The Supreme Court
In and Of the Stream of Power

Edited with introductions by

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Series Introduction

The inscription carved above the entrance to the Supreme Court of the United States is elegant in its brevity and powerful in its directness: "Equal Justice Under Law." No other words have been more regularly connected to the work of the nation's most important judicial tribunal. Because the Court is the highest tribunal for all cases and controversies arising under the Constitution, laws, and treaties of the United States, it functions as the preeminent guardian and interpreter of the nation's basic law. There was nothing, of course, in the early history of the Court that guaranteed that it would do just that. The justices in their first decade of operation disposed of only a handful of cases. During the subsequent two centuries, however, the Court's influence mushroomed as it became not only the authoritative interpreter of the Constitution but the most important institution in defining separation of powers, federalism, and the rule of law, concepts at the heart of the American constitutional order.

Chief Justice Charles Evans Hughes once declared that the Court is "distinctly American in concept and function." Few other courts in the world have the same scope of power to interpret their national constitutions; none has done so for anything approaching the more than two centuries the Court has been hearing and deciding cases. During its history, moreover, the story of the Court has been more than the sum of either the cases it has decided or the justices that have decided them. Its story has been that of the country as a whole, in war and peace, in prosperity and depression, in harmony and discord. As Alexis de Tocqueville observed in *Democracy in America*, "I am unaware that any nation on the globe has hitherto organized a judicial power in the same manner as the Americans. . . . A more imposing judicial power was never constituted by any people." That power, as Tocqueville well understood, has given the justices a unique role in American life, one that combines elements of law and politics. "Scarcely any political question," Tocqueville wrote, "arises in the United States that is not revolved, sooner or later, into a judicial question." Through the decisions of the Supreme Court, law has become an extension of political discourse and, to that end, the rule of law itself has been embellished. We appropriately think of the high court as a legal institution, but it is, in truth, a hybrid in which matters of economics, cultural values, social change, and political interests converge to produce what we call our constitutional law. The Court, as a legal entity, speaks through the law but its decisions are shaped by and at the same time shape the social order of which it is part. All of

which is to say that, in the end, the high court is a human institution, a place where justices make decisions by applying precedent, logic, empathy, and a respect for the Constitution as informed by the principle of "Equal Justice Under Law." That the Court has at times, such as the struggle over slavery in the 1850s, not fully grasped all of the implications of those words does not, in the end, diminish the importance of the Court. Instead, it reminds us that no other institution in American life takes as its goal such a lofty aspiration. Given the assumptions of our constitutional system, that there is something like justice and freedom for all, the Court's operation is unthinkable without having the concept of the rule of law embedded in it.

As these volumes attest, interest in the Court as a legal, political, and cultural entity has been prodigious. No other court in the American federal system has drawn anything approaching the scholarly attention showered on the so-called "Marble Palace" in Washington, D.C. As the volumes in this series make clear, that scholarship has divided into several categories. Biographers, for example, have plumbed the depths of the judicial mind and personality; students of small group behavior have attempted to explain the dynamics of how the justices make decisions; and scholars of the selection process have tried to understand whether the way in which a justice reaches the Court has anything to do with what he or she does once on the Court. Historians have lavished particular attention on the Court, using its history as a mirror of the tensions that have beset American society at any one time, while simultaneously viewing the Court as a great stabilizing force in American life. Scholars from other disciplines, such as political science and law, have viewed the Court as an engine of constitutional law, the principal agent through which constitutional change has been mediated in the American system, and the authoritative voice on what is constitutional and, thereby, both legally and politically acceptable. Hence, these volumes also address basic issues in the American constitutional system, such as separation of powers, federalism, individual expression, civil rights and liberties, the protection of property rights, and the development of the concept of equality. The last of these, as many of the readings show, has frequently posed the most difficult challenge for the Court, since concepts of liberty and equality, while seemingly reinforcing, have often, as in the debate over gender relations, turned out to be contradictory, even puzzling at times.

These volumes also remind us that substantial differences continue to exist, as they have since the beginning of the nation, about how to interpret the original constitutional debates in the summer of 1787 in Philadelphia and the subsequent discussions surrounding the adoption of the Bill of Rights, the Civil War amendments, and Progressive-era constitutional reforms. Since its inception, the question has always been whether the Court , in view of the changing understandings among Americans about equality and liberty, has an obligation to ensure that its decisions resonate with yesterday, today, tomorrow, or all three.

