . . .[56]

This was Dahl's explanation for the "relatively successful work of the Court"[57] in the civil rights arena. Finally, Dahl suggested that the Court was like a "powerful committee chairman in Congress" who cannot successfully oppose the basic policies of the dominant coalition, but who can, "within these limits, often determine important questions of timing, effectiveness, and subordinate policy."[58]

The questions Dahl raised about judicial independence, and the qualifications he suggested, have been taken up by others. For example, McCloskey reached many of the same conclusions as Dahl. McCloskey concluded that the Court followed, rather than stood against, public opinion, noting that it "is hard to find a single historical instance when the Court has stood firm for very long against a really clear wave of public demand."[59] McCloskey also agreed with Dahl that the Court was severely limited and had the greatest likelihood of effectively making policy when it understood those limits.[60] "The Court's greatest successes," McCloskey wrote, "have been achieved when it has operated near the margins rather than in the center of political controversy, when it has nudged and gently tugged the nation, instead of trying to rule it."[61]

Other writers took up different issues. One body of literature examines the role of the Court in times of electoral transition.[62] Another body of literature

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55 *Id.* at 293.

56 *Id.* at 294.

57 *Id.*

58 *Id.*

59 MCCLOSKEY THIRD EDITION, *supra* note 40, at 230; *see also id.* at 14, 132.

60 *Id.* at 234.

61 *Id.*

62 *See, e.g.*, David Adamany, *Law and Society: Legitimacy, Realigning Elections, and the Supreme Court*, 1973 WIS. L. REV. 791; David Adamany, *The Supreme Court's Role in Critical Elections*, *in* REALIGNMENT IN AMERICAN POLITICS 229-59 (Bruce Campbell & Richard Trilling, eds., 1980); Paul Allen Beck, *Critical Elections and the Supreme Court*, 70 AM. POL. SCI. REV. 930 (1976); Bradley Canon & S.

examines attempts by Congress to curb the Court.[63] For example, I explicitly built upon Dahl's work, and identified nine historical periods of intense congressional opposition to Court decisions and examined the Court's reaction. I found that in three periods the Court reversed the decisions that upset Congress, in three periods it ignored congressional ire and continued to decide as before, and in three periods it trimmed its sails somewhat, effectively splitting the opposing coalition. Congressional attacks on the Court varied in effectiveness, depending on the number of opponents and their intensity of feeling, the electoral victory of Court opponents, and their ability to form coalitions.[64] By raising the question of the relation of the other branches to the Supreme Court, Dahl showed that there were theoretically good and empirically interesting questions to be asked and answered.

C. Judicial Selection

Dahl also wrote about the selection of Supreme Court Justices.[65] He viewed their selection as a political process decades before the Robert Bork confirmation battle awakened many others to this view.[66] His argument here was simple. Because the Court was a policymaking institution, presidents sought nominees who favored the president's policy preferences.[67] "Presidents are not famous for appointing justices hostile to their own views on public policy."[68] Dahl thus suggests that, barring mistakes in identifying nominees'

Sidney Ulmer, *A Dissent*, 70 AM. POL. SCI. REV. 1215 (1976); Richard Funston, *Communication*, 70 AM. POL. SCI. REV. 932 (1976); Richard Funston, *Reply*, 70 AM. POL. SCI. REV. 1218 (1976); Richard Funston, *The Supreme Court and Critical Elections*, 69 AM. POL. SCI. REV. 795 (1975).

[63] *See, e.g.*, WALTER F. MURPHY, CONGRESS AND THE COURT: A CASE STUDY IN THE AMERICAN POLITICAL PROCESS (1962); C. HERMAN PRITCHETT, CONGRESS VERSUS THE SUPREME COURT (1961); JOHN R. SCHMIDHASUER & LARRY L. BERG, THE SUPREME COURT AND CONGRESS; CONFLICT AND INTERACTION, 1945-1968 (1972); Roger Handberg & Harold F. Hill, Jr., *Court Curbing, Court Reversals, and Judicial Review: The Supreme Court Versus Congress*, 14 LAW & SOC'Y REV. 309 (1980).

