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The Supreme Court, Politics, and Modern Society

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not to the tyrannical side of his chief competitors for popularity. One can only shudder at the prussianized America which might have emerged from four administrations of Presidents Fisher Ames and Timothy Pickering if they could have held the White House from 1801 to 1817. Just as surely, Jefferson led in the eighteenth-century victory of liberty as he and his associates understood liberty. The reviewer must go along with Benjamin Ginzburg: this victory was a sound achievement, even if it seemed formal and abstract when applied to concrete cases. Most of the time Jefferson identified himself with causes, as Malone wrote, "for which time was fighting." In this he served as one of our many human filters through which seventeenth-century whiggish ideas, cloudy as they were, have been partially clarified and refined from unwanted feudal and regal sediments.

The best evaluation of a folk-hero is not to measure how far short of perfection he fell, but to decide how far forward he really pushed the things that matter. If Thomas Jefferson had died on the evening of July 3, 1776, he would still have achieved a place of high rank. He left us that flaming editorial we have been trying to live up to since the 1820's.

— MARSHALL SMELSER

THE SUPREME COURT, POLITICS, AND MODERN SOCIETY*

Mr. Justice Holmes once analogized the subdued grandeur of the Supreme Court to the "quiet of a storm center," an oblique way of describing the institution's proximity to the mainstream of American politics. Indeed the Court's intrinsic political character was underscored by Alexis de Tocqueville's observation that in America major political disputes frequently tend to resolve themselves into judicial questions. Surely any tribunal vested with power to strike down federal and state legislation, to nullify executive orders, to resolve perplexing controversies between the national and state governments as well as between individual citizens and politically organized society, will inescapably embroil itself in the fires of American politics.

But the Court is not exclusively a political institution. It is a court of law, the symbol of justice and the institutional manifestation of constitutionalism. Thus the Court is both *in* politics and *above* politics; while it is obligated to enforce the decisions of the popularly elected branch of government it is also obligated to give concrete meaning to constitutional principles which may conflict with the former; while frequently the Court must rule in favor of one group of interests which results in the defeat of an opposing array of interests, it must also seek justice in terms of values which transcend the special

* Charles S. Hyneman: *The Supreme Court on Trial.* (New York: Atherton Press, 1963. Pp. ix, 308. $6.50.)

interests of particular litigants; and while the Court cannot stray too far from the popular consensus, it occasionally reminds the American public that the passions of the hour will not be permitted to thwart the principles of limited government. It is this fundamental dualism of the Court's role which inevitably leads it into controversy and makes it impossible to fully assuage the apprehensions of all its critics.

So it is that the Supreme Court has been alternately acclaimed and denounced, its justices praised and maligned. Indeed a major part of the history of the Court is a story of its conflicts with the President, the Congress, the states, or powerful interest groups. But the shock waves released by the Court's recent decisions, beginning with the *School Segregation Cases* of 1954, have reverberated with an intensity that would compare favorably with the popular outcry which followed the decision in the *Dred Scott Case* a century earlier. The net effect of many of these decisions has been the expansion of the meaning of minority rights and individual liberty, usually at the expense of the states.

Much of the recent criticism levelled at the court has taken the form of vicious diatribe. Such voices of unreason must not be allowed to obscure the legitimacy and value of powerful scholarly analyses such as Charles S. Hyneman's critical inquiry into the modern role of the Supreme Court in the American political system. *The Supreme Court on Trial,* which examines critically the Court's activism in the civil rights field and re-examines the whole question of judicial review in the United States, is a book which no serious student of American political institutions can afford to ignore. The reviewer's disagreement with many of the author's assumptions is no bar to admitting that he has done a creditable job in refining some of the issues beneath the current controversy over the Court.

