
Supreme Court

There is no doubt that the U.S. Supreme Court has influenced the politics of the country. As a public body, the Court is a highly visible part of the federal government. This has always been so, even when the justices met briefly twice a year in the drafty basement of the Capitol. Yet the idea that the Court itself is a political institution is controversial.

The justices themselves have disputed that fact. Indeed, the Court has gone to great pains to avoid the appearance of making political decisions. In *Luther v. Borden* (1849), the Court adopted a self-denying “prudential” (judge-made) rule that it would avoid hearing cases that the legislative branch, or the people, could decide for themselves, the “political questions.” In 1946 Justice Felix Frankfurter reiterated this principle in *Colegrove v. Green*. Because it did nothing but hear and decide cases and controversies brought before it, and its decisions affected only the parties in those cases and controversies, Alexander Hamilton assured doubters, in the *Federalist Papers*, No. 78, that the High Court was “the weakest branch” of the new federal government.

There are other apparent constraints on the Court’s participation in politics that arise from within the canons of the legal profession. Judges are supposed to be neutral in their approach to cases, and learned appellate court judges are supposed to ground their opinions in precedent and logic. On the Court, the high opinion of their peers and the legal community allegedly means more to them than popularity.

Conceding such legal, professional, and self-imposed constraints, the Court is a vital part of U.S. politics for three reasons. First, the Court is part of a constitutional system that is inherently political. Even before the rise of the first national two-party system in the mid-1790s, the Court found itself involved in politics. The Court declined to act as an advisory body to President George Washington on the matter of veterans’ benefits, asserting the separation of powers doctrine. In 1793 the Court ordered the state of Georgia to pay what it owed a man named Chisholm, an out-of-state creditor, causing a constitutional crisis that prompted the passage of the Eleventh Amendment. Those kinds of political frictions—among the branches of the federal government and between the High Court and the states—continue to draw the Court into politics.

After the advent of the national two-party system, partisanship became institutionalized, with the result that appointments to the Court have always been political. Nominees often have political careers before they agree to serve. They are almost always members of the president's political party. The role the Senate plays in consenting to the president's nominations (or, in slightly under one-fourth of the nominations, refusing to consent), further politicizes the Court, for the Senate divides along party and ideological lines in such votes. The confirmation debates and, after 1916, the hearings, are riven with politics, and once on the Court, the justices' political views are often remarkably accurate predictors of their stances in cases that involve sensitive issues. The controversies surrounding President Ronald W. Reagan's nomination of Robert Bork and President George H. W. Bush's nomination of Clarence Thomas are recent examples of this observation.

Similarly, once on the Court the justices do not necessarily abandon their political aspirations. Salmon P. Chase, Stephen J. Field, Charles Evans Hughes, Frank Murphy, and William O. Douglas all wanted to be president of the United States, and Chief Justice William Howard Taft was an ex-president when he assumed the center chair. Felix Frankfurter and Abe Fortas continued to advise their respective presidents while on the bench.

Finally, the output of the Court has a major impact on the politics of the day. While it is not always true that the Court follows the election returns, it is true that the Court can influence them. In the first 60 years of the nineteenth century, slavery cases fit this description. Even after the Thirteenth Amendment abolished slavery, politically sensitive civil rights cases continued to come to the High Court. Labor relations cases, taxation cases, antitrust cases, and, more recently, privacy cases all had political impact.

Even the self-denying stance the Court adopted in political questions was subject to revision. In a famous footnote to *Carolene Products v. U.S.* (1938), the Court announced that it would pay particularly close attention to state actions that discriminated against "discrete and insular minorities" precisely because they were not protected by democratic "political processes." In the 1940s, the Court struck down state laws denying persons of color the right to vote in election primaries. Later decisions barred states from drawing legislative districts intended to dilute the votes of minority citizens. By the 1960s, the Court's abstinence in political questions had worn thin. In a series of "reapportionment cases," the Court

determined that states could not frame state or congressional electoral districts unfairly. The High Court's rulings, sometimes known as the "one man, one vote" doctrine, remade state and federal electoral politics.

The Early Period

Perhaps the most appropriate way to demonstrate the Court's complex institutional politics is to describe its most prominent cases. The very first of the Court's great cases, *Marbury v. Madison* (1803) involved political relations within government, the partisan composition of the Court, and the political impact of a decision. It began when the Republican Party of Thomas Jefferson and James Madison won control of the presidency and both houses of Congress in what Jefferson called the revolution of 1800.

