Understanding Supreme Court Opinions

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Preface

This book provides an introduction to the legal reasoning and the modes of persuasion and justification used by Supreme Court justices, as well as others engaged in constitutional adjudication. It attempts to provide a new perspective on the workings of the Supreme Court, thus also seeks to shed new light on the workings of our constitutional system and enrich our understanding of the notion of the rule of law.

The book is intended to be used in several ways. It is designed to be used as a supplement to a constitutional law casebook, as well as a book that can be combined with other materials written from the perspective of the political scientist.

The idea for this book grew out of my experiences in teaching an undergraduate constitutional law course at the University of Rochester. Among the goals I had established for this course were simultaneously introducing students to the substance of constitutional law and introducing them to the methods of reasoning and analysis used in constitional law. But the problem I faced was that it was difficult to achieve these goals in one semester when students brought with them little or no legal background. Thus I cast around for a way to make more efficient and effective the learning of constitutional reasoning and analysis. I wanted to improve the course so that students themselves would earlier in the semester begin to learn to use analytical and reasoning skills that the Supreme Court justices used in writing the opinions assigned in the course. This would help students both become more astute readers of those opinions and improve their abilities to work with those opinions to address novel constitutional issues.

There are a number of books on the market that discuss legal methodology

and reasoning generally, but I found no book that specifically addressed constitutional reasoning as practiced by the United States Supreme Court. I therefore turned to the writing of my own introduction, which at first took the form of a long paper which I placed on reserve in the library. Over a period of four years I revised the paper, and it is from that paper that this book grew.

There are thus literally hundreds of University of Rochester students to whom I am indebted for giving me the opportunity to teach and who demonstrated such an enormous interest in constitutional law that they fed my desire to be an ever better teacher for them. I especially want to acknowledge the help of the following who volunteered to read and comment on the first drafts of the completed book: Luke Bellocchi, Robert Hughes, Scott Glotzer, Douglas Gerhardt, Jon Getz, Dan Minich, and David Mustard. I alwo owe much thanks to Alexandra van Geel for her comments on several chapters. To Professor Martha McMarthy and Steven E. Gottlieb I want to say thanks for your support and insightful comments and suggestions. Finally, there is somewhere in this land an anonymous, to me, reader of this manuscript whose detailed and conscientiously developed critique of two versions of the book did much to improve it. The weaknesses that remain are certainly my responsibility, but I am grateful for the suggestions and the willingness to share and collaborate.

Introduction

Some years ago when I was in college, and about to go on to law school, I had a conversation with a lawyer in my home town. He told me that I would enjoy law school if I enjoyed reading lots of "little stories." Well, in law school I did read lots of little stories, but it was also clear that what that lawyer had told me was misleading. It was true that the judicial opinions I read were stories with considerable human conflict, drama, and passion. But by calling these accounts "little stories" he had intimated that these stories were not complex and intricate. He seemed to suggest that they were no more than a series of interesting anecdotes. In fact, each was more like a Shakespearian play with multiple characters, a complex structure, densely packed language, and several layers of meaning. These were not mere tabloid accounts of human conflict but rich pieces of writing that even with multiple readings yielded new insights.

While the reading and understanding of law is often compared to the reading and understanding of literature, let me suggest a different comparison. You are an historian of ancient Rome, and you are working with the speeches of a famous Roman senator delivered in the Roman senate. In trying to understand the meaning and significance of these speeches you will be asking yourself these and other questions:

- What social function did the giving of speeches serve? Why did this senator and other senators give speeches? What role did the Roman senate have in the system of government?
- On what occasion was this speech given? Who was the audience?
- Under what constraints did a senator operate when delivering a speech?

Were there things that Roman senators could not say or were expected to say?

- What was the logical argument of the speech? What point was it making and how did it justify that point?
- What materials did the speech rely on to make its point?
- Were the assumptions and premises of the speech plausible at that historical moment in time? Are they still plausible today?
- How does this speech compare with previous speeches given by the same senator? other senators? Are there different styles of speeches?
- What underlying values and beliefs were embodied in the speech?
- What were the political, economic, and social effects of this speech?

