Michigan Law Review

Volume 67 | Issue 2

1968

The Warren Court and the Political Process

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I. THE COURT BEFORE WARREN

OUR complex political system creates endless opportunity to debate the proper roles and powers of each of our principal political institutions. Students of the Supreme Court who quarrel over the proper role of the Court sometimes forget that the powers of the President and the proper place of Congress have also been subject to fierce controversy throughout our history, and that the political tension between the national government and the states has provided a persistent theme from the beginning of the Republic. It must never be forgotten that the system provided by the Framers was not designed to produce efficient government, but rather was intended, through the positing of power against power, to create a "free" government, one in which property and the other minority rights might be reasonably secure against the weight of popular majorities. Yet, they did not—and in the nature of things they could not—set forth a detailed permanent model, one in which the role of each of our great political institutions was rigorously defined for all times. James Madison, speculating about the probable strength of each of the three branches of the new government, gave the palm to the legislature, which, in his judgment, tended to draw "all power into its impetuous vortex."[1] His fellow commentator, Hamilton, awarded third place to the Supreme Court, "beyond comparison the weakest of the three."[2] The relationship between national and state governments conceived by Madison envisaged the popular and powerful states as fully capable of resisting national power; thus, the task of the newly established national government was to attract sufficient support to enable it to serve as a counterweight to the divisive tendencies of the states.[3]

In tracing historically the relationships of each branch of the

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1. THE FEDERALIST No. 48, at 333 (J. Cooke ed. 1961). In the same number, Madison observed that "it is against the enterprising ambition of this department [the legislature], that the people ought to indulge all their jealousy and exhaust all their precautions." *Id.* at 334.

2. *Id.* No. 78, at 523. To Hamilton, the Court would "always be the least dangerous to the political rights of the constitution . . . ." *Id.* at 522.

3. *Id.* Nos. 45, 46.

national government to the others, one notes both long-term and short-term changes in the relative power of each. Certain Presidents, notably Jackson and Lincoln, expanded presidential power during a century marked by strong congressional action. The Supreme Court, under Marshall, strengthened national powers against state pretensions and established the Court's role as the pre-eminent interpreter of the Constitution. Yet, the Court was usually generous toward state action until the last decade of the nineteenth century, and the *Dred Scott* decision[4] in 1857, which frustrated congressional efforts to compromise the slavery issue, marked only the second time the Court had faulted an act of Congress.

The present century has been marked not only by short-range ebbing and flowing of executive power, but also by congressional acceptance of a largely ratifying and checking role in its relationship with the President.[5] The twentieth century clearly is the age of executive initiative and administrative government. The great era of Congress lies in the past.

To point out that the Supreme Court has also had a checkered career since the turn of the century is to state the obvious. Over the protests of Justices Holmes, Brandeis, and occasionally others, the Court read into the Constitution an economic and social philosophy which made it a frequent and effective censor of state and national legislation.[6] Progressive political leaders increasingly viewed the Court, which allied itself in spirit with the dominant laissez-faire philosophy of powerful business leaders, as a barrier against needed social change. When the forces pressing for large-scale social reform found a powerful spokesman in Franklin D. Roosevelt, the Court was brought under siege. Although the President's ill-conceived Court-packing plan was defeated, the Court, sensing the dangers confronting it, withdrew from its censorious role. The power to govern was returned to Congress and the President. No longer would the Court use the tenth amendment to frustrate national commerce and taxing power.[7] Also abandoned was the ready use of the due process clauses to inhibit state and national social legislation.[8]

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4. Scott v. Sanford, 60 U.S. (19 How.) 393.

5. E. CORWIN, THE PRESIDENT, OFFICE AND POWERS (4th rev. ed. 1957); J. HARRIS, CONGRESSIONAL CONTROL OF ADMINISTRATION (1964); R. NEUSTADT, PRESIDENTIAL POWER (1960); N. POWELL, RESPONSIBLE PUBLIC BUREAUCRACY IN THE UNITED STATES (1967).

