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Bringing Politics Back In (reviewing Lucas A. Powe, Jr., The Warren Court and American Politics (2000))

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Book Review

BRINGING POLITICS BACK IN

THE WARREN COURT AND AMERICAN POLITICS

Gerald N. Rosenberg*

I. INTRODUCTION

In the Preface to *The Warren Court and American Politics*, Lucas A. Powe, Jr., the Anne Green Regents Chair at the University of Texas Law School, notes that “everyone seems to turn into a partisan once the Warren Court is mentioned.”¹ Powe, too, as a former clerk to Justice Douglas, admits that he was “once a partisan, celebrating liberal victories and despairing retrenchment.”² But cheerleading, the “dominant feature of Warren Court literature,”³ is not his aim in this ambitious book. Rather, Powe wants to understand what “the Court did and was trying to do,” the “import” of the Court’s opinions, and the “forces working on the Court that produced them.”⁴

*The Warren Court and American Politics* is a big, majestic book, with 501 pages of text, not including brief endnotes, eight pages of black and white photographs, and an eight page chronology listing important judicial and political events occurring during the Warren years, from the election of Eisenhower in 1952 to the moon landing of July 1969. It is divided into eighteen chapters and four parts, organized chronologically by Court term, plus a concluding chapter. The first part, covering the 1953-1956 terms, focuses on *Brown v. Board of Education* and the domestic security cases of those terms that created a serious congressional attack on the Court. Part II, labeled “Stalemate,” discusses the 1957-1961 terms and continues the history of the congressional-Court battle. Its focus remains on civil rights and domestic security issues. Over half of the book is contained in Part III,

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² Id. at xiv-xv.
³ Id. at xiv.
⁴ Id. at xv.

Although the organization of the book is typical of legal treatises, Powe’s goals and understandings are not. Powe’s Warren Court is not viewed as most modern legal scholarship portrays it, primarily as the great protector of Carolene Products’ “discrete and insular minorities.” Rather, Powe argues it can best be understood as a result-oriented Court less concerned with legal reasoning than with the outcome. Powe writes that “it is difficult to speak of an overriding jurisprudence apart from the results reached.”

But what were the right results? What drove the Court? For Powe, the answer is straightforward: “From the justices’ points of view, the Court’s prime role was to facilitate the policies ordained by the elected branches.” In other words, the Warren Court was “a functioning part of the Kennedy-Johnson liberalism of the mid and late 1960s.” And this, in turn, explains why it is so revered by liberals. As Powe puts it, “a prime reason that liberals were and remain captivated by the Warren Court is that it represents the purest strain of Kennedy-Johnson liberalism.” That liberalism included, to be sure, the overturning of Jim Crow segregation. But it was deeper and more encompassing than just that. The Warren Court was a national institution, a coequal branch of the federal government, and it “demanded national liberal values be adopted in outlying areas of the United States.” While “the dominant motif of the Warren Court is an assault on the South as a unique legal and cultural region,” its nationalizing agenda was aimed at illiberal practices and beliefs wherever they occurred. These ranged from malapportioned state legislatures to book and movie censorship to prayer in schools to repressive police practices. The Warren Court worked alongside the other branches to bring Kennedy-Johnson liberalism to America.

Powe also argues that it is a mistake to see the Warren Court as a seamless whole. As national political commitments shifted from Eisenhower to Kennedy to Johnson, and as the make-up of the Supreme Court shifted along with it, the Warren Court changed. Thus, Powe argues that there were three

5 U.S. vs. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938). Powe notes that “scholars have identified Footnote Four as the dominant feature of Warren Court jurisprudence.” Powe, supra note 1, at 215.
6 Powe, supra note 1, at 216.
7 Id. at 17.
8 Id. at 494.
9 Id.
10 Id.
11 Id. at 490.
distinct Warren Courts. The last, "History's Warren Court," came into being in 1962 when President Kennedy appointed his Secretary of Labor, Arthur J. Goldberg, to replace Justice Frankfurter. With five secure votes now in place for liberal outcomes, the Court was politically in tune with the liberal changes that were about to sweep the country.

In each chapter, Powe brings his politically-sensitive approach to bear. In discussing Court opinions, he, of course, employs the tools of traditional legal analysis, examining the arguments made by counsel, the legal options open to them and the justices, and the analytic strengths and weaknesses of the Court's opinions. In addition, he moves beyond this standard legal-academic approach to look for both political and personal factors that might explain case outcomes, and he often assesses their effects. His analysis moves effortlessly from fine legal distinctions to political and cultural events and displays thorough knowledge of the justices' approaches to legal matters, their political insights and ambitions, and their relationships to each other and the Court.

Powe differentiates himself from the vast majority of legal academics in another way as well. Not content to merely discuss constitutional doctrine, Powe announces two goals:

The first is to help revive a valuable tradition of discussing the Supreme Court in the context of American politics. The second seeks to replace stereotypes with information by synthesizing the numerous books and articles on the Supreme Court, its decisions, and its justices during Warren's tenure.12

These are admirable goals; the first one in particular sets Powe aside from most legal academics, for as he points out, "Lawyers and law professors are Court-centered by both nature and training. They tend to see law as more or less autonomous in relation to the larger society."13 In contrast, Powe writes, "Decisions do not occur in a vacuum. Law is not just politics, but judges are aware of the political context of their decisions and are, like everyone else, influenced by the economic, social, and intellectual currents of American society."14 The centrality of politics to Powe's analysis confronts the reader from the very cover of the book which, unlike conventional legal books on the Supreme Court, presents a picture not of that Court, but of the 1963 March on Washington at which Dr. Martin Luther King, Jr. delivered his famous "I Have A Dream" speech.