The Jeffersonian Republicans wanted to purge the judiciary of their rivals, the Federalists, and eliminate many of the so-called midnight appointments. In the coming years, Congress would impeach and remove Federalist district court judge Timothy Pickering and impeach Federalist Supreme Court justice Samuel Chase. Into this highly charged partisan arena came the case of William Marbury.

Marbury was supposed to receive a commission as a justice of the peace for the District of Columbia. However, when he was the outgoing secretary of state, John Marshall failed to send the commission on, and the incoming secretary of state, James Madison, with the assent of President Jefferson, did not remedy Marshall's oversight. When Marbury did not get the commission, he filed suit with the clerk of the Supreme Court under the provisions of the Judiciary Act of 1789, which gave the Court original jurisdiction in such matters.

Thus, the case went directly to the Court. The issue, as Marshall, who was now chief justice, framed it, was whether the Court had jurisdiction over the case. He intentionally ignored the political context of the suit. It seems obvious that the issue was political, but in a long opinion for that day (26 pages), Marshall wrote for a unanimous Court that the justices could not issue the writ because it was not one of the kinds of original jurisdiction given the Court in Article III of the Constitution. The Constitution controlled or limited what Congress could do, and prohibited the Congress from expanding the original jurisdiction of the Court. Congress had violated the Constitution by giving this authority to the Court. In short, he struck down that part of the Judiciary Act of 1789 as unconstitutional.

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The power that Marshall assumed in the Court to find acts of Congress unconstitutional, and thus null and void, was immensely important politically within the government structure, for it protected the independence of the Court from Congress, implied that the Court was the final arbiter of the meaning of the Constitution (the doctrine of judicial review), and reminded everyone that the Constitution was the supreme law against which every act of Congress had to be measured. Although critics of *Marbury* decried judicial tyranny and asserted that the opinion was colored by Marshall's party affiliation, a political challenge to Marshall's opinion was not possible because it did not require any action. *Marbury* went away empty-handed.

Marbury managed to keep the Court out of politics in a formal sense, though it was deeply political; the "self-inflicted wound" of *Dred Scott v. Sanford* (1857) plunged the Court into the center of the political maelstrom. What to do about slavery in the territories was a suppurating wound in antebellum national politics. By the late 1850s, the controversy had destroyed one national party, the Whigs, and led to the formation of a new party, the Republicans, based wholly in the North and dedicated to preventing the expansion of slavery.

Against this background of intensifying partisanship and sectional passion, the Supreme Court might have elected to avoid making general pronouncements about slavery and stick to the facts of cases, narrowing the precedent. However, in 1856 newly elected Democratic president James Buchanan asked the Court to find a comprehensive solution to the controversy when Congress deadlocked over the admission of Kansas as a slave state. A Democratic majority was led by long-term chief justice Roger B. Taney of Maryland, a dedicated states' rights Democrat who had been Andrew Jackson's reliable aide in the war against the second Bank of the United States.

Dred Scott was the slave of U.S. Army doctor John Emerson, and was taken with him from Louisiana to posts in free states and free territories. In 1843 Emerson returned to a family home in Missouri, a slave state, and Scott went with him. In 1846, three years after Emerson's death, for himself and his family, Scott sued for his freedom. After two trials and four years had passed, the Missouri trial court ruled in his favor. The Missouri Supreme Court reversed that decision in 1852. Northern personal liberty laws, the response to the Fugitive Slave Act of 1850, angered Missouri slaveholding interests, and the new policy that the state's supreme court adopted in *Scott* reflected that anger.

But Scott's cause had also gained new friends, "free soil" and abolitionist interests that believed his case raised crucial issues. Because Emerson's estate had a New York executor, John Sanford, Scott could bring his suit for freedom in federal court under the diversity clause of the Judiciary Act of 1789. This litigation could only go forward if Scott were a citizen, but the federal circuit court sitting in St. Louis decided to hear the suit. In 1854, however, the federal court agreed with the Missouri supreme court: under Missouri law, Scott was still a slave.

