Chapter 1 – The Institution of the Court

What holds together the great and famous cases in the history of the U.S. Supreme Court? Over the more than two hundred years, the justices have changed ideological fronts more than once, sometimes radically. In their turn, present legal scholars have endeavored to fit these changes together into an ideological evolution, explained as progress, what has been called a march of liberty. But another side of the cases forces a way upon the mind, and most prominently, two observations intrude: First, over this same history, the Court has repeatedly differed with and overruled Congress: and second, the Court has as repeatedly re-interpreted so as to increase its own power. None of the expressed ideologies appear to account for these repeated occurrences, which when fit together occur so regularly as to suggest a course attracted by influences left so far not explained.

*The constant conflicts with Congress* – The crucial significance of the Court’s constant conflicts with Congress leaps out looking back at the example of Reconstruction. During that tragic era, Congress enacted three great Reconstruction Amendments (the 13th, 14th, and 15th Amendments), which guaranteed the freedmen the franchise and their other civil rights, as well as the Civil Rights Act of 1875, which prohibited segregation. But the Court will shortly interpret away the intent of this massive legislative effort, making the promises a dead letter on the face of the Constitution. Then with Plessy v Ferguson (1896), the Court interprets into the Constitution the legal doctrine of “separate but equal,” opening the way for legal segregation. In effect, the Court replaced the congressional program for Reconstruction with a judicial program. Rather than equal rights, the freedmen end up with segregation.

The currently dominant explanation blames “racism,” a mistaken and evil ideology, seen as gripping the whole nation, not just the Court. Yet that explanation forgets the facts and so misses the point. Congress proposed and the people ratified the Reconstruction Amendments, and Congress also passed the Civil Rights Act of 1875. The Court threw the whole thing out. Then actually, racial ideology cannot have triumphed in Congress, but rather only in the Court. Then what explains this conflict between Congress and the Court? What explains why Congress did one thing and the Court the reverse?

Wherever our casebook on constitutional law falls open, the pages reveal a similar divide, the Court against Congress, each arriving at diametrically opposed policy solutions. We must begin to wonder about some underlying, systemic cause in the very nature of the two institutions, transcending the ideological issues of the day and worthy of our interest for its own sake.

*The Court’s ascent to power* – Looking back across these institutional conflicts, we also notice the Court repeatedly emerges victorious. Just as they won over Reconstruction, they keep winning. Since the political marketplace works on power, the ability to impose one’s will, such a run of success must reflect a predominant power. And turning to that calculation, we find that the wins do reflect the Court’s superior institutional power, moreover, a superior power that keeps growing, especially in relation to Congress. So for example, during industrialization the Court will strike down a series of “progressive” reforms, laws aimed at the accompanying ills, such as child labor, dangerous workplaces, and faulty products. But the Court enjoys the power to strike down those laws only through having themselves previously invented a new doctrine called “substantive due process.” This new doctrine let judges void as unconstitutional laws they deemed “unreasonable.” Since that standard lacked hard edges, this legal innovation let the Court intervene much more widely. Matters initially reserved to the legislative calendar became matters pending on the judicial docket. Yet we find nothing more routinely neglected than tracing the Court’s ascent to power, never squarely faced and dealt with on its own terms.

Through long-stranding judicial caution, the Court contributes to this gap, the justices preferring to speak about their power only in the most circumspect language. On their face the opinions generally rule clearly enough, holding for or against the parties. But in the subtext, without explicit discussion or even acknowledgement, these same opinions subtly re-define and expand judicial power. To grasp the significance requires an effort of exegesis and putting the pieces together. In 1803 in Marbury v Madison, Chief Justice John Marshall will claim that great power of judicial review, which lets judges declare congressional laws unconstitutional and hence void. But we must turn to other cases for the precise contours, these supplemental texts hedging the doctrine with narrow limits, the judges pledging never to declare an act unconstitutional except in a clear-cut case beyond a reasonable doubt. In fact, the Court never held another congressional statute unconstitutional for over fifty years. Then finally, in 1857 in the Dred Scott Case, Chief Justice Roger Taney would declare the Missouri Compromise of 1820 unconstitutional. That law prevented the spread of slavery into free territory, and Taney voided it. But since such a conclusion hardly clear-cut, reaching that ruling forced him to abandon those original restraints on judicial review. Not only did he utterly fail to acknowledge this, but wrote as if he were doing nothing unusual. Despite this reticence, in effect Dred Scott created a new paradigm for judicial review. No longer would the justices be limited to clear-cut cases, instead enjoying a much more wide-ranging power. And so it goes throughout the history of the Court. We must continually engage in a somewhat complex endeavor to sort out and add up the implications, which obscures the movement of the power.