[64] Gerald N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 REV. POL. 369 (1992).

[65] Dahl, *supra* note 1, at 289.

[66] In 1987, President Reagan nominated Judge Robert Bork to replace retiring U.S. Supreme Court Justice Lewis Powell. Seen as an outspoken conservative by many, women's groups and civil rights groups quickly mobilized to fight the nomination. Soon they were joined by a host of environmental, health, labor, and consumer groups, ranging from Common Cause and the Sierra Club to Planned Parenthood and the National Mental Health Association. The confirmation battle made use of modern political campaign tools including polling, television ads, and mass mailings. After lengthy and acrimonious confirmation hearings, the Senate voted down the nomination by a vote of 58-42. *See* ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA (1989).

[67] Dahl, *supra* note 1, at 284.

[68] *Id.*

policy preferences, the views of the President on the key issues of the day would be reflected on the Supreme Court. But unlike so many current pundits, Dahl celebrated the political nature of the selection process. "[I]f justices were appointed primarily for their 'judicial' qualities without regard to their basic attitudes on fundamental questions of public policy," Dahl wrote, "the Court could not play the influential role in the American political system that it does in reality play."[69]

It was in large part because of the political nature of the appointment process that Dahl believed that the Court was part of the dominant political coalition. To test this, Dahl examined the average length of time between appointments. He found that, on average, one new Justice was appointed every twenty-two months.[70] Thus, a new President, on average, would have two Court appointments in his first term, and four over two terms. This number of appointments, Dahl reasoned, should be enough to create a Court majority congenial to the policy aims of the President. Consequently, the Court was likely to be part of the dominant political coalition simply because a majority of its members were appointed by that coalition. As Dahl put it, "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."[71]

D. The Political Nature of Judicial Decisionmaking

How do courts reach decisions? The conventional view in the 1950s, and today, is simple and straightforward: judges read the legal texts in question, apply precedent, reason by analogy, and reach a decision that, if not compelled by this legal method, is strongly indicated by it. Based on this view, research into judicial decisionmaking involves purely legal analysis. Dahl, however, took another view. Decisionmaking by the Court, he argued, was political as well as legal. First, it was political because the Court was a policymaker weighing different policy alternatives. Second, and importantly, decision-making by the Supreme Court was political because of the indeterminancy of legal sources. There were cases, he wrote, in which "strictly legal criteria are

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[69] *Id.* at 285.

[70] *Id.* at 284.

[71] *Id.* at 285. The numbers have changed somewhat since Dahl wrote. From 1957, when Dahl wrote, to the present, eighteen Justices have been appointed (Whittaker through Breyer). This works out to one new Justice every thirty months. Thus, a one-term president should be able to make one or two appointments, while a two-term president should have three or more.

inadequate."[72] He expanded this point, noting that "[v]ery often" there are cases in which

> [C]ompetent 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.[73]

This is a problem, Dahl suggests, to those who insist on viewing the Court as only a legal institution:

> 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 form their own predispositions or those of influential clienteles and constituents.[74]

Viewing the Court as a political institution, Dahl argued that judicial decision-making was influenced by nonlegal factors. In reaching decisions, the Court, Dahl concluded, "cannot act strictly as a legal institution." The Justices "must . . . 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."[75]

Dahl's view of judicial decisionmaking as value-driven was more than three decades ahead of its time. In the late 1980s and early 1990s, a flurry of political science writing on judicial decision-making emerged that came to be called the "attitudinal model."[76] Proponents of this model argued that in deciding cases judges select outcomes that are closest to their preferred policy preferences and then make use of precedent and legal reasoning to justify them.[77] Based on this view, the legal method is simply a smokescreen for disguising the policy preferences of judges. While Dahl did not do any of this work, he set forth its basic assumptions.

