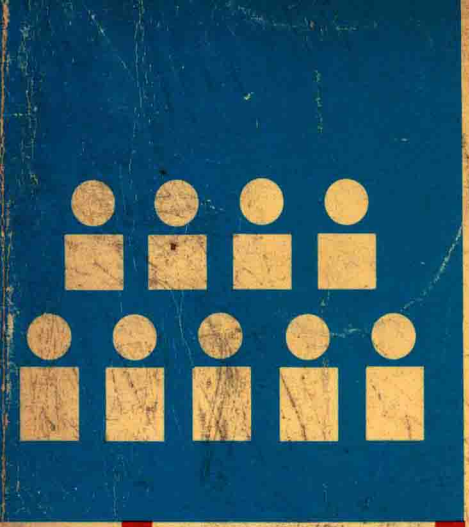

The Supreme Court and American Government

Edited by John Vanderzell

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A CASEBOOK EDITED BY

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Preface

The charge has sometimes been made that there is no American political theory. Whether the charge is true or not, it is the function of the Supreme Court to recognize, invent, and apply general principles of American government as they emerge from very concrete facts. In this sense the Supreme Court is the official American political theoretician. That is one reason why students studying American government ought to have an acquaintance with what the Court has said and how it has said it.

Furthermore, the Court is responsible in no less degree than the Congress, the President, the political parties, and other institutions for the development of public policy. One need only cite the desegregation decisions, the reapportionment decisions, and the criminal procedures decisions of recent years to verify that statement.

In compiling a selection of cases for use in American government courses, an editor is faced with two insurmountable problems. First, given space limitations, he must decide which of the very important cases to omit. For every reason that might be thought of for leaving *The Civil Rights Cases* out of the selection, two reasons occur for including it; nonetheless that case was excluded. The same can be said for a number of others that would appear on nearly everyone's list of historic cases.

Ultimately, the choice of cases for inclusion or exclusion was made on the basis of three criteria: (1) the immediate relevance of the decision to some major proposition about American government; (2) experiential success in the use of the case in teaching American government; and (3) current interest. Notes preceding and following each case attempt to say something about the background of the case and what the effect of it has been. Thus, while the opinion of *The Civil Rights Cases* is not included, there is a discussion of it.

The second problem involves editing the cases. There is always a danger that the dictates of space will leave room only for disjointed aphorisms. As to this, one can only hope to have avoided the danger as much as possible—to have included enough to satisfy the moderately curious and to induce the more ambitious to go to the original documents.

Finally, the organization of the cases ought not to be thought of as a pact with fate. It would make good sense to assign *Marchetti* as a demonstration of the congressional taxing power, for example. Or a package on politics might include *Baker* v. *Carr*, *Reynolds* v. *Sims*, *Katzenbach* v. *Morgan*, and *South Carolina* v. *Katzenbach*. Almost every case speaks to Federalism.

Thanks are due to my colleagues in the Department of Government at Franklin and Marshall College, whose comments have been eagerly sought and whose encouragement has been generously given.

J. V.

Contents

III. Congress 83

IV. The President 117

V. Politics 143

Introduction

The Court and the Constitution

From time to time there have been a few who have thought the American Constitution to be a pact with the devil or the result of a capitalist conspiracy. For these few, the Constitution has been reprehensible. But for the rest, since the United States became a nation, opinion has been divided over the meaning and construction of the document rather than its desirability as the fundamental law. Probably the most remarkable demonstration of this fact is the allegiance to the document claimed by both the North and the South before, during, and since the Civil War. The claim of the Confederacy was not that the Constitution was wanting but that the North had perverted it. Indeed, they maintained, the national government had usurped power contrary to the provisions of the Constitution; the true defenders of the constitutional faith were the Confederate States. The Union, of course, was of the contrary view.

In more recent times, opponents of school desegregation, of voting rights, of proscription of school prayers, and of solicitude for rights of the accused, have no quarrel with the Constitution. Again, for those who are disappointed by the failure of society and government to eradicate all vestiges of racism, privilege, and unequal treatment, the problem is not that the Constitution is at fault but that what it promises has not been delivered. If it can be said that there is any consensus in the country, it must at least be that the Constitution represents the highest achievement of which man is politically capable. It may be necessary to tinker—to amend and adapt—on occasion, but in its main parts and spirit it earns the fealty of all. And therefore the Constitution is exalted to the status of "higher law."