Volume Introduction

The articles in this volume detail the development of the Supreme Court from its origins in the Philadelphia Convention of 1787 through the present. The essays are a blend of traditional historical analysis and biography, since the latter has emerged as a distinctive form of analysis of the high court. In an institution as small as the Supreme Court, the roles of individual justices have been significant. The names of John Marshall, Roger B. Taney, Oliver Wendell Holmes, Jr., Benjamin N. Cardozo, Felix Frankfurter, and Earl Warren march across the pages of the Court's history and that of the nation as a whole. These essays were selected for inclusion because they connect the history of the Court, the lives of its justices, and the history of the nation. They also, however, address the evolution of the high court as a whole, from its modest beginnings in the 1790s to its critical role in our own time. One of the most important features of the Court, as an institution, has been the capacity of its justices to grow, learn, and develop as new constitutional controversies pass before them. The most gifted leaders of the Court, whether as chief justices or associate justices, understood that the decisions they made had great consequences not only for the nation but for the Court as an institution. At times, as in the fabled *Dred Scott* decision of 1857, they seem to have misapprehended the powers entrusted to them; at other times, as in the great decisions of the Court affirming the New Deal in the late 1930s, they understood that by limiting the scope of their action they could actually increase their influence over American life. These essays, therefore, are as much about the history of the nation as about the Court, but they prove that the one has been inseparable from the other.

Several of the essays also treat the Court as a maker and interpreter of history. One of the distinguishing characteristics of America's precedent-based system of constitutional law is its frequent recurrence to history as a way of explaining its actions. The Court, as it turns out, has the unique power to define officially what that past means, making history often as not a hostage of the justices.

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LAW AND SOCIETY

LEGITIMACY, REALIGNING ELECTIONS, AND THE SUPREME COURT†

DAVID ADAMANY*

I. SYMBOLISM AND REALISM

The "legitimacy" of the Supreme Court and of its decisions, as invoked recently in the on-going debate about judicial review, is a wayward child of Realist paternity. Jerome Frank perceived in men "a subjective need for believing in a stable, approximately unalterable legal world,"[1] which caused them to identify an "unrealizable permanence and fixity in law."[2] Thurman Arnold, too, understood that "Law is primarily a great reservoir of emotionally important social symbols"[3] which represents for mass publics and rulers alike "the belief that there must be something behind and above government without which it cannot have permanence or respect."[4]

Such thinking has special appeal in constitutional law. Describing the Constitution as both instrument and symbol, Edward S. Corwin suggested that constitutional symbolism "harks back to primitive man's terror of a chaotic universe, and his struggle toward security and significance behind a slowly erected barrier of custom, magic, fetish, tabu [*sic*]."[5] It serves, in short, as a symbol of certainty and allegiance for the mass public, as "an object of popular worship."[6] Karl Llewellyn detected a similar wellspring of American belief in a fixed Constitution: It affords a "comforting sense of solid permanence, of an *unchanging* foundation from which to face a changing, unreckonable world."[7]

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1. J. FRANK, LAW AND THE MODERN MIND 35 (1930).
2. *Id.* at 10.
3. T. ARNOLD, THE SYMBOLS OF GOVERNMENT 34 (1962).
4. *Id.* at 44.
5. Corwin, *The Constitution As Instrument And As Symbol*, 30 AM. POL. SCI. REV. 1072 (1936).
6. *Id.* at 1082.
7. Llewellyn, *The Constitution As An Institution*, 34 COLUM. L. REV. 1, 5 (1934).

American reverence for the Constitution is not, however, rooted solely in the psychic need for symbols of certainty. The language of the Constitution adds to the image of fixity; in many provisions explicit words describe highly salient aspects of the government as it exists today. We have in fact a Congress of two houses, a Senate with two members from each state, a President who possesses the power to veto legislation, terms of executive and congressional office fixed in the document, to cite but a few examples. These explicit provisions tend to obscure the incertitude that pervades most of the power-granting and power-restraining passages, and thus to reenforce the aura of certainty that enfolds the covenant.