The questions you may wish to ask about the speeches of the Roman senate are in many respects the same questions one should be asking about the opinions of the United States Supreme Court. As was true of the speeches of the Roman senators, the opinions of Supreme Court justices are written within a particular institutional setting and are designed to serve certain social, political, and, of course, legal functions. A judicial opinion must be understood in light of the institutional setting in which it was written. Not the least of these functions is that these opinions are intended to be *persuasive* arguments. The opinion is designed to convince the reader that the judgment reached in the case—the bottom line—was correct.

You need to understand all this as well as why this particular opinion was being delivered at this time. How did it come to be that the Supreme Court rendered this opinion at this point?

To understand the opinion one needs to realize that the justices operate under a variety of legal, political, and social constraints and expectations. These limitations force the opinion-writer to write in a certain style, to use only certain kinds of materials to support his or her arguments. These constraints and expectations have an important effect on the tone, the voice, and the style of the opinion. It is these constraints and expectations which force the opinion to sound and look like a *legal* opinion and not just, for example, the expression of a political opinion.

Beyond trying to understand the social and political function of opinions in general, one must also get into the content of the opinions. What was its point? What were the arguments made in support of that point? Were the premises of those arguments well supported? What are its unspoken values, assumptions, and principles? And what was the political, economic, and social effect of the opinion?

Clearly, reading and understanding Supreme Court opinions involves something more than reading little stories. And this book is designed to help in the learning of the skills needed to come to a full understanding of these documents which have such a special place in our legal and political system. To that end

Chapter 1 provides background information essential to understanding those opinions. This chapter discusses the Constitution itself and the Supreme Court's role in interpreting and enforcing the United States Constitution. The chapter also talks about how cases or problems get to the Supreme Court, and how it comes to be that the Court issues its opinions.

In the course of reviewing constitutional law in Chapter 1, I will introduce a theme that will become more prominent in Chapter 2, the task of writing a Supreme Court opinion as seen from the perspective of a justice on the Supreme Court. Thus, Chapter 2 discusses the constraints and expectations a justice faces in the writing of opinions. My belief is that one can become a better reader or consumer of Supreme Court opinions if one can appreciate the writing of those opinions from the perspective of a justice.

Chapters 3, 4, and 5 are an introduction to how the justices have handled three important aspects of judicial opinion writing. Chapter 3 discusses three basic *strategies of justification* that the justices have used in writing opinions. A strategy of justification is the general approach an opinion can take to accomplish its task of persuading a reader of the correctness of the Court's judgment. To take one example, the opinion may use the strategy of justification called the *analogy*: (1) This case is like previous case "A." (2) Like cases ought to be treated alike. (3) In the previous case we did "X." (4) Therefore, in this case we shall also do "X."

This, and the other two strategies of justification, are not by themselves sufficient to write an opinion. They are like carpenter's tools; that is, necessary implements to build a house but not sufficient. To complete the structure one still needs building materials. Thus, in Chapter 4, I turn to a discussion of the building materials a justice must work with in constructing an opinion. These materials include, among other things, the text of the Constitution itself, evidence of the intent of the framers, evidence of contemporary moral values, and precedent. Unfortunately, there are many controversies and problems surrounding the use of these and other legal materials; this chapter introduces these disuptes.

One of the most important building materials the justices must use in constructing a persuasive opinion is precedent; that is, prior Supreme Court opinions. But, again, there are many problems surrounding the use of precedent. Chapter 5 provides an introduction to these problems as well as a perspective on how the justices have used (and abused) precedent. You will learn that working with precedent, as is true of working with the other construction materials discussed in Chapter 4, takes skill and art. These materials can be used in a variety of ways, and knowing what these materials can and cannot do is part of learning what it means to become an effective justice of the Supreme Court as well as an effective lawyer.

The concluding Chapter 6 brings the materials of the previous chapters together. A single Supreme Court opinion is reprinted and the chapter then

proceeds to provide a detailed analysis of it. Just one caution: Each Supreme Court opinion is in important respects a unique document, different from other opinions. Thus, the kind of analysis one may undertake of one opinion will differ in some respects from the analysis of other opinions. But Chapter 6 should prepare one to get started in the interpretation and analysis of other opinions.

