THE WARREN COURT

Cases and Commentary

Harold J. Spaeth

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To my wife, Jean Daulton Spaeth,
and my distinguished colleague, Glendon Schubert

Foreword

This book is meant to supplement existing casebooks and textbooks which focus more upon the past than upon the present. All too often the student enrolled in a course in constitutional law or politics terminates his study at some point in the past. I hope that this book will provide the material necessary to insure a measure of timeliness in such courses of study. For readers other than students, the book also stands alone, presenting the decisions and policies of the Warren Court in a context intelligible to the lay reader. Although the cases themselves are important in the study of the Supreme Court, their significance is not self-evident. Hence, I have sought to blend the features of the casebook with those of the textbook. The cases printed in this book include majority as well as minority opinions; decisions included cover the period from 1953 (when the Warren Court came into existence) to the end of 1965.

My focus in this book is primarily upon the leading cases decided by the Warren Court. By a leading case I mean one which produces what appears to be a pronounced impact upon the course of American government and society and/or contains an incisive statement of values considered important to the operation or character of American government or society. A selection of cases based upon this conception of a leading case must of necessity be somewhat subjective. I am hopeful, however, that my judgment of the leading cases decided by the Warren Court varies but little, if at all, from that of other political scientists. The quoted decisions of the Supreme Court are printed with their footnotes numbered as in the *United States Reports;* where excisions of text have resulted in excision of footnotes, these footnote numbers are skipped. My own footnotes are indexed by letter in alphabetical sequence.

In addition to a focus upon the leading decisions of the Warren Court, this book also pays considerable attention to the voting behavior of the justices in the various areas of policy making with which the Warren Court has been involved. I believe that the justices are political actors within the mainstream of American politics, that they function as decision makers who are responsible for deciding questions and resolving

issues important to the functioning of American government and society. This book, however, is not a behavioral analysis of Supreme Court decision making as such. Only attitudinal analyses and a critique of certain legalistic factors which are considered significant motivators of the behavior of Supreme Court justices are included.

Finally, a word about the commentary which introduces the various cases. Because I am a political scientist and because the Court is a governmental body deciding basic policy questions—and most decidedly the Warren Court has been such—the textual material is politically oriented. Furthermore, I have organized the book's contents compatibly with the policy matters which have been the subject of Warren Court decisions, rather than according to purely legal or constitutional categories. Fortunately, a division of cases according to policy issues differs little from one framed by legal considerations. Accordingly, the legalistically oriented reader should not find the book's contents any less meaningful than the reader whose interest is political.

A number of persons assisted in the preparation of this book. My graduate assistants in 1964 and 1965, Mr. Douglas Parker and Mr. Charles Poland, efficiently verified quotations, citations, and miscellaneous factual assertions, and served as sounding boards and perceptive critics on matters of style as well as substance. Mr. Roger Jacobs, librarian at the University of Detroit Law School, was especially kind in providing me with the necessary source materials. Dr. Hilda Jaffe, former editor of the Michigan State University Social Science Research Bureau, and Nancy K. Hammond, the present editor, edited the manuscript. Meredith Thompson transcribed and typed the various drafts with precision and dispatch. My wife, as usual, was irreplaceable in reading proof.

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H. J. S.

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THE WARREN COURT IN PERSPECTIVE

Ostensibly, the Framers of the Constitution expected the Supreme Court to function as a "brake on progress," as an instrument which would slacken the pace and delimit the scope of governmental policy making at both levels in our federal system: the national as well as the state. The expectation that the Supreme Court would restrain and delimit the powers of government was perhaps most authoritatively expressed in *The Federalist,* the classic commentary on the Constitution by Hamilton, Madison, and Jay. In No. 78 of *The Federalist,* for example, Hamilton speaks of the federal judiciary as an "excellent barrier to the encroachments and oppressions of the representative body," and as "the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws."

But the Supreme Court's power of judicial review was not the only instrument designed to exercise a restraining influence upon governmental policy making. The system of checks and balances, the separation of powers, the division of power between the nation and its states, bicameralism, and the executive veto were all directed to the same end—to negate and restrain the exercise of governmental power. Indeed, the nature of the American governmental system was such that the positive use of power was exceedingly difficult to achieve. Not only were the powers granted narrowly limited, but the effective exercise of power within the authorized boundaries was also impeded. In short, the constitutional system was devised to make come true the saying, "that government is best which governs least." And in this system of minimum government, the Supreme Court was to be the capstone, the supreme guardian of stability. It was to be the major bulwark in a system already well provided

with lesser obstacles to the realization and implementation of governmental policy making.

