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Judicial Competence and Fundamental Rights

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CORRESPONDENCE

JUDICIAL COMPETENCE AND FUNDAMENTAL RIGHTS

To the Editors:

In the April 1979 issue of the *Michigan Law Review*, Professor Ira Lupu added his valuable contribution to the continuing debate on the problem of defining the nature of fundamental rights under the Constitution.¹ In many respects his article is a wholly admirable piece of scholarship, both well-researched and carefully reasoned. However, on one issue — the question of judicial competence to identify the values he defines as fundamental — Professor Lupu's discussion is seriously deficient. This letter will examine the problem of judicial competence and conclude that it is fatal to Professor Lupu's conception of the appropriate role of the Court under the due process and equal protection clauses.

In his search for a source of fundamental rights, Professor Lupu identifies two criteria which he finds that a given claim must satisfy to deserve special protection under the Constitution:

- 1) Historically, American institutions must have recognized the liberty claim as one of paramount stature.
- 2) Contemporary society must value the asserted liberty at a level of high priority.²

Accepting *arguendo* the basic premise that one should look outside the history and text of the Constitution to find fundamental rights,³ this definition of such rights seems at least as appropriate as any other. But having identified the criteria that determine fundamentality, one must still determine whether the Court is institution-

1. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981 (1979) [hereinafter cited without cross-reference as Lupu].

2. *Id.* at 1040-41.

3. Little needs to be added to the discussion in the article of the various positions on this point. *See id.* at 1034-35. One's position depends largely on a kind of existential leap of faith made from very basic premises concerning the appropriate role of the courts in shaping values in American society. In the interests of full disclosure, I would only add that my personal leap brings me to the side of Black (*Griswold v. Connecticut*, 381 U.S. 479, 507-27 (1965) (Black, J., dissenting)), Berger (R. BERGER, *GOVERNMENT BY JUDICIARY* (1977)), and Bork (Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971)), rather than Harlan (*Griswold v. Connecticut*, 381 U.S. 479, 499-502 (1965) (Harlan, J., concurring in the judgment)), Perry (Perry, *Abortion, the Public Morals and the Police Power: The Ethical Function of Substantive Due Process*, 23 UCLA L. Rev. 689 (1976)), and Lupu.

ally competent to identify the values that satisfy these criteria.⁴ Institutional competence in this sense is a relative rather than an absolute concept; the issue is not whether the Court will invariably distinguish correctly between fundamental and nonfundamental liberties but rather whether entrusting such decisions to the Court will result in a more accurate determination than leaving the matter entirely to the political branches.⁵

The clearest example of the problem with the Lupu approach comes in the determination of contemporary values. Since the values of a nation are in fact values of the people of that nation, it is tempting to conclude that because legislators must return to the people periodically to be elected, their sense of national values will be more accurate than similar determinations by judges who are appointed for life.⁶ Lupu attempts to avoid this problem by drawing a distinction between national majorities on the one hand and state and local majorities on the other. He argues that state legislative decisions are likely to reflect local values, which may vary from those of the nation as a whole. It is these national values which the Constitution embodies. Since the Supreme Court is a national body, he concludes that it is at least as competent as local legislatures to divine these national values.⁷

Professor Lupu would have the Court accomplish this task largely by considering widespread patterns of state legislation.⁸ Such an approach would work a rather bizarre alteration in the structure of American federalism. As generally conceived, subject to limitations imposed by the national government, any given state government (or group of state governments) has no authority to af-

4. See Lupu at 1049.

5. In fairness it must be noted that an erroneous determination that courts rather than legislatures are more institutionally competent to identify fundamental rights has different consequences than a similarly inaccurate appraisal that the legislature is the more able of the two bodies to make such decisions. In the former case, rights that are not fundamental will be added to those values that the legislature has already accurately determined to satisfy Lupu's criteria; the result will be that the legislature will be denied the flexibility to act in some areas where its authority should be paramount. In the latter situation, individuals will be denied some liberties which should be considered fundamental.

One could plausibly argue that preventing infringements on fundamental liberties is somehow more important than preserving legislative flexibility in those areas where it is appropriately exercised. This argument leads to the conclusion that one should prefer judicial to legislative identification of fundamental values if there is any doubt regarding relative institutional competence. My only response is that I disagree with the major premise of the argument.

6. Lupu at 1049 (citing Ely, *The Supreme Court, 1977 Term — Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 49-50 (1978)).