The way to Constitution worship was further smoothed by "the fact that the new government was ratified on the ascending arc of a period of prosperity," which was readily attributed to the Constitution, heightening the popular approval which would be passed down to generations yet unconceived.[8] As soon as politicians recognized the Constitution's popularity, they began summoning it for every purpose. All favored the Constitution and all found in its words, intentions, purposes, or spirit support for their policies. Such unity in its praise transformed popular support into mass adoration.[9]

Adoration of the Constitution soon became adoration of its guardians, the Justices, despite lingering doubts about the constitutional source of their self-proclaimed power of judicial review. The unshakeable faith that law has a clear, fixed meaning, that legal "rules decide cases,"[10] and that the judiciary is merely a "mouthpiece of a self-interpreting, self-enforcing law,"[11] merges Supreme Court with Constitution in the minds not only of the public, but of many judges and lawyers as well.[12]

The prevalence of this "phonographic theory" of constitutional adjudication has been encouraged by the justices themselves, although most clearly knew better. The Court's relentless self-identification with the Constitution reached its pinnacle in Justice Roberts' now notorious dictum in *United States v. Butler*.[13]

> When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty,—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.[14]

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8. Lerner, *Constitution and Court as Symbols*, 46 YALE L. J. 1291, 1296-97 (1937).
9. *Id.* at 1297-98.
10. Llewellyn, *supra* note 7, at 6-7.
11. Corwin, *supra* note 5, at 1080.
12. Llewellyn, *supra* note 7, at 7. Also J. FRANK, *supra* note 1, chap. 3-4, especially at 31, 37.
13. 297 U.S. 1 (1935).
14. *Id.* at 62.

The power of judicial review has been justified "by the fiction that the Court is merely requiring other agencies of government to subordinate themselves to a self-evident Constitution which, in some miraculous way, coincides, at the particular moment of the decision, with the judicial version of it."[15]

The concept of judicial neutrality strengthens further the joining of Constitution and Court.[16] Because they are appointed and since they eschewed partisan stumping after the nearly successful removal in 1805 of Justice Samuel Chase,[17] justices avoid the stigma of partisanship that inheres in campaigning for office. The eminence of the judicial tradition has also magnified the greatness and "neutrality" of the Court.[18] Some justices have been truly outstanding statesmen, and even the lesser ones often have risen to distinction, for "there seems to be something about the judicial robes that not only hypnotizes the beholder but transforms the wearer."[19] And while many of the greatest justices were also among the least detached, the reflection cast in the public arena has been of enormously able men deeply devoted to their public trust, namely to the guardianship of the Constitution.

Finally, there is what Richard M. Johnson has called the "dramaturgy" of the Court[20]—the majesty of its courtroom; the black robes of the justices; the ritual of its proceedings at oral argument and on decision day; the secrecy and isolation of its decisionmaking conferences; the formal opinions invoking the symbols of Constitution, precedent, and Framers' intent; and all the other elements of setting and conduct that distinguish the Supreme Court, a body of constitutional guardians, from all other officials whose actions they may find wanting when tested against the national covenant.

II. NEW USES FOR AN OLD MYTH

The symbolic quality of the Constitution and the Supreme Court has, it will be correctly said, long ago become a commonplace in the literature of law and political science. But the hands of creative scholars have recently bent it to new purposes. Jerome Frank and Thurman Arnold intended to strip away the mystery of law so that people might govern themselves free of its irrational appeals. Edward S. Corwin and Max Lerner exposed and dispelled the myth of Constitution and Court to open the way for the New Deal vehicle of popular, as opposed to judicial, will. Karl Llewellyn wanted "an intelligent reconstruction of our constitutional law

15. Mason, *Myth and Reality In Supreme Court Decisions*, 48 VA. L. REV. 1385, 1388 (1962).
16. Lerner, *supra* note 8, at 1311-12.
17. Lillich, *The Chase Impeachment*, 4 AM. J. LEGAL HIST. 49-51, 71 (1960).
18. Lerner, *supra* note 8, at 1311-12.
19. *Id.* at 1312 n.60.
20. R. JOHNSON, THE DYNAMICS OF COMPLIANCE 33-41 (1967).

theory"[21] around the view that the Constitution was an operating contemporary institution, subject to popular controls. And Alpheus T. Mason's pleas were for open criticism and debate of the merit of judge-made policy rather than awe-stricken acceptance of judicial decisions.