Powe explicitly returns to this theme, with a flourish, in the concluding chapter. Here, he takes a jab not only at Warren Court-worshipers, but also at the "legal mind" itself. While stating that the Warren Court "definitely did inspire a generation of lawyers . . . who worshiped it,"15 himself in-

12 Id. at xi.
13 Id. at xii.
14 Id. at xiii-xiv.
15 Id. at 501.
cluded, he emphasizes that “all the good things bestowed on American society in the 1960s did not come from judicial decisions alone.” Reverence for the Warren Court, thus, is reverence for the heyday of modern liberalism, and “a nostalgia for the Warren Court is necessarily a nostalgia for the 1960s.” Paraphrasing Thomas Reed Powel’s definition of a legal mind as “a mind that can think of one of two inseparably connected things without thinking of the other,” Powe ends the book with these words:

The same impulses that produced the “I Have a Dream” speech and the sanitation strike in Memphis five years later, that sent Neil Armstrong and Buzz Aldrin to the moon and John and Robert Kennedy to Arlington Cemetery, that caused four African-American students to sit in at Woolworth’s in Greensboro and hundreds of demonstrators to gather in Chicago for the Democratic National Convention, that sang “Blowing in the Wind” and “White Rabbit,” that authored Catch 22 and The Housewife’s Handbook of Selective Promiscuity, that filmed Dr. Strangelove and The Green Berets, that placed Viola Liuzzo in Alabama and George Wallace in Michigan, that witnessed the New Frontier and the New Nixon, that celebrated the withdrawal of Soviet missiles from Cuba and the introduction of American combat units in Vietnam, that sent youths to Mississippi for “Freedom Summer” and to San Francisco for the “Summer of Love,” that offered a Great Society for America and a TVA for the Mekong River, that unleashed idealism and produced hubris, that witnessed old virtues and verities that Earl Warren represented, like integrity, patriotism, and family, begin their slide out of style—well, those impulses created history’s Warren Court, too. Only a legal mind could separate them.18

Hallelujah! Although it is a truism to state that judges are human beings, that they are part of the broader culture, that they have political views and beliefs, party affiliations, prejudices and biases, that they read the newspapers and watch or listen to the news, much legal commentary simply ignores this political aspect of judicial decision-making. By explicitly identifying himself with the grand politically-informed tradition of Supreme Court scholars like Edward S. Corwin, Alpheus Thomas Mason, Robert G. McCloskey, and Walter F. Murphy, as well as others,19 Powe is reconnecting Supreme Court scholarship to political history. How could it be otherwise? The Supreme Court, like any other institution, exists at a given time in a particular political, cultural, social, and economic setting. Its justices do not deliberate and issue decisions from behind the Rawlsian veil of ignorance. Rather, they are inevitably and inexorably part of the broader political system. By placing them squarely there, in contrast to so much legal writing,20 Powe has taken a giant step towards reconnecting Supreme Court scholarship with

16 Id.
17 Id.
18 Id.
19 Id. at xi-xii.
20 For a critique of the apolitical nature of leading constitutional law books, see Neal Devins, Constitutional Law Casebooks & Judicial Supremacy, 3 GREEN BAG 2d 259 (2000).
political history. And because over three decades have passed since the Warren Court ended, it may now be possible to move beyond ideological accounts to more neutral assessments of the connection.

My exuberance for Powe's purported approach needs to be taken with at least a grain of salt. As a political scientist and a lawyer, what Powe correctly sees as a radical break with most constitutional work by legal academics, I take for granted as the *sine qua non* of thorough work on the Court. To further confess my biases, Powe graciously acknowledges my work in the Preface and credits it with influencing his thinking, even when he disagrees with it.²¹

But there are other, more general reasons for admiring this book a great deal. It covers an enormous amount of ground yet does so in a way that is both easily accessible to the lay reader and provocative and informative for the expert. It is engagingly written, with many vignettes such as William O. Douglas failing to graduate first in his class at Columbia Law School because he received a "C" in constitutional law,²² President Johnson's machinations to create a vacancy for Thurgood Marshall on the Supreme Court,²³ and Justice Brennan's firing of Michael Tigar as his clerk out of fear that Tigar's campus radicalism would be used by the Court's opponents.²⁴ Powe's discussions of the Court's involvement with civil rights and its speech decisions are particularly rich. Although not brief, in many ways *The Warren Court and American Politics* achieves two of Chief Justice Earl Warren's aims for his most famous opinion: it is readable and nonaccusatory.