To conclude, an opinion is not a self-report of the internal decision-making processes of the Court itself or the internal mental deliberations of the individual justice who wrote the opinion. Opinions are documents designed to persuade, to convince the reader that the judgment the opinion reached was correct. That is to say, opinions are documents designed to serve legal, political and social functions. And when a justice approaches the writing of an opinion, he or she, typically, has several ways available in which the justification of the judgment can be written. The opinion writer thus can choose among different options in crafting the justification for the decision reached. Crafting the argument in such a way that it has the appearance of there having been no other way the opinion could have been written, and so convincing that it appears that no other decision could have been reached, is a high art form.

Viewing Supreme Court opinion writing as a high rhetorical form can make one cynical about the Supreme Court, the justices, lawyers, and law school training. Are judges and lawyers merely people with great rhetorical skills which they can use to justify any position they want to justify? Are law schools and courses in law vehicles for preparing people to be skilled rhetoricians? I believe the answer to these questions is in part "yes." But this is only a fraction of the story. It is also important that courts and judges reach wise decisions, sound decisions. It is important that lawyers consider seriously the cases they take, the kind of clients they represent, and the positions they advocate.

Thus it is important, vitally important, for the future of law and our society, that law schools and undergraduate courses in law be concerned not merely with preparing people to be rhetorically skilled. I believe teachers of law should wrestle in their courses with questions of right and justice. Students of the law should be concerned not only with developing analytical and rhetorical skills but also with formulating their own values and beliefs, their own views of right and justice. The following story illustrates my concern:

> DEVIL SPEAKING TO AN ATTORNEY: I can give you riches beyond your wildest dreams. I can make you the most famous lawyer in all the land. You will win every case you undertake. The world will beat a path to your door. And in exchange for all this I will merely take your soul, the soul of your wife, and the souls of your children.
>
> ATTORNEY: That's great! But what's the hitch?

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CHAPTER 1

The Supreme Court and the Constitution

The United States Constitution is the supreme law of the land. Federal, state, and local governments, their legislative, judicial, and administrative branches, as well as all federal and state officials and employees, must conform their actions, policies, and laws to constitutional requirements (see Addendum to Chapter 1). Sometimes this is easily accomplished because the constitutional text is precise. Few would debate whether each state is to be represented by two senators. But other phrases and words of the Constitution are not so clear. For example, section 1 of Article II says that no person except a "natural born" citizen is eligible to be President. Presumably this means the President must have been born on American soil and not have obtained citizenship through naturalization procedures. But what of the person born on an American ship sailing in international waters? Does the phrase "natural born" exclude from the Presidency men and women born by means of caesarean section? These questions have not yet been officially answered, and the very fact we must ask them suggests that the constitutional text is not always clear.

A vague or ambiguous constitutional text is an obvious invitation to disputes over its meaning. In fact, disputes regularly arise between different branches of the federal government, between the federal government and the states, and between, on the one hand, federal or state government, and on the other hand, an individual. There thus arises the need for having some way to get a resolution of the dispute and an authoritative interpretation. Since 1803 the Supreme Court has played this role. In *Marbury v. Madison* (1803) the Court declared that the Constitution authorized it to determine when the challenged law or policy was inconsistent with the Constitution.

Because we, as a people, expect the Supreme Court to justify its exercise of this politically, economically, and socially important power of judicial review, the Court at the conclusion of many of its cases writes an opinion explaining and justifying the decision it reached. These opinions are precedent for the lower courts, and are used by lawyers to advise their clients (which include governmental officials) what it is they now believe is constitutionally permitted and what is constitutionally prohibited. It is these same opinions which form the basis of most courses in constitutional law. Unfortunately, these opinions, like the Constitution itself, are not free from vagueness and ambiguity; hence they, like the Constitution itself, require careful reading and interpretation.

The interpretation of Supreme Court opinions is a skill that needs to be learned. This chapter begins instruction in this skill by outlining in general terms the kinds of constitutional disputes the Supreme Court has been asked to resolve and the various roles the Court has played in our constitutional scheme. These sections also introduce some of the criteria the Court has used in deciding who is right in its interpretation of the Constitution. The next major section of the chapter takes up the question of how these disputes get to the Supreme Court and something about the internal decision-making process of the Court as it decides its cases. The last section introduces the Supreme Court opinion itself by outlining in general terms the major parts of the typical opinion.

