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**The Politics of Constitutional Law**

**by**

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*The Politics of Constitutional Law*

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Mark Tushnet\*

*The Warren Court and American Politics*<sup>1</sup> is a spectacularly good book. Written for an audience of educated non-lawyers, it provides the best available account of the relation between the Warren Court's liberalism and American politics during the entire period of Warren's tenure.<sup>2</sup> I think it important to begin with these words of praise, because the bulk of this Essay will use Professor Powe's work to raise some questions about the enterprise of offering an account of Supreme Court decisions that connects them to contemporaneous political developments. Part I of the Essay briefly describes the main lines of Professor Powe's interpretation of the Warren Court. The longer Part II raises questions about the ways in which we might try to go about verifying the accuracy of that interpretation.

I. The Warren Court and American Politics

Professor Powe's account of the Warren Court has two major themes. The first is a periodization that divides the Warren Court era into three segments. The second stresses the importance of race and the South in the Warren Court's work.

A. Periodization

Earl Warren and his colleagues William Brennan and Thurgood Marshall are the exemplars of Warren Court liberalism. The inclusion of Brennan and Marshall in the pantheon should alert us to some anomalies, however. Marshall was appointed to the Court in 1967 and served with Warren for only two Terms before Warren retired in 1968. And, as Powe points out, Brennan provided the grounds for asserting that the Court in the second half of the twentieth century was the Brennan Court primarily through his leadership of the Court's liberal wing after Warren's retirement. As Powe puts it, no one would call Brennan "the most important justice" of

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<sup>1</sup> (2000) [hereafter cited by page number only].

<sup>2</sup> Throughout, I use the word *liberalism* to refer to the form of center-left politics associated with the Democratic party from the New Deal through the Great Society period, and not to liberalism as a political philosophy.

that period based on the years he served with Earl Warren (p. 500).<sup>3</sup> While Warren sat on the Court, it *was* the Warren Court.

Powe's focus on Warren's years of service generates the periodization he offers. In the first period, from Warren's 1953 appointment and the initial decision in *Brown v. Board of Education* (1954) through the 1956 Term, the Court moved in a liberal direction. *Brown* itself extended Vinson Court precedents quite dramatically. The Court's decisions on national security rejected what the Court's majority saw as excessive McCarthyite reactions to a threat from domestic communism that the majority regarded as far less substantial than did contemporary politicians. The early Warren Court was a clearly liberal Court. It did not go as far as the later Warren Court did, but the direction in which it moved was clear.

Professor Powe describes the second period as one of "stalemate."<sup>4</sup> *Brown* and the Court's national security decisions provoked strong reactions in national politics. Southern politicians in Congress and in the statehouses spear-headed challenges to the Court's authority. Arkansas governor Orval Faubus attempted to defy *Brown* and provoked the Little Rock school crisis. A number of proposals to restrict the Court's jurisdiction, primarily in national security cases, moved through Congress. None of these attacks on the Court fully succeeded. President Dwight Eisenhower, at best a reluctant supporter of the principle of desegregation, nonetheless saw Faubus's actions as a threat to national authority and deployed troops to assist the desegregation process in Little Rock. The legislative proposals were watered down as they moved through Congress, and in the end none was adopted. The Court responded to the attacks on it nonetheless. According to Professor Powe, Justice Felix Frankfurter in particular was almost traumatized by what he saw happening in Congress. Warren was unable to assemble a consistent majority for liberal positions as long as Frankfurter served.

What Powe calls "History's Warren Court"<sup>5</sup> ran from the 1962 Term through Warren's retirement. The Warren Court liberals took full control with the appointments of Arthur Goldberg, Abe Fortas, and Thurgood Marshall. Even Justice Hugo Black's increasing "conservatism" as he aged was not enough to deprive the liberals of a solid majority in nearly every case they chose to review.<sup>6</sup>

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<sup>3</sup> Brennan undoubtedly exerted some important behind-the-scenes influence, and Warren certainly relied on him to take the lead in many important cases, including *Cooper v. Aaron*. Still, I think Powe's judgment is right: Had he retired in 1966, Brennan would be seen as Warren's most important lieutenant.

<sup>4</sup> See p. 125 (giving Part II the heading "Stalemate: The 1957-1961 Terms").

<sup>5</sup> See p. 207 (heading of Part III).

