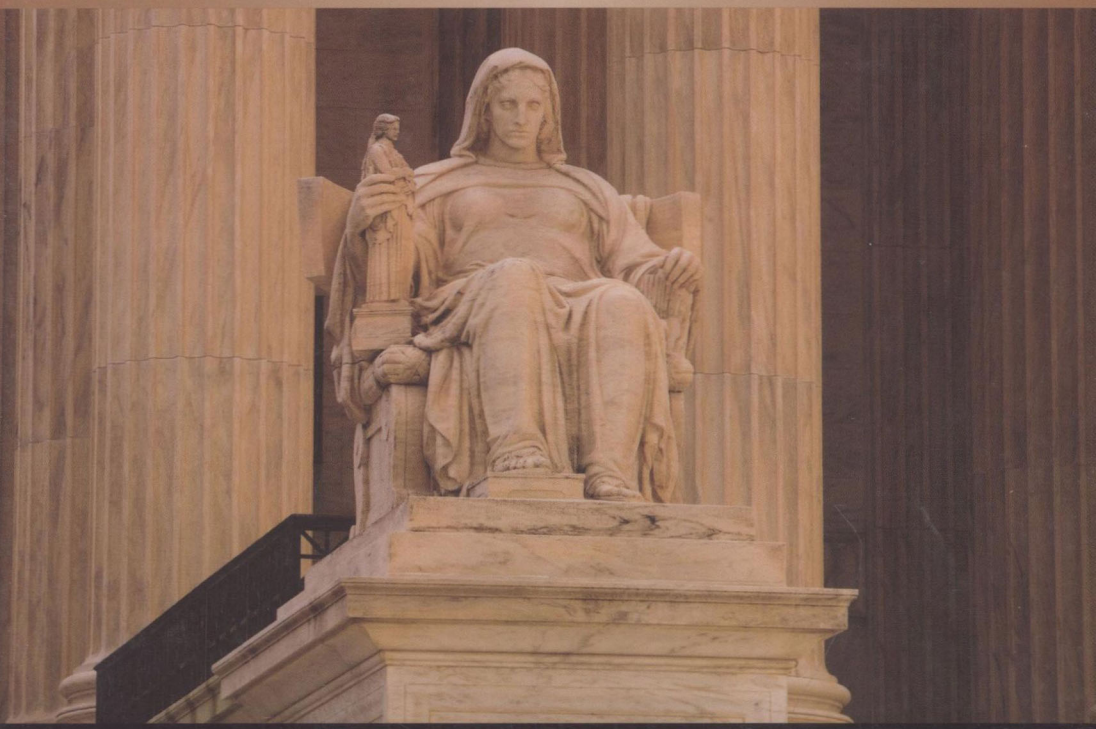
FIFTH EDITION



THE AMERICAN SUPREME COURT

ROBERT G. MCCLOSKEY

REVISED BY
SANFORD LEVINSON

ROBERT G. McCLOSKEY

THE AMERICAN SUPREME COURT

FIFTH EDITION

REVISED BY SANFORD LEVINSON

THE UNIVERSITY OF CHICAGO PRESS
Chicago and London

ROBERT G. MCCLOSKEY was professor of government at Harvard University. He is the author of *American Conservatism in the Age of Enterprise* and editor of *Essays in Constitutional Law*.

SANFORD LEVINSON is the W. St. John Garwood and W. St. John Garwood Jr. Centennial Chair in Law at the University of Texas Law School; professor of government at the University of Texas, Austin; the author of *Constitutional Faith* and *Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Correct It)*; and the coeditor of *Processes of Constitutional Decisionmaking*.