Psychologically, a system thus distinguished—distinguished not only by limits upon the scope of governmental power, but also by built-in obstacles to the effective exercise of those powers which were granted to government—made much sense. The American environment was, and still largely remains, fluid and dynamic. Socially, culturally, and economically, American society was unstructured by comparison with Old World society. As the colonial period receded into the past, within a lifetime an individual born in humblest circumstances could become a multimillionaire; the offspring of illiterate peasant immigrants could become an arbiter of fashion or the author of learned books. The ability of an individual to achieve such changes in status and life style is but one reflection of drastic societal changes. The expansion of the nation from the Atlantic seaboard to the distant reaches of the Pacific Ocean, the impact of the industrial and technological revolutions upon the simple agrarian society of the nineteenth century, and the transformations brought about by urbanization, immigration, and mass transportation and communication—all fundamentally affected the individual, his way of life, and his relationships with others. The early nineteenth-century ideal of the autonomous individual, self-reliant and free to follow his own interests in competition with his fellows, came to lack relevance in the face of changes beyond the individual's control which left men considerably less than self-sufficient. No amount of social change, however, has eroded man's need for a measure of apparent stability in the flux of life, and consciously or unconsciously Americans erected a governmental system whose institutions, character, and powers were designed to be fixed[a] and permanently stable.

JOHN MARSHALL AND THE FUNCTION OF THE SUPREME COURT

But despite the expectations of the Framers, the Supreme Court did not long keep to its role as a mere restraining influence in the governmental system. With the accession of John Marshall to the Chief Justice-

[a] The fixity of the system was not so great as to exclude provision for amendments to the Constitution. The amending process, however, was made exceedingly difficult to effectuate by requiring much more than a simple majority for adoption of an amendment: two-thirds of both houses of Congress to initiate a proposed amendment, with ratification requiring the approval of three-fourths of the states.

ship in 1801, the Court began to function in an eminently purposeful and creative manner. By the use of a variety of constitutional provisions, such as the supremacy clause[b] and the interstate-commerce clause,[c] Marshall and his associates effectively penned the bumptious states within the corral of national supremacy. Further, the Marshall Court used the contract clause[d] to protect vested property rights from abridgment by state legislative enactments.

In effect, the Supreme Court under Marshall effectively promoted the objectives of the Federalist Party, strengthening national authority against the currents of decentralization and protecting vested property rights against the incursions of state governments that were responsive to the wishes of the lower social and economic classes. It is notable that the promotion of Federalist objectives by the federal judiciary had the support of those among the Framers who had become members of the Federalist Party after the adoption of the Constitution. Indeed, if they were to realize their objectives, no other course was open to the Federalists after the election of 1800, when their Party was badly defeated at the polls by the Jeffersonians.

Perhaps the most dramatic assertion of the Court's role as an agent for political change during its early years was Marshall's opinion in *McCulloch* v. *Maryland,* 4 Wheat. 316 (1819). In a landmark decision, the Court broadly construed the necessary-and-proper clause[e] to allow implied powers to be exercised even though there was no explicit reference to them in the Constitution. In the *McCulloch* case, the power complained of was the incorporation by Congress of a national bank. In relevant part, Marshall wrote:

> We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to

[b] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

[c] "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . ."

[d] "No State shall . . . make any . . . Law impairing the Obligation of Contracts . . ."

[e] "To make all Laws which shall be necesary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

Although Marshall begins and ends the passage with strong references to fixity, to the unchanging character of the Constitution and the governmental system which it oversees, the middle sentence evokes a rather incompatible image. In the same vein, in an earlier portion of this opinion, Marshall discourses on the nature of constitutions. He points out that the function of a constitution is only to outline a system of government rather than to "contain an accurate detail of all the subdivisions of which its great powers will admit." A constitution, therefore, "requires that only its great outlines should be marked, its important objects designated," with "the minor ingredients which compose those objects be-[ing] deduced from the nature of the objects themselves." Following up these assertions, Marshall ended on a note less than satisfactory to those seeking reference to a fixed star: "We must never forget that it is a *constitution* we are expounding."