Hyneman's main argument is that the Supreme Court lifted itself to a new plateau of judicial power in nullifying the system of legally sanctioned segregated schools in the South. Thus *Brown v. Board of Education* (1954) was unlike any previous exercise of judicial review. Up to this time the Court's great power to strike down legislation hinged primarily on *Marbury* v. *Madison* (1803) and the *Dred Scott Case* (1857). Hyneman appears to agree with those who view the *Dred Scott Case* as an extension or an enlargement of judicial power and not merely a reaffirmation of the doctrine of judicial review as expounded in the Marbury case. In the latter, it is alleged, the Court did not assert its superiority over the political arms of the national government, but simply refused to enforce a statute conferring a power upon the Supreme Court which Marshall felt was contrary to the express language of the Constitution; whereas the *Dred Scott Case* represented the first time the Court imposed upon Congress its own interpretation of the latter's duty under the Constitution. In any event, until the *School Segregation Cases,* the one common feature of all decisions overruling state or federal legislation had the effect of "reinstating the regime of law that existed prior to the particular enact-

ment." But the segregation cases represented a power thrust of an entirely different order. There the social consequences were quite severe, for the Court ruled a "way of life unlawful and ordered a revision of law and governmental practice." Accordingly a "new constitutional regime," as Hyneman puts it, was instituted.

Whether a *new* constitutional regime has in fact been instituted depends upon one's reading of constitutional history. I prefer to read *Brown* v. *Board of Education* alongside of the following factual observations. First, the Radical Republicans who dominated Congress after the Civil War erected a structure of law, constitutional and statutory, designed to eradicate every last vestige of state law recognizing distinctions based on color. Second, the institution of legally enforced segregation was not finally legitimized until the Supreme Court decided *Plessy* v. *Ferguson* in 1896, a decision in conflict with the clear and indisputable intention of the framers of the Fourteenth and Fifteenth Amendments. Finally, the Court has been slowly, almost imperceptibly, chipping away at the "separate but equal" formula for many years, at least in the field of education. The Brown case signaled therefore not a revolution in constitutional theory, but the culmination of a long line of doctrinal development. In fact it would be better to argue that the Court in that case was correcting a half century of error that began with Plessy.

Actually, Hyneman seems more alarmed over the application of Brown than over the decision itself. He is particularly disturbed by the fact that the Brown case has been used as precedent to strike down segregated recreational facilities without an accompanying explanation by the Court of how or why the logic and assumptions of the former can or should be applied to the latter. In short, the Court does not appear to have established an adequate doctrinal bridge between the school and non-school cases. Hyneman says, perhaps correctly, that "there was no assertion, no dropping of hints, that separation of the races in other governmentally owned or operated facilities should also be viewed as inherently unequal and *ipso facto* forbidden by the Constitution."

The failure of the Court to circumscribe its powers in this important area of public policy, notes Hyneman, could lead to a bid for unrestrained judicial power reminiscent of the pre-1937 Court. Still another disquieting feature of the new regime is the intensity of the resistance to the *School Segregation Cases,* exacerbated by such equally explosive decisions as *Baker* v. *Carr,* on the part of a large sector of the American public generating not respect but disobedience of law. These and related decisions are self-defeating since they tend to diminish public confidence in the authority of the Supreme Court.

But they are also damaging to the democratic process. Deeply committed to the view that the survival of this democracy depends upon the capacity of its people through elected representatives to order public policy, Hyneman fears that an activist Court, by nudging the public along directions in which it does not want to go, may under-

mine majority rule and blunt the public's sense of political responsibility. He indicates that those who press for greater judicial activism are in effect recommending: 1) that the Supreme Court save the nation from the failures of Congress; 2) that the Supreme Court police the democratic process; and 3) that the Court "be bolder in identifying ideals and setting public officials in pursuit of those ideals." With each of these recommendations Hyneman finds certain practical and logical difficulties not the least of which is that the Court inherently is no more capable of settling constitutional issues involving great questions of public policy than is Congress. After all, the Court is as subject to whim and caprice as is Congress while justices are as susceptible to the infirmities of human judgment as any other public officials.

To support this view Hyneman briefly examines the history of the Court's use of key constitutional provisions (for example, general welfare, interstate commerce, necessary and proper, due process of law) to illustrate the jagged and circuitous route these provisions have taken in the Court's effort to impose meaning upon phrases clothed at best in ambiguity. He notes how the justices, through judicial legerdemain and adroit use of sundry conceptual devices, have been able to embody their policy preferences in major constitutional provisions. And because the justices continue to read their personal preferences into the Constitution the Supreme Court of the United States is now on trial "by due process of politics."