The U.S. Supreme Court agreed to a full dress hearing of Scott's appeal in 1856. Oral argument took four days, and the Court's final ruling was delayed another year, after the presidential election of 1856. Joined by six of the other justices, Taney ruled that the lower federal court was correct: under Missouri law, Scott had no case. Nor should the case have come to the federal courts, for Scott was not a citizen. The law behind this decision was clear, and it was enough to resolve the case. But Taney added two dicta, readings of history and law that were not necessary to resolve the case but would, if followed, have settled the political questions of black citizenship and free soil.

Taney wrote that no person of African descent brought to America to labor could ever be a citizen of the United States. Such individuals might be citizens of particular states, but this did not confer national citizenship on them. In a second dictum, Taney opined that the Fifth Amendment to the Constitution, guaranteeing that no man's property might be taken without due process of law, barred Congress from denying slavery expansion into the territories. In effect, Taney retroactively declared the Missouri Compromise of 1820, barring slavery in territories north of 36° 30' north latitude, unconstitutional.

The opinion was celebrated in the South and excoriated in the North. Northern public opinion, never friendly to abolitionism, now found the possibility of slavery moving north frightening. Abraham Lincoln used it to undermine his rival for the Illinois Senate seat, Stephen Douglas. Lincoln lost the race (Douglas and the Democrats controlled the legislature), but he won the debates and found an issue on which to campaign for president in 1860.

In his first inaugural address, President Lincoln issued a subtle warning to the holdover Democratic majority on the Court, and to Taney in particular. The will of the people, embodied in the electoral victory of the Republicans, would

not tolerate a Court that defended secession. The justices took the hint. They agreed to the blockade of the Confederate coastline and accepted the administration view that the Confederacy did not legally exist. By the end of the war, Lincoln was able to add enough Republicans to the Court, including a new chief justice, Salmon Chase, to ensure that Republican policies would not be overturned. For example, the majority of the Court found that “greenbacks,” paper money issued by the federal government to finance the war, were legal tender.

The Industrial Age

The Reconstruction amendments profoundly changed the constitutional landscape, giving the federal government increased supervision over the states. Insofar as the High Court had already claimed pride of place in interpreting the meaning of the Constitution, the Thirteenth, the Fourteenth, and the Fifteenth Amendments, along with the Civil Rights Acts of 1866, 1870, 1871, and 1875, should have led to deeper Court involvement in the politics of the South. Instead, the Court’s repeated refusal to intervene reflected the white consensus that nothing further could be done to aid the newly freed slaves in the South, or the black people of the North, for that matter.

The so-called voting rights cases were inherently political because they touched the most basic rights of citizens in a democracy—the right to participate in the political process. In these cases, the Court deployed the first kind of politics, the politics of federalism, in response to the third kind of politics, the wider politics of party. By 1876, the Radical Republican impulse to enforce an aggressive Reconstruction policy had spent itself. In the election of 1876, the Republican nominee, Rutherford B. Hayes, promised that he would end the military occupation of the former Confederate states, in effect turning over state and local government to the “Redeemers,” former Confederate political leaders, and leaving the fate of the former slaves to their past masters.

In *U.S. v. Hiram Reese* and *U.S. v. William Cruikshank et al.*, decided in 1875 and 1876, the Court found ways to back the Redeemers. In the former case, a Kentucky state voting registrar refused to allow Garner, an African American, to pay the poll tax. The motive was as much political as racial, as the state was Democratic and the party leaders assumed that every black voter was a Republican. A circuit court had dismissed the prosecutor’s indictments. The High Court affirmed the lower court. In the latter case, a mob of whites attacked blacks

guarding a courthouse in New Orleans. Again the federal circuit court had found the indictments wanting. The High Court agreed.

Was the Court concerned about the political implications of the two cases? They were heard in 1875, but the decision was not announced until the next year. In his opinion for the Court in *Cruikshank*, Chief Justice Morrison R. Waite introduced the concept of “state action,” a limitation on the reach of the Fourteenth Amendment’s due process and equal protection clauses. The New Orleans mob was not an agent of the state, so the Fourteenth Amendment and the civil rights acts did not apply. The door was now wide open for the Redeemers to pass Jim Crow laws, segregating public facilities in the South, and deny freedmen their rights using supposedly neutral restrictions like literacy tests for voting as well as “whites only” primaries for the most important elections—those in the Democratic primary. Outright discrimination received Court approval in the case of *Plessy v. Ferguson* (1896), in which “equal but separate” laws, more popularly known as “separate but equal,” became the rule of the land.