6. E. CORWIN, LIBERTY AGAINST GOVERNMENT (1948); A. MASON, THE SUPREME COURT FROM TAFT TO WARREN (rev. ed. 1968); R. MCCLOSKEY, THE AMERICAN SUPREME COURT ch. VI (1960).

7. *See* United States v. Darby, 312 U.S. 100 (1941).

8. A. MASON, HARLAN FISKE STONE, esp. pt. V (1956); R. MCCLOSKEY, *supra* note 6, ch. VII; C. PRITCHETT, THE ROOSEVELT COURT (1948).

In the period from 1937 to 1953, the Court's role contracted as it proceeded to undo some of its earlier handiwork, concentrating on the staples of appellate review.[9] For, even when its role is conceived in the most modest terms, the Court always has duties of the highest importance; interpreting and applying the provisions of increasingly complex congressional enactments, reviewing decisions of myriad federal agencies, and resolving clashes of state and national power still leave the Court, in James Bradley Thayer's phrase, "a great and stately jurisdiction."[10] But the post-1937 Court did not wholly abandon its role as censor. Other potentially explosive areas of judicial concern had emerged even before the Court revolution of 1937. First amendment issues involving the national government came before the Court as early as 1919,[11] and with the *Gitlow* decision[12] in 1925, state actions affecting first amendment freedoms became amenable to Supreme Court review on the judicially evolved theory that the "liberty" protected by the fourteenth amendment's due process clause included freedom of speech and, by implication, the other enumerated rights of the first amendment. In 1931 freedom of press,[13] in 1937 freedom of assembly,[14] in 1940 freedom of religion,[15] and in 1947 the religious establishment provision[16] were incorporated into the fourteenth amendment. Since state and local governments had been far more diligent than the national government in suppressing dissenters and harassing unpopular minorities, large-scale judicial intervention depended on the manner in which the Court chose to regard its new opportunities.[17]

In the celebrated footnote 4 of *United States v. Carolene Products Co.*,[18] Justice Stone suggested—in highly tentative language—that the Court might properly employ more stringent tests when reviewing legislation or official action that affected specific first amendment

9. C. PRITCHETT, CIVIL LIBERTIES AND THE VINSON COURT 240 (1954), concluded that "[t]he Vinson Court's solution was almost entirely within the tradition of the strong legislature-weak judiciary formula which Holmes developed for the quite different purpose of controlling judicial review over state economic legislation."

10. *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 152 (1893).

11. Abrams v. United States, 250 U.S. 616 (1919); Schenck v. United States, 249 U.S. 47 (1919).

12. Gitlow v. New York, 268 U.S. 652 (1925).

13. Near v. Minnesota, 283 U.S. 697.

14. DeJonge v. Oregon, 299 U.S. 353.

15. Cantwell v. Connecticut, 310 U.S. 296.

16. Everson v. Board of Educ., 330 U.S. 1.

17. The opportunities were certain to arise because of the increasing public and legal activities of organized groups in the 1930's. *See generally* R. HORN, GROUPS AND THE CONSTITUTION (1956).

18. 304 U.S. 144, 152 (1938).

rights, restricted normal political processes, or focused upon "discrete or insular" minorities.

This conception of a preferred position for certain freedoms was firmly adopted by some of the Justices, particularly Black, Douglas, Rutledge, and Murphy, and was followed on occasion by others. In opposition, Justice Frankfurter, adhering to the teachings of his Harvard Law School mentor James Bradley Thayer, saw no reason to concede a preference to the Bill of Rights.[19] Reiterating a political philosophy expressed decades earlier, Frankfurter viewed the Supreme Court as an essentially undemocratic institution, one that should defer to the decisions of the representative branches on virtually all occasions.[20] With the exception of the second John M. Harlan, no other Justice in the modern era has foresworn judicial power in such positive terms. Although classed by most observers with Frankfurter and Harlan as "conservatives," Justices Jackson, Clark, Reed, Minton, Whittaker, White, Stewart, and Chief Justice Vinson were less impressed with the dangers of judicial intervention; their numerous votes in support of governmental action reflected their conclusion that, on balance, such action was reasonable.