The unmasking of judicial power—so ardently sought by these friends of popular policymaking—has for Robert A. Dahl and Charles L. Black, Jr. revealed an entirely new justification for judicial review. Dahl, in an essay very widely read in undergraduate political science courses,[22] concedes that the Supreme Court is a national policymaker; dismisses on grounds of both logic and history the claim that the Court is a "democratic" vehicle for safeguarding minority rights; finds that virtually all "important" congressional policies struck down by the Court within four years of enactment, and thus presumably while the sponsoring lawmaking majority was still intact, subsequently are vindicated by further congressional action or judicial reversal; ascribes this mainly to the President's appointment power, noting that on the average a new justice is appointed every 22 months; and concludes finally that "the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States."[23]

This line of reasoning is not entirely free from difficulty, however. If judicial review cannot be theoretically squared with democracy and if the Court is defended mainly because it quickly harmonizes its policies with the preferences of lawmaking majorities, then why have judicial review at all? The American polity would be different without judicial review only to the extent that lawmaking majorities would never, as happens now, be delayed or, in a handful of cases, obstructed in effecting major policies.

Dahl responds in several directions. "National politics in the United States, . . ." he says, "is dominated by relatively cohesive alliances that endure for long periods of time."[24] The Supreme Court could not, except in rare cases, sustain policies at odds with those of the dominant coalition. It might, however, occasionally take policy initiatives when the coalition is so unstable on key issues that no lawmaking majority can be assembled for any policy option, but when there is adequate support to sustain the Court's decision against attempts to override it.[25] Why judicial enactment of policies which cannot garner a lawmaking majority is appropriate in a democracy remains unanswered. Even where the conflict over policy is a struggle only among minorities, a situa-

21. Llewellyn, *supra* note 7, at 3.
22. Dahl, *Decision-Making In A Democracy: The Supreme Court As A National Policy-Maker*, 6 J. PUB. L. 279 (1957).
23. *Id.* at 285.
24. *Id.* at 293.
25. *Id.* at 294.

tion Dahl suggests is typical,[26] Supreme Court policymaking cannot be viewed as democratic, for it neither advances majority aspirations nor necessarily promotes the position of the most numerous minority.

The Supreme Court, Dahl goes on to say, "is an essential part of the political leadership and possesses some bases of power of its own, the most important of which is the unique legitimacy attributed to its interpretations of the Constitution."[27] It is this special legitimacy that defines the Court's role as a national decisionmaker. "The main task of the Court is to confer legitimacy on the fundamental policies of the successful coalition."[28] It does this, presumably, by declaring presidential and congressional actions constitutional.

But the Court's role does not stop there.

> Considered as a political system, democracy is a set of basic procedures for arriving at decisions. The operation of these procedures presupposes the existence of certain rights, obligations, liberties and restraints; in short, certain patterns of behavior. The existence of these patterns of behavior in turn presupposes widespread agreement (particularly among the politically active and influential segments of the population) on the validity and propriety of the behavior. Although its record is by no means lacking in serious blemishes, at its best the Court operates to confer legitimacy, not simply on the particular and parochial policies of the dominant political alliance, but upon the basic patterns of behavior required for the operation of a democracy.[29]

This additional justification is awkward at best. If its purpose is to reassert the Court's role as a defender of minorities or an agent of external standards of justice, then there is a contradiction with Dahl's earlier concession that "no amount of tampering with democratic theory can conceal the fact that a system in which policy preferences of minorities prevail over majorities is at odds with the traditional criteria for distinguishing a democracy from other political systems."[30]

Furthermore, Dahl's own analysis of judicial vetoes of congressional legislation does not support the proposition that the Supreme Court legitimizes basic rights. He identifies 23 major congressional policies which were overruled by the Court within four years of enactment. In six instances Congress either acquiesced

26. *Id.* at 281.
27. *Id.* at 293.
28. *Id.* at 294.
29. *Id.* at 294-95.
30. *Id.* at 283.

in the decision or made some ambiguous response. Only two of these, involving the rights of former Confederates, can be described, even by the most generous measure, as judicial protection of individual rights.[31] In the remaining four cases and in the 17 other decisions, which Congress reversed, the Court typically cast its lot with privileged interests against disadvantaged groups. It voided the New Deal, vetoed the progressive income tax, blocked child labor legislation, and denied workmen's compensation for longshoremen and harbor workers.[32]