The politicization of the High Court in the Gilded Age, a period of rapid industrialization, was nowhere more apparent than in a trio of highly political cases that arrived at the Court in 1894 and 1895. The first of the cases arose when the federal government prosecuted the E. C. Knight sugar-refining company and other refining operations, all part of the same sugar trust, for violation of the 1890 Sherman Antitrust Act.

Chief Justice Melville Fuller wrote the opinion at the end of 1894. Congress had the power to regulate interstate commerce but, according to Fuller, the refineries were manufacturing plants wholly within the states of Delaware, Pennsylvania, and New Jersey, and thus not subject to federal law. The Court, by a vote of 8 to 1, had refused to let the progressives in the government enjoin (legally stop), combination of the sugar refineries. It was a victory for the monopolies and the politicians they had lobbied. By the same lopsided vote, in *In Re Debs* (1895) the Court upheld a lower-court injunction sought by the federal government against the American Railway Union for striking. It too was a triumph for conservative political forces.

The third time in which the Fuller Court delved into the great political causes of the day was an income tax case. Democratic voters in rural areas favored the reintroduction of an income tax. The tax Congress passed during the Civil War expired in 1872. In 1894 Congress

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passed a flat 2 percent income tax on all incomes over \$4,000—the equivalent of about \$91,000 in 2005 dollars. Defenders of the sacredness of private wealth were aghast and feared that the measure brought the nation one step closer to socialism. In *Pollock v. Farmers Loan and Trust Company* (1895), Fuller and the Court agreed and set aside the entire act of Congress, not just the offending corporate provisions.

All three of the High Court's opinions angered the Populists and other reformers. William Jennings Bryan, the former congressman who captured the Democratic Party nomination in 1896, won over a much divided convention, in part, with an attack on the Court's dismissive view of the working man. But Bryan sounded like a dangerous extremist in a decade filled with radicalism. Better financed, supported by most of the major newspapers, the Republicans and McKinley won a landslide victory, with 271 electoral votes to Bryan's 176.

During U.S. participation in World War I, nothing could have been more political than the antiwar protests of 1917–18, and the Court handled these with a heavy hand. Here the Court acted not as an independent check on the other branches of the federal government, upholding the Bill of Rights, but as the handmaiden of the other branches' claims to wartime powers. In such cases, the Court was political in the first sense, as part of the larger operation of the federal government.

When pro-German, antiwar, or radical spokesmen appeared to interfere with the draft by making speeches, passing out leaflets, or writing editorials, or when they conspired to carry out any act that might interfere with the draft, the federal government arrested, tried, and convicted them under the Espionage Act of 1917. The High Court found no protection for such speech in the First Amendment. As Justice Oliver Wendell Holmes Jr. wrote in upholding the conviction of Socialist Party leader Eugene V. Debs, Debs's avowed Socialist commitments could not be tolerated by a nation at war. The government had to protect itself against such upsetting speech. Holmes would reverse himself in *U.S. v. Abrams* (1919), but antigovernment political speech in time of war did not receive protection from the Court under the First Amendment until the Vietnam War.

Liberalism Triumphant

In the New Deal Era, the Court thrust itself into the center of the political arena. By first upholding federal and state intervention in the economy, then striking down

congressional acts, and then deferring to Congress, the Court proved that external political considerations could be as powerful an influence as the justices' own political views. The New Deal, from 1933 to 1941, was, in reality, two distinct political and economic periods. Most of the more controversial programs from the first New Deal, like the National Recovery Administration, the Court (led by the conservative quartet of George Sutherland, Willis Van Devanter, Pierce Butler, and James C. McReynolds, joined by Owen Roberts) struck down, under the substantive due process, doctrine it originally announced in the case of *Lochner v. New York* (1905).

With the Depression largely unaffected by the first New Deal, Franklin Roosevelt's administration and Congress enacted more egalitarian reforms in 1935. Among these were programs to provide jobs (the Works Progress Administration), the Social Security Act, the Rural Electrification Administration, and the National Labor Relations Act. The last of these finally ended the antilabor injunction, in effect overruling the Court's attempts to protect it. The stage was set for a constitutional crisis between Roosevelt and the Court. In 1937, however, Justice Roberts shifted his stance, joining, among others, Chief Justice Charles Evans Hughes to uphold the constitutionality of the Social Security Administration, the National Labor Relations Board, and other New Deal agencies. What had happened to change the constitutional landscape?