Much of this book is given over to re-examining the nature of the authority conferred upon the Supreme Court by the Constitution. Hyneman's investigation of the origin and practice of judicial review is principally intended to show that men may reasonably doubt that the "power of judges to nullify statutes was vested in them by the constitution." He finds that there is and has always been throughout our nation "a significant social doubt" that the Supreme Court can disallow acts of Congress, a doubt reinforced by the superficiality of Marshall's reasoning in *Marbury* v. *Madison* and the fact that his opinion in that case had the effect of limiting the power of the judiciary and not that of Congress.

Whatever may have been the quality of Marshall's reasoning Hyneman's interpretation of the Marbury case is so narrow as to strip it of the larger significance it has had in the history of our constitutional law. If Marshall did not say in so many words that the Supreme Court was superior to the other branches of government in determining the legitimacy of the latter's responsibilities under the Constitution, certainly the entire temper and tone of the decision pointed to the doctrine of judicial supremacy. *Marbury* v. *Madison* constitutes an organic link in a long line of decisions and practices establishing the Supreme Court's position as final arbiter of the Constitution's meaning as against the states or the political branches of the national government. In any case, one wonders about the relevance of this lengthy rehashing of the debate over judicial review of federal legislation since the great con-

troversial decisions of the last decade which have so upset Hyneman have not involved the nullification of congressional legislation; indeed, the Court has deliberately refrained from reaching constitutional issues in cases under federal law by giving every benefit of constitutional doubt to the popularly elected branch. This is one reason it is unfair to compare the Warren Court with the pre-1937 Court which knocked down one federal statute after another; and if one attacks the Court for making policy by dint of statutory interpretation he attacks the Court for something it cannot possibly avoid doing.

The fact is that the "new constitutional regime" has been instituted by cases nullifying *state* legislation under the Fourteenth Amendment. But Hyneman seems to feel that the states' rights position is tenable not only because there is ample precedent in American history for state resistance to the exercise of federal authority but also because of lingering doubt, particularly in the South, that the Supreme Court was ever given the power to speak *ex cathedra* about state responsibility under the Amendment. Indeed, the express language of the Fourteenth Amendment does not even settle the question of *which* government, state or federal, shall have the last word in defining its meaning. At least these are some of the considerations which the author thinks ought to modulate the Court's decisions in those areas where long-standing state policies embedded in the culture and mores of the people are being reviewed.

This is by far the weakest part of the entire argument and is wholly unconvincing. The fact that a substantial minority believes the Court to be without power to do a certain thing is no real argument against the Court doing it when our law and tradition have ratified that power. But more, the Fourteenth Amendment was a blueprint for an equalitarian society; it was clearly intended to nationalize certain basic rights and with that to prohibit classifications based on color. It represented, as John P. Roche put it, "the gravestone of Madisonian federalism." The further suggestion that the Amendment does not settle the question of which government may define its meaning may be theoretically compelling but sheer folly if accepted as a practical guide to action; no state can be allowed to define the outer limits of its power under the Constitution if we are to abide with the principle of federal supremacy. Indeed, the necessity for *uniform* application of the Constitution implies the primacy of federal interpretation. And at the federal level the duty of defining rights claimed under the Fourteenth Amendment has fallen, by default as much as design, to the Supreme Court which is under no obligation to conform its opinions to the value structure of any particular group.

It should be recalled that Hyneman questions the propriety, not the legality, of the *School Segregation Cases;* for it was somehow undemocratic for the judiciary to intrude itself into the field of educational policy in contravention of local law and custom. Stating the issue in this way, however, sheds more darkness than light. For one thing how are we to define "educational policy," the area into which,

it is charged, the Court has blatantly intruded? To define the content of education or to tell the state the standards it must adopt in evaluating an educational program would be such an intrusion. But in the desegregation decision the Court simply held that when a state undertakes to provide for a compulsory system of education it shall do so under conditions of strict equality. In view of the evidence all about us pointing to the manifest injustice of segregated educational facilities the Court, in deciding the above, simply did what it felt it had to do in the application of the Equal Protection Clause. This is not to suggest that the Court should reach out to right every wrong and correct every injustice that afflicts the nation. (I say this because Hyneman seems intent in putting this albatross around the necks of those willing to rise to the defense of the Brown case.) Rather, this is to suggest that when a *gross* injustice is perpetuated by state laws which constitute an *unreasonable* and *arbitrary* denial of equality under law then it is the Court's right and duty to correct the situation when an appropriate case ripe for decision comes before it.