To assert that *The Warren Court and American Politics* has admirable aims is not to assert that it fully achieves them all. An author cannot do everything in one book and Powe does a great many things very well. In the end, however, Powe doesn't fully succeed in escaping the Court-centeredness for which he rightly criticizes other legal academics. The result is that *The Warren Court and American Politics* is really a book about the Supreme Court, with references to the broader political system. The acknowledgment of the broader societal influences is often both general and belated. Rather than setting forth the political landscape and then inquiring about how the Court fit into it, Powe typically presents Court cases first and then mentions political factors. In terms of his aims, Powe gives his readers both too much and too little—too much in terms of the number of cases discussed; too little in terms of the political dimensions surrounding the cases and in the social science literature that explores them.

²² *See* Powe, *supra* note 1, at 6.
²³ *See* id. at 291.
²⁴ *See* id. at 328-29.
In addition to being too Court-centered, much of his analysis is based on inference, lacks supporting data, too readily assumes that what the Court did mattered, and does not specify the mechanisms by which the Court was moved to decide cases and to decide them in particular ways. In Powe’s defense, these are hard things to do. While the rest of this review will explore these critical points, Powe deserves a great deal of credit for trying to return the Court to the broader political and social culture. His head was going in the right direction, even if his heart could not quite make it.

II. A COURT-CENTERED ANALYSIS

Karl Marx once noted that in any historical period we are all trapped by “the illusion of that epoch.” What he meant, most simply, is that our understandings of politics and history, and all human culture for that matter, are inextricably intertwined with our forms of social and economic organization. A cruder version of this insight might be, “what you see depends on where you sit.” Lawyers and legal academics suffer from this set of blinders as much, if not more so, than others.

The Supreme Court on which Earl Warren served as Chief Justice is one of the most important Supreme Courts in U.S. history. As Powe documents, it issued opinions across a broad range of issues and changed constitutional doctrine and law in several fields. Constitutional scholars find it riveting. Powe, in his exuberance for his topic, goes even further. In his worldview, not only was the Warren Court a hot topic of conversation among constitutional law scholars, but also among the public at large. As Powe writes, “By the time Earl Warren retired in 1969 after sixteen years as chief justice, the name ‘Warren Court’ had become a household word and there was no doubt in anyone’s mind that the Supreme Court was a co-equal branch of government.”

The problem with this claim is that it mistakes the world of constitutional law professors for the world of American citizens. Far from being a household word, in 1966 eight percent more Americans correctly identified General Charles De Gaulle of France than Chief Justice Earl Warren! Far from there being “no doubt in anyone’s mind that the Supreme Court was a co-equal branch of government,” in 1966, when a major national survey asked what the U.S. Supreme Court had done recently, almost half could

26 For an argument that legal academics are insulated and isolated from mainstream intellectual discourse to their detriment, see Gerald N. Rosenberg, Across the Great Divide (Between Law and Political Science), 3 GREEN BAG 2d 267 (2000).
27 POWE, supra note 1, at xi.
not recall anything at all.\textsuperscript{29} This was despite major decisions on civil rights, prayer in schools, reapportionment, criminal rights and the like that take Powe five hundred pages to describe. Most Americans, it turned out, had barely a clue what the "Warren Court" had done. When prompted with a list of eight "decisions," four of which the Court had recently made and four of which it had never made, and asked to identify which, if any, the Court had made, only fifteen percent of a 1966 sample made four or more correct choices. Fifty percent offered two or fewer correct responses.\textsuperscript{30}

None of these data implies that the Warren Court was unimportant. But they do suggest that its actions, like those of Courts before and after it, were largely invisible to the public at large. As Powe illustrates, elite reaction to the Court's decisions was often hyperbolic. But to the public at large, its actions were barely perceptible. Like a shooting star, they at best flashed brightly for a split second, then faded rapidly into hazy unconsciousness. Students of the Warren Court need to be particularly careful to avoid the illusions of their profession.

Nowhere is Powe's Court-centeredness more apparent than in his discussion of civil rights. For example, in discussing \textit{Plessy}, he accords it an importance it simply did not have. He writes, "The South had erected its entire white supremacist social structure under the regime of \textit{Plessy}."\textsuperscript{31} This suggests that the Court's decision in \textit{Plessy} mattered. It did not. In fact, it was hardly noticed. In the late nineteenth and early twentieth centuries the white South was erecting a full scale system of apartheid with the implicit, if not explicit, support of Northern elites. Given the enormous inequalities in power between whites and blacks in the South, and the unwillingness of the federal government to enforce any decision that supported civil rights, the Court in \textit{Plessy} was talking only to itself.

While I praised Powe's treatment of the modern civil rights era earlier in this review, it also focuses too much on the Court. Chapter 9, which explores the years leading up to the passage of the 1964 Civil Rights Act, gives insufficient attention to the role of the civil rights movement independent of \textit{Brown}. Despite \textit{Brown}, for example, neither President Kennedy nor his brother, the Attorney General, showed interest in or commitment to civil rights. The Administration urged that the electrifying 1961 Freedom Rides be stopped on the ground that they would embarrass the President on his upcoming trip to Europe. It was not until 1963 that the Kennedy administration introduced a civil rights bill, and that bill was even weaker than Eisenhower's lackluster 1957 bill. When the civil rights violence in Birmingham created enormous political pressure for a stronger bill, the Ad-

\textsuperscript{29} See WALTER F. MURPHY ET AL., PUBLIC EVALUATIONS OF CONSTITUTIONAL COURTS: ALTERNATIVE EXPLANATIONS 53 (1973).