Yet during the period from 1937 to 1953, there were three constitutional areas in which the Court demonstrated particular interest, and in many cases, invalidated governmental action. Jehovah's Witnesses won a number of triumphs, most notably in the second

19. Speaking of the preferred-position concept, he argued that it was "a mischievous phrase, if it carries the thought, which it may subtly imply, that any law touching communication is infected with presumptive invalidity." Kovacs v. Cooper, 336 U.S. 77, 90 (1949).

20. Justice Frankfurther's majority opinion in Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940), and his dissent in West Virginia Board of Educ. v. Barnette, 319 U.S. 624, 646 (1943) are excellent examples of his antireview attitude. Arthur E. Sutherland suggests that between 1938 and 1943 a profound change in our political philosophy may have occurred, a revision of thought about majoritarian institutions. *All Sides of the Question, Felix Frankfurter and Personal Freedom* in 2 FELIX FRANKFURTER: THE JUDGE 109 (W. Mendelson, ed. 1964). If this insight is correct, it is clear that Frankfurter remained a true believer to the end. Clearly the Justice has a romantic and rather elementary conception of the role of our representative institutions and the nature of their functioning, which seems surprising in one who was so close to the seats of power in the 1930's. But perhaps that experience served to reinforce his bias against judicial review, since Frankfurter's principal position was that in a world of relative values the legislature was at least more representative than the Court. Frankfurter had written in 1934, "[T]he process of constitutional interpretation compels the translation of policy into judgment, and the controlling conceptions of the Justices are their 'idealized political picture' of the existing social order." *The Supreme Court of the United States*, in XIV ENCYCLOPEDIA OF THE SOCIAL SCIENCES 424 (1934), reprinted in LAW AND POLITICS: FELIX FRANKFURTER 21, 30 (E. Prichard & A. Macleish ed. 1939). Apparently he had little respect for the argument that Supreme Court Justices also have a representative role.

flag salute case.[21] The *Duncan* case,[22] invalidating martial rule in Hawaii during World War II, and *Thornhill v. Alabama*,[23] drawing peaceful picketing under the protection of free-speech guarantees, were other libertarian victories. Second, by insisting on a realistic assessment of the "equality" afforded by "separate but equal" facilities,[24] and by stressing the importance of the intangible detriments flowing from a segregated education,[25] the pre-Warren Court rendered inevitable the decision in the school desegregation cases.[26] Similarly, the pre-Warren Court began in the 1930's to evince interest in the process of criminal justice in the states. As the Court chose to look more closely at the realities of criminal justice, it discovered that racial minorities and indigent and inexperienced defendants were subject to law enforcement and trial practices that fell short of due process of law.[27]

Despite its new judicial concerns, it is fair to say that the pre-Warren Court had slipped into a secondary role in the political system, and its decisions, on the whole, did not arouse serious public criticism. The decision in the steel seizure cases[28] was popular, primarily because President Truman's standing with the American people was not high. The decision upholding the convictions of the Communist Party leaders[29] was widely applauded, as were other decisions supporting actions restricting Communists.[30]

By 1953, then, when Earl Warren stepped down as Governor of California to accept a recess appointment from President Eisenhower, the Court was already embarked on new judicial paths. But the nation, troubled by its thorny relations with the Soviet Union and frustrated by its seemingly inconclusive involvement in Korea only five years after the conclusion of a major war, seemed in no mood to deal forthrightly with the pressing problem of civil rights, and reacted with some impatience to claims on behalf of political dissenters. And law enforcement agencies, as well as the public in general, had traditionally been hostile to more considerate treatment

