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The Supreme Court on Trial, by Charles S. Hyneman

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BOOK REVIEWS

THE SUPREME COURT ON TRIAL. By Charles S. Hyneman. New York: Atherton Press. 1963. Pp. ix, 308. $6.50.

One of the unintended consequences of the framing of the United States Constitution has been an apparently unending succession of scholarly efforts to describe the true nature and functioning of the complex political system that has its basis in that document. In retrospect, it seems inevitable that each generation should find occasion to reexamine the respective powers of each of the great institutions—President, Congress and Court—, to dispute again and again the allocation of powers between the nation and the states, especially since 1868 when the Fourteenth Amendment was adopted, and to define the boundaries of individual and group rights against governmental power.

This process of reinterpretation of the Constitution and redefinition of the functions and powers of each of our political institutions is inevitable because the values, needs, aspirations and ways of organizing the work of any society change over time. With modern industrialized societies the swift pace of social change becomes a central and inescapable fact conditioning all political thought and behavior and compelling a constant reshaping of both formal and informal political behavior.

What makes the American political system so difficult to understand is that it represents a magnificent effort to achieve a perhaps impossible goal—to combine successfully in one document and one system elements of unity and of decentralization, of separated powers and shared powers, of grants of power to government and safeguards of individual and group freedoms.

Such a system has invited continuing dispute and debate. There has been no period during which all reasonable men have agreed about the respective spheres of power of a President, the Congress or the Supreme Court. The Presidency, originally conceived essentially as a check on the more powerful legislature, has, in the Twentieth Century, become the pre-eminent American institution, while the prestige and creative powers of Congress have waned, though the legislative power to resist the President remains great. Yet writing as late as 1885, Woodrow Wilson could describe and decry the tendency of Congress to dominate the Presidency.[1] But shifts of power between President and Congress are evident

1. WILSON, CONGRESSIONAL GOVERNMENT (2d ed. 1885).

not only over long periods, but also from administration to administration, depending on the party in power, the President's conception of his office and powers, and the quality of leadership available at a particular time in Congress. An obvious explanation of enhanced executive power lies in the sudden emergence of the United States as a world power, resulting in a heightened concern with foreign policy, and a succession of wars which place a premium on Presidential initiative. In addition, differences between the constituencies of these two elective institutions go far to explain their inability to view issues in the same light. Especially in the modern era, the President's greater concern for the well-being of his city-dwelling constituents, including Negroes and other minority groups, compels him to seek social welfare measures that Congressmen and their rural and small town constituents tend to resist. Whether or not a redistricting of congressional seats, resulting from *Wesberry v. Sanders,*[2] changes the nature of congressional representation, the tides of power flow inexorably toward the further strengthening of the Presidency.

If time has dealt favorably with the Presidency and more harshly with the fortunes of Congress, what has been the fate of the Supreme Court in its continuing search for a role?

Originally thought to be inevitably the weakest of the three national organs,[3] the Court has over time managed to secure an important and in some areas an almost decisive voice in the determination of national policies. A body of appointed officials with life tenure, the court has been under attack in virtually every decade. These attacks range widely in character. A fundamental assault is grounded on the charge that the Court was not given authority by the Constitution to determine in any authoritative way the constitutionality of acts of Congress or actions of the President, a position seemingly adopted by Professor Hyneman against what he agrees to be the weight of authority. He is sympathetic with the strong criticism expressed from time to time that the Justices have allegedly read their own philosophy into the vague phrases of the Constitution, a more tenable ground because many of the most important provisions of the Constitution are hardly self-explanatory. Professor Hyneman, as have others, decries the tendency of the Court to choose a position and then rationalize what it has done by reference to one line of precedents, or smatterings of history, or whatever comes to hand. The Court has also been criticized from the beginning for favoring national power at the expense of state power. Although it is impossible to challenge the legitimacy of this function of the Court in the light of the su-

2. 376 U.S. 1 (1964).
3. THE FEDERALIST No. 78.

premacy clause[4] and the clear mandate in the Judiciary Act of 1789,[5] authorizing review of state court decisions involving the Constitution, laws or treaties of the United States, Professor Hyneman, in company with numerous other critics, finds the Court too eager to settle issues that are better left to the political processes. And as a clincher to the argument that the Court is a policy-making, and not a judicial body, Professor Hyneman as have critics of the judiciary before him, points to the Court's refusal to adhere to precedents from time to time.