\textsuperscript{30} See Kenneth M. Dolbeare, \textit{The Public Views the Supreme Court, in LAW, POLITICS, AND THE FEDERAL COURTS} 194, 199-201 (Herbert Jacob ed., 1967).

\textsuperscript{31} Powe, supra note 1, at 46.
ministration opposed strengthening it. In response to a House Judiciary Committee draft strengthening the bill, Attorney General Robert F. Kennedy met with the full committee in executive session and criticized it in “almost every detail.” President Kennedy, through the Attorney General, specifically objected to key provisions, such as the prohibition on job discrimination that became Title VII, the provision making the Civil Rights Commission a permanent agency, the provision empowering the Attorney General to sue on behalf of individuals alleging racial discrimination, and the provisions prohibiting discrimination in federally-funded programs and allowing fund cut-offs. The Civil Rights Act of 1964 was the result of Northern, white revulsion at the violence inflicted upon civil rights demonstrators and the coming to power of Lyndon Johnson, not Court action.

Powe’s Court-centeredness can also be seen in his claim that Brown “had brought out the worst in the American South.” As I have argued at great length elsewhere, it was the civil rights movement independent of Brown that brought out the worst in white Southerners, not the Court. The white South had been ignoring Court decisions throughout the twentieth century and white violence against blacks, although decreasing over time, was an ever-present threat. What was different in the late 1950s and early 1960s was that black Americans took to the streets to demand their freedom. When their protests were violently repressed, and the national media covered that violent repression, bringing the reality of Southern apartheid to the nation, Congress and the President acted. Thus, contra Powe, it was not the case that in passing the 1964 Civil Rights Act “Congress had validated the Court’s biggest case in history by voting margins that would have been unthinkable at any previous time.” Nor was that Act based on the “principle of equality in Brown and subsequent cases.” Congress and the president were reacting to the political pressures created by the civil rights movement, not to the actions of the Court.

Another way to make this point is that the Supreme Court and Congress were moving together, responding to the same pressures. Congress faced the pressure a decade after the Court, and responded, one might argue, in similar fashion. Interestingly, in the seemingly endless Senate debate on the 1964 Act, references to Brown can be found on only a few
dozen out of many thousands of pages. Over forty percent of those references are by senators opposing both the bill and Brown as unconstitutional. None of this means that the Court’s decision was not praiseworthy or courageous or legally justified. It was all of those things, but that does not mean that the Court played an important role in influencing congressional action.

Powe’s Court-centeredness can even be seen in his explicit denial of it in the Preface. He writes, “I hope to eschew the law professor’s traditional Court-centered focus and instead place the Court where it belongs as one of the three co-equal branches of government, influencing and influenced by American politics and its cultural and intellectual currents.” But the claim that the Court is a “co-equal” branch of government cannot be the starting point of the analysis. The importance and influence of the Court is an empirical question, not a question of definition. The Court’s power and influence, like that of any institution in the political system, varies by issue and over time. For example, consider the obvious point that the Court has never been a “co-equal” participant with the other branches in decisions about war and peace. Similarly, the post-1937 Court had much less influence over economic matters than the Court that it succeeded. Again, none of this means that the Warren Court did not break with the judicial past and change constitutional law in important ways. It does mean that the political and societal impact and understanding of those legal changes need to be empirically investigated, not assumed by definition. By assuming the central importance of the Supreme Court, Powe turns away from investigating the actual role of the Warren Court.

III. ASSUMING IMPACT, ASSERTING CAUSATION, AVOIDING DATA

Throughout the book, Powe too readily and uncritically assumes that the Court’s decisions had a large impact on American society. Given the Court-centeredness of his analysis, this is perhaps not surprising. Powe’s comments on civil rights, obscenity, and criminal law illuminate this point.

In chapter 7, Powe discusses the events at Central High School in Little Rock, Arkansas, that led President Eisenhower to federalize the Arkansas National Guard and to send the 101st Airborne division to Little Rock, as well as to the Court’s decision in Cooper v. Aaron. It is a powerful story of constitutional rights vindicated; a Supreme Court order, backed up by the President with troops. The problem is that this action resulted more in romance than in reality; it produced only token integration and left the Little Rock public schools almost completely segregated. Despite this “very important” Supreme Court decision, as of June, 1963, nearly 5 years later,

38 See ROSENBERG, HOLLOW HOPE, supra note 35, at 120 n.9.
39 Powe, supra note 1, at xv.
41 Powe, supra note 1, at 160.
only 69 out of 7,700 students at the “formerly” white, junior and senior high schools of Little Rock were black.\footnote{See William Brink & Louis Harris, The Negro Revolution in America 41 (1963). As late as 1989, problems still remained. That year, the predominantly black Little Rock School District settled (for $129 million) its lawsuit against the state and two mostly white suburban school districts. See id.}

What, then, makes \textit{Cooper v. Aaron} such an important case? It was important because it came down firmly on the liberal side of the segregation issue, the side that was supported by Northern elites. If the Court had delivered the same lecture that Supreme Court decisions were the law of the land and all office-holders were duty-bound to obey it, but had come out the other way, I suspect it would have been blasted by those same elites. After all, would \textit{Dred Scott} have been seen differently if the Court had clothed its outcome in language about its finality? The point is that \textit{Cooper v. Aaron} tells us more about liberal constitutional lawyers and their substantive preferences than it does about ending segregation in public schools.

