

## THE SUPREME COURT IN POLITICS

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**Lucas A. Powe Jr.** *The Supreme Court and the American Elite, 1789–2008*. Cambridge: Harvard University Press, 2009. x + 421. Notes, bibliographic essay, and index. \$29.95.

The U.S. Supreme Court is an important political institution. Nonetheless, general political histories of the United States give little attention to the Court and its justices. The appointment of justices and the decisions of courts are mere footnotes, at best, in the history of presidential administrations. Perhaps this reflects the relative insignificance of the judiciary and its actions on the broader political stage. The work of the Court pales in comparison with wars, elections and legislative struggles. The history of the Court has instead been relegated to more specialized accounts. Often those accounts were written from a primarily legal perspective or framed in terms of a history of constitutional law. The relationship between politics and the judiciary was pushed into the background.

For many years, the classic one-volume history of the Court has been Robert G. McCloskey's *The American Supreme Court* (4<sup>th</sup> ed., revised by Sanford Levinson, 2004). Originally published in 1960, *The American Supreme Court* situated the history of the Court within politics. McCloskey's concern was to describe the Court as an "agency in the American governing process, an agency with a mind and a will and an influence of its own," which used the law to achieve or try to achieve results (p. xv). The Harvard political scientist hoped to set aside the legalistic suggestion that the justices were primarily working out the logic of the law. The justices had agency in determining the course of public policy, and the Court was an agency within the structure of the government that made and implemented policy. The Court's power was both real and fragile. The Court's story, according to McCloskey, could "be broadly understood as an endless search for a position in American government that is appropriate" to the political era and the "subtle limits of judicial capability" (p. 15). A central lesson of his account, he concluded, was that the historical Court had been "fully alive to such realities as the drift of public opinion and the distribution of power in the American republic" (p. 246). The point was not that the justices "slavishly" adjusted themselves to public

opinion or the powerful actors around them but that they "seldom lagged far behind or forged far ahead of America" (p. 247).

McCloskey's general perspective on the Court as a political institution that was historically configured and responsive to the interests and views of other political actors has found resonance in a subsequent literature.<sup>1</sup> In 1957, the Yale political scientist Robert Dahl published a study arguing that the Supreme Court had rarely exercised the power of judicial review in a way that obstructed current legislative majorities on important public policies. He attributed the Court's docility to the political appointments process, which had tended to keep the majority of the justices aligned with dominant national coalitions over much of American history.<sup>2</sup> Over the past fifteen years or so, a growing literature has developed and emphasized these themes. Various known as the neo-Dahlian or political regimes' literature, a variety of scholars have explored the ways in which the Court operates within the constraints of the political environment and constitutional law is shaped by the matrix of ideas and interests surrounding the justices.<sup>3</sup> Although Dahl's article was analytically sharper and driven by a stronger thesis than McCloskey's book, it was also substantively spare.<sup>4</sup> McCloskey's rich narrative was less focused than Dahl's was on demonstrating the single point that the Court operated within the political mainstream or with establishing a dominant mechanism by which politics influenced the Court, and this made his work less fertile for social scientists. But McCloskey shared a sensibility with the later political regimes' literature that the Court contributed actively to American constitutional development, helping to construct a constitutional edifice that the Founders had only partly started. In doing so, the justices were operating in an environment crowded with ideas and actors and institutions; and, while they did not walk in lockstep with public opinion or political leaders, they did play a responsible and responsive role within the political system.

McCloskey's substantive and normative analysis of the Court's work was perhaps more prominent to his contemporaries and more provocative. McCloskey had cut his teeth on a study of Gilded Age political and constitutional thought, and he brought to his study of the Court a New Deal progressive's sensibility. Like Felix Frankfurter and Alexander Bickel, he urged caution. He not only observed that "the Court seldom strayed very far from the mainstreams of American life and seldom overestimated its own power resources" (i.e., "the Court learned to be a political institution and to behave accordingly"), but he also warned that the Court should not proceed "by a series of leaps and bounds" but must move by "slow and gingerly steps" if it were to be successful (pp. 247, 248). This was not a message uniformly welcomed as the Warren Court was taking off. McCloskey's older sensibility could also be seen in his thematic approach to the Court. Something had to give in order to fit the Court's history into a single, relatively slender volume. McCloskey's