21. West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).
22. Duncan v. Kahanamoku, 327 U.S. 304 (1946).
23. 310 U.S. 88 (1940).
24. Sweatt v. Painter, 339 U.S. 629 (1950).
25. McLaurin v. Oklahoma State Regents for Higher Educ., 339 U.S. 637 (1950).
26. Brown v. Board of Educ., 347 U.S. 483 (1954). *See* R. HARRIS, THE QUEST OF EQUALITY (1960); C. PRITCHETT, CIVIL LIBERTIES AND THE VINSON COURT ch. 7 (1954).
27. *See* D. FELLMAN, THE DEFENDANT'S RIGHTS (1958).
28. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).
29. Dennis v. United States, 341 U.S. 494 (1951).
30. American Communication Assn. v. Douds, 339 U.S. 382 (1950); Adler v. Board of Educ. of the City of New York, 342 U.S. 485 (1952), among others.

for criminal defendants, whether by overly generous judicial doctrine or the use of legal "technicalities."

II. The Warren Era

President Eisenhower's nomination of Earl Warren as Chief Justice of the United States represented an awareness that the Supreme Court was, and necessarily remains, a political organ as well as a court of law. If legal experience and technical skill were prime requisites for a Justice or Chief Justice, it would have been difficult to justify the Warren appointment. Apart from discharging a major political debt, the appointment—concurred in by United States Attorney General Brownell and presumably by other leaders of the Eastern wing of the Republican Party—promised to bring to the Court a mildly liberal leader who could be counted on to play a part in reinforcing the image of no-nonsense, businesslike government which the new Administration hoped to maintain.[31]

In the very first term of Warren's tenure the Court handed down its opinion in the school desegregation cases,[32] which had been before the Court in the last term of Vinson's leadership, only to be set for reargument in the following term. The predictable reaction to the Court's pronouncement in these cases and to the implementing decision that followed in 1955,[33] despite the Court's unanimity, was a barrage of violent criticism from political leaders and other spokesmen in the "deep South." More concrete resistance soon followed: legislative "interposition" resolutions were adopted, and various laws and administrative measures to thwart, or at least delay, implementation of the *Brown* decision were enacted. Almost all Southern members of Congress joined in 1956 in issuing a "Declaration of Constitutional Principles," which concluded with an appeal for resistance by "all lawful means."[34] Other decisions applying the desegregation rule to various activities and facilities further inflamed Southern sensibilities.

It cannot be overstressed that this violent and persistent attack on the Court by the political leaders of a substantial section of the nation has affected public reaction to other important Court decisions. For here was a large, vocal minority eager to discredit the

31. *See* the account of the appointment in J. Weaver, Warren: The Man, the Court, the Era ch. 13 (1968).

32. Brown v. Board of Educ., 347 U.S. 483 (1954).

33. Brown v. Board of Educ., 349 U.S. 294.

34. The legal resistance is chronicled in various issues of the *Race Relations Law Reporter*. *See also* J. Greenberg, Race Relations and American Law (1959).

Court in every conceivable way; and, given the range of controversial subjects that inevitably challenged the Court, the opportunities for public denunciation were numerous. In addition to the steaming racial issues, the Court had to pass on antiobscenity measures, the rights of criminal defendants, sit-ins and other controversial forms of free expression, prayers and Bible-reading in schools, and questions involving apportionment and districting for state and national elections. When decisions favorable to individuals and groups claiming these rights were handed down, the Southern bloc could be counted on for bitter comment and intense efforts to inform news media of the disastrous consequences of the Court's chosen path.[35] Because Southern Senators and Representatives held important committee positions as a result of the seniority system, they were able to use Congress as a forum for their anti-Court crusade. Many non-Southern members of Congress, whose mood has been one of frustration arising from running battles with the bureaucracy, constant presidential prodding, and widespread criticism of Congress, joined in the chorus of denunciation, eager to point the finger of blame at another institution. It was especially pleasant for Congressmen to assume stances that were certain to please substantial numbers of constituents, and many of the Warren Court's decisions were unpopular with large segments of the population for reasons that seem obvious. How many citizens, after endless instruction that Communism was a great and imminent threat to the nation's security, would applaud a decision favorable to Communists?[36] And, clearly, the number of parents outraged by obscene literature exceeded the number of libertarians who applauded the Court's stand favoring literary freedom.[37] Citizens who were alarmed by the growing crime rate were also quick to join the chorus of disapproval generated by law enforcement representatives. Millions of good people were shocked by the decision banning prayers and Bible-reading, and only a massive counterattack beat off the effort to reverse the

35. The bitter struggle to curb the jurisdiction of the Supreme Court is brilliantly described in W. MURPHY, CONGRESS AND THE COURT (1962), a work crucial to our understanding of congressional attitudes in the 1950's and 1960's.