<sup>6</sup> I am not entirely comfortable in describing Black as increasingly conservative. He would have said, and I think he may have been right, that he was applying his long-standing principles to a new set of problems. Or, to put it in more conventional terms, it was not Black

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This periodization has two important features. First, it retrieves the middle period of the Warren Court. Too often we associate the Warren Court with its great cases, such as *Brown* and *Miranda v. Arizona*. That ignores what amounted to about one-third of Warren's tenure on the Court. Second, the periodization arises from Professor Powe's political history of the Court. This is obviously true of the second period, when the stalemate – that is, the interruption of the Court's march toward liberalism – occurred because of the Court's response to the adverse reaction in Congress and the South to what it had done. It is equally obviously true of the third, when the march resumed because of liberal appointments by President John F. Kennedy and, particularly, President Lyndon Johnson.

What of the first period, though? It might seem something of a mystery. How did a Court dominated by holdovers from the Roosevelt and Truman eras become a liberal Court when the new appointments were made by President Eisenhower? He was, after all, a Republican whose conservatism was tempered only by the recognition that the Republican party had to accept the New Deal's domestic initiatives, abandoning the party's antediluvian wing, and the U.S. global role, abandoning its isolationist wing.<sup>7</sup> Here Professor Powe's second major theme comes into play.

### B. The Warren Court and the South

According to Professor Powe, the Warren Court was, at its core, an attack on the values associated with the 1950s South.<sup>8</sup> The Court stepped in where “local elites were imposing outmoded values” (p. 490), and that was particularly true in the South. As Professor Powe puts it, if one looks at the “geography of constitutional violations” found by the Warren Court, “[i]t is the South by an overwhelming margin. Then it picks up urban areas of Catholic dominance” (p. 493). Geography is important in itself, but it is also a proxy for the view held by political elites in the 1950s and 1960s of those who disagreed with their values as narrow-minded and backward.

The Warren Court understood *de jure* segregation to be a purely southern phenomenon. The Court's free speech law, with *New York Times v. Sullivan* as its centerpiece, developed in the

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who changed, but liberalism.

<sup>7</sup> For a discussion of the isolationist wing's last gasp, see pp. 111-13 (describing Senator John Bricker's unsuccessful effort to amend the Constitution to clarify the legal implications of treaties and executive agreements).

<sup>8</sup> Because the Republican party had few adherents in the South, it was overall more liberal on issues of race than the Democratic party was in the 1950s. For a suggestive comment, see p. 36 (referring to Eisenhower's knowledge of “Attorney General Herbert Brownell's strong feelings that the United States had to . . . oppose *Plessy*” in *Brown*). At the same time, however, leading Republican strategists were interested in developing the party in the South.

context of civil rights protests (p. 491).<sup>9</sup> The Court's criminal justice decisions responded to practices widespread in the South, although they occurred in the North as well.<sup>10</sup> So, for example, Professor Powe describes *Gideon v. Wainwright* as a Southern case, noting that "Florida could gain the amicus support of only Alabama and North Carolina" while "twenty-two states filed amicus briefs on Gideon's side" (p. 380).<sup>11</sup> The national security decisions are a bit more difficult to fit into this framework, although one can note that, whether for reasons of principle or to gain strategic advantage over the Court, the attacks on the Court for its national security decisions were led by conservatives, many of whom were Southerners already alienated from the Court because of *Brown*. Opposition to the Court's school prayer decisions, according to Professor Powe, "centered" in the South (p. 362).

Overall, Professor Powe makes a strong case for his periodization and for the centrality of the South to the Warren Court's jurisprudence.<sup>12</sup> A different kind of narrative, responding to

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<sup>9</sup> The classic description of this phenomenon, written while the Court was still developing its jurisprudence, is HARRY KALVEN, JR., *THE NEGRO AND THE FIRST AMENDMENT* (1965).

<sup>10</sup> Describing the criminal justice decisions as Southern seems correct to me, although I would emphasize rather more than Professor Powe does the fact that they involved practices regarded as outdated by the most professionalized segments of the criminal justice community (including, notably, the police). For a hint at this point, see p. 396 ("From the Court's perspective it was essential to understand that [in *Miranda*] the Court was requiring the states to do only what the FBI already did."); *Miranda v. Arizona*, 384 U.S. 436, 483-86 (1966) (quoting a letter to the Court describing the FBI's practice from 1964).

<sup>11</sup> See also p. 386 ("*Gideon* was the last important purely southern criminal procedure case.").