approach was “to write a series of interpretive essays in the history of judicial review” (p. xv). His discussion was explicitly partial rather than comprehensive. He made no pretense of reviewing all the Court’s important cases or of tracing doctrine. The Court’s history was organized around central “problems.” The “nation-state problem” from the founding through the Civil War, the “business-government problem” from the Civil War through the New Deal, and the problem of individual rights since 1937. Hovering over all of these was the problem of judicial power itself. McCloskey’s original book has been supplemented with new chapters and brought out in new editions by one of his students, Sanford Levinson, but it still has its limitations.

Lucas A. Powe, Jr. is among those who share the broad sensibility of the political regimes literature that has both built on and modified what scholars like Robert McCloskey and Robert Dahl had argued at mid-century. His earlier book on the Warren Court (*The Warren Court and American Politics*, 2000) emphasized the ways in which the Court was not a lonely heroic outpost of liberalism but was instead most active and successful when it was operating hand-in-hand with the New Frontier–Great Society coalition in the elected branches. The Warren Court would seem to be a classic example of a “counter-majoritarian” judiciary and a hard case for neo-Dahlian literature, but Powe’s narrative effectively situates the Court within (not against) the political currents of the period. Contrary to what Dahl might have expected, Powe showed how a dominant political coalition might want the Court to actively use the power of judicial review (for example, to disrupt recalcitrant local majorities and their policies). Despite what McCloskey warned at the outset of the Warren era, Powe showed how the aggressive use of judicial power could sometimes win greater public and political support for the Court.

Powe’s new book, *The Supreme Court and the American Elite*, is a worthy successor to McCloskey as the best one-volume history of the Supreme Court. It is more successful than his earlier book on the Warren Court in effectively integrating the activity of the Court and the political context. Powe’s history of the Warren Court tended to segregate and limit his discussion of political events, while keeping the focus on a fairly extensive review of the Court’s constitutional jurisprudence during the Warren years. In this volume, cases are more effectively situated within a wider political and social context. As McCloskey had also hoped to do, Powe shows the Court as both an agent shaping political history and an agency of public policy. His Court does not just ponder doctrine. The justices grapple with social and political problems. They represent and reflect political and ideological factions. The Court interacts with and is shaped by other political actors.

In keeping with the recent literature, Powe perhaps gives greater emphasis than McCloskey did to the theme that “the Court is a majoritarian institution”—that is, “it identifies with and serves ruling political coalitions” (p.

ix). The Court's primary role is to implement the policy commitments of the "political regime" with which the justices are affiliated. Powe suggests that McCloskey's "New Deal dominated thinking" might have led him to misunderstand the historical function of the judiciary (p. ix). A key challenge for Powe's narrative is in understanding how bold judicial actions often found political purchase. But Powe also complicates that theme by linking the justices to "other upper-middle-class professional elites" and by taking note of the importance of contingency, particularly "lucky presidents who are able to appoint several justices [and] change the direction of the Court" (p. ix). Analytically, these points do not hang together easily without some discussion and qualification. Terms like "political regime" and "elite" are never rigorously defined; and, as an explanation for judicial decision making, this leaves some room for refinement. But it provides a framework for the narrative, and Powe's general understanding of the history of judicial review is clear enough. The Court is a power player, and it operates by cooperating with a shifting set of powerful political allies and often by moving in the same direction as many social and political leaders. But cooperation and shared sensibilities still leave space for the justices to exercise judgment and creativity in setting an agenda and developing doctrine.

Unsurprisingly, Powe departs from McCloskey's substantive preoccupations. Reflecting progressive concerns, McCloskey focused his history on the themes of union and economics. Giving his book a more modern feel, Powe accords race the prominence it deserves throughout the Court's history and anticipates, to a greater degree, the issues of presidential power and civil liberties that have taken on such importance since the New Deal. But McCloskey was also an intellectual historian, and his history gave some prominence to currents of thought and the influence of ideas in politics and on the justices. Powe has little time for what the intellectuals were saying or for the intellectual context from which constitutional ideas developed. The "elites" of greatest interest to him are those who were taking action through political mobilization or the consolidation of social and economic power.