One factor could have been Roosevelt's plan to revise the membership of the Court. Congress had done this before, adding justices or (at the end of the Civil War) reducing the number of justices. Roosevelt would have added justices to the Court for every justice over the age of 70, in effect "packing it" with New Deal supporters. From their new building, dubbed "the marble palace" by journalists, all the justices disliked the packing plan. No one knew what Roosevelt's plan would bring or if Congress would accede to the president's wishes. In fact, the Senate quashed the initiative. But by that time the High Court had shifted its views enough to let key measures of the second New Deal escape, including Social Security, collective bargaining for labor, and minimum wage laws.

With the retirement of one conservative after another, Roosevelt would be able to fill the Court in a more conventional way with New Deal supporters. From 1937 to 1943, turnover in the Court was unmatched. The new justices included Hugo Black, Stanley Reed, Felix Frankfurter, William O. Douglas, Frank Murphy, James F.

Byrnes, Robert Jackson, and Wiley Rutledge. All, to one degree or another, believed in deference to popularly elected legislatures.

After World War II, the cold war and the so-called second Red Scare again required the Court to step carefully through a political minefield. At the height of the cold war, the House Un-American Activities Committee and the Senate's Permanent Subcommittee on Investigations, led by Senator Joseph McCarthy of Wisconsin, sought to uncover Communists in government posts. A wider scare led to blacklists of former Communists and their alleged conspirators in Hollywood, among New York State school teachers, and elsewhere.

Here the Court's majority followed the election returns in such cases as *Dennis v. United States* (1951). The case arose out of Attorney General Tom Clark's orders to prosecute the leaders of the Communist Party-USA (CPUSA) for violating the 1940 Smith Act, which forbade any advocacy or conspiracy to advocate the violent overthrow of the government. Although this was only one of many cases stemming from the "Foley Square Trials" in the federal district court in New York City, the High Court had yet to rule on the First Amendment issues involved.

Chief Justice Fred Vinson warned that the government did not have to wait to act as the Communist Party organized and gathered strength. The Smith Act was clear and constitutional—and the Communist Party, to which Dennis and the others indicted under the act belonged, had as its policy the violent overthrow of the government. Justices Hugo Black and William O. Douglas dissented.

In so doing, they initiated a great debate over whether the Court should adopt an absolutist or more flexible interpretation of the Bill of Rights. Black's dissent was that the First Amendment's declaration that Congress shall make no law meant "no law." Conceding some power to the government, Douglas, an author himself, would be the first to grant that printed words could lead to action, and he made plain his dislike of the Communists' required reading list. But, he reasoned, "If the books themselves are not outlawed, if they can lawfully remain on library shelves, by what reasoning does their use in a classroom become a crime?" Within a decade, Douglas's views would triumph.

The Rights Revolution and Reaction

Civil rights again thrust the Court into the center of political agitation, except this time it spoke not in political

terms but in moral ones. The civil rights decisions of the Warren Court elevated it above the politics of the justices, and the politics of the men who put the justices in the marble palace. Earl Warren, chief justice during this "rights revolution," came to personify the Court's new unanimity. He was first and foremost a politician. His meteoric rise in California politics, from humble beginnings to state attorney general, and then governor, was accompanied by a gradual shift from conservative Republicanism to a more moderate, centrist position—one that favored government programs to help the poor and regulation of business in the public interest. In return for Warren's support at the 1952 national convention, newly elected President Dwight D. Eisenhower promised him a place on the Court. The first vacancy was the chief justiceship, and Eisenhower somewhat reluctantly kept his word.

Warren did not have a distinguished civil rights or civil liberties record in California. During World War II, he had been a strong proponent of the forced relocation of Japanese Americans from their homes on the West Coast to internment camps. But on the Court he saw that the politics of civil rights and the Fourteenth Amendment's plain meaning required the end of racial discrimination in schools, public facilities, and voting.