A second example of the uncritical assumption of judicial impact appears in Powe’s discussion of the Warren Court’s obscenity decisions. In an early chapter on the 1953-1956 terms (chapter five), Powe recalls the \textit{Roth} decision, which limited the definition of obscenity and thus gave extended constitutional protection to a wide range of material. He writes that the Court “brought constitutional law into harmony with mid-twentieth century American values.”\footnote{Powe, supra note 1, at 122.} In a later chapter (thirteen) on the 1962-1968 terms, Powe credits the Court with shutting down censorship boards. The result of the Court’s decisions, Powe writes, was the end of movie censorship in the United States: “It was just too much. Censorship boards vanished overnight . . . .”\footnote{Id. at 339.} These decisions were unproblematic, however, because “when interpreting the Constitution the Court did not appear to be ahead of the country.”\footnote{Id. at 122.} Unfortunately, Powe provides no evidence for any of these claims.

At the dawn of the twenty-first century, if not decades earlier, it is not acceptable to make claims about “American values” or that an institution is “ahead of the country” without careful attention to data. What are the values of America in the area of obscenity? How can Powe be so confident? Indeed, I am reminded of the old Simon & Garfunkel song in which they “look for America.” They, at least, didn’t know what it was. In making this argument about American values, Powe makes the same mistake as one of the scholars who inspired him the most, Robert G. McCloskey.\footnote{See id. at xvi.} McCloskey peppers his seminal book, \textit{The American Supreme Court}, with unsubstantiated claims about American values.\footnote{McCloskey claims, for example, that “the Court has seldom lagged far behind or forged far ahead of America.” Robert G. McCloskey, \textit{The American Supreme Court} 209 (2d. ed. 1994).} Perhaps that was accept-
able scholarship in 1960 when McCloskey published *The American Supreme Court*, but it is not today.

The data do not support Powe's claim that the Court's obscenity decisions were in tune with the views of the public at large. In 1965, for example, Gallup reported that fifty-eight percent of Americans thought that the laws on what books could be sold in their state were "not strict enough," nearly four times as many who thought the laws were "about right" and nearly fifteen times as many who thought the laws were "too strict." As late as 1973 nearly forty-three percent of respondents to the General Social Survey believed that pornographic material should be illegal. The Court was in tune, however, with Northeastern, liberal elites, and those better educated, higher income Americans living in urban areas throughout the country. Thus, the data lend support to Powe's claim that the Warren Court was part of a liberal coalition that "demanded national liberal values be adopted in outlying areas of the United States." They do not support the claim that the Court's obscenity decisions represented majority views.

It is also not clear that the Court's decisions had much impact on the availability of sexually explicit material. In an extensive survey in the mid-1960s of a random sample of 250 booksellers in 12 states with varied obscenity laws, James Levine discovered that "only a small minority of booksellers are enlightened about the supposedly momentous decisions of the United States Supreme Court." Explicitly analyzing several Supreme Court decisions on obscenity in literature, Levine concluded: "The Supreme Court may have donated a wealth of raw materials for the benefit of legal scholars, but its influence on the dissemination of sex literature in the general bookstore has been miniscule [sic]." Much to Levine's surprise, the best indicator by far of whether a bookstore would sell such literature was the attitude of the store owner. Those who disapproved of sexually explicit material refused to sell such books while those owners who were neutral or supportive carried them. This suggests that sexually explicit material became available less because censorship boards shut down and more because there was a demand for it and some booksellers were willing to meet that demand.

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51 Powe, supra note 1, at 494.
53 Id. at 130.
54 Id. at 135-38.
Market demand and a growing unwillingness of many governments, particularly in urban areas, to act, made Court decisions superfluous.

On one level, Powe is aware of this. Towards the end of his discussion of obscenity, he writes that "it would be a mistake to see the law as driving the market."\textsuperscript{55} A few pages later, he comments that "[t]he influx of more sexually explicit materials on the urban markets was not caused by the Supreme Court, but the Court did nothing to attempt to stop it or even to slow it down."\textsuperscript{56} These claims are likely correct, but they are belated. Rather than framing the discussion around changes in the availability of sexual material, and then inquiring what role, if any, the Court played in it, Powe focuses on the Court and then mentions, almost in passing, other societal forces.

Nowhere is this unsubstantiated assumption of impact clearer than in Powe's claims about the Warren Court's criminal rights decisions. The Court, he writes, "remade the entire American system of criminal justice."\textsuperscript{57} Through decisions such as \textit{Mapp} (1961) (exclusionary rule); \textit{Gideon} (1963) and \textit{Argersinger} (1972) (provision of counsel); \textit{Miranda} (1966) (removal of coercion inherent in police interrogations and reading of rights); \textit{In re Gault} (1967) (provision of due process protections to juveniles), the Court purported to remake the American system of criminal justice. But Powe does not ask the question of what differences these decisions made. And in order to answer this question, Powe must look at empirical data; he does not.