But what of congressional enactments struck down by the Court more than four years after enactment? Do these portray a different judicial role—one of commitment to civil liberties in the long term? Dahl found that in fewer than ten of 40 instances did the Court void legislative action in protection of the Bill of Rights; and "it is doubtful that the fundamental conditions of liberty in this country have been altered by more than a hair's breadth as a result of the decisions."[33] There were, on the other hand,

> fifteen or so cases in which the Court used the protections of the Fifth, Thirteenth, Fourteenth and Fifteenth Amendments to preserve the rights and liberties of a relatively privileged group at the expense of the rights and liberties of a submerged group; chiefly slaveholders at the expense of slaves, white people at the expense of colored people, and property holders at the expense of wage earners. These cases, unlike the relatively innocuous ones of the preceding set, all involved liberties of genuinely fundamental importance, where an opposite policy would have meant thoroughly basic shifts in the distribution of rights, liberties, and opportunities in the United States—where, moreover, the policies sustained by the Court's action have since been repudiated in every civilized nation of the Western world, including our own.[34]

Dahl's survey, made in 1958, does not take into account the Court's recent role as a defender of disadvantaged minorities. But the minority-rights activism of the Warren Court is already fading; that one 15 year period will not counterbalance the whole of the Court's historical record recited by Dahl; and even in this modern role, judicial review will still not square with democratic theory as Dahl postulates it.

It is difficult to know, then, what Dahl means when he defends the Court as a legitimator of rights, liberties, restraints, and obligations which are fundamental to a democracy. These issues come to the Court's attention in only two situations. First, the

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31. Ex parte Garland, 71 U.S. (4 Wall.) 333 (1867); United States v. Klein, 80 U.S. (13 Wall.) 128 (1872).
32. Dahl, *supra* note 22, at 287, 289-90.
33. *Id.* at 292.
34. *Id.* at 292-93.

lawmaking majority expands such rights by legislation (for example, the Voting Rights Act of 1965), in which case the Court's approval is indistinguishable from its usual legitimization of legislation and its disapproval, as Dahl himself concedes, has been substantially damaging to the cause of liberty throughout history. Second, minorities may seek judicial protection from legislation which trammels rights but "legitimization" of rights, liberties, restraints, and obligations in such instances means striking down legislation to protect freedom, which Dahl concedes is not justified by democratc theory and which has not been the Court's usual conduct in history.

Thus, neither Dahl's assertion that the Court may exercise leadership in an unstable coalition nor his admonition that the justices legitimize rights or liberties will square with his own definition of democracy and his own rendering of the Court's historical use of the power of judicial review. All that remains is Dahl's bare assertion that the Supreme Court's special role in American democracy is freighting majority policies with the special legitimacy it derives from the public reverence for its guardianship of the Constitution. Thus does the much assailed myth of Constitution and Court become the handmaiden of majority rule.

Charles L. Black, Jr., too, argues that the symbolic aspect of judicial power supports democratic government by legitimizing the deeds of the popular branches, or at least their authority to do such deeds.[35] The Constitution empowers government to act, but it also creates special difficulties because it establishes a "government squarely based on the theory of limitation."[36] The constitutional words granting powers to the national government and those imposing limits on its power are often general, and therefore unclear in their application to particular situations.

Conflicts arise between those who adopt one reading of constitutional powers and limitations and those who advance a different reading. These conflicts, entirely in good faith, challenge not merely the merits of particular actions of government but its authority to act. Inherent in these clashes arising from a scheme of limited government is a threat to the legitimacy of governmental actions, for some segment of the population invariably perceives them as unauthorized by the basic arrangements of the polity.