7. See Lupu at 1049. See also *id.* at 1042-43.

8. *But see id.* at 1049.

fect the policies of any other state government. Thus, for example if all states except Minnesota believed that the use of marijuana should be legalized, Minnesota is under no compulsion to follow that judgment if its legislators do not agree with it.

But under the Lupu scenario, if a sufficient number of states were to adopt a policy and maintain it over a long period of time, they could in effect use the institution of the Supreme Court to force this policy on other unwilling states. His own example of no-fault divorce laws provides an excellent illustration. If all states but Michigan chose to adopt such laws, and maintained them over a sufficiently long period of time to constitute "historical" recognition, then Michigan in effect would be forced by the other states to adopt such an approach, even if the Michigan legislature has repeatedly considered and rejected the no-fault proposal.

But Professor Lupu's argument also suffers from a more basic flaw: it discounts the position of Congress in making the value judgments that he would give the Court the power to override. The argument that the Supreme Court is in a better position than state and local governmental bodies to ascertain national values has some appeal; however, the argument falters when an attempt is made to apply it to congressional judgments. Like state legislators, representatives and senators are elected, and thus their votes presumably reflect the values of their constituents; and almost by definition, the constituency of Congress reflects a cross section of national opinion.

The existence of Congress is important in two respects. First, while most cases decided under equal protection and substantive due process rationales have concerned state laws, the same standards apply to the actions by the federal government. For example, although *Maher v. Roe*⁹ dealt with the constitutionality of a state's refusal to fund nontherapeutic abortions as general medical aid, the same principles would apply to federal laws that similarly limit funding.¹⁰ I do not understand Professor Lupu to argue that substantive due process applies different constraints to the states than to the federal government; indeed, given the identical wording of the due process clauses of the fifth and fourteenth amendments, such a contention would be extraordinarily difficult for anyone to maintain. Nor does he seem uncomfortable with the concept that the fifth amendment incorporates standards generally equivalent to those of the equal protection clause.¹¹ Yet the arguments he uses for preferring the

9. 432 U.S. 464 (1977). See Lupu at 1003-15.

10. See, e.g., Pub. L. No. 95-205, 91 Stat. 1460 (1977).

11. See Lupu at 995 & n.78.

judgment of the Court over those of state and local governments on issues of fundamental rights are simply inapplicable when applied to Congress.

Of course, in most situations where a state law is challenged as abridging a fundamental right, there will be no congressional action directly suggesting a position on the issue. Professor Lupu argues that in such cases the Court can make an independent decision on the ground that Congress has "refuse[d] to accept the assignment" of defining fundamental rights.¹² But the very fact of congressional inaction suggests a decision that the challenged state law does not intrude on fundamental rights. If Congress had felt that such an intrusion had taken place, it could have enacted a statute invalidating the state law and made its decision stick under the supremacy clause. Nor can the failure to adopt such a law be attributed to inadvertence; generally, if the challenged state law touches the kind of deeply felt values that Lupu defines as "fundamental," then one can expect some constituents to bring the matter to the attention of their representatives. Given this situation, one can only take congressional inaction as approval of, or at least acquiescence in, the policy underlying the state law.¹³

Thus, if the Lupu position is to be adequately justified, it cannot rest on the theory that it is transferring final authority on national values from local governments to the national government (embodied by the Supreme Court); rather, it must justify transferring final authority from the political branches of the federal government to the judicial arm of the government. This in turn requires a demonstration that Congress is often likely to ignore the deeply held values to which Lupu refers in determining what actions it is to take.

In another context, Professor Lupu suggests that he would adopt

12. *Id.* at 1049.

13. Although Professor Lupu does not seriously argue that Congress will often not be empowered to override state judgments in matters touching fundamental rights, *see* Lupu at 1049 n.323, the matter deserves some mention. At least in theory, the federal government is one of only enumerated powers, most of which are listed in U.S. CONST. art I, § 8. These powers have, however, been interpreted quite broadly, particularly the commerce power and the taxing and spending authority to which Lupu himself refers. Indeed, the interpretation of these powers has been so broad as to lead some commentators to suggest that the theory of enumerated powers is no longer any constraint on Congress at all. *E.g.*, E. BARRETT, CONSTITUTIONAL LAW — CASES AND MATERIALS 248-49 (5th ed. 1977).