CONSTITUTIONAL CONFLICTS

Constitutional conflicts involve fundamental issues of right and wrong; principles of social justice, power, and authority; oppression and liberty; economic development; and even war and security. But the language of right and wrong, liberty and justice is not the language in which the Supreme Court discusses these disputes. Take, for example, the issue of the minimum wage. In the legislature the question of whether a law should be passed requiring employers to pay a minimum wage may be debated in terms of the free market versus the welfare state, the protection of the working poor versus the loss of jobs. Once a minimum wage law has been passed and challenged as an unconstitutional exercise of legislative power, the terms of the debate shift to such questions as whether the law is a violation of the Fourteenth Amendment's prohibition against the deprivation of life, liberty, or property without due process of law.

The difference between the language of policy and constitutional language can be illustrated in a different way. Of central importance to American policymakers is the problem of how to honor the principle of tolerance of antithetical political and cultural differences without going so far as to flirt with social disunity. The Supreme Court has played an important "navigator's" role in steering the ship of state on this course. But it has done so using language and concepts derived from the constitutional text. Thus the Court's opinions touching

upon these issues have spoken in terms of such concepts as equal protection and the free exercise of religion.

Because Supreme Court opinions speak about fundamental issues of social policy in the language of the Constitution it is important to start toward an understanding of these opinions by looking at the Constitution itself.

AN OVERVIEW OF THE CONSTITUTION

The Constitution includes these five fundamental features:

- Provisions that touch upon such matters as the relationship between Congress, the President and the Supreme Court, their respective powers, and how the officers of these three branches are elected or appointed
- Provisions that regulate the relationship between, on the one hand, the federal government, and, on the other hand, the states
- Provisions designed to protect individuals against governmental invasions of their liberty, privacy, and other rights
- Provisions that guarantee persons the equal protection of the laws or otherwise prohibit invidious discrimination
- The two clauses of the First Amendment regulative of the relationship between government and religion

There are, of course, other provisions of the Constitution of great importance (e.g., section 3 of Article IV governing the admission of new states to the union, Article V which establishes the procedures for amending the Constitution, and Article VI which declares the Constitution the supreme law of the land). But the obtaining of a general understanding of the constitutional framework and the roles that the Supreme Court has played in interpreting those provisions can be addressed in terms of the five features listed above.

The conflicts which have arisen in each of the five areas all have one thing in common, namely, they begin with a dispute over what a government (federal, state, or local) or governmental official has done. The dispute may be brought to Court by another branch of government, a private person, or private business, but the genesis of the dispute must be in the official acts of a government, governmental official, or someone acting at the behest of a government. That is to say, constitutional conflicts are over what government or governmental officials (federal, state or local) have done or what government has gotten someone to do. These are not disputes solely between two private citizens, solely between a private citizen and a business, or solely between two businesses. Constitutional disputes are about governmental actions, or in the language of constitutional doctrine, about *state action*. Why is this the case? The answer is that the Constitution is a charter for *governmental* behavior, not a charter for regulating purely private relationships.

This is a reality of constitutional law that leads to some perhaps surprising conclusions. For example, if an employee is fired by a company for publicly criticizing that company's environmental record, this dismissal does not raise a constitutional free speech issue. Why? The reason is that the company is a private enterprise and its actions are not directly governed by the Constitution. But if that same employee were fired for the same reason by a local municipality, that dismissal would raise a constitutional issue of freedom of speech (*Pickering v. Board of Education* [1968]). The efforts of the National Collegiate Athletic Association to discipline a basketball coach for improprieties in his basketball program is an effort by a private organization and does not raise "constitutional" issues (*National Collegiate Athletic Association v. Tarkanian*, [1988]). Or take the case of the father who had been beating his infant son for two years; the last beating placed the boy in a life-threatening coma from which he emerged permanently brain damaged. Local officials were aware of the problem but took no steps to remove the boy from the father's care until it was too late. Does this raise a constitutional issue? "No," said the Supreme Court (*DeShaney v. Winnebago County Department of Social Services* [1989]). First, the father's abuse was the abuse by one private individual of another—the Constitution does not itself regulate this behavior. (State criminal law does.) Second, the failure of the local social services agency to act also was not a constitutional violation because the Constitution does not require government to protect the life, liberty, and property of its citizens. "The [Constitution] is phrased as a limitation on the State's power to act, not as a guarantee of certain minimum levels of safety and security."