<sup>12</sup> This seems the place to note the few errors or arguable misstatements I found in the book. Professor Powe says that the Court in *Dombrowski v. Pfister* found that 42 U.S.C. § 1983 was an express exception to the anti-injunction act, 28 U.S.C. § 2283 (p. 281). *Dombrowski* actually found the anti-injunction statute inapplicable because the plaintiffs did not seek an injunction against a pending state court proceeding. See 380 U.S. 479, 484 n.2 (1965). *Mitchum v. Foster*, 407 U.S. 225 (1972), is the first case holding that § 1983 is an express exception to § 2283. Professor Powe says that *New York Times v. Sullivan* "held" the Sedition Act of 1798 unconstitutional. Metaphorically, perhaps, but the disapproval of the Sedition Act, which was of course not a subject of the litigation, was dictum, not holding, at least in the usual sense. Professor Powe asserts that the lawyers challenging the death penalty during the Warren era "mistakenly believed that a defendant convicted of murder was more likely to be sentenced to death if he was an African-American. (It turned out that the race of the victim, not that of the defendant, was the significant factor.)" Professor Powe does not provide a citation to the

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some of the concerns I raise in the next Part, might deal with the Warren Court's place in the history of American liberalism. In such an account, Professor Powe's periodization might be too fine-grained. That is, liberalism may not have varied enough during Warren's service for an intellectual historian to divide the Warren Court into three periods rather than to treat it as one long episode, perhaps extending to the 1980s.<sup>13</sup>

Another, arguably more important, difficulty arises from Professor Powe's focus on the South. One might infer from Professor Powe's account that the Court would get itself in trouble when it turned its attention to what it saw as constitutional problems in the North. And indeed it did. The Court's attempt to enforce its desegregation rulings in northern school districts generated enormous opposition,<sup>14</sup> and its abortion decisions, addressing laws on the books and enforced throughout the nation,<sup>15</sup> remain among its most controversial.

Focusing on the "geography of constitutional violations" (p. 493) may be misleading, however. One could re-describe *moving North* as *taking on fights with more and more people*. That is, it might be numbers rather than geography that mattered: The Warren Court succeeded in implementing its vision of liberalism, to the extent that it did succeed, not because that vision was incompatible with established values in the South, but because there were more people who agreed with the Court than agreed with the South. Professor Powe rightly minimizes the so-called countermajoritarian thrust of judicial review as exercised by the Warren Court, noting for

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parenthetical comment, or other support for the term *mistakenly*, but if he is referring to the well-known Baldus study, relied on by the capital defendant in *McCleskey v. Kemp*, 481 U.S. 279 (1987), he is wrong to suggest that it supports assertions about the death penalty in the 1960s. The Baldus study discovered the race-of-victim effect in studying the administration of capital punishment in the 1970s. *See id.* at 286. FRANKLIN E. ZIMRING & GORDON HAWKINS, *CAPITAL PUNISHMENT AND THE AMERICAN AGENDA* 34-35 (1986), referring to the period before 1965, mention "[a] variety of studies since 1940 [that] provided evidence of [racial] discrimination, the extent of which is most apparent in cases of death sentences for rape." Finally, on a much lower level, Professor Powe successfully resisted the common temptation to refer to the plaintiff in *Sweatt v. Painter* as Herman Sweatt, but did manage to spell Heman Marion Sweatt's first name as Heaman (p. 50).

<sup>13</sup> I believe it is the intellectual historian's perspective, rather than the political historian's one, that leads people to suggest that the late twentieth century Court should be called the Brennan Court, or the Warren-Brennan Court.

<sup>14</sup> For a discussion, see JOHN C. JEFFRIES, JR., *JUSTICE LEWIS F. POWELL, JR.* 289-319 (1994).

<sup>15</sup> This distinguishes the abortion cases from *Griswold v. Connecticut*, which involved a statute that had close parallels, according to Professor Powe, only in Massachusetts, New York, and Rhode Island (p. 376).

example that the Court in the 1960s “was ready to help those that the national . . . legislature was enthusiastically helping” already (p. 489).<sup>16</sup> What that implies, though, is that we need to know why the Court chose the *Southern* minority as its target rather than some other minority.