The University of Chicago Press, Chicago 60637
The University of Chicago Press, Ltd., London

Fifth edition 2010
Printed in the United States of America

19 18 17 16 15 14 13 12 11 10 1 2 3 4 5

ISBN-13: 978-0-226-55686-4 (cloth)
ISBN-13: 978-0-226-55687-1 (paper)
ISBN-10: 0-226-55686-7 (cloth)
ISBN-10: 0-226-55687-5 (paper)

Library of Congress Cataloging-in-Publication Data

McCloskey, Robert G. (Robert Green)
The American Supreme Court / Robert G. McCloskey ; revised by Sanford Levinson. — 5th ed.
p. cm.
Includes bibliographical references and index.
ISBN-13: 978-0-226-55686-4 (cloth : alk. paper)
ISBN-13: 978-0-226-55687-1 (pbk. : alk. paper)
ISBN-10: 0-226-55686-7 (cloth : alk. paper)
ISBN-10: 0-226-55687-5 (pbk. : alk. paper)
1. United States. Supreme Court—History. 2. Courts of last resort—United States—History. 3. Constitutional history—United States.
I. Levinson, Sanford, 1941– II. Title.
KF8742.M296 2010
347.73′26—dc22

2009046336

♾ The paper used in this publication meets the minimum requirements of the American National Standard for Information Sciences—Permanence of Paper for Printed Library Materials, ANSI Z39.48-1992.

The American Supreme Court

THE CHICAGO HISTORY OF AMERICAN CIVILIZATION

Daniel J. Boorstin, Editor

To My Wife
R. G. McC.

For Rebecca and Gabriella
S. L.

PREFACE TO THE FIFTH EDITION

I begin this preface with the opening words of my preface to the first revised edition in 1994: "This is literally a labor of love," to reflect my abiding affection, even forty years after his premature death in 1969, for Robert G. McCloskey. He was my Ph.D. supervisor when I was a graduate student at Harvard and, far more important, was everything a mentor should be. It is, though, not only my respect for the memory of a wonderful man that has led me to revise his book in the specific manner that I have. *The American Supreme Court* is justifiably regarded as a classic, as signified by the fact that even the 1960 edition remained in print, and continued to be assigned in courses, well after most books published at that time had been consigned to the remainder heap. It not only presents a remarkably concise descriptive overview of the history of the Supreme Court, it also clearly articulates a particular normative view of the role best played by the Court within the American political system. Though McCloskey may be a voice from the past, he spoke to concerns that certainly remain as we stride further into the twenty-first century.

This accounts, then, for the basic decision to *add to*, rather than genuinely *revise*, his book. The first seven chapters are exactly as he wrote them at the end of the 1950s, save for the silent correction of a very few factual errors and, more important, different titles for chapters 6 and 7. I argue in my own final chapter that the term "welfare state," used in the original title for chapter 6, is better used for the regime that emerged in the United States following Lyndon B. Johnson's "Great Society" and its consolidation by Richard M. Nixon. I thus substitute the term "regulatory state" for "welfare state" in the title of chapter 6. It also seemed obviously desirable to revise the title of chapter 7 insofar as McCloskey's version of the "modern court and modern America" is now more than a half century old.

I certainly do not want to suggest that I would not argue for some changes in McCloskey's own arguments were this a genuinely coauthored

work. Inevitably, both developments in disciplinary scholarship and generational shifts in overarching perspectives would lead to differences in approach. An example of both, probably, is that I would focus much more on slavery as a dominating issue of the Supreme Court's first seventy years, rather than treat it simply as one aspect of the controversies, important as they were, about federalism. And I have a somewhat different view of John Marshall. McCloskey's romanticized view of this chief justice was partly shaped by his being a product, in important senses, of the Great Depression and the New Deal response. (He was born in 1916.) An important part of New Deal judicial theory was the theme that Roosevelt simply wanted to return to Marshall's broad and capacious nationalist vision, almost unaccountably hijacked by Republican conservatives at the turn of the twentieth century. I see far less continuity between Marshall and the New Deal and am inclined to accept Yale law professor Bruce Ackerman's view that the Constitution was fundamentally amended, even if outside Article V, by the developments that we associate with the New Deal.

