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THE INSTITUTION

FOR THE productive life of more than one academic generation, or at least twenty years, social research on courts and law has been grounded in political jurisprudence (Shapiro, 1964). Whether the subject has been judicial interpretation, doctrinal developments, or policy impact, the epistemological frame gave priority to interests, and intellectual fascination examined the exercise of power under stress. Culminating, as journalism, in *The Brethren* (Woodward and Armstrong, 1979), this research was diverse. It included, among other things, the game theoretic models of Walter Murphy (1964), the attitude studies of Glendon Schubert (1965; 1974), and the impact work of Kenneth Dolbeare (1967). Research spanned the spectrum of experience from a criminal suspect to the Supreme Court and back to the suspect again. During this period, social scientists reconstituted the reality of courts and the legal environment according to a political perspective.

The dominant view emerged from legal realism in law schools and became implanted through the work of behavioralists in political science departments. The nature of judging was made definitively political in the bloc analysis pioneered by C. Herman Pritchett (1948). Confidence in the rigor of the new methods and their compelling certainty led to developments far beyond Professor Pritchett's work. Since the mid-1970s, that work has taken stock of its contribution, and contemporary examples reveal some sensitivity to the collective quality of institutional behaviors (Tate and Handberg, 1986). Yet the research and the method remains political in the "realist" sense, because its insight is drawn from disagreement and the "storms" of political controversy (O'Brien, 1986). The conventional wisdom became the view that the judge can do whatever he

wants and that only in some unenlightened prior age did people believe the law really mattered. We heard that the justices decide as they wish and write the opinion as a rationalization. The result was that social science research on appellate courts described politics, not law.

The political approach is also evident in the focus on struggle central to the "disputes" paradigm. With its source in the correlative disciplines of anthropology and sociology, a focus on disputes has turned social research away from appellate courts and the traditional doctrinal material of law. By offering a culturally transcendent framework, the disputes industry bridged disciplines and placed law in society (Abel, 1974). Its success was greatest in the hallways and the corridors where the disputes could be observed. But these hallways had their limits (Cain and Kulcsar, 1981/82). Elements of political reality in court are so widespread today that they have lost their critical edge. Both politics and disputes have broadened our knowledge of the bench and increased familiarity with courthouse corridors, judicial chambers, and law offices.¹ Yet for some time the lack of serious attention to the legal terrain and the diversion of interest from the traditional subjects—law and legal thought—has been a problem. This inquiry proposes leaving the preoccupation with disagreement and struggle to move toward a study of social practices, especially as they provide insight into the cult surrounding the Supreme Court.

To advance public law research it has become important to pay more explicit attention to the paths that have been shared. We have seen initiatives in the area of doctrine (Harris, 1982; O'Neill, 1981) and in the institutional studies where attention to symbolic phenomena has traditionally been rarer (Harrington, 1985; Provine, 1980). More generally, in political science scholars have been turning away from the politics of interests and behavior to shared practices in legislatures (Ethridge, 1985), in international political economy (Goldstein, 1986), and public opinion (Bennett, 1980). Some have even described a "new institutionalism" (March and Olsen, 1984). The turn from more traditional political inquiry and necessarily from dissents and disputes in the material that follows is a natural one for public law scholarship that never totally lost its connection to the stuff of tradition. That stuff, law and courts, doctrine and rhetoric, is brought back to the fold of social research through explicit attention to social practices.

"BEYOND" POLITICS

It has seemed as if a culturally specific frame, one necessarily incapable of universal application, was required to understand legal material. From apprenticeships to modern law schools, legal education has been