THE COURT AS SUPERVISOR OF THE BOUNDARIES OF EXECUTIVE, LEGISLATIVE, AND JUDICIAL AUTHORITY (FIRST FEATURE)

Judicial Power

The Constitution establishes the three branches of the federal government and defines their respective powers. Because the grants of power to the three branches are phrased in general terms, disputes regularly arise regarding the scope of these grants. Take for example the problem of "judicial power." Article III of the Constitution gives the Supreme Court "judicial power." This general grant of power does not explicitly empower the Supreme Court to review the constitutionality of the statutes adopted by Congress and signed by the President. Thus one must turn to other materials to answer the question whether the notion of "judicial power" includes the power of "judicial review," the power to strike down as unconstitutional the acts of the other branches of government. The Supreme Court addressed this question in one of its earliest cases.

In *Marbury v. Madison* (1803), Chief Justice John Marshall wrote that the Supreme Court did have the power, even the duty, to review the constitutionality of the acts of Congress. The Chief Justice offered several justifications for the Court's exercise of this power, including the following:

1. The Constitution is a form of law. In fact, it is the supreme law of the land.
2. As the supreme law it also binds the Supreme Court.
3. When a federal statute conflicts with the Constitution, it is void.
4. When confronted with a case which involves a federal statute in conflict with the Constitution, the Court must determine which of these two laws is to be used in resolving the case before the Court—statute or Constitution.
5. Since the Constitution is superior to any ordinary law, the Court is duty bound to give force to the Constitution; to do otherwise would subvert the principle of a written constitution.

(Scholars have criticized this justification on the grounds that it begs the question of who is to determine what the Constitution means. While Marshall may be correct that the Court is duty bound to enforce the Constitution, that still does not answer the question whether the Court may willy-nilly adopt an interpretation of the Constitution different from that relied upon by the legislature.)

Having taken for itself the power of judicial review, the Court set itself up as an important arbiter of disputes regarding the scope of the authority of the President and Congress. Specifically in the *Marbury* case, the Court decided the question whether Congress constitutionally could expand the Supreme Court's "original" jurisdiction. The Constitution gives the Supreme Court two forms of jurisdiction, original and appellate jurisdiction. (Original jurisdiction exists when a court takes a case at its inception, tries it, and passes judgment. Appellate jurisdiction is the authority to take and review a case after it was decided by a court with original jurisdiction.) The Supreme Court's original jurisdiction is limited to a narrow class of cases, namely, cases affecting ambassadors, other public ministers and consuls, and those in which a state is a party to the case. One of the issues in the *Marbury* case was whether or not Congress had the authority to expand the Court's original jurisdiction to include a much broader class of cases. The Court said "no" and, using the power of judicial review, declared a federal statute which expanded the Court's own original jurisdiction to be unconstitutional.

Legislative Power

One of the most famous examples of the Supreme Court's defining congressional power came in *McCulloch v. Maryland* (1819). In that case the Court was asked to decide whether or not Congress had the authority to charter a national bank.

Article I's listing of the powers of Congress makes no express mention of such a power; thus the Court was forced to ask if bank chartering were an implied or inherent authority.

To begin answering this question, Chief Justice Marshall started by reviewing the other provisions of the constitutional text. He took note that Article I, Section 8 of the Constitution empowered Congress to "make all Law which shall be necessary and proper for carrying into Execution" both the specific powers granted to Congress and "all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." He also noted that the Constitution expressly granted Congress authority to lay and collect taxes, to borrow money, to regulate commerce, to declare and conduct war, and to raise and support armies and navies. He next suggested that it was in the interest of the nation to facilitate the execution of these powers, and that we have to presume that the framers intended to give to Congress the appropriate means to carry out these powers. He noted that the Constitution should not be read as a "splendid bauble." Thus, he argued, the "necessary and proper" clause authorized Congress to use any means calculated to produce the end. And, since chartering a bank is an appropriate means to the ends specifically mentioned in the Constitution, bank chartering should be viewed as power incidental to those powers which are expressly listed in the text.