Were this entirely my own book, moreover, I would spend some pages on the Court's role in the saga of American expansion by which the United States was transformed from a nation of eleven Atlantic coast states at the time of Washington's inauguration in 1789 (North Carolina and Rhode Island had not yet ratified the Constitution) to a country of fifty states—one of them in the mid-Pacific—plus assorted colonies such as Puerto Rico. The Court, as a matter of fact, played no significant role in the most important single event of this transformation, the Louisiana Purchase of 1803, but it played a significantly greater role in legitimizing the new legal order that characterized the relationship with American Indians in the late nineteenth century and the control exercised over the new American Empire in the early twentieth century.

And there are surely other differences as well. One of them involves the role that McCloskey implicitly assigns to the Court as the primary agent of American constitutional development. No one can deny that the Court has played a significant role. But it is important for students to be aware of what has come to be called "the Constitution outside the courts." As political scientist–lawyer Mark Graber has demonstrated, Alexis de Tocqueville was wrong insofar as he suggested that Americans tend to turn all issues into judicial ones. He may have been correct that Americans tend to view political issues as *legal* ones, but the primary venue for much constitutional debate, especially in the nineteenth century, was Congress, not the Supreme Court. Congress may well play a less central role today as a serious constitutional interpreter. However, for anyone

aware of constitutional arguments in the twenty-first century, it is obvious, for example, that the Office of Legal Counsel within the Department of Justice may well be at least as important as the Supreme Court with regard to such contemporary issues as the scope of presidential power and the methods of interrogation that can be used by the American government in conflicts against nongovernmental terrorist groups that are likely to be endemic in the present century. Still, even if students should become aware that other institutions besides the American judiciary—not to mention mass political movements like the civil rights movement of the 1950s and 1960s or the New Right that developed in the 1970s and 1980s in part as a response to the Court's decision in *Roe v. Wade* protecting a woman's right to abortion—play a role in constitutional development, it would be foolish to ignore the important role played by the American Supreme Court. I remain convinced that the book that McCloskey wrote offers a fine introduction to that subject that should remain available for assignment to students.

It should be clear, then, that I view this as *McCloskey's* book and not my own. Thus I have tried to update it and to make it useful to succeeding generations by imagining, as best I can, how he might have responded to the remarkable events of the four decades since he wrote the book. Fortunately, one has some idea what his answer might be for the first of those decades, and I have drawn on some of his articles. For the time since 1969, I can only call on my own imaginative resources.

This being said, I gladly accept full responsibility for the two chapters that I have added. In the new chapter 8, I try primarily to update the story that McCloskey began telling in terms of the Court's role as protector of the civil rights and liberties of vulnerable, often unpopular, minorities. Chapter 9, on the other hand, represents something potentially quite new, for there I argue that this role in significant ways has been supplemented, and, perhaps more accurately, supplanted, by a distinctively new one as "monitor of the welfare state"—a function that I identify with developments occurring in the decade after the initial publication of *The American Supreme Court*. In the introduction to the previous edition, I noted that "the Court has begun the twenty-first century by attempting to return to a much older role as "umpire" of the federal system and defender of states' rights against an encroaching national government." I think it is fair to say that it has not truly fulfilled any such aspirations, and I will suggest why this has been the case.

After these two new chapters, the reader will find the original epilogue, "The Court of Today and the Lessons of History." In keeping with what

I hope is the spirit of this book, I am reprinting it as it was published in 1960, though I have added my own coda, which continues a conversation initiated almost a half century ago in Cambridge. Indeed, the theme of intergenerational conversation—so memorably achieved back then as a senior professor took a fledgling graduate student under his wing—ever more resonates in my own consciousness; my own students are now the age that I was when I first met Robert McCloskey in 1963, and I am twenty years older than he was then. Even if these students, perhaps properly, dismiss some of the arguments found in this book as reflecting the particular consciousness-forming experiences first of Robert McCloskey and then of myself, I hope they will nonetheless agree that the conversation about the historical development and normative role of the Supreme Court is one well worth continuing. The dedication to my granddaughters is a symbol not only of love and gratitude for their presence in my life but also of the hope that they themselves will join, years from now, in the ongoing conversation about the deep meaning of the United States Constitution and the particular role of the Supreme Court in implementing it.