Marshall's foregoing statements reach the edge of judicial objectivity. As a dispenser of justice, the judge is precluded from exercising his will. His decisions must accord with the Constitution and the law; his own personal views and predilections are not grist for the judicial mill. Such is the formal explanation of the judicial function. In reality, however, courts do make policy, at least appellate courts do, and the Supreme Court is paramount among our appellate-court systems. Even so, proper form must be observed. Accordingly, no opinion of a court can maintain that the decision reflects merely the will of a majority of the judges.[f]

On the other hand, Chief Justice Marshall and his associates were required to construe a document which did not "contain an accurate detail of all the subdivisions of which its great powers will admit." If the Constitution did contain such accurate detail, no one would have any recourse to its stipulations but by amendment, and any clerk could take over the Court's function. Given the document as it stood, the Court had

[f] It is not unusual, though, for a dissenting opinion to accuse the majority of writing its own predispositions into law. This is a common tactic to discredit the majority's holding in the hope of securing a reversal at some future time. All of the great dissenters in Supreme Court history—from Justice Johnson in Marshall's time, through Peter V. Daniel and the first Justice Harlan, to Holmes and Brandeis, and Justice Black in the early years of the Warren Court—have used this tactic with telling effectiveness.

two possible courses of action: to take Marshall's path and render decisions which could be justified on the basis of the Framers' intent, the meaning of the words, or logical analysis; or to force detailed amendments by repeated refusal to take action where the nature of the action was not clearly stipulated. Clearly, the latter course would have destroyed the Court as a governmental body.

The Court, then, since Marshall, has found itself trying to fulfill two contradictory functions. On the one hand, it must be a policy-making body; on the other, an impartial dispenser of justice under the Constitution and laws of the United States. This conflict was resolved early in our constitutional history: The policy-making function was cloaked by the myth of judicial omniscience and impartiality. From the time of the Marshall Court, legions of judges, lawyers, public officials, and private citizens have reiterated the notion that judicial decision making is an occult science, attainable only by those deeply steeped in the law. From this assertion follows the conclusion that Supreme Court justices possess the key which enables them to apply and construe the Constitution—the fundamental law—with indisputable precision. This position was first articulated by Hamilton in No. 78 of *The Federalist:*

> The judiciary . . . may truly be said to have neither FORCE nor WILL, but merely judgment . . .
>
> It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it prove any thing, would prove that there ought to be no judges distinct from that body.

At the Supreme Court level, the myth of judicial impartiality culminated in Justice Roberts's classic utterance in his opinion of the Court in *United States* v. *Butler,* 297 U.S. 1 (1936):

> It is sometimes said that the court assumes a power to overrule or control the action of the people's representatives. This is a misconception. The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down. When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty,—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the

former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends.

The assertion of judicial impartiality, especially as applied to the Supreme Court, struck a responsive chord in the majority of Americans. In addition to the psychological warrant for stability and certitude, the myth of judicial objectivity fitted compatibly into the notions of respect for the higher law common to American society during its formative era. This respect had both religious and political roots. The former involved conceptions of natural law or of Scripture as a divinely ordained code of personal conduct, while the political roots lay in the English common law and the ancient and sacrosanct customs and traditions from which it evolved. The result was a deeply rooted reverence for the Constitution which, within a generation of its adoption, became the supreme symbol of American patriotic devotion. To this reverence for the Constitution was coupled the veneration of the Supreme Court as the anointed guardian of America's holy writ.

THE BASES OF JUDICIAL POLICY MAKING: JUDICIAL REVIEW AND STATUTORY CONSTRUCTION

The Court has two sources of decision-making capability: judicial review and the more prosaic, but no less significant, power of statutory construction. Judicial review, the doctrine which Marshall formulated in *Marbury* v. *Madison,* 1 Cranch 137 (1803), applies exclusively to constitutional interpretation. It gives the Court authority to determine the constitutionality of actions of the other branches and units of the national government and, derivatively, the authority to judge the compatibility of actions of state governments with the provisions of the federal Constitution and laws. Although judicial review is used much less than statutory construction as the basis of decision making, it attracts much more attention, undoubtedly because of its uniqueness. No other government gives quite the same power to its supreme judicial tribunal.

Judicial review, although conceived and formulated as a restraint upon the actions of the other branches and units of government, may also be used to legitimate those actions. As a result, judicial review may serve to enlarge the sphere of governmental authority. This is precisely what was done in *McCulloch* v. *Maryland,* 4 Wheat. 316 (1819), when