There can be no doubt that the Court's decisions in *Brown v. Board of Education* (1954), *Cooper v. Aaron* (1958), and subsequent school desegregation cases had a major political impact. Certainly southern members of Congress recognized that impact when they joined in a "manifesto" denouncing the Court for exceeding its role in the federal system and the federal government for its intrusion into southern state affairs. President Eisenhower was so disturbed by the Court's role in the rights revolution that he reportedly said—referring to Warren and Justice William J. Brennan—that his two worst mistakes were sitting on the Supreme Court.

In more recent times, the nomination process itself has become the beginning of an ongoing politicization of the Court. The abortive nominations of the Nixon and Reagan years proved that the presidency and Congress at last considered the Court a full partner—with the result that every nominee was scrutinized more carefully. There would be no more Earl Warrens, at least in theory. The effect was a hearing process that had become a national spectacle of partisan politics.

The focal point of that spectacle has been another of the Court's decisions—*Roe v. Wade* (1973). Every candidate for the Court is asked where he or she stands

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on this case that legalized abortion for most pregnancies. Oddly enough, it was President Nixon's Court, which he had constructed in reaction to the Warren Court's rulings on criminal procedure, that produced this ruling.

Chief Justice Warren Burger knew the importance of *Roe v. Wade* and its companion case, *Doe v. Bolton*, from the moment they arrived in 1971 as two class-action suits challenging Texas and Georgia abortion laws, respectively. In both cases, federal district court panels of three judges struck down the state laws as violating the federal Constitution's protection of a woman's privacy rights, themselves a politically charged issue after the Court's decision in *Griswold v. Connecticut* (1965), which struck down a Connecticut law banning the distribution of birth control materials, largely on privacy grounds.

The majority of the justices agreed with the lower courts but labored to find a constitutional formula allowing pregnant women to determine their reproductive fates. Justice Harry Blackmun, a Nixon appointee, was assigned the opinion for the majority, and based the right on the due process clause of the Fourteenth Amendment, though he clearly had more interest in the sanctity of the doctor-patient relationship than in the rights of women. His formulation relied on the division of a pregnancy into trimesters. In the first of these, a woman needed only the consent of her doctor. In the second and third trimesters, after the twentieth week, the state's interest in the potential life allowed it to impose increasingly stiff regulations on abortions.

The 7-to-2 decision invalidated most of the abortion laws in the country and nationalized what had been a very local, very personal issue. *Roe* would become one of the most controverted and controversial of the Court's opinions since *Dred Scott*, to which some of its critics, including Justice Antonin Scalia, would later compare it. For women's rights advocates it was a decision that recognized a right, but only barely, with qualifications, on a constitutional theory ripe for attack. Opponents of abortion jeered a decision that recognized a state interest in the fetus but denied that life began at conception. They would mobilize against the desecration of religion, motherhood, and the family that they felt the decision represented. The position a nominee took on *Roe* became a litmus test. Congressional and presidential elections turned on the abortion rights question, as new and potent political action groups, in particular

religious lobbies, entered the national arena for the first time to battle over *Roe*.

If more proof of the place of the Court in American politics were needed, it came at the end of the hotly contested 2000 presidential election campaign between Albert Gore Jr. and George W. Bush. As in *Marbury*, *Bush v. Gore* (2000) exemplified all three of the political aspects of the Court's place in U.S. history. First, it was a federalism case. Second, the division on the Court matched the political background of the justices. Finally, no case or opinion could have a more obvious impact on politics in that it determined the outcome of a presidential election.

To be sure, there was a precedent. In 1877 another hotly contested election ended with a decision that was clearly controversial, and five justices of the High Court played the deciding role in that case as well, voting along party lines to seat all the electors for Republican Rutherford B. Hayes and none of the electors for Democrat Samuel J. Tilden as part of the commission set up to resolve the dispute. But in *Bush v. Gore*, the disputed results in the Florida balloting never reached Congress. Instead, the justices voted to end the Florida Supreme Court-ordered recount and declare Bush the winner in Florida, and thereby the newly elected president. The majority disclaimed any partisan intent.

Whatever stance one takes on *Bush v. Gore*, the case, like those before it, offers proof that the Court has a role in the institutional politics of the nation, that the members of the Court are political players themselves, and that the Court's decisions can dramatically affect the nation's political fate.

See also House of Representatives; presidency; Senate.

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