*The ideological explanation –* The present scholarship continues to ascribe the Court’s motivations to ideologies. Just as we heard them blame the rise of segregation on racism, they ascribe the rise and fall of other legal doctrines to the rise and fall of other underlying ideologies. But this approach suffers from another besetting defect. Since ideologies ultimately rest on ethical values, such assessments of the Court ultimately amount to ethical assessments. Good judicial performance is seen as resulting from good values motivating the hearts and minds of the judges and vice versa. Much reason looks to reside with this outlook. After all, our overriding concern calls for justice, outcomes that square with our ethical notions. Then if good ethical values motivate the judges, surely that should lead to good judicial opinions. Except the usual problem occurs with such ethical evaluations. The consensus on ethical norms breaks down over the details. Thus, in these ideological or ethical assessments, the image of the Court must necessarily shift with the ideological or ethical perspective of the viewer. Rather than a stable picture we are left with no more than an ongoing ideological and ethical conflict between rival factions.

The familiar controversies between “liberal” versus “conservative” demonstrate this failure. In the 1930s, liberals attacked the Court for declaring virtually the whole New Deal unconstitutional. More recently and in their turn, conservatives attacked “judicial activism.” But neither do more than applaud or denounce the Court on a partisan bias, as shown by running over the litany, going from affirmative action back to abortion. Both sides demand outcomes in keeping with their agendas, support or condemn by that measurement. Surely we need a better way to describe the Court than to say in essence: It’s good when liberals win or bad when conservatives lose.

How get beyond this stalemate? Both liberals and conservatives ignore an initial difficulty: How fairly weigh their competing claims? In arguing about the Court, both sides strain every fiber of rhetoric like lawyers desperate to win before the court of public opinion. Only as any lawyer worth his salt can tell you, fair judicial procedure fundamental to a just verdict. Even before you begin a trial, you must first set up the legal forum to render impartial justice. But in controversies over the Court, neither liberals nor conservatives show any inclination to face this preliminary question. Instead each takes the stance summed up by the King of Hearts to Alice: “Verdict first and trial afterwards.” Each insists on their outcomes, rather than honestly asking: Is the procedure in place to fairly judge between us? Just here we should avoid such an error in method. Instead we should begin by asking the right initial question: Is the institutional forum properly constructed to render a just verdict, even-handedly to decide such disputes as those between liberals and conservatives? Setting up a fair process should stand as the precondition to the discussion.

Such a move seems obvious and looks down an avenue that promises to bypass the deadlock in the ideological or ethical approach. The success of scientific method furnishes a clear analogy. Scientists continue to differ over theories, but eventually learned to agree upon method. This shift in emphasis led to progress across the board. Almost an obsession with similar tactics serves as a marker of modernity and often allows a similar progress. Dialogue in all spheres relies upon a pre-accepted methodology, participants acquiescing as they enter. Scholarly controversy may rage in the academic journals, but all submit to the crucible of peer review. It has come to be widely recognized that reliable method stands as a preliminary problem, stands at the start of any intellectual endeavor, and we are more successful by settling those preconditions upfront. Unable to agree on what the tests will verify, we are more able to agree on what tests will prove validity. The rules come before the game, and however much the lust for victory, all must agree to play by the rules.

From what has been said, then, certain considerations emerge, suggesting a new approach to understanding the Supreme Court. We must account for the constant institutional conflicts between the Court and Congress. We must account for the Court’s ascent to power. We should not let the agenda of any political faction predetermine our judgment. Rather we should start by directing our attention toward the processes, asking if those fairly judge between the factions. By keeping all these concerns in view, we may hope to reach a more adequate and coherent explanation about the Court, that is, one flowing from a central set of premises and explaining the completeness of the data.

*Classic political science –* At least since Aristotle, classic political science has centered on analyzing political power in relation to political structure. Brief reflection will show that the suggestions made with reference to the Court no more than a return to that traditional method. This coincidence reinforces the notion such an approach has much to offer applied to the Court. Other governmental institutions face interrogation phrased in terms of their power and structure all the time, studies yielding useful answers about Congress, the presidency, or the bureaucracy. To put the judiciary through a similar inquiry looks in order.

Also at least since Aristotle, classic analysis began by dividing government into three basic forms: monarchy, aristocracy, or democracy, that is, rule by a single individual, rule by a select group, or rule by the people. Constitutions ancient and modern show considerable ingenuity mixing and matching these elements into more complex combinations. But the distinction between the types ultimately rests on who possesses the power, the ability to impose one’s will. Within each type a political process controls the flow of power. Speaking of a political institution’s structure refers most significantly to this process, which keeps power in certain hands.

The internal structure of these basic political forms all operate upon two strong and interconnected forces: First, individual self-interest, the tendency of individuals to seek power or equivalents such as money or prestige. Second, the institutional will-to-power, this same tendency manifested on the institutional scale. These forces variously aligned bind together the institutional structure of all the types. To take an early example, in ancient kingship the personal self-interest of the king runs throughout, giving coherence to the system. Whatever else the king’s government may accomplish, maintaining his own interests stands primary. Nor does he willingly brook rivals, attracting all authority to himself.