In any event, if, as Lupu argues, the fourteenth amendment embodies a judgment that rights meeting his criteria merit special protection, then Congress has authority to protect those rights independent of the powers enumerated in article I. Section 5 of the fourteenth amendment gives Congress the authority to enforce the provisions of the amendment, and this power is broad enough to allow Congress to protect those values that are fundamental within the meaning of the due process clause. *See* *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *United States v. Guest*, 383 U.S. 745 (1966).

Professor Perry's position that the nature of the federal legislative process makes its actions inherently unreliable as a barometer of social attitudes that help determine which rights are fundamental.¹⁴ In support of this contention, Lupu offers three possibilities, which are best discussed in the context of a particular right. Consider the situation in which a majority has come to the conclusion that the liberty to choose one's sexual preference is one to be "valued . . . at a high priority" and thus that all laws discriminating against homosexuals should be abandoned. Lupu first argues that the majority may fail to obtain revisions of laws prohibiting such conduct because they may be laboring under the misconception that most people still believe that the homosexual conduct should be forbidden. Fearing defeat, the members of the majority may shift their energies to other projects that they perceive to have better prospects.¹⁵

Second, Lupu suggests that the law might not be changed because of a lack of forceful commitment on the part of the majority. He and Perry reason that since most members of the majority will have no personal stake in the removal of sanctions against homosexuals, they will not be inclined to pursue this goal aggressively. Thus, their will can be defeated by a small but vocal minority favoring the retention of such sanctions.¹⁶

Finally, the possibility is raised that the majority may be lulled into a false sense of security by a long-term failure to enforce the offending sanctions. Since a ban on homosexual acts will not seem to have any immediate effect on any person, opponents of the law may feel that their efforts are more profitably invested in seeking other changes. Thus, when a change in policy in the prosecutor's office leads to a decision to prosecute homosexual behavior, people may be arrested and convicted under a law that offends the sensibilities of the majority.¹⁷

The first two arguments would have greater force if Lupu's concept of a fundamental right embraced *all* attitudes of the majority of society which have been held for the requisite amount of time to become historically established. But as he recognizes, this would give the due process clause far too great a scope. Instead, he limits the concept to those rights to which members of society give a high priority. Beliefs in such rights are likely to be deeply held; thus, those holding the beliefs will be unlikely to be deterred from press-

14. Lupu at 1039 & n.286 (citing Perry, *supra* note 3, at 727-28).

15. Lupu at 1039 n.286.

16. *Id.* at 1039-40 & n.286; Perry, *supra* note 3, at 727-28.

17. Lupu at 1039 n.286.

ing their position by the perception that they constitute a minority view. Similarly, high priority values are almost by definition those which a person will actively and vocally support. If freedom of sexual preference is in that category, then rather than facing a basically indifferent majority which generally favors such freedom and a strongly committed active minority which favors criminal sanctions for homosexual activity, the legislature will likely be faced with two vocal groups—a majority pressing for repeal of sanctions and a minority for retaining (or even strengthening) the current laws. Given that scenario, repeal seems almost inevitable.

The argument based on the possibility of a return to enforcement after a long period of nonenforcement is more troubling. *Griswold v. Connecticut*¹⁸ stands as an apparent example of just such an occurrence. But even without invoking the specter of substantive due process analysis, the system presently offers potential correctives; the possibility of jury nullification and the use of executive clemency come to mind immediately. Moreover, such instances are likely to be isolated, and the damage to deeply held values self-limiting; any attempt to part from past policy and enforce on a significant scale a statute that is antithetical to widely and deeply held values will almost certainly be met by public resistance and a quick repeal of the offending law. In short, the magnitude of the danger does not seem sufficient to justify the Court's arrogation of such a broad and potentially dangerous power as the authority to define fundamental rights based on its perception of society's past and current ethical values.

Professor Lupu fails to mention what is perhaps the greatest practical barrier to a pure majoritarian implementation of values through the federal legislature — the existence of the Senate. One can readily envision a situation in which the House of Representatives passed a bill guaranteeing the rights of homosexuals, while the Senate rejected a similar bill even though members of each house of Congress faithfully followed the wishes of their respective constituencies. In such a case, the vote of the House would reflect majority sentiment, yet discrimination against homosexuals would remain legal.

At the outset, it seems appropriate to note the apparent incongruity of employing the due process clause as a counterweight to that pernicious anti-majoritarian institution, the United States Senate. But even leaving this incongruity aside, the existence and composition of the Senate does not significantly detract from the efficacy of

18. 381 U.S. 479 (1965).