The quest for higher law traces its origins to antiquity. Political philosophers and other transient mortals have been unwilling to accept the proposition that might makes right. Rather, what is right is what conforms to a higher order—religious, natural, moral, economic—and the actions of mortal men are justified to the degree to which they conform to the commands of the higher law. But so long as the higher law is merely a creed or a faith, vindication of what it guarantees is left to chance in the contemporary world or final judgment in the hereafter. But the Constitution, written and sure and adaptable, is the consummation of the quest for a higher law which is operative here and now, and which is binding equally and dispassionately on all without regard to station or status. The Constitution holds the promise of justice in a lifetime—not in a mystical hereafter. It is small wonder that there has been "Constitution worship" in the United States.

What the Constitution promises it provides a mechanism for realization. De Tocqueville noted long ago that sooner or later every political controversy in the United States is converted into a legal question. Observance of constitutional standards and particulars is enforced, especially, through the Supreme Court. If there were doubts about this before *Marbury* v. *Madison*, there have not been serious ones since. The Supreme Court and the supreme law go together.

This is not to deny what everyone knows. Every Supreme Court has been the object of criticism and scorn from more or less numerous and vocal parts of the nation. Chief Justice Earl Warren and the Warren Court are not universally acclaimed. The "nine old men" of the thirties provoked large-scale hostility to the Hughes Court. The calls for action against the various wayward Courts have ranged from "interposition" and impeachment to the establishment of a "Superior Supreme Court." Intermediate proposals have included an increase of the membership, a decrease of the membership, disallowance of 5–4 decisions holding statutes unconstitutional, withdrawal of jurisdiction in certain kinds of cases, and so on. But the significant fact is that, while criticism of particular Courts has been almost a national pastime, no very serious proposals outside of academic circles have been made to eliminate the idea or the institution of a Supreme Court whose

function it is to enforce the Constitution by hearing the complaints of those who rase a constitutional claim to a right. Even the Roosevelt "Court-packing plan" stopped short of such a proposal, whatever the motive for it might have been. Not coincidentally, the decline in the power of Roosevelt's New Deal can be said to have begun at the time of defeat of his Supreme Court proposals.

II

Problems arise when we admit that there cannot be a definite rule about every conceivable thing. If this is true of a statutory code, it is even more true of a constitution. Chief Justice John Marshall noted that a constitution cannot be expected to have "the prolixity of a legal code" and that, perforce, the Constitution must be adaptable and contain general principles but not highly specific detail. Of course this means that discretion must be exercised by those whose responsibility it is to convert the constitutional generalizations into specific commands. It is therefore a commonplace that the federal Constitution in many of its important parts is less than definite. Justice Frankfurter used to distinguish between its "phrases of art" and "phrases of precision." The latter—"Senators shall have six-year terms" is one—are precise and known. The former—due process is one—are imprecise but knowable to reason, experience, and the judicial technique. That is why it is indispensable that reasoned opinions be written; why it is imperative to refer to history, custom, and fact; why the elaborations of the Constitution's art take place by observing the "technicalities" that are meant to ensure the place of principle in the face of the demands of expediency.

There are some who make a distinction between written constitutions and "ultimate" constitutions, which are the real rules of society. Written constitutions might contain such "inspirational statements" as equal protection while, in the real world of everyday affairs, equal protection gives way before other, unspoken, rules of behavior which regulate the course of events in a more fundamental way. When civil rights workers are encouraged to "Tell it like it is, baby, tell it like it is," they are being urged to

strip away the veil of pretense of the inspirational statements in favor of reality. Again, it was hoped that by separation of powers and by making the judges independent of political clamor through life tenure, it would rest with the Court to make the "inspirational statements" the ground for actual vindication of guaranteed rights —that the Constitution would be not merely a collection of platitudes but a guardian of rights. But the Constitution grants a number of rights and powers, and the problem for the Court is to resolve disputes about which of the Constitution's provisions is necessarily holding in particular instances. So the Court must make choices. And there will be arguments about the choices that judges make when they apply general principles to particular situations in actual cases.