immersed in the richness of time and place. It has drawn heavily from cultural artifacts. We see it in the cases of the common law and the stories that reconstitute courtroom reality in modern drama. Politics and disputes provided the more abstract frame demanded by the scientific style, but they tended to exclude unique social institutions from rigorous scientific investigation. By definition, those aspects of legal or cultural practice idiosyncratic to a particular setting, such as the community where research like William Muir's study of attitude change took place (1967), resisted generalization. In the name of science, countless towns lost their identity and innumerable cases had their distinguishing features removed. Yet there is, around law and courts, a universal conception that might facilitate penetration of the particularities and sociosyncratic nature of individual systems of law and courts. The common element is that legal doctrine and legal institutions, law and office, are comprised of social practices, the same aspects of social life from which conflict stems and to which it must appeal. Practices are the mirror image of conflict and, like conflict, they allow cross-cultural comparison, generalization, and theory-building. In contrast to politics, with its emphasis on interests and disagreement, practices are the things about which there is agreement and they can be the basis for a rigorous investigation of culture and social institutions.

Appellate courts in general and the Supreme Court in particular are associated with symbols and rules; however, they have not been thought to confine the action. Here, nevertheless, the institution demands attention. In the context of social science research on law, the perceived opposition of the lawgivers of the high courts to the more pervasive context of disputes, called "upper court myth," has limited the interest in investigations of the appellate courts. Yet at the very least these courts are characterized by legal phenomena and are part of social life. There is law around the Supreme Court of the United States, although perhaps not as much as we once took for granted. Consequently, this discussion focuses on that court, an institution that demonstrates the manner in which conventions, as possible forms of conduct, contribute to the construction of social reality.

A position associated with the tradition of political jurisprudence, but offering a way out, provides a framework for the discussion that follows. Martin Shapiro's description of courts (1981) suggests an institutional link between disputes and practices in the resolution of conflict. Building from the triadic structure of dispute resolution, Shapiro describes the legal phenomena of law and office as maintaining authority over a dispute. Legal doctrine and legal institution are the terrain for disputing in a culture that relies on these institutions. They are not the only terrain and not

always the dominant terrain, but when a dispute is evident in our culture, law and the offices of a court may well structure how the dispute develops. Shapiro's contribution thus incorporates judicial office and law into the processes abstracted by researchers as conflict resolution and traditionally seen in terms of politics or disputes. Law and office, the sociological abstraction, provide a route back to traditional concerns of social research on law, the shared beliefs about which people dispute and that form the basis for dispute resolution. But coming from a social research paradigm by way of a spokesman for political jurisprudence, authoritative institutions serve as the conceptual background for the description of the Supreme Court that follows. Authority will thus be grounded in institutional settings that are themselves constituted by belief.

The implications of going "beyond" politics in this investigation also means that there will be far less attention to cases than is the tradition in political scholarship. Like individual political choices, cases will be illustrative. *Marbury v. Madison* and *U.S. v. Nixon* are integral to the shifting ideologies of authority discussed in the next chapter. *Brown v. The Board of Education*, because there has been so much written about it, and *Gideon v. Wainwright*, because what has been written was so significant, help elaborate the story of the institutional setting. *Regents of the University of California v. Bakke* is one of my favorite cases for showing how doctrinal material developed in the institution transforms practices into action. And, of course, *Roe v. Wade* is the modern case most often associated with Court capacity. As with other instances of choice, the focus will be on the whole, the tradition in terms of which cases are seen, rather than outcomes. The cases share an institutional construction with statutes, like the Judges Bill of 1925, with commentary like the *Federalist Papers* or *The Brethren*, with personality, like John Marshall's for instance, and with place, like the building that has so recently been put up for the Supreme Court. Just as the message of discourse analysis is that law is more than the decisions (Brigham, 1978), the point in this perspective is that the institution is more than its cases.

SOCIAL RESEARCH ON INSTITUTIONS

One quality of a social institution is that we take it for granted. Institutions like the Supreme Court as a whole or some part of it, like the majority opinion, are ways of doing things that provide the background for policy or law. Disputes take place with reference to them and politics is in, around, and about them. Before any cases are decided, we want to know how they will come out and once they are decided the attention

shifts only marginally to the impact or implications of a decision. Ordinary or conventional understanding of institutions such as these presents a challenge simply because the understanding is ordinary. We tend not to want to talk about what we know. We might debate the actions of a Supreme Court or the wit of a particular president. But we find it harder to investigate the fact that there is a President or that the justices of the Supreme Court go to a particular building to work. These conventions, though historically contingent, constitute limits on action. They are politically significant not because they determine outcomes but because they determine what cases are about.