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[72] *Id.* at 281.

[73] *Id.* at 280.

[74] *Id.*

[75] *Id.* at 281.

[76] *See* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993); Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989); Jeffrey A. Segal et al., *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 57 J. POL. 812 (1995). For an argument that judges must act strategically rather than vote their sincere policy preferences, see LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998).

[77] *Id.*

E. Legitimacy and the Symbolic Meaning of Supreme Court Action

The Supreme Court, in Dahl's opinion, was best understood as a political institution that was part of the dominant national alliance. Moreover, it had limited powers and was more akin to a powerful congressional committee chair than a co-equal branch of government. But it did have some power. The source of that power, Dahl suggested, was the "unique legitimacy attributed to its interpretations of the Constitution."[78] The Court could jeopardize its legitimacy, however, "if it flagrantly opposes the major policies of the dominant alliance," a course, Dahl argued, it was unlikely to follow.[79] Its "main task," Dahl argued, was "to confer legitimacy on the fundamental policies of the successful coalition."[80]

This was a striking claim for both normative and empirical reasons. Normatively, one of the strongest defenses for allowing a non-electorally accountable Court to invalidate the acts of democratically accountable branches is that the Court acts on constitutional principle, not partisan preference.[81] Its decisions, on this claim, carry a heightened sense of legitimacy when compared to the decisions of the elected branches because they are mandated by the Constitution. Thus, Dahl focused on an issue of fundamental importance for assessing the role of the Court. But the claim was also striking because, unlike for any other claim in the Article, Dahl did not provide even a shred of evidence for it. Further, it appears to contradict his primary claim that the Court is a political institution, part of the dominant political alliance.

The question of the Court's legitimacy has continued to attract scholarly attention. The evidence, although not decisive, does not support Dahl's claims. If the Court has a heightened legitimacy then one might expect its decisions to be implemented smoothly. One need only note that at least some controversial Supreme Court decisions, such as *Brown* and *Roe v. Wade* were and are opposed by large segments of the population and were and are unevenly implemented. Similarly, if the Court has a heightened legitimacy, one might expect it to be able to change people's opinions as the Court informs them of what the Constitution requires. Here, too, there is not much evidence that

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[78] Dahl, *supra* note 1, at 293.

[79] *Id.*

[80] *Id.* at 294.

[81] *See, e.g.*, Owen M. Fiss, *The Supreme Court, 1978 Term—Forward: The Forms of Justice*, 93 HARV. L. REV. 1, 12-13 (1979).

Court decisions on controversial issues change many minds.[82] In fact, evidence suggests that Americans' view of the Court is driven by their substantive agreement with its decisions.[83]

The positive relationship often asserted between Court decisions and legitimacy depends on a level of public knowledge about the Court that may be missing. That is, for the public to grant legitimacy to Court decisions, the public has to both believe that the Court is a proper, impartial, and competent interpreter of the Constitution and know about its decisions. While this does not seem an onerous responsibility, surveys have consistently shown that only about forty percent of the American public, at best, follows Supreme Court actions, as measured by survey respondents having either read or heard something about the Court. In 1966, for example, despite important Supreme Court decisions on race, religion, criminal justice, and voting rights, fifty-four percent of a nationwide sample could not recall any recent Court decisions.[84] More recently, in April 1975, the Gallup Organization asked two questions on knowledge of the Supreme Court's abortion decisions. Although the questions were asked only about two years after the decisions, Judith Blake found that "less than half of American adult respondents were informed about the 1973 decisions."[85] By 1982, almost a decade after the decisions, little had changed. When a national sample was asked whether there was a Supreme Court decision forbidding or permitting a woman to obtain an abortion during the first three months of pregnancy, fifty-nine percent of the respondents replied "no" or "don't know."[86] The lack of knowledge about even landmark Supreme Court decisions like *Roe v. Wade*[87] makes claims about the Court's heightened legitimacy problematic.