Similarly what does Hyneman mean in labeling an action "undemocratic"? Apparently a democratic decision is one made by the political organs of government and since the Supreme Court is a nonpolitical institution the judicial process lies outside the vortex of democratic decision-making. To postulate such a neat antinomy is to set up a straw man that is easily knocked down. A lot depends on how one frames the question. The problem in the *School Segregation Cases* is not that of the Court pitting a superior will against the will of the majority in order to bring about a higher morality and a better society. Indeed, this *would* be a variant of benevolent despotism. Rather, the problem has been at least in part the almost total inability of a congressional majority to express itself on this issue because of anachronistic rules of procedure, seniority, filibusters, and other anti-majoritarian devices which have frequently enfeebled the national legislative process. Roche offers the further suggestion that the Court's invasion of this policy battleground was born of necessity because of "the inability of our party system to supply a unified package of leadership and policy which leaves whole sectors of national life in a contested no-man's land." This, by the way, is still another reason why it is unfair to analogize the current Court to the pre-1937 court which acted in unashamed defiance of majority will.

Public response to the *School Segregation Cases* has involved widespread approval and conformed generally to the value structure implicit in the American consensus, notwithstanding the intensity of the Southern protest. Even there much, if not most of the criticism has come from the most irresponsible and abrasive sector of the Southern community. Indeed for the Court to have decided otherwise would have been to pass the mantle of leadership to the most regressive and backward part of the nation.

The American Negro is restless and impatient with a political system that relegated him initially to slavery and then to a century of

second-class citizenship. A minority as large and potentially explosive as the Negro population must somewhere along the line have effective access to the decisional apparatus of government; the very stability of a democratic regime would seem to depend upon it. One reason the American Negro may not have resorted to violence in recent years is because he has been able to vindicate his birthright and redress injustice by legal means in the only forum where that has been possible, the Supreme Court. Encouraged by the segregation cases the Negro has gained the confidence to press ahead for all his rights under the Constitution. And who will gainsay that the political system is better off because of the Negro's increasing awareness of his potential for citizenship. Looked at in the context of the entire contemporary political situation it cannot be said that the segregation cases are incompatible with the democratic way of doing things.

Hyneman's rejoinder is that the Supreme Court does not exist to correct the failures of the representative branches of government. The Supreme Court, possessing the power neither of the purse nor of the sword, cannot effectively correct any failure of the elected branches. He correctly notes that the more perplexing problem is whether the Court is in a better position than the elected branches to determine whether there has been a political failure. Though an interesting question it is quite meaningless to discuss this as an abstract matter. When dealing specifically with *Brown* v. *Board of Education* the conclusion is nearly inescapable that there has been a gross political failure where the treatment of the Negro in the field of education is concerned. For the resolution of the racial conflict in America there must in the final analysis be a collaboration of the legislative and executive arms of the federal government. All the Supreme Court has done is to say what the Fourteenth Amendment forbids; doubtless the Court has taken the lead in defining the necessities of the Equal Protection Clause, but this does not necessarily imply, as the author suggests, a lack of confidence in the political process as a way of realizing our ideals.

This book has not convinced me that *Brown* v. *Board of Education* and the subsequent application of that decision raised the Supreme Court to a new plateau of power; nor am I particularly worried about the implications of that case as to the future course of judicial decision-making. The alleged failure of the Court to circumscribe its power leads the thoughtful man to wonder, says the author, whether the new regime will be confined to questions of racial segregation. For example, he sees nothing in the logic of recent decisions which would prevent the court from reviewing the constitutionality of an allocation of public funds where it is shown that Negro populated areas have not been equitably treated in the repair and maintenance of city streets. I suppose it is possible to conjure up in our minds a whole list of frightful possibilities that might conceivably and logically flow from a certain line of decisions, but the thoughtful man who views the court in historical perspective knows that these so-called possibilities—for any-

thing is possible—are more imaginary than real and that the court functions with a sense of judicial propriety even in an era of activism on the bench.

