

From A Distance

The breadth and balance Powe brings to the Warren Court's legacy make it one of the most important legal histories of the decade.

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THE WARREN COURT AND AMERICAN POLITICS BY LUCAS A. POWE, JR. (Harvard University Press; 501 pages; \$35)

THE WARREN COURT MAY BE THE MOST famous and politically controversial Supreme Court of all time. But only now, more than 30 years after it passed into history with Chief Justice Earl Warren's 1969 retirement, has a book finally accorded the Warren Court the comprehensive, first-rate historical treatment it deserves. Lucas A. Powe, Jr.'s *The Warren Court and American Politics* is a landmark piece of scholarship, and it is a book that will be required reading for years to come for anyone who is interested in U.S. Supreme Court history.

Powe, a First Amendment scholar and chaired professor at the University of Texas School of Law, clerked for the Warren Court's most liberal lion, William O. Douglas, from 1970 to 1971. He stresses that he intends his book to be "an external rather than an internal history of the Court," and he fulfills that promise. Only on rare occasions does Powe use the justices' private Court papers to relate the sorts of behind-the-scenes case histories that Bernard Schwartz compiled in his invaluable but sometimes tedious *Super Chief: Earl Warren and His Supreme Court* (New York University Press, 1983). But Powe's choice to emphasize "the relationship between the Supreme Court's decisions and national politics" rather than the Court's internal deliberations provides readers with precisely the idea], big-picture history, the Warren Court merits.

Like other scholars before him, Powe stresses that the Warren Court that is praised and condemned as personifying liberal judicial activism came into being not in 1953, when Earl Warren succeeded the late Fred Vinson as chief justice, but only nine years later. In 1962, when Justices Charles Whittaker and Felix Frankfurter retired, President John Kennedy named Byron White and Arthur Goldberg as their successors, and Goldberg joined Warren, Douglas, Hugo Black, and William Brennan as the fifth solid member of a consistently liberal majority.

Much of the historical legacy of the Warren Court preceding 1962 can be summed up in a single word: *Brown*, as in *Brown v. Board of Education* (1954). Powe's treatment of the Court's decision in *Brown* mirrors the long-standing scholarly consensus: "The result was as clear as could be--the legal reasoning was not." The Court declared that "separate educational facilities are inherently unequal," but appeared to base that conclusion more on social science evidence than constitutional analysis. Academic discomfort with the *Brown* opinion has only increased over time, and Powe's evaluation of the Court's miscalculation is the now-mainstream view: "It was as if their need for unanimity and the fear of hostile reaction so blocked their vision that they could not focus on the real function of the opinion." *Brown* did not explain in constitutional terms why the Court's previous acceptance of racial segregation in public schools was now being completely reversed, and Powe correctly observes that Warren put forth "an opinion that failed in all its functions except result."

One of *Brown*'s worst shortcomings was how it "never addressed" what segregation actually was, and that error--which the Court failed to rectify in its second major school desegregation ruling,

Cooper v. Aaron, in 1958--allowed southern federal court judges to avoid all but token school integration until the U.S. Court of Appeals for the Fifth Circuit began to force the issue in 1966. Explaining why the Court was "missing in action" with regard to Brown's actual implementation between 1958 and 1968 is one of the most difficult interpretive questions concerning the Warren Court, and Powe concludes that what transpired resulted not from happenstance but because "the Court intentionally chose to obfuscate." Only in 1968, in Green v. County School Board of New Kent County, did the Warren Court finally declare that Brown's command entailed actual integration of public schools.

Powe errs, as have others, in portraying Brown itself rather than the upswing in African American activism that followed on Brown's heels, as the primary stimulus for the dramatic increase in segregationist antipathy that marked 1956 and 1957. Powe correctly observes, however, that it was the combination of southern opposition to Brown, and conservative fury over the Court's 1956 and 1957 rulings against various anti-Communist probes, that produced outspoken congressional denunciations of Warren and his colleagues during the late 1950s.

