

April 1972

The Modern Supreme Court

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Recommended Citation

Joseph E. Fortenberry, *The Modern Supreme Court*, 75 W. Va. L. Rev. (1972).

Available at: <https://researchrepository.wvu.edu/wvlr/vol75/iss3/12>

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states that recovery for breach of warranty or contract, despite the looming presence of the FTC, must be predicated upon state law.¹⁹ The regulations of the FTC are used solely to curb deceptive practices.

Lawyers will find that Mr. Kintner covers areas of everyday concern, ranging from interference with a competitor's business to offers of free goods and contests. For the attorney who practices preventive law, this book is a must.

*Edward D. McDevitt**

THE MODERN SUPREME COURT. By Robert G. McCloskey.¹ Cambridge: Harvard University Press. 1972. Pp. x, 376. \$12.95.

At the time of his death in 1969, Robert G. McCloskey had achieved preeminence as a scholar of the history and politics of the United States Supreme Court. His lectures caused indifferent undergraduates to burst into enthusiastic applause; his books and articles inspired beginning students and veteran Court-watchers with their erudition and wisdom. He was asked to write the foreword to one of the Harvard Law Review's annual surveys of the Supreme Court's work,² an honor almost never granted to a political scientist. Professor McCloskey's scholarship was especially valuable for two reasons. First, he never let the reader fall into the trap of believing that Supreme Court history was irrelevant to present day problems of power and judgment; nor did he try to convince the reader that every crisis faced by the present Supreme Court was the exact analogue of a problem confronted by the Marshall, Taney, or Fuller Courts. Second, he never attempted to disguise his disagreement with substantive decisions of the Court. Unclouded by envy of the Justices' power or disdain for the results of their activity, Professor McCloskey's criticisms are perhaps the most incisive and significant of any contemporary writer.

At his death, Professor McCloskey was at work on a book cover-

the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.

¹⁹ The latest word on the law in West Virginia is found in Cady, *Law of Products Liability in West Virginia*, 74 W. VA. L. REV. 283 (1972).

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¹ Late Jonathan Trumbull Professor of American History and Government, Harvard University.

² McCloskey, *Foreword: The Reapportionment Case, The Supreme Court 1961 Term*, 76 HARV. L. REV. 54 (1962).

ing roughly a generation in the history of the Supreme Court, the years 1940 to 1969. He lived to complete only the first two sections — those dealing with the Stone and Vinson Courts — which together amount to approximately a third of the book. The two sections of the book covering the Warren Court are constructed from essays published between 1956 and 1965. While the book is a composite of several articles of Professor McCloskey's work, it has been so skillfully assembled that the unity of the author's portrait of the Supreme Court since 1940 is readily apparent. Credit for the expert selection and assembly of these essays should be given Professor Martin Shapiro, the editor of the book.

I

The central theme of Professor McCloskey's last book is suggested by its title: *The Modern Supreme Court*. Working from a theme that he had expounded in an earlier book,³ Professor McCloskey attempts to demonstrate that the Warren era was not a departure from the Court's heritage but merely part of a longer story. This story had its beginning during the 1940's when the Court, under the leadership of Chief Justice Stone, began to devote itself to the protection of individual liberties against the encroachments of government power and to abandon review of the reasonableness of economic regulation.⁴ To be sure, the Warren Court was more active than the Vinson or Stone Court, but concern with the sanctity of individual liberties forms a common bond.

Evidence of continuity in the Court since the quiet revolution of 1937 is readily available. Practically every hard question posed to the Warren Court had been presented to the Stone or Vinson Court.⁵

³ R. McCLOSKEY, *THE AMERICAN SUPREME COURT* (1960).

⁴ See McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34.

⁵ A few examples will suffice:

A. *Reapportionment*: *Colgrove v. Green*, 328 U.S. 549 (1946); *Baker v. Carr*, 369 U.S. 186 (1962).

B. *State Aid to Religion*: *Everson v. Board of Educ.*, 330 U.S. 1 (1947); *Zorach v. Clauson*, 343 U.S. 306 (1952); *Board of Educ. v. Allen*, 392 U.S. 236 (1968).

C. *Exclusionary Rule as Method of Controlling Police Searches*: *Wolf v. Colorado*, 338 U.S. 25 (1949); *Mapp v. Ohio*, 367 U.S. 643 (1961).