Providing the answer to that question would, I think, have to entail the kind of broader investigation of mid- to late-twentieth century American liberalism that Professor Powe generally eschews. He concludes that the Warren Court “demanded [that] national liberal values be adopted in outlying areas of the United States” (p. 494), and that the Court was “a functioning part of . . . Kennedy-Johnson liberalism . . . [that] combined Kennedy’s rhetoric with Johnson’s ability to do the deal” (*ibid.*). Again, as with nearly all of Professor Powe’s comments, this seems clearly correct. But, I believe, it operates at too high a level of generality to be completely helpful. The next volume on the Warren Court, building on Professor Powe’s important contribution, should pay closer attention to the details of Kennedy-Johnson-Warren-Brennan liberalism, and place that liberalism in the context of the history of American liberalism and American political thought more generally.

## II. The Status of Interpretive Accounts of Supreme Court Decisions

As Professor Powe notes in his introduction, his book “attempts to revive the genre of Supreme Court scholarship that focuses on the relationship between the Supreme Court’s decisions and national politics” (p. xiii). Powe suggests that that genre went into decline as legal academics more or less completely abandoned their traditionally feeble connections to political science departments and made scholarship with an almost entirely normative focus our nearly exclusive concern, and as political scientists shifted from interpretive efforts to quantitative ones. He thus offers an explanation that is structurally similar to his account of the Warren Court and American politics: It is what we might call a sociological explanation.

Perhaps, however, we should consider the obvious alternative, that the interpretive genre went into decline because it was intellectually impoverished. The quantifiers in political science, insisting that truly scientific accounts require the production and evaluation of verifiable (or falsifiable) propositions, persistently asked two questions.<sup>17</sup> To academic lawyers, they asked (as I would put it), “When you are operating in your normative mode, you say that the Supreme Court reached decision X because that’s what the law required, and when you are operating in your explanatory mode, you say that it did so because that’s what a majority of the justices thought the law required. But, as heirs to legal realism, we know that ‘the law required it’ can’t operate as an explanation. And we think we have to develop a formal model, which we’re

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<sup>16</sup> Obviously, as with all generalizations, this one overstates the case. Even the Court’s criminal justice decisions, however, were consistent with liberal-sponsored legislation seeking to reform the criminal justice system to address what liberals regarded as the root causes of crime.

<sup>17</sup> For a good introduction to quantifiers’ challenges, see LAWRENCE BAUM, *THE PUZZLE OF JUDICIAL BEHAVIOR* (1997).

calling the ‘legal model,’ to test the proposition that justices do what they do because they think the law requires it.” To the interpreters, the quantifiers asked, “You say that the Court reached its decisions because the justices were sensitive to certain strains in national politics, or because the justices had an ideology that led them to their decisions. But how do you *know* that? Usually what you do is infer political influences or ideological causation from the decisions themselves, but that’s completely circular. What we’re going to do is develop a model that will let us test the extent to which extra-legal factors influence decision.”

Powe, a legal academic who also teaches in a political science department,<sup>18</sup> knows that the quantifiers have not made much progress with their positive program. In large part because of the demands for statistical rigor that the quantifiers impose on themselves, their “legal model” is ridiculously simplified,<sup>19</sup> and the studies that purport to show the model’s inadequacies as a predictor of judicial behavior will persuade no serious legal academic. The quantifiers’ alternative is more promising, but the attitudes and other social or political factors they invoke are again too simple for their account to be entirely persuasive.<sup>20</sup> Even so, the quantifiers’ epistemological challenge to interpreters like Professor Powe is quite serious.

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<sup>18</sup> See p. xv, describing Professor Powe’s joint appointment in the Government Department.

<sup>19</sup> For a description of the “legal model,” see JEFFREY A. SEGAL & HAROLD SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 32 (1992) (“the legal model postulates that the decisions of the Court are based on the facts of the case in light of the plain meaning of statutes and the Constitution, the intent of the framers, precedent, and a balancing of societal interests.”); HAROLD SPAETH & JEFFREY SEGAL, *MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE SUPREME COURT* (1999) (testing the legal model by examining whether justices who dissent in one case later adhere to the new precedent or to their dissents). Adherence to precedent is only one component of a well-specified “legal model.” A judge might refuse to follow the precedent and still be acting in accordance with a legal model rather than implementing his or her policy preferences (if, for example, the judge, after giving adherence to precedent due weight, concludes that it is outweighed by the requirement that he or she implement the Constitution’s original understanding).