This same self-interest and institutional will-to-power crucially influences the function of any political institution, exerting an irresistible attraction within the system. As a result, if we plug the same political, social, or ethical problem into one type of government institution, we likely get an entirely different answer than from another type of government institution. The gravitational tug of individual and institutional interest warps any issue passing through the system, altering the course. Those wielding power within the process will change outcomes in subtle and not so subtle ways toward their own ends. To stick with the example of kingship, despite any platitudes to the contrary, we expect such a system to reach outcomes favorable to the monarchy. History amply proves how widely these may vary from the public good. A benevolent monarch is almost as much an oxymoron as a dictatorship of the proletariat. Absolute power at least tends to corrupt absolutely.

At bottom such recognition foundational to the American belief in democracy. Long ago Americans perceived only democratic institutions function in the public interest. Elections serve as an overriding, effective mechanism, redirecting self-interest to work in the public interest. Since an elected official must at least appear to serve the people, this mechanism refracts his self-interest to work in the public interest. One cannot forebear quoting Hume’s well-known aphorism: “[I]n contriving any system of government, and fixing the several checks and controuls of the constitution, every man ought to be supposed to be a knave; and to have no other end in all his actions, but private interest. By this interest, we must govern him, and by means of it, make him co-operate to public good, notwithstanding his insatiable avarice and ambition.”[[1]](#endnote-1)

The Founders sought to employ the institutional will-to-power in another familiar way as well, setting up the separation of powers and system of checks and balances. They divided the power of government between the competing branches and balanced the power of each against the other. Under their theory, the institutional will-to-power of the legislature, the executive, and the judiciary relentlessly collides. But since none can overcome the others, this tension maintains a stasis, preventing tyranny, giving room to freedom.

A well-built democracy depends upon the same care to institutional design throughout. Just as elections hold officials responsible, all aspects of the system must incorporate effective mechanisms of accountability. It is not enough to elect Congress, if later the internal rules of procedure let a few members dominate the body, and generally speaking, the party and committee system have passed through the will of the majority. It is not enough to assign mandates to the bureaucracy, rather Congress, the chief executive, and the courts need to constantly hold bureaucrats accountable, carrying out as well as limited to those mandates. Appropriate controls must extend through every line of the political blueprint.

It would seem doubtful the Supreme Court somehow exempt from these fundamental rules of political science. It would seem self-interest and the institutional will-to-power must play some part in how the Court functions. In other words, these factors must affect outcomes. It then becomes important to study the Court’s institutional structure, seeing how these forces apply, if at all.

*Other influences of political structure –* However, to say interest says much, but not all. While political institutions strongly tend to serve interests, other aspects of their structure also influence their function. Analysis needs to pay careful attention to the devil in these other institutional details.

To develop the significance, let us return to ancient kingships, noticing how the very nature of the institution results in strengths as well as weaknesses. Kingship offers the prospect of unanimity, dispatch, and secrecy. Kings can centralize national resources and aims; they can respond rapidly; they can hold their purposes close. These features serve extremely useful purposes, especially in conducting foreign policy and warfare, and in early history gave kingships a comparative advantage over less organized nations. But in other contexts these same strengths serve as liabilities. A king’s tight control crushes freedom and free-markets, leading to the age-old story of oppression and economic stagnation, the people miserable and impoverished. Other besetting flaws appear a creeping senescence, the leadership cadre clinging on unto death, and frequent quarrels over the succession leading to civil wars.

The Roman Senate gives a striking instance of an institutional nature that decisively influenced institutional function. An aristocratic element in a republican constitution, senators held their seats for life, but promotion came only at the culmination of a long career, the final tier after winning a series of offices by election before the Roman assemblies. A senator had run a gauntlet of public service, training him in a harsh school of practical experience, testing his ability and stamina. Within the Roman state, this august body exercised considerable power, and in particular, over foreign policy. And it is a remarkable fact that for some two hundred years the Senate plotted a consistent course in foreign policy, steered upon four guiding principles: First, Rome never fought any except just wars, which they interpreted as eliminating all potential rivals. Second, Rome never quit on a war regardless the cost, relentlessly doubling down on loses, which forced opponents into a zero sum game, facing catastrophe as the price to stay in. Third, despite some well-known exceptions to teach an object lesson, Rome treated the vanquished with unusual generosity. Rather than enslaving conquered peoples, they promoted them to allies and left them largely autonomous. Fourth, Rome scrupulously honored her treaties, allowing reliance upon her word. In combination, Rome meant to conquer, and she put to other nations a stark either-or choice: Either negotiate an early out, taking easy terms reliably kept, or face ceaseless war to annihilation. This formula applied naked power and self-interest to both ends of the equation, and most made the necessary calculation. Many surrendered without a real contest; Rome built a network of loyal alliances, which further increased her strength; the recalcitrant suffered obliteration like Carthage. With this foreign policy Rome conquered the then known world. And it must be noticed none of this could have happened without the very nature of the Roman Senate. Senators had extensive, practical experience of affairs, forming them into exactly the sort of men to come up with such a hard-headed, long-sighted policy; their elevation above day-to-day politics took much factional strife out of the process, facilitating a consensus; their life-time offices, fresh senators gradually added as others died off, gave the policy long-term stability. The institutional structure decisively influenced the institutional function, charting a course otherwise unimaginable.