Two other major issues stoked the political controversy over the Warren Court during the early 1960s. The first and most important, although little remembered now, concerned the Court-ordered reapportionment revolution that began with Baker v. Carr in 1962 and culminated with Reynolds v. Sims in 1964. Warren would later declare that Baker, not Brown, had been the most important decision of his era, and initially the Court's insistence upon both equally apportioned districts--"one man, one vote"--and upon applying this new constitutional requirement to both houses of bicameral legislatures, generated intense criticism from the rural oligarchies whom the rulings quickly dethroned. But the equal representation revolution rapidly took hold, and, as Powe observes, "Reynolds went from debatable in 1964 to unquestionable in 1968."

The second arena was the criminal procedure revolution that began with Mapp v. Ohio in 1961 and Gideon v. Wainwright in 1963 and peaked with Miranda v. Arizona in 1966. Powe provides a tour de force account of how Gideon, immortalized by Anthony Lewis's best-selling Gideon's Trumpet (Random House, 1964), in truth was fully predetermined by the unheralded case of Douglas v. California (1963). Powe also perceptively observes how the three most unpopular Warren Court criminal procedure decisions, Mapp, Miranda, and Escobedo v. Illinois (1964), were of national impact, whereas most of the Court's other, less infamous criminal process rulings served largely to bring southern police and prosecutorial practices into compliance with existing national norms.

The political controversy that surrounded Escobedo and Miranda, Powe notes, was the result of how "the crime rate was shooting up at the exact time that the Court was expanding the rights of criminals." By 1968 a Gallup Poll found that only 36 percent of Americans had a favorable view of the Court--a drop of nine points since the year before--while 53 percent viewed the Court unfavorably. Republican presidential candidate Richard Nixon made the Court a significant issue in the 1968 election, and legal historian Kermit Hall has provocatively argued that "Richard Nixon understood the Court and the political stakes created by its work better than many scholars do today."

Powe acknowledges how "the Court was a functioning part of the Kennedy-Johnson liberalism of the mid- and late 1960s," but he does not directly address the question of to what extent the American people repudiated these liberal forces come 1968. Instead he rightly emphasizes how the 1965 addition of Johnson buddy Abe Fortas to the Court (and the concomitant departure of Arthur Goldberg) entrapped the Court in Fortas's intimate advisory relationship with Johnson

even before Johnson's effort to name Fortas as Warren's successor in mid-1968 foundered on account of senatorial distrust of Fortas.

Most academic commentary on the Warren Court's constitutional legacy is in full accord with Powe's judgment that the Warren Court was more interested in results than legal theory. And few liberals would quarrel with conservative federal appellate judge Alex Kozinski's conclusion that "the Warren Court saw its mission as righting serious injustice with relatively little guidance from the constitutional text."

Powe correctly calls William Brennan, Jr., "the most important justice of the second half of the twentieth century," and his negative characterizations of the two other best-known justices of the Warren Court, Hugo Black and William O. Douglas, are fully appropriate. By the 1960s Douglas "no longer had the interest" to marshal his prodigious intelligence on behalf of the Court's work, and Black's overblown posthumous reputation "would match reality if he had left the Court with Frankfurter in 1962" rather than hanging on until 1971.

BUT POWE CONCLUDES BY ARGUING THAT "REVOLUTIONARY" is indeed the most appropriate adjective to use in describing the Warren Court. While reapportionment and criminal procedure were the "two truly national" legal revolutions the Court brought about, Powe simultaneously asserts that the "dominant legal motif of the Warren Court" was its wide-ranging "assault on the South as a unique legal and cultural region."

Only obliquely does Powe acknowledge just how radically the Supreme Court's view of the United States has changed over the past 31 years. For the Warren Court, he observes, "federalism served no ascertainable purpose except to authorize local--and typically southern--oligarchies to impose their backwards and often arbitrary views on those unfortunate enough to live within their jurisdictions." The worldview of the Rehnquist Court couldn't differ more radically. While "the Warren Court reflected the view that states were impediments to the achievement of a better, fairer America," the present-day Rehnquist Court majority has repeatedly decreed that state sovereignty must be judicially protected from federal legislative intrusions.

Powe may be largely correct in arguing that most of the Warren Court's work has been incorporated into the legal fabric of modern America, but in some fundamental if not heavily publicized areas of constitutional law, today's Supreme Court is rejecting the most basic premises of the Warren Court in case after case. That caveat notwithstanding, The Warren Court and American Politics is as valuable a work of legal history as any that has been published in the past decade.

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