D. *Constitutionality of Statute Forbidding Distribution of Birth-Control Information*: *Tileston v. Ullman*, 318 U.S. 44 (1943); *Poe v. Ullman*, 367 U.S. 497 (1961); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

The intellectual leaders of the Court's conservative and liberal wings were the same men throughout most of the thirty year period, *i.e.*, Justices Frankfurter and Black. Perhaps more significant than these obvious resemblances between the Courts of the forties, fifties, and sixties is the broad consensus among the Justices as to values that are deserving of protection.⁶

Professor McCloskey goes beyond a mere argument for treating the years from 1940 to 1969 as a unit in the history of the Court. He shows the process through which the Supreme Court of the Stone era became the activist Court of the Warren era. One significant portion of this process was the decision of the Stone Court to renounce supervision of economic regulation by the states and the federal government.⁷ Even the most zealous Court could not answer every question raised under the Constitution,⁸ and the abdication of responsibility for economic regulation left the Court free to devote more time to individual liberties. A second component of the process was the gaining of experience and the development of doctrine in the area of individual rights. Problems concerning civil rights and freedom of religion were new topics to the Supreme Court; sweeping decisions affecting those rights were not feasible. The years of the Vinson Court were especially significant as a time of education of the Court in first and fourteenth amendment law.⁹ A final part of the process was the Warren Court's expansion of "standing" and abandonment of restrictive definitions of a "political question."¹⁰ The Warren Court, freed of responsibility for supervision of economic regulation by the Stone Court, armed with doctrine and experience in the field of civil liberties by the Vinson Court, and cut loose from traditional limits on the class of potential plaintiffs and the types of governmental actions open to question, was able to bring about a constitutional revolution in almost every area of the law. This revolution produced a Supreme Court with immense power.

II

The only significant flaws in the book are those for which Professor McCloskey cannot be held accountable. There is no abrupt

⁶ R. McCLOSKEY, *THE MODERN SUPREME COURT* 153 (1972) [hereinafter cited as R. McCLOSKEY].

⁷ See note 4, *supra*.

⁸ R. McCLOSKEY, *supra* note 6, at 195, 316-22.

⁹ *Id.* at 69-71, 89, 90-92, 96, 206.

¹⁰ *Id.* at 263-89, 300-01.

shift in attitude or tone between the first (manuscript) and last (articles) portions of the volume, but this construction creates problems. The manuscript deals with several Court terms as a group and is organized according to subject matter; several of the articles are reviews of one term of the Court. This leads to considerable repetition in the latter part of the book.

The most unfortunate defect, however, is the absence of an analysis of the final terms of the Warren Court — terms that produced such significant decisions as *Miranda v. Arizona*,¹¹ *Flast v. Cohen*,¹² *Jones v. Mayer*,¹³ and *Powell v. McCormack*.¹⁴ There is no analysis of the terms during which anti-Court opinion became more powerful than at any time since 1937.¹⁵ Professor McCloskey clearly foresaw the dangers of attempting to bring about vast and rapid judicial change.¹⁶ We are the poorer for not having his comments on the fulfillment of this prophecy.

III

Professor McCloskey's book attempts to make tentative predictions about the survival of the work of the modern Supreme Court. It also suggests several important conclusions. First, whatever the fate of the substantive decisions of the Stone-Vinson-Warren era,¹⁷ the Supreme Court appears to have won the jurisdictional revolution. The expansion of "standing" and contraction of "political question" seems to be a permanent feature of the legal landscape.¹⁸ While state criminal procedure passes muster more often today than during the latter days of the Warren Court, the Supreme Court shows few signs of returning to the *Palko*¹⁹ or *Adamson*²⁰ eras when states were only required to provide "fundamental fairness" to criminal defendants rather than to abide by the Bill of Rights.²¹ Second, the solutions to some problems

¹¹ 384 U.S. 436 (1966).

¹² 392 U.S. 83 (1968).

¹³ 392 U.S. 409 (1968).

¹⁴ 395 U.S. 486 (1969).

¹⁵ See F. GRAHAM, *THE SELF-INFLICTED WOUND* (1970).

¹⁶ R. MCCLOSKEY, *supra* note 6, at 354-66.

¹⁷ For a statement of the position that the results of the Warren Court's decisions have become irrelevant see A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970).

¹⁸ Even so conservative a decision as *Sierra Club v. Morton*, 405 U.S. 727 (1972), would have seemed a radical statement on standing a decade ago.

¹⁹ *Palko v. Connecticut*, 302 U.S. 319 (1937).

²⁰ *Adamson v. California*, 332 U.S. 46 (1947).

²¹ The recent extension of the right to counsel to some misdemeanor cases is sufficient proof of this. *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

are beyond the Court's competence because they involve matters where principles must yield to unprincipled give-and-take. The Court failed to learn this lesson in the reapportionment cases. Rather than heeding Professor McCloskey's advice and laying down a rule that states must open up "the procedures of popular consent,"²² the Court has wasted valuable judicial time attempting to apply the judge-made concept of "one man-one vote" to situations that can only be settled by "horse-trading." The school desegregation decisions demonstrate that, although the Court can outlaw all forms of state-enforced or state-condoned segregation by setting a standard of racial neutrality, it remains to be seen whether it can implement desegregation by court-ordered busing or whether implementation must be effected by the political branches of government.

Professor McCloskey concludes by pointing out that it is dangerous to characterize any era of the Court's history as a clean break with the past. The Vinson years and certain terms of the Warren era seem, in retrospect, only times of less accelerated change, rather than times of reaction. Similarly, the Burger Court may seem to future observers merely a continuation of the story that began with the naming of Harlan Fiske Stone to be Chief Justice — the story of the modern Supreme Court.

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²² R. McCLOSKEY, *supra* note 6, at 287.

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