We have only to contrast the foreign policy of ancient Athens or for that matter U.S. foreign policy to see the effects of other institutional structures. In the Athenians’ highly direct democracy their turbulent popular assembly constantly intervened in foreign affairs. Faction raged and momentary enthusiasms often prevailed, disregarding prudent counsel, dragging foreign policy back and forth, undermining firmness, contributing not a little to defeat in the Peloponnesian War. While far more stable than Athenian democracy, American foreign policy depends up political institutions much less firm than the Roman Senate. The presidency and Congress constantly sail into the headwinds of party politics, and so foreign policy usually makes way against a fierce gale of criticism from the party-out-of-power. During President John Adams undeclared Quasi War against the French, running from 1798 to 1800, the Jeffersonians tirelessly assailed him. During the Iraq War, beginning in 2003, virtually their same speeches and articles, recycled and updated, served virtually the same purpose. Whether good or bad, we cannot but notice the influence of the institutional set-up on the how the institutions function.

*Social facts –* The modern social sciences second the teachings of classic political science. Partially in an effort to leave behind the vagaries of ethical dispute, sociologists early developed a descriptive method to discover reliable social facts, observations and predictions about aggregates of individual choice or behavior. At the same time, they paid careful attention to the structure of social systems and institutions. Among other things this methodology provides a basis for modern economics and management theory, whose successes demonstrate accuracy and usefulness. This newer approach has given a further confirmation to the older tradition of political science.

Emile Durkheim pioneered the descriptive methodology in his *Suicide*, published in 1897. By a careful study of suicide statistics, Durkheim showed a correlation between the suicide rate and other factors, say good or bad economic times. This technique avoided the notorious difficulty inherent in the study of individual motivations, instead describing more identifiable general trends and influences. To open a city phone book and pick out the future suicides embarks upon an endless inquiry into individual motivation. Yet past behavior safely predicts a suicide rate, the rise and fall tied to measurable indicia. The same can be done for the divorce rate, the crime rate, much economic behavior, and so forth. This move translates from the realm of chaos to the realm of almost science, to the social sciences. We distill the incomprehensible welter of individual motivations into clearer social facts, reliable observations and predictions about aggregates of individual choice or behavior. At the same time this route avoids the shifting sands of ethical argument, ethical norms becoming no more than an item in the observed data. This is the essence of the descriptive method.

Undoubtedly economics became the most successful of the social sciences. In economics the role of money permits statistics as a tool of analysis, achieving a precision denied sociology, psychology, or political science. Yet economics, too, finally rests on social facts abstracted in the same manner as the other disciplines. Just as political scientists posit political systems operate on interest, economists posit that economic systems operate on the profit motive. Buyers and sellers in a marketplace may display a wide variety of behavior. Some may show concern for ethical values such as fair dealing or environmental impact, while others could care less. But we expect the bottom line to decisively reflect the profit motive. Otherwise the bottom line would elude all calculation. This social fact of profit seeking makes the marketplace comprehensible. It gives economics a foundational principle.

In their next move economists structure their system around this principle. Free-markets outperform socialism by working with rather than against the profit motive. Yet as is well known, free-markets suffer from market failures, such as recession or unemployment. These equally solid facts compel economists to constantly tinker with their economic model. Market systems and institutions require not only set up, but continual supervision and even intervention. Such devices as regulatory control and fiscal and monetary policy give some of the means. Today’s high standard of living marks the level of the economists’ success, but persistent shortfalls attest a lack of utter expertise. Yet compared to the past, their achievement impresses, and the same methods look the best avenue down which to search for further advances.

Modern management theory revolves around the central notions of information flow and accountability within a corporate model. That business form represents an innovation essential to modern economies. But almost like living bodies, corporations must constantly respond to changing environments and function efficiently. These require the quick interchange of accurate information and the enforcement of performance standards throughout. Management must hear the message from all reaches of the enterprise, not merely dictate down, and hold employees at all levels promptly accountable. Successful management must structure the business to respond agilely and attain maximum goals. Mechanisms like detailed and timely accounting, customer surveys, or regular performance reviews work as feedback. The black or red ink at the end of the ledger dictates the ultimate reality, continued corporate existence or demise.

Presenting in another context, economics and management theory deal with the same issues as political science. If we take the purpose of government as the public interest, then democracy attempts to set up and run a system much like a free marketplace, working on the same principles of information flow and accountability as a business corporation. Elections serve as the overriding mechanism to sort out competing interests, force information from bottom to top, and hold officials accountable. Other government designs such as monarchy choke off the people’s voice and place accountability outside their control. Just as the dead hand of bad management can stifle creativity and doom a business corporation, excessive power in government’s leaders cuts the people out of the process and disregards their interests.

Modern sociology in all branches follows such a pattern, striving for social facts and stressing the importance of system and institutional structure. In effect, these methods take over the techniques first applied in classical political analysis. In traditional political science, self-interest and the institutional will-to-power amounted to what we now call social facts. These forces reliably predicted aggregate behavior and the performance of political systems and institutions. In the social sciences similar social facts such as the profit motive predict the performance of systems and institutions such as the marketplace or the business corporation. This perception focuses attention at all levels upon the structure of social systems and institutions to achieve desired results.