<sup>20</sup> And, unfortunately, making the models more complicated is likely to reduce the number of cases in each category so severely that the statistical standards the quantifiers impose on themselves are unlikely to be satisfied. In describing the “attitudinal model,” which “claims that the decisions of the Court are based on the facts of the case in light of the ideological attitudes and values of the justices,” *ibid.*, Segal and Spaeth refer to the aggregation issue in describing the models attention to “a specific area of the Court’s decision making (e.g., death penalty or affirmative action) . . . [and] the justices’ attitudes toward civil liberties generally.” *Id.* at 33.

I should say at the outset that I am on Professor Powe's side in this dispute.<sup>21</sup> As Part I of this Essay suggests, I would sometimes offer somewhat different interpretive accounts of the Warren Court's decisions, emphasizing more than Powe does the effects of a comprehensive ideology of Great Society liberalism on some outcomes. But I accept the general structure of explanation he employs. In what follows I suggest that that structure is subject to more questions than Professor Powe acknowledges, questions that come sometimes from the side of the legal academics and our "legal" focus and sometimes from the side of those who accept models in which extra-legal factors influence and even determine legal outcomes.<sup>22</sup>

Professor Powe sees the relation between politics and the Supreme Court running in two directions: The Supreme Court affects American politics, and American politics affects the Supreme Court. Section A examines his account of the effects the Supreme Court has on American politics; Section B explains why it can be helpful to look beyond the Court's words for an explanation of its decisions; and Section C examines Professor Powe's account of the effects politics has on the Supreme Court.

#### A. The Supreme Court in American Politics

The evidentiary problems associated with an examination of the Supreme Court's role in politics are, in the first instance, relatively minor. Professor Powe deploys the general form of the account repeatedly. It goes like this: The Supreme Court makes a decision. Members of Congress say things about the decision, introduce bills responding to it, and incorporate discussions of the Court's decision in their political campaigns. We know that the Court plays a role in politics because the politicians tell us so. This may well be true, but one can wonder about how important these political responses to the Court are when we examine the overall state of American society.

Here are three examples of this type of account. June 17, 1957, became known among the Court's critics as Red Monday because the Court handed down four decisions restricting the ability of national and state governments to investigate and regulate the activities of members of the Communist party (pp. 93-98). In the ensuing months, prominent national political figures

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<sup>21</sup> At one point Professor Powe endorses an interpretive account I offered of Justice Thurgood Marshall's position in *Powell v. Texas* (p. 443). Although I continue to accept my own account, I use it below as an example of some of the epistemological problems the quantifiers have identified. See text accompanying notes — *infra*.

<sup>22</sup> A prominent alternative to the epistemological stance that motivates my discussion deserves mention. My stance is that interpretations require supporting evidence. The alternative is that any interpretation consistent with indisputable facts can be acceptable as long as a group of readers finds it satisfying. For a recent and accessible discussion of these epistemological issues, see JOYCE APPLEBY, LYNN HUNT, & MARGARET JACOB, *TELLING THE TRUTH ABOUT HISTORY* (1994).

denounced the Court for “go[ing] too far” (p. 101). Congress responded with the Jencks Act, which accepted the core of the Court’s holding that defendants were entitled to view prior statements of government witnesses but allowed judges to control the timing of that access. A year later, Congress “came dangerously close to passing” legislation that would have severely restricted the Supreme Court’s power to review decisions in domestic security cases (p. 133).<sup>23</sup> The legislation’s sponsors of course referred regularly to the Court decisions that motivated their proposals.

A second example is provided by the nomination of Abe Fortas to succeed Warren as Chief Justice. During the hearings on the nomination, Senator Strom Thurmond took the Supreme Court’s criminal procedure decisions as the focus of his opposition to Fortas’s promotion. Referring to a 1957 decision holding that federal courts could not admit into evidence a confession made during a period of unreasonable delay before bringing a suspect before a magistrate, “Thurmond exploded: ‘Mallory, Mallory, Mallory, I want that word to ring in your ears—Mallory. A man who raped a woman, admitted his guilt, and the Supreme Court turned him loose on a technicality’” (p. 471).<sup>24</sup> And during the hearings a witness presented what came to be known as the “Abe Fortas Film Festival,” consisting of clips from sexually explicit films that the Court, with Fortas sitting, had found protected by the First Amendment (p. 472).

Finally, the Court’s criminal procedure decisions, and particularly its expansive protection against self-incrimination through confession, became part of “[t]he [p]olitics of ‘[l]aw and [o]rder’” of the late 1960s (p. 407). Again, legislation was introduced, and enacted, purporting to require that courts admit into evidence all voluntary confessions, with the absence of *Miranda* warnings to be treated simply as one factor going to voluntariness.<sup>25</sup> During his 1968 campaign for the presidency, Richard Nixon said that “some of the courts have gone too far in weakening the peace forces against the criminal forces” (p. 410, quoting Nixon).