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82 *See* Gerald N. Rosenberg, *The Irrelevant Court: The Supreme Court's Inability to Influence Popular Beliefs About Equality (or Anything Else)*, *in* REDEFINING EQUALITY 172-190 (Neal Devins and Dave Douglas eds., 1998).

83 *See* WALTER F. MURPHY ET AL., PUBLIC EVALUATIONS OF CONSTITUTIONAL COURTS: ALTERNATIVE EXPLANATIONS (1973); *cf.* Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635 (1992). It is too early to say anything definitive about the public's reaction to *Bush v. Gore*, 531 U.S. 98 (2000). However, a December 2000 Gallup Poll showed a sharp, forty percent increase in the percentage of Republican identifiers responding that they have "A Great Deal" or "Quite a Lot" of confidence in the Supreme Court, and a drop in the percentage of Democratic identifiers similarly responding. Gallup Organization, *Opinion of U.S. Supreme Court Has Become More Politicized* (Jan. 3, 2001), *available at* http://www.gallup.com/poll/releases/pr010103b.asp.

84 MURPHY ET AL., *supra* note 83, at 53.

85 Judith Blake, *The Supreme Court's Abortion Decisions and Public Opinion in the United States*, 3 POP. & DEV. REV. 45, 57-59 (1977).

86 *Americans Evaluate the Court System*, PUB. OP., Aug./Sept. 1982, at 24, 25.

87 410 U.S. 113 (1973).

Finally, the claim of heightened legitimacy rests on the public believing that the Court is a proper, impartial, and competent interpreter of the Constitution. On this score, the evidence is not helpful. In 1968, Murphy and Tanenhaus found that only 12.8% of the American public was aware of even major Court decisions, accepted constitutional interpretation as a proper role for the Court, and regarded the Court as carrying out its responsibilities in an impartial and competent manner.[88]

The point, however, is not so much whether Dahl's claims about the Court's legitimacy were correct. Rather, by raising the issue Dahl reminded readers of its importance.

IV. CLOSING COMMENTS

In the preceding pages I have tried to convey a sense of why *Decision-Making in a Democracy* has been such an influential piece of scholarship. I credit its success to three main factors: its asking questions of fundamental importance to the study of the Supreme Court; its careful, well thought-out, empirical methodology presented in an exceedingly well-written way; and its raising a host of questions that subsequent scholars have addressed. In these ways, Dahl showed us the road to take in examining the role of the Supreme Court in the American polity.

Throughout his career, Dahl also showed those who knew him an additional road to take. In honoring Dahl's Article, we celebrate not only an extraordinary piece of scholarship, but also an extraordinary scholar and person. Nice guys, Leo Durocher once reputedly said, finish last. Dahl proves him wrong. I had the privilege of taking a graduate seminar from Dahl, serving as one of his teaching assistants, and working with him on the early stages of my dissertation. Dahl was revered by Yale graduate students who knew him not only for his scholarship (which this edition of the *Emory Law Journal* celebrates), but also for his gentleness, his humility, and his decency. For many Yale graduate students, Dahl was important not merely as a scholar, but also as a model of the kind of professor we all wanted to be.

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[88] Walter F. Murphy & Joseph Tanenhaus, *Public Opinion and the Supreme Court: A Preliminary Mapping of Some Prerequisites for Court Legitimation of Regime Change*, 2 LAW & SOC'Y REV. 357, 359, 377-78 (1968); *see also* Adamany, *Law and Society*, *supra* note 62, at 807 (arguing for the "Court's incapacity to legitimize governmental action").

Toward the end of the Article, Dahl writes: "By itself, the Court is almost powerless to affect the course of national policy."[89] I'm fairly sure that he is correct in this claim. Even so, Robert Dahl not only powerfully affected the careers of several generations of Yale graduate students, but also the course of research and commentary by future judicial scholars.

[89] Dahl, *supra* note 1, at 293.