Sanford Levinson

ACKNOWLEDGMENTS

As noted in my preface, my deepest acknowledgment is indeed to Robert McCloskey. It is no coincidence at all that McCloskey is a dedicatee of *Processes of Constitutional Decisionmaking*, a casebook, now in its fifth edition, that I coedit with Paul Brest, Jack Balkin, Akhil Reed Amar, and Reva Siegel, which is organized very much along McCloskean historical lines. Indeed, I suspect that it is my initial training that has made me so unsympathetic to the typical way that constitutional law is taught, particularly in American law schools, which is to engage in clause-by-clause analysis rather than to recognize that *all* doctrines during a particular period are interlaced with the dominant issues of that era.

Paul Brest was one of the reasons I chose to attend the Stanford Law School after gaining my Ph.D., and I have never had reason to regret that choice. His invitation, back in 1979, to collaborate with him on the second edition of his path-breaking casebook certainly changed my intellectual and professional life, not least because it forced me to reflect at length about developments in recent American constitutionalism and how they can best be organized for pedagogical purposes. Chapter 9 of this book would never have taken form in 1994 had I not struggled over several summers to organize a new chapter in the 1992 edition of *Processes* on the Constitution and the modern welfare state. All of my revisions for this new edition of *The American Supreme Court* reflect continuing conversations with our new collaborators (and my close friends) Balkin, Amar, and Siegel. Balkin deserves special mention inasmuch as we have now coauthored well more than a dozen articles together, many of them dealing with the issues of American constitutional development, as well as the role of the Supreme Court. If I cannot imagine what my life would have been like without the opportunity to work with Robert McCloskey as a graduate student, that has certainly become equally true with regard to my collaboration with Jack.

It should also go without saying, but should be said anyway, that I have benefited immensely from my three-decade association with the University of Texas Law School and my colleagues there, who have always proved willing to read my drafts, discuss my ideas, and, in the case of Deans Mark Yudof, Mike Sharlot, Bill Powers, and Larry Sager, finance various symposia on topics relating to the United States Constitution. Among my nondecanal colleagues, I must single out Scot Powe, for his endless encouragement and help; my own "take" on the Warren Court has certainly been affected by his magisterial study, *The Warren Court and American Politics*. Indeed, this has more recently been followed by his true magnum opus, *The Supreme Court and the American Elite, 1789–2008*. I am also grateful to many friends and associates, including participants in various Internet discussion lists, for their invaluable help with regard to the bibliography, which I hope will be useful to students (and even professors) who use this book. Mark Graber should be singled out for special thanks in this regard, though his impact on my thinking (and on this latest revision) has gone far beyond his provision of bibliographical references.

Finally, I remain grateful to John Tryneski of the University of Chicago Press, who has been a sympathetic and helpful friend in our joint project of keeping alive Robert McCloskey's marvelous book.

Sanford Levinson

PREFACE TO THE FIRST EDITION

This book deals with the work of the Supreme Court of the United States as a constitutional tribunal, exercising the power of judicial review. It does not purport to describe the activity of the Court as a whole; much less is it a history of constitutional law in the widest possible sense, treating of constitutional developments that have been brought about by legislative and executive action, or by the more subtle process we call custom. Finally, because it is a brief book, I cannot of course even claim that it covers the story of judicial review comprehensively. The chapters are interpretive essays in the history of judicial review. They deal with aspects of that history that seem to me important and interesting, but they omit material that might legitimately seem equally important or interesting to another.

My aim has been, within this compass, to understand the way the Supreme Court has conducted itself to achieve its results, the role it has played in American life. I have been most concerned, as the text will reveal, to see the Court as an agency in the American governing process, an agency with a mind and a will and an influence of its own. Greatly as we may respect John Marshall, not many sophisticated persons would now take these words of his very seriously: "Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing."