A government of limited powers is compelled, therefore, to "devise some way of bringing about a feeling in the nation that the actions of government, even when disapproved of, are authorized rather than merely usurpative."[37] Congress and the President can scarcely be allowed to have the final say concerning the constitutional definition of their own powers, for this would be contrary to

35. C. BLACK, THE PEOPLE AND THE COURT Ch. 3 (1960).
36. *Id.* at 39.
37. *Id.* at 47.

the theory of limited government. Nor would an "appeal to reason" be sufficient. The constitutional words are vague; and there is no single "reasonable" view of the document's intention or meaning upon which men of good will must necessarily agree.[38]

There remains, then, the creation of a consensus "on a procedure for submitting [constitutional questions] for decision to an acceptable tribunal."[39] Such a tribunal must be part of the national government, for the central government cannot surrender the definition of its powers to private persons or to bodies rooted in less than the whole nation. "The problem, then, is to devise such governmental means of deciding as will (hopefully) reduce to a tolerable minimum the intensity of the objection that government is judge in its own cause."[40] Such an institution should, to a satisfactory degree, be independent of the policymaking branches; it should be a specialist in tradition and precedent; and it should be a plural body to reduce the risk of idiosyncratic judgments by a single man and to insure continuity of its work.[41] Hence, in America, the Supreme Court.

The Court's central legitimizing function occurs when it validates actions of the popular branches, but validation can only be meaningful if the justices possess the power to strike down acts of the elected branches and show on some occasions their willingness and ability to use that power. The credibility of judicial declarations that governmental actions are constitutional would be impaired if all actions were, either by the necessity of constitutional arrangements or merely in practice, so validated,[42] for "[i]f everybody gets a Buck Rogers badge, a Buck Rogers badge imports no distinction."[43]

This line of reasoning, though somewhat more intricate, still rests on the same cornerstone as its predecessors: The myth of Constitution and Court. The public is required to believe that the words of the Constitution have implicit in them some clear limits on popular government, that rules do decide cases. If they do not believe this, if they view the judges as having a free hand in shaping constitutional decisions, the image of limited government is exploded, for the judges have the same unlimited authority that would be objectionable if vested in the elected branches.

Furthermore, the independence of the justices and the insistence that the umpire concern itself with precedent are similar to the orthodox phonographic theory of constitutional adjudication. Sheltered from "politics," judges will supposedly give impartial

38. *Id.* at 47-48.
39. *Id.* at 48.
40. *Id.* at 49.
41. *Id.* at 49-50.
42. *Id.* at 53.
43. *Id.*

judgments based on the Constitution's words as explicated in past cases. The people must believe that these independent judges, respectful of precedent and tradition, engage in no act of will, no policymaking, but rather in applying the grants and limitations "found" in the Constitution.

Yet Realism teaches that in a good many instances judges make policy willingly and self-consciously. Their judgments on the validity of substantive policies and their determinations that decisions lie properly in the realm of the President or of Congress or of the States, and thus in the hands of officials responsive to one constituency rather than another, are in fact discretionary choices. Insulation does not snuff out their own strongly held values. Nor does precedent impede their will: There usually are past decisions to support every position; and where there are not, judges can overrule or distinguish the embarrassing cases.

Black requires the public to believe what most officials do not believe: That insulation means neutrality, that constitutional words and precedents bind judges, that tradition marks unambiguous guideposts for decision. And the measure of official disbelief is the manner of judicial appointment. Justices are selected mainly for reasons of party and ideology, very often in anticipation of specific views they hold.[44] Indeed, Black himself urges the propriety of ideological considerations in senatorial review of presidential nominations to the Court.[45] Therein lies the contradiction: The public must believe that judges are neutral and impartial arbiters of the Constitution, for the legitimizing function which justifies judicial review rests on such popular perceptions; officials, on the other hand, ought to understand and act upon the reality that judges are policymakers whose preexisting values and beliefs are reliable percursors of how they will decide constitutional questions.

Would the people accept the theory of judicial guardianship of limited government if they did not believe these myths about insulation, neutrality, precedent, tradition, clear constitutional words, and judicial impartiality? It seems doubtful. The Supreme Court's legitimization of policy, its assurance to the people—especially those who dissent from the substance of decisions—that such actions are indeed authorized, rests, at last, on popular belief in those same illusions about Constitution and Court which, in the view of Realist writers, constrict the people's ability to grasp control of their own destiny. Black's argument exalts the fact of popular belief in those myths.

The path of Supreme Court legitimacy took still another twist

44. The most prominent factors in presidential nominations of justices are reviewed in H. ABRAHAM, THE JUDICIAL PROCESS 50-75 (2d ed. 1968).

45. Black, *A Note On Senatorial Consideration Of Supreme Court Nominees*, 79 YALE L. J. 657 (1970).