The empirical data do not support Powe's sweeping claim.\textsuperscript{58} Consider, for example, the exclusionary rule required by \textit{Mapp}.\textsuperscript{59} While its effect is hard to measure (how does one observe the not carrying out of an illegal search?), the studies that have tried have found little change. As Donald Horowitz summarized the literature, "If \textit{Mapp} has deterred police misconduct, the secret has been very well kept."\textsuperscript{60} Further, the exclusion of illegally seized evidence from trial only comes into play when there is a trial! Throughout the United States, only a tiny percentage of arrests result in trials, with plea-bargains being the most common outcome. The data suggest that the high-sounding words of \textit{Mapp} may not have produced much change.

\textit{Gideon},\textsuperscript{61} and the Burger Court decision in \textit{Argersinger v. Hamlin},\textsuperscript{62} required that before receiving jail time, indigent criminal defendants be provided with counsel at public expense. In practice, however, the data show that these constitutional requirements have had a minimal effect on
the criminal justice system. Malcolm Feeley, observing over 1,600 criminal cases in New Haven, Connecticut in the late 1970s, discovered that only half of the defendants were represented by counsel. Twenty percent of those not represented were charged with felonies and one-third of those receiving jail time were not represented by counsel. But perhaps this should not be surprising because in not one of the more than 1,600 cases Feeley observed did a defendant request a trial.\textsuperscript{63} Even when counsel is provided, studies have repeatedly shown that the criminal justice system is more interested in the smooth processing of cases than in expensive and time-consuming trials marked by spirited adversarial justice. Couple bureaucratic needs with massive under-funding and the result is a criminal justice system that in practice has made little more than cosmetic changes.

Another example in Powe's list of Court cases that have brought about substantive change is \textit{Miranda v. Arizona}\textsuperscript{64} with its now famous recitation of rights. Powe writes, "Warren's goal of equalizing knowledge was more successful that he could have dreamed of, although hardly for the reasons he assumed."\textsuperscript{65} The evidence does not support Powe's claim. A number of empirical studies highlight that few criminal defendants know or understand their rights and how incapable they are of making intelligent uses of them. For example, a 1980 survey reported that "a significant portion of adults do not understand their rights when read the Miranda warnings."\textsuperscript{66} Over forty percent of a sample of \textit{ex-offenders} believed they would have to explain their criminal involvement to a judge, if questioned in court.\textsuperscript{67} Another study found that a majority of Americans had a good deal of misinformation. For example, a Denver study found that sixty percent of suspects believed that "under no circumstances" could their signature on a waiver form have any legal effect.\textsuperscript{68} \textit{Miranda} did make a procedural change, but it is not at all clear that it made a substantive one.

The story is similar with \textit{In re Gault},\textsuperscript{69} the 1967 case applying virtually the full panoply of due process protections to juvenile courts. "Under our Constitution," Justice Fortas wrote for the Warren Court, "the condition of being a boy does not justify a kangaroo court."\textsuperscript{70} The Court's language was powerful, but the results of the decision were mixed, at best. A 1989 review essay found that "less than fifty percent of juveniles adjudicated de-

\textsuperscript{63} See MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT 9-10 (1979).
\textsuperscript{64} 384 U.S. 436 (1966).
\textsuperscript{65} POWE, supra note 1, at 400. The reason, Powe argues, is that popular police television shows such as \textit{Dragnet} incorporated \textit{Miranda} warnings into their scripts. See id.
\textsuperscript{67} See id.
\textsuperscript{69} 387 U.S. 1 (1967).
\textsuperscript{70} Id. at 28.
It turns out, however, that this may be a blessing. Holding the severity of the crime constant, several studies have found that juveniles represented by counsel receive harsher sentences than those not represented. To sum up, the data do not support the claim that the Warren Court’s decisions revolutionized the criminal justice system. While some procedural changes were made, often in the service of justice officials working to professionalize the criminal justice system, substantive changes are much less obvious. Indeed, it appears that the changes required by the Warren Court were more symbolic than substantive. As Tigar put it, “the constitutional revolution in criminal procedure has amounted to little more than an ornament, or golden cupola, built upon a roof of a structure foundrotting and infested, assuring the gentlefolk who only pass by without entering that all is well inside.”

A final example is Powe’s treatment of the draft-card burning case, United States v. O’Brien, in which the Court, in an opinion authored by Chief Justice Warren, upheld the jailing of a Vietnam War protestor for burning his draft-card against claims that his actions were protected as symbolic speech. Powe offers an impassioned critique of the decision, labeling it “one of the most shameful moments of the Warren Court.” But the decision was essentially irrelevant, as anyone who regularly attended antiwar demonstrations would know. Draft-cards were burned by the thousands, if not tens of thousands, with nary a prosecution. The antiwar movement was a major social movement and there was not much the Court did, or could have done, that would have affected it.