The Challenge of Convention

The ways of knowing institutions actually indicate what they are made of. One kind of association is with their physical manifestations. In law, the bench, the robes, and the marbled walls signal that something is going on, and that the activity is important. We know that these "things" are not just physical, but we treat the physical presence as the institution. And although it is no secret that the Court had makeshift quarters until only fifty years ago, we lose track of that fact. After Chief Justice William Howard Taft acquired a new building for the Supreme Court in the 1930s, his successor referred to the black robed justices in their new home as "Beetles in the Temple of Karnak." The new building was a little more than many of the justices believed appropriate for the Court. The institution evident in the pictures we have of it has changed dramatically since ratification of the Constitution established the legal foundations for the American Republic.

Institutions, if they are to be taken on their own terms as meaningful social phenomena, also present a challenge to social scientists because they have a range of significations and a variety of uses. Sometimes an institution is quite animated as when a voice on the other end of the telephone says, "Supreme Court, may I help you?" An institution is often represented by the people who work in it (see Vining, 1986: 110-132). A justice may speak for "the Court" or the Chief may lend his name to the institution, as in the Marshall, the Taney, the Warren, or the Burger Court. On occasion it is a president such as Nixon or Roosevelt who lends his name to the institution, but this indicates a tension and it is usually for a shorter period of time. These names suggest a human quality and reflect a political view of the institution. As applied to the Supreme Court, they are more common today than they were in the past.

An institution is also very unlike mortals in its capacity to endure. Like other cultural phenomena, institutions are able to transcend changes in membership. This is the quality that gives them their "Naturalness"

and it is a characteristic of institutions that suggested to Aristotle the analogy of rivers and fountains that have a "constant identity" even as the flow changes the composition of the thing (Barker, 1962: 99). An institution is identifiable across time in ways that rivers are, but people are not. The Supreme Court is said to have decided *Brown v. The Board of Education* (1954) and *Board of Regents v. Bakke* (1978). Here, the institution mediated policy shifts in the meaning and relevant context for interpreting another "continuous" institution, the Constitution of the United States.

In English, the idea of an "institution" has evolved from an action, the giving of form or order to a thing.² It was once simply something that could be done, and apparently little more. By the time the American Republic was founded, the word referred to "an established organization for the promotion of some object." We now speak of a university as an institution, sometimes a bank or corporation, and certainly political establishments such as the Supreme Court. But the concept of an institution has evolved to the point that we have lost track of what it means for an institution to give form or order to our politics. This study reverses the etymological process to capture the fact that institutions are constituted in possible forms of action, that the process of giving form exists even if we don't see it. We must see that we give form to or constitute institutions like the Supreme Court in order to understand the form we are giving to it.

Portrayal of an institution requires a leap from the common sense concreteness, evident in buildings and artifacts like robes and purple curtains, to the shared perceptions that tell us what these things mean. New Dealers saw "nine old men." Their efforts to transform the institution were met by "Lions under the Throne," as portrayed by Charles Curtis in his contribution to the massive literature on the institution stimulated by the "Court packing" fight (Curtis, 1947). The Warren Court was a trumpet or at least responded to the calls of convicts like Clarence Earl Gideon. *The Brethren*, as a title, is a paradoxical allusion to collegiality and institutional tradition while the book plays on discordant personalities and disregard of institutional conventions. Such characterizations are not simply the rhetorical flourish of humanistic commentary; they reflect a public perception. Although traditionally outside more rigorous investigation, there is considerable social meaning in these descriptions. The challenge is to take Learned Hand's picture of the Court as "a piece of tapestry" (1947: xi), examining the threads and what they comprise.

The relative disinterest of social scientists in what it means to be all these things has been due, in part, to professional effort to create a distinct language on the scientific model. That project found interests (politics) and conflicts (disputing) to be appropriate foundations. Students of