In these and other instances, politicians expressly made the Court’s actions a focus of their political actions – their legislative proposals or their campaigns. In that sense, the Court played a role in politics. But, we might ask, did the Court *make a difference*? Consider the three episodes I have used to illustrate the Court’s role. Court-stripping legislation, while proposed, was not enacted. Abe Fortas was not confirmed as Chief Justice, of course, but the primary

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<sup>23</sup> The quotation is taken from Earl Warren’s memoirs.

<sup>24</sup> The case Thurmond referred to was *Mallory v. United States*, 354 U.S. 449 (1957). The decision turned on the Court’s interpretation of a federal Rule of Criminal Procedure, presumably alterable by Congress, rather than on the Court’s interpretation of the Constitution. Thurmond has never had a clear grasp of law.

<sup>25</sup> The Supreme Court eventually held the statute unconstitutional in *Dickerson v. United States*, 120 S.Ct. — (2000).

reason for the nomination's failure was the Republican expectation that Richard Nixon would win the presidency in 1968.<sup>26</sup>

Cultural shifts, which Professor Powe discusses (pp. 354-57), were more influential in making sexually explicit material widely available than the Court's obscenity decisions. Those shifts would have made it increasingly difficult for prosecutors to obtain convictions for distributing sexually explicit materials even if First Amendment law had remained where it was before Warren's appointment. As Professor Powe puts it, "It would be a mistake to see the law as driving the market" (p. 348). He points out that the *Story of O*, an up-scale piece of words-only pornography, was published *before* the Court's 1966 decisions that made it impossible as a practical matter for *any* prosecutor to obtain a conviction for distributing material that was not hard-core pornography (p. 348-49).

As for the politics of crime: Politicians were responding to public concerns about *crime*, not about the Supreme Court's decisions as such. At least sometimes, the politicians attributed those rates to the Court's decisions. But, as Professor Powe points out, the crime rates rose because of simple demographic considerations: Young men make a large contribution to crime rates, and in the 1960s there were more young men around than earlier. "With an age cohort like that, it didn't matter where one turned for statistics; they were going to show a huge jump in crime" (p. 408). The Court's criminal procedure decisions were largely irrelevant to the politically salient matter, the high crime rates; the Court could have done all that it could to assist Nixon's "peace forces," and crime rates would still have gone up, and politicians would still have developed a politics of law and order, and the liberal "ins" would have been charged by the "outs" with responsibility for the rising tide of crime.

At most, then, the Supreme Court's role in American politics seems to be to serve as a focal point for political positions taken for other reasons. It remains unclear to me how significant this role is. Focal points can matter, of course, and perhaps politicians would find it harder to mobilize support on some specific issues if they did not have the Court to focus on. Still, I confess to feeling that Professor Powe's political account of the Court's role has something of an "inside the Beltway" tone to it: Much of the discussion deals with maneuvering in and around Congress, without conveying a sense that anyone other than a political junkie should care about such maneuverings.

## B. Why Look at Politics At All?

Professor Powe is concerned with the other side of the relation between the Supreme Court and American politics – the role that politics play in Supreme Court decision-making. Normatively oriented legal scholars typically disdain that kind of account. To them, what the Court says is what it does. That is, Supreme Court opinions invoke the Constitution's language,

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<sup>26</sup> See p. 468 ("Republicans wanted delay until after Nixon's victory."). I acknowledge that the Democratic-controlled Senate might not have acceded to the Republican interest absent opposition by some Southern Democrats to the Warren Court.

precedent, original understanding, and the like, asserting that those sources provide the reasons for the Court's results.<sup>27</sup> And here, to the normatively oriented scholar, *reason* has two meanings. The sources provide the normative justifications – the reasons in a justificatory sense – for the results, and they are the causal factors – the reasons in a causal sense – for those results.<sup>28</sup> On this view, we need look no further than the Court's decisions to account for the Court's actions.

I have no doubt that justificatory reasons *can* be causal factors in a person's actions, including his or her decisions.<sup>29</sup> But *are* they such factors in Supreme Court decision-making? As I have suggested, the quantifiers seem to rely on the legacy of legal realism for their hypothesis that such reasons are not causal factors.<sup>30</sup> Although Professor Powe does not explicitly address the question of the relation between justificatory reasons and causal ones, sometimes his analysis suggests the grounds he has for looking beyond what the Court says to find explanations for what it does.