Some choices have to be made in squeezing the history of the Court into a single volume of reasonable length. *The Supreme Court and the American Elite* is written in a breezy and accessible style designed to appeal to the general reader or the student. Endnotes are kept to a minimum, and a bibliographical essay is relatively short. McCloskey's series of chronological "interpretive essays" painted the Court's history in bold strokes and could be thin on the details. By contrast, Powe's book on the Warren Court spent nearly 600 pages reviewing each major area of constitutional case law developed during a roughly fifteen-year period. Powe's new book is longer than McCloskey's but shorter than his own book on the Warren Court.

Organizationally, Powe chooses to divide the Court's history by substantive events and the defining agenda of the era rather than by the more artificial boundaries of the changing personnel of the Court or the identity of the Chief Justice. It is not insignificant, for example, that the chapter title covering the pre-Civil War period refers to "the Jacksonian Court," not the Taney Court. Most chapter titles do not refer to the Court at all. A third of Powe's text is dedicated to the pre-Civil War period, and just over a quarter is given over to the period from the Civil War through the New Deal. That leaves about 40 percent focused squarely on the modern period, covering events since the Court's reversal in 1937. By contrast, only a quarter of the text of the latest revised edition of McCloskey's book focuses on the pre-Reconstruction period, and only a fifth treats the period between the Civil War and 1937. Another recent, more doctrinally oriented, one-volume history by Peter Hoffer, William James Hoffer, and N. E. H. Hull (*The Supreme Court: An Essential History*, 2007) organizes the Court's history by the tenure of chief justices; and, as a result, gives a quarter of its space to the pre-Reconstruction period and nearly 40 percent to the period between the Civil War and 1937. Powe's narrative is not equally balanced across these three important periods in American political and constitutional history, but he judiciously weights the book toward the busy modern era without short-changing any earlier period.

Structurally, the book largely advances by briefly telling the story of one case after another, using the case narratives to situate the Court and the justices in political space and to introduce other relevant events and actors. The model here is less Robert McCloskey than Charles Warren's *The Supreme Court in United States History* (rev. ed., 1928). The result is more coverage of canonical constitutional cases, but the discussion is clearly selective. The aim is less to mention all the important cases than to highlight a representative set that illustrate the issues confronting the Court and how the justices have operated as political actors. On the whole, Powe references more specific cases than McCloskey; but his emphasis is not on doctrinal turning points or development over time, and his thematic choices differ. (For example, McCloskey highlighted the line of commerce-clause cases decided by the Taney Court that were still bones of contention for the New Deal generation, but Powe gives them little attention and focuses instead on political questions and slavery disputes that McCloskey ignored or brushed over lightly).

Powe's new book provides an accessible introduction to the Court and American political and constitutional history. He successfully marries a brief history of the Court with a portrait of the Court as a political actor. Hopefully it will whet the appetite of readers to explore the contested landscape that he has laid out in more depth. As McCloskey had done for an earlier generation of readers, Powe promises to do now.

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1. See Howard Gillman, "Robert G. McCloskey, Historical Institutionalism, and the Arts of Judicial Governance," in *The Pioneers of Judicial Behavior*, ed. Nancy Maveety (2003).

2. Robert A. Dahl, "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker," *Journal of Public Policy* 6 (1957): 179.

3. See, e.g., Mark A. Graber, "The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary," *Studies in American Political Development* 7 (1993): 35; Michael Klarman, "Rethinking the Civil Rights and Civil Liberties Revolutions," *Virginia Law Review* 82 (1996): 1; Keith E. Whittington, *Political Foundations of Judicial Supremacy* (2007); Howard Gillman, "Courts and the Politics of Partisan Coalitions," in *The Oxford Handbook of Law and Politics*, ed. Keith E. Whittington, R. Daniel Kelemen, and Gregory A. Caldeira (2008); Barry Friedman, *The Will of the People* (2009).

4. In reviewing the first edition, the more behaviorally minded political scientist John Schmidhauser complained of the "absence of rigorously assembled supporting evidence." John R. Schmidhauser, *Midwest Journal of Political Science* 5 (1961): 192.