Historically the Court has also played an important role in defining Congressional power to regulate interstate commerce. To understand these disputes I want to draw a distinction between two types of challenges. Constitutional challenges that claim, for example, that the term "legislative power" does not include the power to charter a bank raise an "internal" question of power (i.e., a question of the definition of the term "legislative power"). But Congress may have the legislative power to carry out a specific act, given the definition of the term "legislative power," but the exercise of this power may, nevertheless, transgress an "external" check on the power. Such an external check might be a constitutional right of an individual, the authority of another branch of the federal government to deal with the matter, or the sovereignty of a state.

Article I expressly authorizes Congress to regulate "interstate commerce," but serious questions exist regarding the scope of that power and, especially, whether "external" limits are imposed upon that authority by the separate existence and sovereignty of the states. Consider, for example, the following issues with which the Court had to deal: May Congress prohibit the transportation across state lines of lottery tickets? (Yes.) May Congress regulate labor practices in the steel industry on the grounds that intrastate labor disputes affect interstate commerce? (Yes.) May Congress control the amount of wheat a farmer grows solely for his family's private consumption, that is, wheat that will not enter the flow of interstate commerce? (Yes.) May Congress, pursuant to its power to regulate interstate commerce, prohibit a small family-owned barbecue, serving a local clientele, from refusing to serve customers on the basis of race? (Yes, again.)

In rendering these decisions the Court considered the text of the Constitution (the meaning of the phrase "interstate commerce"); the principle of federalism and the concurrent authority of states to regulate these same activities; the intent of the framers; precedent; and practical considerations such as the desirability of a sound national economy. It was in terms of these legal materials that the Court forged its justifications for its expansive interpretation of Congress's authority.

The Court has used these same legal materials in considering other issues of Congressional power, such as the scope of Congress's authority to tax and spend (Article I, Section 8). Again the express words of the text do not provide a definitive answer to the question whether Congress may "coerce" states or individuals to take certain actions, or adopt certain policies, by using federal funds as a carrot. For example, the issue arose whether Congress may withhold federal highway funds from those states which permit individuals under twenty-one to purchase or possess in public any alcoholic beverage. (The answer is "yes" (*South Dakota v. Dole* [1987].) In justifying its answer the Court made reference to the text of the Constitution, the debate between James Madison and Alexander Hamilton over the meaning of the general welfare clause, the definition of the concept of "coercion," and the principle of federalism.

Presidential Power

Just as the Court has demarked the boundaries of congressional authority it has also done important work in defining the power of the President. One famous occasion of the Court's exercise of this responsibility arose when President Truman directed the Secretary of Commerce to seize the operation of the nation's steelmills during wartime. The President issued this directive in the face of a strike by steelworkers that threatened to interrupt the flow of steel necessary for the war effort. Significant to the case was the fact that the President acted without any authorization from Congress; he simply relied on the Constitution's general grant of executive authority (*Youngstown Sheet & Tube Co. v. Sawyer* [1952]). To answer the question whether the President had the authority to commandeer the steelmills the justices asked: (1) whether the power had been expressly granted by the Constitution, (2) whether the power may be implied from the Constitutional text, (3) whether or not the power was an inherent power of the President.

The Court began its analysis by turning to the constitutional text itself, but it found no express authorization for such an order. The justices next examined the concept of "executive power" and the role of the President in our constitutional scheme of government in an attempt to answer questions (2) and (3). Even assuming the justices had concluded that the President had the authority to issue such an order (they, in fact, did not so conclude), they would still have had to ask whether the President's authority was limited by considerations "external" to the grant of power to him. These "external" checks on the President's power include: (1) a constitutional grant of authority over the same topic to Congress (e.g., Congress's authority to declare and make war), and (2) the separate existence and