What should the result be in a case which might be decided one way if the commerce clause is applied and another if the Fifth Amendment is applied? Reasonable men will differ as to which constitutional rule is applicable and as to the facts which are the "most important" facts in a case brought to it for decision. The problem of judging the constitutionality of an act of Congress or any other action upon which the Court is called to decide has never been merely to lay the act next to the Constitution to see if the former squares with the latter. Judgments about the Constitution cannot be converted into a simplistic problem of geometric congruence.

In the first place, then, the discretion of the Court is a necessary result of the constitutional language.

In the second place, the judicial discretion is grounded in the system of case law and the development of precedent.

It has been said that it is more important that the law be settled than that it be settled right. This simply means that persons ought to know with certainty what they can do without incurring a punishment. What they are required to do may not be "right" in a fundamental sense, but at least they know that they will not go to jail if they do it. The rules of the game are set. If in one case a certain result is reached, then, when a second case like the first is presented for decision, the rule that was controlling in the first will be controlling in the second. The first case set the precedent, and all subsequent cases like it are decided

in the same way. The happy results of such a system are that it is possible to know what the law is in a myriad of circumstances, that all persons in the same circumstances will be treated alike, and that as new circumstances arise it is possible to develop new precedents for the new or changed conditions. The body of case law—the precedents—limits the choices of those who owe a professional allegiance to them—the lawyers and the judges. The vagueness of the constitutional language is thus made more specific by the frequent application of it in actual cases.

By this time, however, there are literally thousands of precedents, not all of which are compatible with one another, so that it is possible to align a series of precedents on both sides of almost any question. Besides, the facts in one case are rarely identical in every respect with any previously decided one. Or new facts, new understandings, and new technology may require changes in direction or new principles altogether. Even more likely, some of the facts of a case may be like those in one line of precedents while other of the facts are like those in another line of precedents. The system of precedents with the Court citing previous cases at considerable length may thus give the appearance of certainty while actually providing the means of judicial discretion.

A third area of judicial discretion exercised by the Supreme Court is evidenced by the choice of cases the Court will decide to hear. In the 1962 term of the Supreme Court, of 2,161 cases brought on appeal or certiorari, 1,752 were summarily denied a hearing, and only 136 were disposed of after full hearing and opinion. With but very few exceptions, whether the Supreme Court will hear a case at all rests with the discretion of the Court. Most of the applications made to the Court are rejected with the cryptic "Certiorari denied."

On the surface a denial of certiorari simply means that the petition did not persuade four of the nine Justices that the Court ought to hear the case. Why they were not persuaded is a harder problem. Certiorari will not be granted unless the question posed in the case is of national significance, not merely of interest to the immediate parties to the dispute. The Court is not interested, so it says, in merely correcting the error of a lower court. Rather, as former Chief Justice Vinson put it in an address to the American

Bar Association, ". . . you represent not only your clients, but tremendously important principles, upon which are based the plans, hopes, and aspirations of a great many people throughout the country" (cited in Glendon Schubert, *Constitutional Politics*, p. 92). Even appeals which come to the Court "as a matter of right" may be rejected for decision by the Supreme Court for "lack of a substantial federal question."

The point is that the Supreme Court is in control of its business, deciding only those cases it wants to decide. Alexander M. Bickel, in his perceptive book, *The Least Dangerous Branch*, argues that the power of the Court not to decide is at least as important as its power to decide cases brought to it. Whether that is true is less significant than that it is, in terms of choice affecting the nation's life, on a par with a decision of, say, the Ways and Means Committee not to decide on Medicare.

The boast is that we have "a government of laws, not of men," that the Constitution's principles and spirit substitute for whim and mere will. But the range of choice is so vast that what is apparently barred from the front door gains entrance through the rear—so that there is government by men after all. And most serious of all, by men not elected or subject to reelection; not appointed for a limited time but for life; not subject to the threat of a decrease in salary but having a guaranteed income.