Professor Powe sometimes offers what appears to be a normative critique in writing about particular cases. On first blush, the presence of such critiques in a political history is puzzling.<sup>31</sup> Why should it matter that a decision was well or poorly reasoned? In part, it might matter because one might think – although I do not – that badly reasoned opinions are more likely than

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<sup>27</sup> Some of Professor Powe's formulations occasionally suggest that he accepts the normatively oriented scholar's approach, at least with respect to some decisions. *See, e.g.*, p. 346 (referring to Justice John Marshall Harlan's "devotion to traditional judicial craft").

<sup>28</sup> I should note that normatively oriented scholars sometimes are uninterested in finding the reasons in a causal sense for the Court's decisions, particularly if they are advocates seeking to persuade some justices of the correctness of the positions the scholars advocate. The enterprise of persuasion rests on the proposition that reasons in the justificatory sense can be reasons in the causal sense as well, and to the extent that an advocate can control only arguments and not other causal factors, the advocate is properly uninterested in causal factors other than reason.

<sup>29</sup> I know that there is a large philosophical literature on the causal role of reason in action, but I am so unfamiliar with it that even a standard "See generally" citation would be misleading, suggesting that I – rather than my research assistant – actually tracked down the literature and thought about what it said.

<sup>30</sup> *See* SEGAL & SPAETH, *supra* note —, at 65 (noting that "[t]he attitudinal model has its genesis in the legal realist movement of the 1920s.>").

<sup>31</sup> Of course such critiques might simply be the residual effects of Professor Powe's interest in normative analysis. *See* p. xiii, where Professor Powe describes himself as an "academic (and periodically practicing) constitutional lawyer."

well reasoned ones to be the subject of political controversy.<sup>32</sup> But in part we might want to pay attention to whether an opinion is well reasoned because examining the quality of the reasoning might serve what we can call a diagnostic purpose.

I use Professor Powe's account of *Brown v. Board of Education* to exemplify the way in which analytic criticisms can help identify when the Court's asserted reasons are not causal factors in its decision. Professor Powe presents criticisms of Chief Justice Warren's opinion that are by now more or less standard. First, the opinion cited works by social scientists to support a crucial step in the Court's argument. But those works actually did not do so.<sup>33</sup> In addition, one – *An American Dilemma* – was written by Gunnar Myrdal, a Swedish scholar whose critics had already charged him and his work with socialist tendencies (p. 42). And even worse, as Professor Powe puts it, “Judges can claim, fairly or not, an expertise in law. They cannot claim an expertise in psychology” (p. 40). *Brown* thus on its face abandoned law for some other intellectual enterprise, or at least was an innovation whose reliance on unusual sources needed to be defended more effectively than Warren's opinion did.

Second, the Court ordered reargument in *Brown* in part to gather information about the original understanding of the Fourteenth Amendment's drafters and ratifiers regarding school segregation. After argument,<sup>34</sup> the Court found the evidence “inconclusive.”<sup>35</sup> But, Professor Powe argues, the Court did so only because its focus was too narrow. The Court looked at whether the framers and ratifiers “intended to bar segregation” (p. 41), and correctly found the evidence that they did inconclusive (at best). Professor Powe says that history could have been used “successfully and honestly to reach the result in *Brown*” (*ibid.*). The framers and ratifiers sought “to protect the equality of all Americans . . . but especially that of African-Americans” (*ibid.*). They mistakenly believed that segregation was compatible with racial equality under a regime of “separate but equal.” By the time *Brown* was decided, it was apparent that “de jure

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<sup>32</sup> As I have suggested, see text accompanying notes — *supra*, the causal chain operates in the other direction: Disagreement with outcomes leads critics to say that the opinion is badly reasoned.

<sup>33</sup> For example, the famous “doll tests” by Kenneth and Mamie Clark, which were said to support the conclusion that African American students attending schools segregated by law had lower self-esteem than other students, showed that African American students attending schools in the North actually had *lower* self-esteem than the children tested in southern schools. P. 43.

<sup>34</sup> Actually, the key justice, Felix Frankfurter, came to the conclusion that the historical evidence was inconclusive *before* the argument, based on research his law clerk Alexander Bickel did over the summer preceding the reargument. See MARK TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961, at 203-04 (1994).