36. *See* Stumpf, *Congessional Response to Supreme Court Rulings: The Interaction of Law and Politics*, 14 J. PUB. L. 377 (1965) for a study of Court "reversal" bills in Congress. *See also* Lytle, *Congressional Response to Supreme Court Decisions in the Aftermath of the School Segregation Cases*, 12 J. PUB. L. 290 (1963); *Hearings on S. 2646, Limitation of Appellate Jurisdiction of the United States Supreme Court Before the Subcomm. of the Senate Comm. on the Judiciary*, 85th Cong., 2d Sess. (1958).

37. *See* S. KRISLOV, THE SUPREME COURT AND POLITICAL FREEDOM 39-53 (1968) for an analysis of the antilibertarian cast of American public opinion.

Court by means of the Becker Amendment.[38] Even the relatively popular reapportionment decisions aroused militant opponents who stood to lose by a fairer system of representation.[39] And of course, the cry of "states' rights" was raised not only in response to the desegregation decisions, but also in opposition to all decisions that found fault with state laws or practices. When the Conference of State Chief Justices issued its curiously unjudicial report in 1958,[40] ticking off grievances against the United States Supreme Court, it merely confirmed for many citizens their own vague fear that in an increasingly confusing and rapidly changing world, the Supreme Court seemed determined to render innovative and therefore distressing decisions.

In retrospect, it seems obvious that when the Court chose to hand down decisions favorable to racial minorities, political dissenters, criminal defendants, and protagonists of unpopular causes, it could hardly expect cheers from the majority of people. Empirical studies of popular attitudes consistently reveal deep-rooted popular opposition to many provisions of the Bill of Rights, and ingrained hostility toward dissenters and advocates of change.[41] Only strong stands by political and social leaders and by the popular media could offset this antilibertarian sentiment of the majority, but rarely were such stands taken. The Congress, as mentioned above, found the Court a convenient target. President Eisenhower assumed a remarkably dispassionate attitude toward the desegregation decisions, and withheld the massive reinforcement which the prestige of his name and office might have provided.[42] Presidents Kennedy and Johnson were willing to speak out on racial matters, but, in the nature of politics, they could not be expected to defend the Court on every

38. *See* Beaney & Beiser, *Prayer and Politics: The Impact of Engel and Schemp on the Political Process*, 13 J. PUB. L. 475 (1964). Of course, the simple focused type of question may yield deceptive results; *see* the preliminary findings of Murphy & Tanenhaus, *Public Opinion and the United States Supreme Court*, 2 LAW & SOCIETY REV. 357 (1968). Given an open-ended question about the Court concerning their likes and dislikes, the majority of respondents come up with nothing. Nevertheless, racial issues and school prayer, and to a lesser but growing degree, criminal-justice matters did evoke responses from a substantial minority.

39. On the Dirksen Amendment campaign *see* R. DIXON, DEMOCRATIC REPRESENTATION (1968) chs. 15, 16; Dixon, *Article V: The Comatose Article of Our Living Constitution*, 66 MICH. L. REV. 931 (1968).

40. Report of the Committee on Federal-State Relations as Affected by Judicial Decisions.

41. *See* S. KRISLOV, *supra* note 37.

42. *See* R. HARRIS, *supra* note 26, at 155-57. That "you cannot change people's hearts merely by laws," was one of President Eisenhower's cherished beliefs. J. WEAVER, *supra* note 31, at 217.

issue.[43] The American bar, which furnished heroic support to the embattled Court of the 1930's, has, on the whole, taken a less sympathetic position toward the Warren Court, which it views as too controversial and excessively disrespectful toward precedent.