Yet there has been too little effort, I believe, to project a contrary view back into judicial history in order to see what the Court *was*, if it was not what Marshall asserted. And because this has not been done, as I am at pains to suggest in the epilogue to this volume, we are not prepared as we should be to evaluate the Court of today, either as critics or as defenders.

Robert G. McCloskey

CONTENTS

ONE

The Genesis and Nature of Judicial Power

On June 21, 1788, when the convention of New Hampshire voted 57 to 46 to approve the proposed national constitution, the requirement of nine ratifying states was fulfilled and the United States of America sprang into legal being. Opportunity for instant creation of this magnitude occurs only in fiction and law, and the delegates did not underrate their historic moment. They were careful to specify that it came at one o'clock in the afternoon, for they feared that Virginia might act that very evening and claim a share in the honor. They need not have worried. The Virginians were in for three more days of oratory, mostly by Patrick Henry, before their state's proud name could be added to the list.

Fifteen months later, President Washington accomplished another of these portentous juridical feats by signing the Judiciary Act of 1789, which was to be called many years afterward "probably the most important and the most satisfactory act ever passed by Congress." The latter-day eulogist was himself a Supreme Court justice, and his good opinion of a law that made him one of the most august figures in the nation is not surprising; a long roll of eminent statesmen since 1789 could be called to testify on the other side. But hardly one of them would dispute his opinion that the act was extremely important, for it not only established the far-flung system of federal courts but boldly defined their jurisdiction, and especially that of the Supreme Court, in such a way that the states, Congress, and the president could be held subject to judicial authority.

Finally, on February 2, 1790, some of the men who had received these high commissions and whose duty it therefore was to give living force to these paper enactments, assembled in the Royal Exchange building in New York and organized as the Supreme Court of the United States. The occasion was solemn, and the newspapers followed it closely, passing on to the people every crumb of detail about this third great department of their young national republic. Yet neither the press nor the people nor

the justices themselves could quite know how momentous the day was, and there is good evidence that they did not. Only four of the six men Washington had chosen to adorn the Supreme Court turned up for that first official meeting. Robert H. Harrison declined appointment, apparently because he thought his judicial post as chancellor of Maryland was more important; and John Rutledge, though officially a member of the Court in its first three terms, never attended a session and soon resigned to accept the chief justiceship of South Carolina. Looking back, we can see that the first meeting of the Supreme Court of the United States was one of the mileposts in the history of jurisprudence. We can see that the ratifying of the Constitution and the signing of the Judiciary Act had, when taken together, opened great wells of judicial power, and that the four justices who sat together in the Royal Exchange that winter were inaugurating a governmental enterprise of vast and unprecedented dimensions. But the principals were looking forward, not back, and the future must have seemed cloudy.

In the nature of the case they would not have known much about the prospects of their Court and the Constitution, for the very good reason that so little about either had been firmly decided. The delegates who framed the Constitution have been traditionally and deservedly praised for producing a document that could earn the approval of such diverse states as Massachusetts and Georgia and such diverse men as John Adams and Thomas Jefferson (neither of whom, by the way, attended the Federal Convention). But this congenial result had been achieved not only by compromise but by forbearance. The Constitution clearly established a few principles about which there was no serious colonial disagreement, for example, the representative system for choosing officials and the separation of powers between the departments of the national government. It compromised a few more troublesome issues like the question of equal state representation versus representation based on population, and the question of the slave trade. But still weightier difficulties that might have prevented ratification were either left severely alone by the Founding Fathers or treated in ambiguous clauses that passed the problems on to posterity.

No one quite knew, for example, what was meant when the Constitution endowed Congress with power "to regulate commerce among foreign nations, and among the several states"; or to make all laws "necessary and proper" for carrying out the national government's other powers; or when it was asserted that the Constitution as well as laws and treaties made by the nation were "the supreme law of the land." No one was sure how the