Beginning from so similar a start, classic political science and modern social science have come to intertwine and cross-pollinate. Recent studies of bureaucracy exemplify this trend. While bureaucracy is nothing new, mass societies of necessity generated equally massive bureaucracies. This phenomenon in government has naturally attracted the attention of scholars deploying all the weapons in the present day arsenal. As an instance, the “capture theory of bureaucracy” holds that bureaucracies demonstrate a strong tendency to serve the interests of those regulated over the public interest. In other words, over time interests placed under an agency somehow manage to “capture” the agency, turning it to their purposes. The Interstate Commerce Commission (ICC) early set up to regulate the railroads is often cited. While intended to prevent monopolistic practices, the ICC quickly came to favor the railroads over the public. Exactly how such subversion occurs may prove difficult to trace in detail, which replicates the trouble sorting out individual motivations in other social settings. Yet the capture theory articulates a well-accepted social fact. The response must again come from attention to institutional design. The bureaucracy must be structured so as to maintain accountability to the public. Here we find the purpose for such rules as forcing agency employees to wait a period before going to work in the firms they regulate. This limits the “revolving door” where the bureaucracy and private firms exchange staff, setting up a comfortable and profitable relationship between the two enterprises. On the larger scale the Congress, the chief executive, and the courts must hold the bureaucracy accountable. In all of this we see applied the methods jointly developed by political science and the social sciences.

This same sort of analysis is widely applied to Congress, the presidency, and the bureaucracy, but for some reason not the Supreme Court. Yet why should techniques yielding useful information about the other branches not do the same for the judiciary? It would appear time to extend contemporary methodology to the Court.

*An aristocracy of merit* – To begin with structure, then, the Supreme Court runs as an aristocracy, albeit one of merit. However the sound may grate upon some sensibilities, the simple need for accurate definition must serve to excuse the offence, which amounts to no more than an accurate application of the classic terms of political science. The merciless requirement for correct description presents no other ready alternative. Since governmental form influences governmental function, we must start by proper identification of the form, taking the other steps as they come, letting the consequences fall where they may. The method forces the beginning.

In traditional political analysis “aristocracy” is a term of art, an aristocratic institution being defined as no more but no less than vesting control of office in a select group. Periodic elections serve as the defining characteristic of democracy, and in turn, lifetime tenure marks a clear transition, either to monarchy or aristocracy, assuring as it does office in the hands of a single ruler or select ruling group. Descent by birth is not a necessary ingredient to an aristocratic institution, history offering numerous instances of quite other principles of selection. While held for life, membership in the Roman Senate came only as the culmination of a long career in public office won by balloting in the Roman assemblies. The key distinction lies not in the manner of selection, but in who controls the institution. In a democracy the people retain ultimate control. In an aristocratic form the officials control the institution, outside of intervention by the people.

Accurately described in these traditional terms, the Constitution does not create a pure representative democracy at all, but a mixed form of government. The Congress and the presidency are democratic elements, but the Supreme Court an aristocratic element. By the briefest inspection this conclusion becomes inescapable. Article III provides: “The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour.” This language effectively confers lifetime office on the justices of the Supreme Court, precisely fitting the classic definition of an aristocratic institution. The select group of the justices controls the institution.

Clearly the Founding Fathers preferred republican institutions over monarchy or aristocracy. Why then depart from representative principles in their construction of the Supreme Court? It appears that as throughout where feasible, they were imitating the English model. Not surprisingly, the English constitutional system having grown up under royal tutelage, the monarch appointed their judges, retaining a power of removal. In the events leading up to the Glorious Revolution of 1688, this royal authority worked against the parliamentary opposition, as in politically charged cases the judges ruled for the king or suffered the consequences, being stripped of their robes. After final triumph, Parliament responded by effectually cutting the judges’ leading strings. While the monarch still elevated to the bench, judges now held office during good behavior. This reform rendered the judiciary independent of the executive. However, English judges did not and still do not enjoy supremacy over Parliament in interpreting their constitution. Since that constitution remains unwritten, Parliament retains the ability to alter the fundamental law by simply passing a statute, which leaves final control with that body rather than the judiciary.

In the U.S. Constitution the Founders adopted lifetime tenure for judges to assure a similar judicial independence. In almost the same breath they adapted the English device for judicial selection to their new framework. The president replaced the king as chief executive, and in so doing, inherited the prerogative to appoint the judges, but with a check inserted by requiring Senate approval. Looking to Article II: “He … by and with the Advice and Consent of the Senate … shall appoint … Judges of the supreme Court.” In other words, the president nominates and the Senate must confirm the justices to the Supreme Court.

The historical record conclusively shows this two-step method elevates eminently qualified candidates to the Court. The president by virtue of his own qualifications possesses an unusual degree of ability and experience in making such choices while benefiting from wide access to information and counsel. The nomination must pass scrutiny by a chamber with a similar unusual level of ability, experience, information, and advice. The outstanding legal attainments of those confirmed attest the excellence of this method of selection. Perhaps no Supreme Court justice has fallen below the leading lawyers of the day, and many rank among the great jurists of any age.