It has often been remarked that the Court should, and usually does, follow the election returns. The argument is that although the Court is not an elective body, it must in its own way behave as a representative institution. If one takes this argument seriously, the Warren Court has, perhaps, been wrong on most of the controversial issues for which it has provided answers. If the function of the Court is to please the majority and displease as few groups and interests as possible, then Chief Justice Warren and the other politically sophisticated members of the Court have badly misconceived their role and deserve the criticism that they have received. But there is another view of the Supreme Court's role that casts the work of the Warren Court in a more favorable light. If the role of the representative branches is to give voice to—as well as shape and lead—public opinion, it may well be the proper function of the Supreme Court to voice the best aspirations of our people, to give reality to the ideals we profess in our Constitution and Declaration of Independence, and to provide justice for those who otherwise have difficulty claiming it. Who can deny that a viable society requires reasonably prompt and appropriate attention to important social problems? It is the Court, not the representative branches, which has tried to eliminate the racial cancer which still threatens America. Only well after the Court's first efforts did Congress and the President see fit to act. And, without traversing the ground covered in other Articles in this Symposium, is it not clear that the dominant theme running through the other controversial decisions of the Warren Court is the necessity of equal rights for all, protection of the underdog, and respect for the dignity of man in a confusingly complex society? One can, of course, argue that the Warren Court has tried to move forward on too many fronts in a period of social change and unrest. A cautious political strategist might conclude that in the light of the troubles stirred up by the desegregation decisions, the Court would have been wiser to allow Bible-readings and prayers in the schools, avoid restrictions on the police, assist in the crackdown on smut

43. President Kennedy's espousal of a comprehensive Civil Rights Act in 1963, enacted into law under President Johnson in 1964, might be regarded as the great exception. But Congress was driven, not led, to this action in 1964 and to other rights bills in subsequent years. By 1968 all had returned to normal.

peddlers, let Communists take their lumps, and stay out of the reapportionment thicket; but the Court has chosen a more embattled way.

Writing in 1941, Robert H. Jackson observed that the Supreme Court was "almost never a really contemporary institution . . . . The judiciary is thus the check of a preceding generation on the present one; a check of conservative legal philosophy upon a dynamic people; and nearly always a check of a rejected regime on the one in being."[44] The mistake of the Warren Court, according to its critics, is that it insists on moving too fast—on advancing far beyond the needs and expectations of the present generation. One of the most perceptive commentators has warned that the Court should not ignore history "in determining how judicial control should be exercised and when it should be brought to bear." Surely, he admonishes, "the record teaches that no useful purpose is served when the judges seek all the hottest political caldrons of the moment and dive into the middle of them."[45] It is hardly a daring speculation to suggest that a post-Warren Court may move somewhat cautiously in the conservative atmosphere of the late 1960's. Yet, the doctrines of equality, freedom, and respect for human dignity laid down in the numerous decisions of the Warren Court cannot be warped back to their original dimensions. The attitude of more and more Americans, particularly the members of the young and better-educated generation, is one of intense commitment to human rights. Generations hence it may well appear that what is supposedly the most conservative of American political institutions, the Supreme Court, was the institution that did the most to help the nation adjust to the needs and demands of a free society.[46]

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44. THE STRUGGLE FOR JUDICIAL SUPREMACY 315.

45. R. MCCLOSKEY, THE AMERICAN SUPREME COURT 229 (1960).

46. Archibald Cox has written:

> Only history will know whether the Warren Court has struck the balance right. For myself, I am confident that historians will write that the trend of decisions during the 1950's and 1960's was in keeping with the mainstream of American history—a bit progressive but also moderate, a bit humane but not sentimental, a bit idealistic but seldom doctrinaire, and in the long run essentially pragmatic—in short, in keeping with the true genius of our institutions.

THE WARREN COURT 133-34 (1968).