IV. ARGUMENT BY INFERENCE

What motivates a justice to decide a case in a particular way? The traditional response of lawyers and legal academics is that a justice applies precedent and reasons by analogy to reach a result that if not compelled by this legal analysis is at the very least strongly supported by it. Powe, however, argues strongly that for the most part the justices of the Warren Court did not take this approach. Rather, as I have noted, he claims that they were

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72 See Barry C. Feld, In re Gault Revisited: A Cross-State Comparison of the Right to Counsel in Juvenile Court, 34 CRIME & DELINQ. 393, 405 (1988). This surprising finding may be the result of a widespread belief on the part of juvenile court judges that the “child’s best interests are not served by an adversary hearing” and that the process should focus less on juveniles’ “rights” and more on their “welfare.” HOROWITZ, supra note 60, at 188.
75 POWE, supra note 1, at 328.
result-oriented, deciding on the outcome they preferred and then writing an opinion that justified it. Powe’s result-oriented understanding of the Warren Court is similar to what is commonly referred to as the “attitudinal model” in political science, which posits that justices select an outcome closest to their policy preferences and then make use of precedent and legal reasoning to justify it. The challenge in supporting such a model is to provide evidence of the justices’ preferences that is independent of their votes. As Segal and Cover put it, “One cannot demonstrate that attitudes affect votes when the attitudes are operationalized from those same votes.” In other words, one cannot read opinions, figure out which side they support, and then claim that they are result-driven. This is because one has no way of knowing whether the result drove the legal analysis or the legal analysis led to the result. An independent measure of the justices’ preferences is necessary to sort out the possible causal paths.

Unfortunately, throughout his book, Powe gives no attention to this problem of judicial motivations and causal mechanisms. He simply explains votes by an assumed result orientation of the justices. For example, as I quoted Powe earlier, “From the justices’ points of view, the Court’s prime role was to facilitate the policies ordained by the elected branches.” This is argument by inference; he could be right, but how does Powe, or anyone else, know? Similarly, towards the end of the book, Powe explains the votes in Powell v. Texas (concerning a law that made public drunkenness illegal): “All were politically well attuned, but votes in Powell seem best understood in terms of how ideologically liberal they were and how willing they were to believe their own judgment was infallible.” There is a kind of pop psychology to this form of analysis, and it appears again on the next page when Powe writes, “A majority of the justices were men of action, confident in their own judgment.” A final example of the lack of attention to judicial motivations is Powe’s explanation for why the Court

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76 See Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model (1993); Harold J. Spaeth & Jeffrey A. Segal, Majority Rule or Minority Will: Adherence to Precedent on the U.S. Supreme Court (1999); Jeffrey A. Segal & Albert D. Cover, Ideological Values and the Votes of U.S. Supreme Court Justices, 83 AM. POL. SCI. REV. 557 (1989); Jeffrey A. Segal et al., Ideological Values and the Votes of U.S. Supreme Court Justices Revisited, 57 J. POL. 812 (1995); Jeffrey A. Segal & Harold J. Spaeth, The Influence of Stare Decisis on the Votes of U.S. Supreme Court Justices, 40 AM. J. POL. SCI. 971 (1996).

77 Segal & Cover, supra note 76, at 558.

78 The best measure that political scientists working in this field have come up with so far is editorial comments at the nomination stage. By coding editorials on nominations in the New York Times, the Washington Post, the Chicago Tribune and the Los Angeles Times, Segal & Cover were highly accurate in predicting the subsequent votes of justices in civil liberties cases over the 1953-1987 period. See Segal & Cover, supra note 76, at 561-62.

79 Powe, supra note 1, at 17.

80 392 U.S. 514 (1968).

81 Powe, supra note 1, at 443.

82 Id. at 444.
retreated from its apparent aim of requiring a compelling state interest when unequal treatment was based on wealth: "But fate—riots, assassinations, Fortas's resignation, and the ever-mounting costs of the Vietnam War, both psychologically and economically—soon pointed the Court toward a different direction." 83 Again, this could be correct, but how do any of us know?

In order to deal with this challenge, Powe needs to provide evidence of the justices' policy preferences and personality that is independent of their votes. Careful study of their pre-judicial careers might provide some of the evidence necessary to make the case. In addition, if Powe wishes to make the case that the justices reacted to political events, such as the Vietnam War, he needs to find evidence for it. Such evidence might be found in the private papers of the justices, letters to family and friends, and interviews with those who knew the justices well. Without such evidence, Powe's claims are merely plausible. And in keeping with the limits of his data, he would have been better advised to have presented his claims tentatively and cautiously, as possible explanations rather than as statements of fact.

This lack of clarity in understanding judicial decision-making can also be seen in Powe's equivocation on the factors that produced the Warren Court. He goes back and forth between claiming that the Warren Court was an accident dependent on the vagaries of appointments (with President Eisenhower appointing Justices Warren and Brennan), and an inevitable product of national politics. In other words, Powe is not clear on what drives judicial decision-making. In some places he suggests that the Warren Court was "an accident of history" 84 and he cites President Eisenhower calling his appointment of Warren "the biggest damn-fool mistake" he made. 85 But the brunt of his analysis is that the Court was part of the national, liberal, political coalition. Which was it that influenced the justices? Was it their jurisprudence? Their particular political preferences? Or was it the Court's relationship to the other branches? Are we to view the Warren Court (or any court) as an aggregation of individual views or as an institution responding in particular ways to Congress and the President? Powe provides little guidance to these questions.