Congress as an instrument for ascertaining and protecting fundamental values. For certainly such values, no matter how deeply and long-lastingly held, must be shared by more than a bare majority in order to rise to the level envisioned by Professor Lupu under the due process clause. What is needed is a consensus, rather than a simple majority view; and in a nation as diverse as the United States, it seems only appropriate that the consensus cross regional lines. To decide otherwise would turn the due process clause into a device by which, for example, the populous East could impose its deeply held beliefs on the sparsely populated states. Given this observation, the make-up of the Senate should not be seen as a barrier to reliance on the legislative judgment for determining which rights are fundamental.

In short, one would expect that in general (although admittedly not always) the federal legislature would act to protect those rights which are fundamental within Professor Lupu's definition. By contrast, the ability of the Court to identify such values accurately is far more questionable. Plainly the Justices are not exposed to the kind of input on moral values that is available to legislators through the day-to-day operation of the political process. And the principal surrogate that Professor Lupu suggests — observation of the actions taken by state and federal legislators¹⁹ — is likely to be misleading. It is no doubt true that one can expect fundamental rights to be widely protected by Congress and state legislators, but it does not necessarily follow that all rights which receive such protection are fundamental. A general pattern of protection for a given interest may simply reflect a weak but widespread preference for a given policy judgment rather than a high priority value of the sort envisioned by Professor Lupu.

Moreover, if the Court errs, correction will be more difficult than if the legislature had made an analogous error. Unlike a legislature, the judiciary is bound by the principle of *stare decisis*. Although applied somewhat less rigidly in constitutional litigation,²⁰ this concept remains an impediment to adjustments of constitutional rules by the courts in the face of changing conditions. Perhaps more importantly, while legislatures may continually reexamine their conclusions on their own initiative, courts may only decide issues presented to them in an adversary posture. This factor takes on particular importance where a state law is held unconstitutional and then

19. *See* Lupu at 1048.

20. *See, e.g.,* *Glidden Co. v. Zdanok*, 370 U.S. 530, 543 (1962) (Harlan, J.); *Smith v. Allwright*, 321 U.S. 649, 665 (1944).

amended to meet the Court's objection; in such a situation, the declaration of unconstitutionality cannot be reconsidered. Legislators may feel that their institutional duty requires them to respect judicial determinations of unconstitutionality whatever their view of appropriate policy might be. Indeed, the Supreme Court itself, in *Cooper v. Aaron*,²¹ has suggested that legislators have such a duty.²²

In summation, not only is the legislature better placed than the Court to identify fundamental values accurately, but an error made in this regard by the legislature is more easily corrected than a similar mistake by the Court. Thus, the Court should refrain from attempting to make such determinations.

Professor Lupu's article is a valiant effort to supply an appropriate theoretical basis for a relatively expansive role for the Court in defining fundamental rights. His attempt ultimately fails, however, because he undervalues the role of Congress in the recognition and enforcement of such rights. There still remains to be constructed a satisfactory framework to guide the Court's search for a role in protecting liberties outside of those which find support in constitutional text or history.

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Reply:

I thank Professor Maltz for his generally kind characterization of my work. More importantly, I thank him for provoking me to amplify a point on which I spent only one short paragraph and one footnote in *Untangling the Strands of the Fourteenth Amendment*.¹ On "the question of judicial competence to identify the values [to be defined] as fundamental,"² Professor Maltz has convinced me that my initial discussion, while not "seriously deficient," does need further development.

I've taken more than my fair share of pages in this *Review*, so I shall be as brief as possible in responding to Professor Maltz:

21. 358 U.S. 1 (1958).

22. See 358 U.S. at 18.

1. 77 MICH. L. REV. 981 (1979) [hereinafter cited without cross-reference as *Strands*]. The paragraph and footnote to which I refer is at 1049 and n.323.

2. Maltz, *Judicial Competence and Fundamental Rights*, 78 MICH. L. REV. 284 (1979).

1. *The "tails wag the other tails" argument.* Professor Maltz suggests that my view would permit a majority of states to "gang up" on a few others who refuse to fall in line on a matter of legislative policy.³ If any scenario is bizarre, it is his. Why would the other forty-nine states *care* if Michigan varied on divorce policy? Presumably, some Michigan plaintiffs would care; otherwise, no lawsuit would come about. I argued in *Strands* that "[a] widespread pattern of state legislation in support of the liberty is also relevant"⁴ on the contemporary values question. That is hardly a suggestion that a fundamental value finding is automatically triggered when a critical mass of state legislation accumulates. These are questions of subtle and difficult judgment, and state law patterns are only one element in the decisional process. (Yes, Louisiana, you may keep your Francophiliac legal quirks.)