Constitutional realists have known that appeal is made to the Justices, not to a soulless Court. An attorney practicing before the Court must know what kind of argument is most likely to be persuasive with which of the Justices. He must gear his argument to winning five votes. Often he will have great confidence that, say, three of the Justices favor his view of the case and three are opposed. The first three need no convincing and the last three cannot be convinced. For him, the problem is not to argue to a Court of nine men, but rather to persuade two of the three "possibilities."

Some recent research on the politics of the Supreme Court seeks to correlate, in a very precise way, the characteristics of the Justices and their judicial decisions. This effort is, in many respects, enormously interesting and important. But the idea is not new at all. The Jeffersonians knew that it made a difference whether the

Courts were filled with Federalists. And everyone is interested in who (meaning what kind of man) will replace a Justice whose departure from the bench cannot be far off. Every time Chief Justice Warren enters Walter Reed Hospital or Justice Black has a birthday, this kind of speculation makes the daily press. A sizable group of Senators promised to filibuster to death the elevation of Justice Abe Fortas to the Chief Justiceship when President Johnson nominated him for that post on June 25, 1968, following the resignation of Chief Justice Warren.

III

While recognizing the range of judicial discretion in the Supreme Court, it would be wrong to suppose that the Court and its Justices are either entirely autonomous or always sailing uncharted waters. Even though the Supreme Court will always deal with the most controversial issues, the language of the Constitution, its history, and the whole complex of the governmental system sets a framework within which decision is made. Short of change by statute, income from municipal bonds will continue to be tax-exempt. States, within Fourteenth Amendment limits, will prescribe the school curriculum; will prescribe the rules for marriage and divorce; will define the property right in most of its parts. A significant change in the treaty power is unlikely; a nearly complete deference to congressional determinations is to be expected.

It has often been observed that the office makes the man. Justices of the Supreme Court cannot escape the realization of the unique responsibilities of their office. To them, as to no others, are entrusted the deepest faiths and the highest aspirations of the nation—to apply the fundamental principles impartially; to breathe life into them. It falls to them, not merely to vote, but to write reasoned opinions for the scrutiny, criticism, and edification of the nation and, in some instances, the world.

It has been observed that all public questions are converted, sooner or later, into a lawsuit. Thus, the Court is ultimately the final voice on much public policy. The reason for this is not hard to understand in a system that requires that all law be compatible

with the written Constitution as the test of legitimacy. On the other hand, the Court is confined to hearing lawsuits; it is not at liberty to seek out causes of and remedies for all social ills. Indeed, as indicated previously, the Court has important devices for confining itself to those matters which are justiciable, not merely interesting. The Congress, for example, is to determine the "necessary and proper" means to a constitutional end, not the Court. Only those persons having "standing," not just anyone with an academic interest in a point, can bring a suit. Only if it is not possible to decide an issue on statutory grounds will there be recourse to the Constitution. These are hardly rules of decision of a governmental organ bent on imposing its mere will. They are rules indicative of a sensitivity to the incredibly delicate nature of the Supreme Court's function.

Nor are the limits of judicial discretion defined only by the language and "emanations" of the document, the "responsibilities of the robe," and the sure reactions of bench, bar, and populace. There is a Justice Department, a Congress, a President, and a system of inferior courts. There are, increasingly, groups and persons bent on litigation. Actions and reactions of each of these condition, modify, compromise, and define the judicial discretion as surely as the Court's work has serious implications for each of them. If the Court is not to be irrelevant—indeed, a laughingstock —it must, and usually does, act with a keen sense of its various publics.

IV

If we regard politics as the formulation of the formal, authoritative rules governing society, establishing rights and duties, granting rewards and laying penalties, it is clear that the Supreme Court participates in the political process and is a political institution. What is unique about the Supreme Court is its constant responsibility to justify itself and public policy in terms of enduring but adaptable fundamental principles as they appear and are made to appear in the Constitution through time. This, of course, is no easy matter and is not subject to cookbook formulation.

It is also clear that the Supreme Court is placed in a position

that can only call either abuse or high praise on itself—there is not much middle ground. It leaves for others—district courts, circuit courts, state courts—those questions that are not so "substantial," deciding itself those questions of overriding interest. Small wonder that the Court has been praised and damned as either the guardian of the true faith or the traitor to justice.