In the terms of classical political analysis, then, the U.S. Supreme Court must be classified as an aristocracy, albeit one of merit. But classic analysis also holds that institutional structure decisively influences institutional function. Generally, aristocratic institutions function in the interests of the select class who control the institution. In addition, all institutions display an institutional will-to-power, a tendency to acquire more power. To proceed in the tradition manner next requires disclosing the interests in play as related to the attraction of power.

*Judicial interests* – Whatever else they may be, all justices on the Supreme Court share a closely connected set of professional and institutional interests. All are lawyers and serve on the Court. No other significant characteristics unify them all. These affiliations suffuse their attitudes and values with two readily identifiable tendencies: As lawyers they tend to prefer arrangements that confer business on their profession; as judges they tend to prefer arrangements that confer power upon their Court.

It is certainly nothing new to remark that those engaged in a common commercial enterprise show a marked tendency to promote that business. As long ago as 1776, Adam Smith memorably observed in his *Wealth of Nations*: “People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.”[[2]](#endnote-2) Lawyers cannot be supposed to vary from this maxim, nor have they. One need only attend a state bar convention and listen carefully to hear the proof.

In the general culture references abound reflecting a public perception and grievance against lawyer’s self-interested behavior, all the way from Shakespeare’s “first, let’s kill all the lawyers” to present day lawyer jokes. The English philosopher Jeremy Bentham, who lived 1748 to 1832, noticed that lawyers much preferred highly technical procedures and laws, since such complexity enriched their business. In his novel *Bleak House*, published in the 1850s, Charles Dickens portrayed this same complexity in probate proceedings, which made settling estates endlessly drawn out and onerously expensive. Fast forwarding to the present, Chamber of Commerce types speak of the “lawyer tax,” complaining any business of sufficient size steadily leaks revenue to ongoing lawsuits. America has been called the “litigious society,” where almost anyone can be sued over almost anything. All these instances show a widespread and long-standing perception about lawyers possessing a distinct set of interests, which often leave others feeling aggrieved in their own interests.

Nor can it be doubted that lawyers’ interests decisively influence their behavior, indeed, decisively come to suffuse their ethical values. These interests enter into their thoughts, attitudes, and values by a thousand gaping doors, many almost unconscious. Only superficial familiarity with legal culture confirms this observation. Trial lawyers spend their professional lives suing corporations and insurance companies, frequently coming to detest all corporations and insurance companies. The lawyers who defend such cases as routinely come to regard those same trial lawyers as the incarnation of greed and sharp practice. Criminal defense lawyers grow to hate all cops, while prosecutors grow to hate what they see as the amorality, dodges, and lies of the criminal defense lawyers. All across the legal profession this same motion occurs. Typically elaborate justifications accompany the process, more or less plausible. Trial lawyers claim to stand up for the average man against the excessive power of corporate America, while their opponents claim to defend free enterprise against the excesses of the trial lawyers. Criminal defense lawyers claim to defend the rights of the accused against government abuse, while prosecutors claim to protect victims against criminals. Advocacy quickly assumes the status of personal conviction. Their occupational requirements fit a pair of spectacles to the lawyers’ eyes, and by peering through the slight distortion of these lenses, that outlook becomes fixed and normal. Rationalization of professional needs hardens into ethical and worldviews.

But far from irreconcilably divided as a class, lawyers share numerous interests. Tort reform to limit damages in medical malpractice cases finds few friends on either side of the legal aisle, since the lawyers on both sides benefit from the litigation. This may serve as an exemplification of the overriding general rule: Lawyers favor more litigation rather than less, as more litigation means more business. By an extension of the same rule: Lawyers favor more power in courts rather than less, as more power equates to more litigation. The underlying imperative constantly attracts almost all varieties of the legal mind, their attitudes and values being drawn on to follow. Whether we look to the origins of the common law or contemporary legal theory, we find the lawyers faithful advocates for legal theories compatible with these inclinations.

On the Supreme Court such interested motives find similar expression in the judicial will-to-power, a tendency to constantly increase judicial power. As seasoned lawyers, the justices arrive on the bench already fitted out with the usual professional outlook. Once inside the institution, most develop further along those same lines. The psychology here is only too familiar to anyone acquainted with the corridors of government. All officials tend to demonstrate a perpetual dissatisfaction with their share of the perquisites of power and the performance in all other departments and branches. All want more of everything and have a better idea about how things should run. At the lower pay grades, officialdom quarrel endlessly over precedence, office space, funding, and staffing. At the highest levels over matters of utmost national concern, these same struggles play out on a more epic scale, as witness the turf wars between cabinet heads and the White House offices. While the Court deliberates behind an opaque screen and action takes the form of highly reasoned documents drained of such references, yet the results indicate a similar determination to assume precedence and exercise power.