The Supreme Court on Trial is a study of the Supreme Court's role in our political system, prompted by the severe criticism of the Court engendered by the school segregation decisions, a less focused attack by congressmen who disliked decisions that allegedly weakened the battle against native communist leaders, and resolutions of the Conference of State Chief Justices, who at their 1958 meeting expressed their dismay with Court decisions unfavorable to state power. This adds up to a "trial" of the Court for Professor Hyneman, who seeks to understand how the Court works without, as his preface puts it, telling the reader "what my preferences, my predilections, my social bent may be."[6]

Essentially his study is not based on new source material, but represents a careful reading of the standard monographs and much of the polemical literature of which there has been an abundance since 1954. Whatever his intentions, the "preferences, predilections and social bent of the author" emerge very clearly. In essence, Professor Hyneman does not like the notion that the Supreme Court has a legitimate role in the shaping of national policies. He finds appealing the minority scholarly view that Marshall's assertion of judicial review in 1803 was an act of usurpation. Hyneman seems to accept the fact that the Court was given the task of serving as an umpire of the federal system, but quarrels with the way the function has been carried out. Only elected, representative officials may, in his view, rightfully share in the making of policy. The Court's proper function, he would assert, is to decide cases that have no policy significance, leaving all other disputable issues to the political branches. Thus, it was apparently proper for the Supreme Court to have held in *Plessy v. Ferguson*[7] that separate but equal treatment of Negroes satisfied the requirements of the equal protection of the laws clause, because such a decision merely sanctioned political decisions in those states that required segregation. The 1954 school segregation decision[8] is criticized not only as a breach with the law as declared in 1896 but, more importantly, be-

4. U.S. CONST. art. IV, para. 2.
5. Act of September 24, 1789, ch. 20, § 25, 1 Stat. 85.
6. P. viii.
7. 163 U.S. 537 (1896).
8. Brown v. Board of Education, 347 U.S. 483 (1954).

cause it requires changes that Hyneman believes should be produced, if at all, by actions of the elected branches of government.

What the author seeks, then, is a fundamental reinterpretation of the American Constitution, and the political system that has emerged after 175 years. He seeks to put judicial power back in the bottle from which it escaped in the early years of the Republic, and replace a tripartite political system with one in which major power is vested in President and Congress. These are our representative institutions and Hyneman shows little patience with the notion advanced by some scholars that the Supreme Court has a representative function, varying from time to time in its essential features, but hardly outside the mainstream of American political thought and action. The modern Court in particular has represented a variety of groups whose aspirations and claims could hardly find expression through the normal political process. Indigent criminal defendants, dissident political figures of communist and non-communist hue, Jehovah's Witnesses, foes of school enforced religious exercises and American Negroes have been among the constituents of the Supreme Court in the modern era. To the Court, these and other parties have turned in the hope of finding that the promises of the American Constitution were more than empty rhetoric. They have sought and found in the Supreme Court a protector of claims which the "political" organs failed to protect.

We have no way of knowing how our political systems would have developed if the Supreme Court had from the beginning accepted the basic proposition that its only function was to accept every act of the President, the Congress (and presumably, most state actions) as valid, and to have treated the Constitution simply as a body of admonitions to the elective branches. It is of course possible, that the political organs would have developed internal restraints that would have fulfilled the same function as judicial review. But this is idle speculation. An independent judiciary possessing and using the power to advance solutions to constitutional issues has been a part of the national and state political systems and has helped shape the rules of political life for too long a time to be lightly thrust aside.

The Court is, of course, always a fair target for critics who dispute the correctness or propriety of its rulings. It is quite proper to point out, as Professor Hyneman does, that the Supreme Court is more than a court of law, that its decisions are of "political" significance, and that the Court is a participant in the political process. But it is making political decisions whatever the outcome. To accept or reject any claim is a political act in a political system that is not based on a simple majoritarian principle. For example, Professor Hyneman discusses the *Plessy* deci-

sion as *the law,* once handed down. But was it not a "political" decision of the greatest significance to hold that a racial classification was permissible in spite of the Fourteenth Amendment's guarantee of the equal protection of the laws? Was it not political to hold that the dominant forces of the community might treat a large minority as second-rate citizens? In refusing to look behind the pretensions of "separate but equal," to see the separate but unequal public schools available to Negroes, in overlooking discriminatory practices in the administration of laws pertaining to jury duty, voting and numerous other activities, the Supreme Court was registering its approval of legally enforced inequality of rights. Was this not a political decision?