2. *The "Congress as a source of fundamental values" argument.* My discount of Congress's judgment on fundamental values, says Professor Maltz, is a "more basic flaw"⁵ in my argument. Although it strikes me as flawless to do so, I concede that the Court should be more deferential to congressional action which intrudes upon arguably fundamental values than it might be if a state legislature acted similarly. The deference difference is not a product of divergent constitutional standards; rather, it is a product of more judicial respect for Congress on the matter of national values than would be due a state legislature. The standards are the *same*; congressional responses are simply worth more, given the character of the standards as rooted in values embedded nationwide.

Professor Maltz and I quite clearly part company, however, when he suggests that congressional *inaction* can reasonably be construed as a national legislative judgment that a particular state law does not intrude on fundamental rights.⁶ At first glance, Professor Maltz's argument seems outrageously misguided; the dangers of drawing inferences of legislative approval from legislative silence are significant and well known. In light of all the impediments to final legislative action — bills must be introduced, survive committees,⁷ compete

3. *Id.* at 286.

4. *Strands* at 1048.

5. Maltz, *supra* note 2, at 286.

6. *Id.* at 287.

7. Professor Maltz's worry about the Senate's anti-majoritarianism, *id.* at 289-90, seems sickly pale when compared with the anti-majoritarianism of the congressional committee system. Senator Russell Long, for example, in all his accumulated power as Chairman of the Senate Finance Committee, can almost singlehandedly block (though he cannot singlehandedly enact) tax or welfare legislation. Is Senator Long's opposition to a bill to be viewed as functionally equivalent to national legislative disapproval of its policies?

with others for legislative priority, etc. — inaction is never a safe source for even the most uncontroversial of inferences (*e.g.*, legislative acquiescence in some innocuous administrative policy). The political sensitivity of most fundamental rights issues renders any such inferences from silence wholly inappropriate; on such issues, legislators sense that any position will make some constituents very upset, and lawmakers consequently avoid taking a stand. Such a process cannot responsibly be viewed as deliberate, democratic decision about the scope of fundamental rights. Indeed, it would be sounder to treat denials of certiorari as affirmances on the merits, and we know better than to do that.

Second, Professor Maltz assumes dangerously much about the scope of congressional power to act on all these questions. True, once “deeply embedded values” are embraced by section 1 of the fourteenth amendment, Congress would seem to have power, conferred by section 5, to discover such values and protect them against state infringement. Moreover, I suggested in *Strands* that the historical component of the test for such values is a necessary check against *judicial* mistake;⁸ when Congress is acting, perhaps only contemporary support (*i.e.*, enough to legislate) is required. That view, however, leads to the conclusion that Congress may displace any state law on any subject simply by asserting that the override is in service of fundamental rights. Such a conclusion obliterates even the theoretical notion of a national government of delegated powers only. Furthermore, that view of section 5 power offers no principled way to block congressional efforts to reverse the Court’s view of fundamental values, and thus imperils the *Marbury*⁹ notion that the Court is the final arbiter of constitutional questions. Total deference to congressional judgment and power on these questions, therefore, threatens both federalism and separation of powers structures.¹⁰ My own view of section 5 power is thus a more limited one; Congress may act to further (but not retard) the Court’s section 1 concerns and even then is entitled to deference only when its judgment is presumptively more expert than the Court’s. Given a restrained search for values truly embedded, rather than momentarily popular, neither the power nor the expertise of Congress should be thought as sweeping as Professor Maltz would have it. I conceded above a “deference difference,” but that in no way implies a license to Congress to usurp

8. *Strands* at 1040-46.

9. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

10. For the most recent set of judicial views on these complex and controversial questions, see the range of opinions in *Oregon v. Mitchell*, 400 U.S. 112 (1970).

the Court's position as ultimate guardian of constitutional values. Just as the Court is perceived as being on dangerous ground when it "legislates" in too much detail, so too is the power separation fabric stretched thin when Congress undertakes a judicial role.¹¹ Professor Maltz's position is thus doubly faulted; it draws inappropriate inferences from silence, and does so in situations where Congress's power to be vocal is very much, and very properly, in doubt.