Throughout government the familiar aphrodisiac of power lures on, often for what seem the best of reasons. Given the chance, almost no one can resist the temptation to do good by conferring the benefit of their own views and solutions. Their pre-eminence puts the justices in constant danger of giving in to this call. In so doing they do not see themselves as power hungry, but as following their higher nature. To paraphrase slightly what Justice William Brennan will later say, “while a man can, he must.” And so with this as the mantra, over the course of the Court’s history, a familiar scenario has played out over and over. Becoming convinced of their cause, the justices then seize additional power to enforce their convictions. It makes no difference to what era or great and famous case we turn: Marbury v Madison in 1803, Dred Scott in 1857, the Reconstruction and segregation cases, the cases over industrialization, the New Deal litigation, or the judicial revolution in the last half of the twentieth century. In all we see the justices take that crucial mental leap: They develop an ethical certainty, often passionately held. But nothing in the Court’s charter authorizes them to act, and so they ignore previously announced limitations on their power or invent new doctrines increasing that power.

But at some level it becomes a question of what comes first, the lust for power or the love of the good. Do the judges profess their love of the good in their lust for power or does their love of the good seduce them to the delights of power? Such passions and reasons intermix so that an individual can hardly sort them out in his own soul, let alone in an historical figure. But the Court’s history will show the good repeatedly redefined, yet as repeatedly in such a way as to justify additional power. This suggests that the later remains the more stable factor in the equation rather than the former, and that predictions of judicial outcomes can be more reliably made on power relationships than professed ethical justifications. The judicial will-to-power operates inexorably through all vicissitudes of doctrine.

In traditional political analysis the identification of these tendencies is an effort to account for the operation of self-interest within any political system. It will be recalled the traditional approach posits a strong tendency of individuals to act in their self-interest and for institutions to demonstrate an institutional will-to-power. These forces exert an attraction upon any issue passing through a political system. The interests of those with the power will warp outcomes in their favor. Since lawyers make up the Court and the justices control power within the institution, we should then expect results in line with their interests. The lawyer’ business and the judges’ power should increase. In fact, that is exactly what we will see happen as the history of the Court unfolds.

To apply the methodology of the social sciences these same tendencies amount to social facts, reliable observations and predictions of the aggregate behavior of the justices on the Court. Thomas Jefferson was greatly disappointed in the rulings of some of his appointees. Chief Justice Earl Warren was a Republican appointed by Republican president Dwight Eisenhower, but those loyalties are not taken as explaining his course on the Court. Justice Henry Blackmun was appointed by Republican Richard Nixon, but once on the Court, Blackmun authored Roe v Wade, an abomination to most of his party. As a result of these constant changes, the attempt to describe the justices in terms of ideologies, parties, or factions catches only moments in time. But the avidity of professional and institutional interests operates across time, providing a social fact.

However, since today to use the term “interested” is almost to condemn, a moment must be taken to renounce that intent. Classic political science and social science do not indulge in the illusion of “disinterested” individuals such as philosopher-kings. Instead both accept interested behavior as a basic premise and endeavor to design social systems and political institutions putting that force to work in constructive ways, free-markets and democracy for example. In such an analysis to say that lawyers display self-interest or judges a judicial will-to-power is not to condemn, but merely to describe. It is not to say they are worse than anybody else, rather that they are no different. All individuals, groups, and political institutions demonstrate a similar self-interest and a will-to-power. But properly to account for interests first requires their accurate identification. The effort so far attempts to reach that stage in the discussion.

*Other structural features –* But as previously said, to say interest is not to say all. Political institutions also demonstrate other tendencies resulting from their structures, as monarchies enjoy the advantages of unanimity, dispatch, and secrecy or the Roman Senate promoted a remarkably stable foreign policy. Then with respect to the Supreme Court, what other structural features can we identify that help explain their performance?

First and foremost, under the separation of powers, the Court is forced to share power with the other institutions of government, most significantly with Congress and the presidency, but also to a certain extent with the states and the bureaucracies. Congress possesses the vast initiatives inherent in legislative power, the president the vast initiatives in executive power. The states and the bureaucracies possess powers as well. The law may claim to orchestrate all, and the Court may claim primacy as the *ultimo maestro*, but the justices aren’t the only ones with a baton. A great many other composers are making up scores and a great many other conductors are leading orchestras at the same time. This rivalry leaves the Court limited in a great many ways.

Second, it has been mentioned the appointment process reliably elevates highly qualified individuals. Almost all have brought to the job not only solid legal credentials, but extensive experience of practical affairs. The Court’s decisions affirm the justices’ legal expertise, consistently demonstrating sound knowledge of the law combined with the ability to write logically well-reasoned opinions. In the past many of the most prominent justices had already participated in government at the highest levels. Chief Justice John Marshall’s political career included service as Secretary of State. His successor Roger Taney had a comparable career including the cabinet. Chief Justice Earl Warren served as governor of California. In the last half century the trend sets toward justices fielding resumes more confined within the legal profession. This shift probably reflects increasingly bitter Senate confirmation fights, which in turn reflect the higher stakes involved in the Court’s present role. To better run that gauntlet presidents avoid nominees with strong positions previously staked out in partisan strife or powerful enemies left over from those same battles. While such restrictions may eliminate a certain broadness of outlook, present day candidates still come with generally wide experience.