Nor is there any reason why the frontiers of judicial power must be rigidly defined just as there is no real reason why a body of constitutional law should yield the high level of predictability that Hyneman desires. The greatness of our legal tradition is that law deals with particular situations as they arise in unique and varying circumstances and in the context of a complex system of political decision-making, a condition hardly conducive to the formulation of legal exactitudes. A pragmatic society confronts its great socio-legal problems as they compel men's attention and then are resolved in accordance with experience and necessity, not with logic or abstract constitutional theory; in this tradition experience dictates legal theory, not the reverse. It is also worth recalling that the lawmaking roles of judiciary, legislature, executive, and administrative agency change from era to era; the pattern of interplay between them alters, sometimes drastically depending upon the intensity and course of social change, human inertia, and a multitude of other socio-political factors. Whether the court occasionally takes the lead in conflict resolution or whether the behavior of the court conforms to some rigid standard of judicial propriety is quite irrelevant so long as the integrity of the entire political system is maintained. Moreover, it is highly unlikely that an activist Court can seriously affect the balance that obtains between American political institutions, since the court functions within a complex web of government whose character is determined far more by the multifarious pressures brought against it than any pronunciamento of a single organ of law.

Hyneman comes perilously close to suggesting that the relationship between the Court and elected branch of government should be one of subordination rather than coordination. The principle of checks and balances implicit in a government of separated powers is best served by a condition of creative tension between the three branches. I submit that this, not a condition of irreconcilable opposition, properly describes the relationship between the Supreme Court and Congress. As stated before, the Warren Court has not voided any important piece of federal legislation. Indeed, the Court has given Congress every opportunity in the world to rethink certain problems, to question old assumptions, and to clarify abstruse statutory language which may have impelled the court to limit the applicability of a statute.

The Court has, of course, voided important state policies, but only as a by-product of its duty to define minimum constitutional standards that the states must observe. Even here the Court has left room for creativity, inventiveness, and innovation on the part of state policymakers. That is why the *School Segregation Cases* and *Baker* v. *Carr* were sometimes far less than bold seizures of power by a Court insensitive to the desires of local politicians. In the former the Court did not order immediate school integration, but recognizing Southern

sensitivity on this issue, permitted local authorities to work gradual solutions under the general supervision of the federal courts. In the reapportionment case the Court neither spelled out criteria for determining the legitimacy of state apportionment laws nor defined the outer limits of its own authority to redress grievances stemming from malapportionments; yet the decision has elicited a *constructive* riposte as one state after another has begun to re-evaluate the meaning of representative democracy by enacting rational apportionment laws. No one would contend that this issue can definitively be resolved by the courts. Because the Supreme Court is not the best forum in which to resolve the problem of non-representative government and does not have the tools or the competence to draw legislative district lines is no reason why the Court should not review a state apportionment statute which involves an invasion of a constitutional right. A Supreme Court decision often marks the beginning, not the end, of political deliberation.

Perhaps one might view the Supreme Court as a great stimulator of dialogue, a suggestion which Hyneman would consider appalling, I am sure. Maybe the great significance of decisions like *Brown* v. *Board of Education, Baker* v. *Carr*, or *Engle* v. *Vitale* is not that they have decided the issues associated with those cases with absolute finality, to bind this and future generations, but that they have furnished fodder for debate, and have moved enlightened men to reconsider the nature of this society and this democracy and the goals that we as twentieth-century men ought to follow. While the Court's judgments must be respected and obeyed if order is to prevail, still, in a democratic society, all the great questions which affect its life are open questions subject to the interminable scrutiny of responsible men.

— DONALD P. KOMMERS

THE CHALLENGE OF POPE JOHN XXIII*

The era of Pope John XXIII has come and gone. In four brief years the spiritual simplicity of this wise and generous leader has changed the world. Some who saw the first session of the Second Vatican Council, especially the participation of the cardinals and bishops from Asia and Africa, predicted that the Catholic Church would never be the same again. But the calling of the Council was only one of Pope John's tremendous acts which continue to move and reform the

*1. Joseph N. Moody and Justus George Lawler, eds. *The Challenge of Mater et Magistra.* (New York: Herder and Herder, 1963. Pp. vii, 279. $4.95.)

2. John L. McKenzie, S.J., *Myths and Realities: Studies in Biblical Theology.* (Milwaukee: The Bruce Publishing Company. Pp. xvi, 285. $4.75.)

3. James J. Hennesey, *The First Council of the Vatican: The American Experience.* (New York: Herder and Herder. Pp. 341. $6.50.)