Professor Maltz seems to recognize the weakness of his "inaction plus power to act equals approval" line of argument, and so he shifts subtly to a somewhat different approach. He contends, in essence, that a market test for "deeply embedded values" is the only appropriate one. If intense individual value preferences exist, he asserts, they will rise to public notice, ultimately aggregate, and finally become translated into legislation. When that does not occur, he believes, the values are not held with sufficient depth or intensity, and so should not be protected judicially under my standards. Finally, even if this process is short-circuited by lax enforcement of a law that offends such values, Professor Maltz contends that ad hoc devices (jury nullification or executive clemency) will limit the damage.

On the last point first, I can only say that reliance on such devices seems a horribly insecure and unreliable way to protect rights. Moreover, to return to the issue of local vs. national standards, those devices won't help much if a wide majority in one state has temporarily been swept up in some berserk passion. On the more fundamental conception of the political arena as market, I think that Professor Maltz has embraced a model of classical democracy,¹² and that such a model is at powerful odds with current political reality. We have no national town meetings, or binding national value preference polls. Most citizens have no regular access to their representatives, either state or federal. Elections, modern political science has suggested, are not mechanisms by which popular views on policy

11. A useful, though imperfect, analogy can be drawn between the problem discussed in the text and the problem of judicial invalidation of state law as inconsistent with the unexercised federal commerce power. Although, in that setting, Congress clearly has final authority to "prescribe the rule by which commerce is to be governed," *Gibbons v. Ogden*, 6 U.S. (9 Wheat.) 1, 9 (1824) (and thus to consent to or override state law impediments to interstate commerce), the Court has frequently filled in congressional silence with a negative on the challenged state law. See, e.g., *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429 (1978). It does so, moreover, in a context in which the relevant fact-finding seems peculiarly "legislative" in character.

12. For an illuminating review and critique of the vast literature on democratic theory, see J. LIVELY, *DEMOCRACY* 52-110 (1975). My argument above and in *Strands* tends to follow the descriptive conclusions of the empirical theorists. See *id.* at 60-76. For a critique, on normative grounds, of the elitist qualities of empirical theory, see *id.* at 76-80 and the sources cited at 78 n.17.

are mandated; rather, they are devices to check abuse by government insiders and to allow for orderly power transitions. Professor Maltz's argument¹³ that deeply held value preferences will inevitably find legislative protection assumes a degree and quality of participatory democracy that we do not have and, in a mass society, we are not likely ever to have.

High priority values, in my view, are not necessarily those which lead individuals or organized groups into the political arena. Rather, such values are cultural norms that undergird the ongoing social arrangement. Legislative politics is rarely concerned with discovery of such basics; it tends to exalt expediency over principle, and distributional questions over moral ones. Judicial attention to basic values thus becomes a necessary check on the occasional tendency of political branches to respond to more immediate, shortsighted concerns at the expense of deeper, though perhaps less consciously embraced, social values. Litigation efforts (mounted, presumably, by those whose interests are immediately affected) are thus a better test of intensity (though not frequency) of basic value preferences than is legislative output, and are certainly a better test than legislative silence.

Finally, Professor Maltz tells us that "the ability of the Court to identify [fundamental] values accurately is far more questionable [than the ability of Congress]"¹⁴ and that "the Justices are not exposed to the kind of input on moral values that is available to legislators through the day-to-day operation of the political process."¹⁵ On the latter point, an empirical one, I have indicated above my contrary guess. Legislators are exposed to policy choices and pressures, and those pressures may easily overwhelm any moral value component in the choices faced. If we consider the kind of input as well as the frequency or accuracy of input, I find it difficult to accept the proposition that legislators generally receive, much less respond to, anything resembling pure assertions of fundamental values. The Court is far more likely to be exposed, on a regular basis, to the broad range of moral aspirations toward which the society endeavors, and the Court is far more likely to possess the detachment required to reconcile immediate needs with those aspirations. On this matter, perhaps Professor Maltz is right when he says, in a slightly different context, that one's conclusions "depend largely on a kind of

13. Maltz, *supra* note 2, at 287. See, e.g., J. A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 269-83 (1943).

14. Maltz, *supra* note 2, at 290.

15. *Id.*

existential leap of faith made from very basic premises concerning the appropriate role of courts in shaping values in American society."¹⁶ My own leap of faith extends to process as well as to substance, and I remain hopeful that the judicial process can competently and wisely discharge the task I would assign it.

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16. *Id.* at 284 n.3.