Third, as an effect of this selection process, we must notice that the Court has never been recruited from the ranks of the failed or disaffected, but rather from those already successful in life, fully integrated into the prevailing social, economic, and political order. In addition, while perhaps not as hidebound as in the past, the legal profession continues to instill respect for precedent, orderly procedure, and even tradition. As a net result, we would expect such a leadership cadre little inclined toward projects to throw everything out and begin anew; we would not expect an institution so composed to stray too far from accepted ethical norms or vested interests. At the most we might anticipate the justices siding with one or another strong running social tide; at the least we would not anticipate them operating on the radical fringe. Nor are these expectations disappointed, which has proved one of the Court’s abiding institutional strengths. It has always ruled in keeping with not less than a sizable minority, if not the majority. It has been said that the justices “read the newspapers,” that they do not depart too far from public opinion. This feature assures the Court never leaves behind strong reinforcements, which rally to disrupt the coalescence of successful counter-attacks. For example, for all the talk about a “judicial revolution” in the later part of the twentieth century, the justices’ decisions always favored powerful, perhaps even majority blocks of support. These allies turned back all efforts to reverse the Court through legislation or amendments to the Constitution. Thus, the Court has shown no inclination to enter into a true revolutionary struggle, but is strategically placed to tip the balance between the factions. While in the long run this constant tipping may travel a considerable distance, society is not violently disrupted. The Court’s intervention succeeds where an institution in the grasp of more extreme elements might well fail.

Fourth, we must also remark that the Court’s personnel turns over at a slow rate, conferring considerable institutional stability. Once installed justices tend to pursue a steady course, making them bastions of predictability. While individual exceptions may be cited, yet overall the Court remains remarkably consistent for long periods.

Fifth, this steadiness operating in conjunction with the high legal attainments of the justices renders the Court well equipped to assure “the rule of law,” the important concept that requires the law be stated in a comprehensible and consistent way, be stable, be interpreted in keeping with commonly understood logic, and be fairly and impartially applied. The familiar phrase “a government of laws and not of men” encapsulates the idea; sometimes, too, we hear that “the judge followed the law.” We will later see the rule of law not an entirely attainable ideal; law must remain interpreted by men, a process which almost invariably injects a personal ingredient. Yet insofar as able, the law needs a stable, objective existence to inspire trust and allow reliance upon fixed standards in making decisions and guiding conduct. While it must be confessed the justices have often infused their opinions with their own preconceptions, by any reasonably standard the record shows they well maintain the rule of law. We simply do not find gross departures from objectivity such as characterize the English revolutionary era, when king and Parliament, each in their turn of dominance, perverted accepted legal rules beyond recognition in persecuting opponents.

Finally, we must observe that as a judicial institution the Court necessarily little resembles a legislative body such as Congress. The nine-member Court hears cases. The much larger two-chambered Congress enacts statutes, laws of general application. This variation in functions results in large differences. Judges must wait for a case; legislators may leap to the occasion. Judges hear only the litigants; legislators hear from anybody and everybody. Before the bench only the lawyers in the case may speak; on the legislative floor any member may come forward. The judges sit in isolated audience; the public sits in audience on the legislature. The courtroom should shut out the bias of interest; almost any interest finds a way into the lobbies of the legislature. Judges rule in the specific case; the legislature passes laws of general application. Judicial remedies set forth rights; legislation can set up vast programs and bureaucracies as well as levy taxes. Under s*tare decisis*, judges follow precedent; the legislature may alter or utterly repeal a statute the next session. Under the doctrine of double jeopardy only the convicted can of appeal; in the legislature victims of crime may complain about the law as well. Undoubtedly more distinctions could be listed, but these are among the most important.

All of these differences trace to the historic roots of the Anglo-American judicial system. English courts grew up in response to a need, enforcing the criminal law and protecting other legal rights. The English Parliament grew up in response to a separate need, passing laws to govern the entire society. Even down to the present day, this division of function continues, except gradually the judiciary assumed a wider and wider role. As part of this process, the courts burst the straightjacket of old-fashioned judicial procedure. Today the parties to a lawsuit can include vast constituencies, say all black children in a metropolitan school system. The “Brandeis brief” popularized legal arguments incorporating all sorts of data, say sociologist’s study about the negative impact of segregated schools on black children. Judicial remedies have expanded so far as mandating vast social programs, say busing to achieve racial integration. Judges have been known to take over and run bureaucratic agencies, even directing the levy of taxation. But even with these and other innovations, the trammels of judicial procedure still exert an influence. Without entering into the details of any examples, as compared to the legislature, judicial procedures remain more narrowly focused, limiting the issues presented, the interests heard, and the remedies ordered.

But any complete understanding of judicial function must await an exploration of judicial power, the ability to impose one’s will. This will raise the initial question: What powers do judges possess? It involves a further and contentious question: What powers should judges possess?

1. David Hume, *Essays*, “Of the Independency of Parliament” [↑](#endnote-ref-1)
2. Adam Smith, *An Inquiry into the Wealth of Nations*, Chap. X, Part. 2

   [↑](#endnote-ref-2)