There are many persons, including this reviewer, who would have preferred a simpler, more direct formulation in the 1954 decision reversing *Plessy.* But when the Court held that its former "political" decision had been wrong, it is not to be condemned because it refused to adhere to a position that was unsound when first taken and less valid with each passing year. To be sure, the Court could have blunted some criticism by adopting a more devious tactic of finding that segregated schools were not truly equal. The decision in *Sweat v. Painter*[9] suggested the direction the Court might have taken. If intangible as well as physical factors were taken into account, it would be relatively easy to conclude that any "white" institution or facility was more favorably regarded by the majority of citizens. But to its credit, the Court rejected the path of subterfuge and forthrightly denounced "separate but equal" for the sham it had always been, a classification imposed on a minority by the dominant political forces in the community. The alternative course of action, and one, it would seem, preferred by Professor Hyneman, would be to remand the Negro minority to the political branches, to Congress and the President. But if "separate but equal" was a constitutionally permissible doctrine, what chance was there that the political organs, which by definition represent the majority in the community, would act to protect minority rights? What, in short, is the purpose of a Bill of Rights, of guarantees to minorities, if there is no chance that these guarantees can be given meaning? This is the important burden that the modern Supreme Court has assumed—to give reality to the high promises set forth in the Constitution—to say to the majority and their representatives that the Constitution envisages a free society, and that the Court is prepared to safeguard the rights of its humblest constituents. Whether the American

9. 339 U.S. 629 (1950). The University of Texas Law School was regarded as superior to a newly organized Negro school of law with respect to many factors incapable of objective measurement, *e.g.,* reputation of faculty, prestige of alumni, standing in the community.

people will continue to sanction this assertion of power and responsibility by the Court remains to be seen. It is a scant thirty years since the Supreme Court came under heavy attack in the 1930's, an attack which resulted in a changed judicial outlook, a new willingness to accept regulatory power of the federal government. And perhaps it is unrealistic to assume that the Court can long protect minority rights if the dominant majority through fear or impatience demands that they shall have their way. But at least the Court compels the community to have a sober, second thought. And ideals and values announced by the Court may eventually find sufficient acceptance to counterbalance the tendency of the politically powerful to ignore the just claims of the weak.

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FREEDOM OF SPEECH AND PRESS IN AMERICA. By Edward G. Hudon. Washington: Public Affairs Press. 1963. Pp. xiv, 224. $4.50.

In his highly readable[1] volume containing just 179 pages of text, Mr. Hudon does an excellent job of tracing the theories which through history have underlain the decisions of the Supreme Court of the United States interpreting the free speech and press provisions of the First Amendment to the Federal Constitution. The book neither attempts to discuss the cases in detail nor to praise or condemn, except quite incidentally. Its primary purpose is to discover whether any of the tests of constitutional validity that successively have prevailed in the Court has been more successful than the others, and whether the Court has now arrived at a stable basis of decision.

The answer to both of the foregoing questions is in the negative, but the author concludes with a suggested constitutional test based on the specific beliefs of the fathers of the country, which he thinks may provide a sound basis for decision. His suggestion is closely allied to the views so eloquently set forth by Mr. Justice Black in several noteworthy opinions during the past five years and in his 1960 James Madison lecture at the New York University Law Center.[2] The bibliography which

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1. There are a number of typographical errors in the book, which better proofreading would have caught, and on page 83 the coined word "glimly" appears, perhaps substituted for "dimly." On p. 126 the statute involved in Beauharnais v. Illinois, 343 U.S. 250 (1952), is misstated as one designed simply "to punish libel of an individual"; but in general the author's capsule summaries of cases are remarkably clear and correct.

2. Black, *The Bill of Rights,* 35 N.Y.U.L. Rev. 865 (1960).