It is particularly relevant at this point to note that the book is very thinly cited. It is with great hesitancy that I complain that a work by a legal academic lacks enough citations. But there is a large social science and historical literature on the Supreme Court, particularly the Warren Court, that the book ignores. Powe tells the reader that this omission was by "choice," 86 but the choice was ill-advised. It led, perhaps, to the problems I have highlighted throughout the review, including the lack of supporting evidence and specification of causal mechanisms, and the assumptions of

83 Id. at 455.
84 Id. at 209.
85 Id. at 74 (quotations omitted).
86 Id. at xvi.
importance and impact. Greater attention to the literature might have alerted Powe to the need to argue more cautiously or provide the missing material.

V. THE WARREN COURT AS REVOLUTIONARY

The Warren Court and American Politics is marked by a tension between characterizing the role of the Court as an independent, powerful, and important actor on the one hand and as a part of the Kennedy-Johnson liberal coalition on the other hand. Nowhere is this tension more clearly apparent than in the concluding chapter. In summarizing the tenure of the Warren Court, Powe writes, “when supporters and critics alike are asked for a neutral adjective to describe the Warren Court’s work, revolutionary is the overwhelming choice.”87 It is an appropriate description, Powe argues, because “[a] revolutionary body is necessarily one that is engaged in making a sharp break from the past, and constitutional doctrine in 1953 (or even 1962) bore few relationships to constitutional doctrine in 1969.”88 And what did this revolutionary Court do? After a lengthy quotation from Owen Fiss on what Powe labels the “dominant view of the Warren Court,”89 Powe writes that Fiss’s description illustrates that “there were very serious problems in the United States, but thanks to the courageous action of the members of the Court, all the problems were alleviated and some were completely solved.”90 The rest of the chapter “elaborate[s] on Fiss and the standard history of the Warren Court.”91 Never quite repudiating this outlandish claim, Powe does qualify it somewhat.

To call the Warren Court “revolutionary” in any meaningful sense is a travesty. Only the most virulent of conservative critics would call Johnson’s Great Society “revolutionary” and it made far more important and lasting changes in American society than the Court, including the Civil Rights Act, the Voting Rights Act, Medicaid, and Medicare. As noted earlier, Powe himself argues that “the Court was a functioning part of the Kennedy-Johnson liberalism of the mid and late 1960s,”92 which means it was a “liberal” Court but hardly a “revolutionary” one. The United States was being swept by political and social change during the 1960s, and the Court sometimes, but not always, issued opinions that supported that change. One can admire and respect what the justices tried to do without being swept away by overblown claims about the degree of change they made and the impact this change had. The problem Powe faces is that he argues that the Court was both revolutionary and a part of a political coalition that was decidedly not revolutionary. He cannot have it both ways, but he is ultimately

87 Id. at 485.
88 Id.
89 Id. at 486.
90 Id. at 487.
91 Id.
92 Id. at 494.
unwilling to confront the tension. To do so would be to escape from the Court-centeredness and judicial apologia that marks legal academics and to accept the logic of his argument that the Warren Court was no more and no less than a part of a liberal coalition. Like Galileo and the Earth, moving the Court, particularly the Warren Court, from the center of the universe, carries the risk of being branded a heretic. Truer to his background and training than to his professed aims, Powe did not quite make it.

VI. WHAT WAS THE WARREN COURT?

If Powe has succeeded in presenting a reasonably even-handed portrait of the Warren Court, the portrait remains larger than life. Apologists and myth-makers for the Kennedy Administration have always referred to it as “Camelot,” and there is something of that mythical, romantic quality to Powe’s presentation of the Warren Court. The Warren Court was, he writes, “a historically unique Court operating during a historically unique era.” This is true, by definition, of any Court in any time period, but undoubtedly Powe means to convey the notion that the Warren Court acted in a different way than other Courts. So, if the Warren Court is to be understood in Arthurian terms, the question still remains, what was the Warren Court? Was it King Arthur, true and righteous, but abandoned by his closest and most trusted friends? Or was it Sir Lancelot, the epitome of strength and virtue, corrupted by his one fatal flaw?

I am not sure which portrayal Powe would choose, but I am sure that the question is misplaced. For the Warren Court was not a knight in shining armor, and the Kennedy and Johnson Administrations were not Camelot. The Warren Court was a collection of lawyers plying their trade in the context of an increasingly liberal decade. To a large extent many of its decisions moved in sync with those of the other branches, but, given the appointment process, how could it be otherwise? On an intellectual level, Powe understands this, and The Warren Court and American Politics can be read to make this point. But on an emotional level, the larger than life portrait of the Warren Court remains. While intellectually Powe has strived mightily to overcome his youthful worship of the Warren Court, he has not fully succeeded. The task is hard, and Powe has come closer than most any legal academics. For this he deserves a good deal of credit and all of the praise that The Warren Court and American Politics will rightly receive.

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93 Id. at 485.
94 In particular, the Kennedy Administration was long on style and short on liberal substance. From civil rights to the Cold War to the administration of justice, the Kennedy Administration was more conservative than the Eisenhower Administration it replaced. See, e.g., VICTOR S. NAVASKY, KENNEDY JUSTICE (1977).