<sup>35</sup> 347 U.S. 483, 489 (1954).

segregation and equality in American society were incompatible. Where there was legally enforced segregation, there was no equality” (*ibid.*).

How can this critique of *Brown* support a search for extra-legal causal factors, beyond the reasons the Court gave for its decision? One possibility is what we might call the *deeply cynical* view.<sup>36</sup> In its strongest form the deeply cynical view is that the reasons the Court gives for its actions are always so obviously inadequate that something else must be going on.<sup>37</sup>

The cynic would conclude from Professor Powe’s analysis that the opinion in *Brown* was so inadequate – failed to supply justificatory reasons for the result reached – that the causal reasons for the decision must lie outside the opinion. The cynic might be wrong, however. Professor Powe acknowledges that Chief Justice Warren was working under some concededly self-imposed constraints: Warren wanted the opinion to be short, so that everyone in the public could read it, he wanted it to have a tone that did not accuse southerners of moral failings, and he wanted the opinion to have the support of every justice on the Court. In addition, Warren faced a legal constraint whose force Professor Powe does not acknowledge. The lower courts had found that the schools provided to African Americans were in fact equal to those provided whites.<sup>38</sup> Those findings would have made it quite difficult for the Court to adopt Professor Powe’s theory that segregation and equality in physical facilities were necessarily incompatible. An opinion relying on that theory would have been at least as vulnerable to criticism as the one Warren actually wrote.

In fact, I find it quite hard to imagine an opinion that could satisfy the constraints under which Warren was operating that would *not* be vulnerable to the kinds of criticisms Professor Powe develops.<sup>39</sup> Consider brevity, for example. A longer opinion might well have simply

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<sup>36</sup> In some ways, the deeply cynical view is the obverse of the normatively oriented academic lawyer’s view: The latter treats the reasons given in an opinion as justificatory and therefore causal, while the former treats those reasons as never justificatory and therefore never causal.

<sup>37</sup> For reasons I suggest below, note — *infra*, this strong version may be the only one a cynic could actually defend.

<sup>38</sup> The Delaware case rested on the contrary finding, and the lower court there justified its desegregation remedy on the state’s failure to satisfy the requirement that separate facilities be equal. Notably, however, the Court had previously remanded the South Carolina case so that the lower court could determine whether the state was in fact making such progress toward equal facilities that it could be confident that the “separate but equal” requirement would soon be satisfied. See TUSHNET, *supra* note —, at 165-66.

<sup>39</sup> Professor J.H. Balkin is editing a collection of “opinions” in *Brown* written recently by law professors. Had I been invited to participate, I would have been strongly tempted to reprint the actual opinion, with one additional footnote, citing JORGE LUIS BORGES, “Pierre Menard,

presented more targets for critics to shoot at.<sup>40</sup> This response to Professor Powe's criticisms does not defeat the cynic's view, however. True, the lower court fact-finding was a legal constraint, but we could still ask, "Why did Warren think a short, unanimous opinion was an important goal?" The answer would certainly take us to extra-legal considerations, such as Warren's desire that ordinary people could read and understand the opinion. And that could fairly be described as introducing a political factor into the causal account.

Other cases might pose more problems for the cynic proceeding from the proposition that an opinion's legal reasoning is so weak that something else must be at work. Put bluntly, sometimes opinions might be inadequate because their authors are not very good lawyers. In such cases the reasons offered in the opinion would not be justificatory reasons, because they are insufficient to support the result, but they could still be causal ones, the things that actually motivated this less-than-fully competent judge to reach the result he or she did.<sup>41</sup>

The cynic's view, then, cannot fully motivate the search for extra-legal causal factors in judicial decision-making: The reasons a judge offers may or may not justify the result, but they may nonetheless be causal reasons.

The second ground for seeking extra-legal causal factors has several variants. One combines the normatively oriented scholar's view with the cynic's. In this variant sometimes the reasons offered justify and account for the result, but sometimes they do not even though the opinion's author is competent enough to produce an opinion of the first type. We would then look for answers to two questions. First, why did *this* opinion have the shape that it did, that is, why did this otherwise competent judge produce an opinion that fails to justify the result? Second, why do some opinions satisfy the normatively oriented scholar's standards and some do not?

Another variant might begin by noting that sometimes, equally competent judges disagree. One writes a decent opinion for the majority, and another dissents, also with a decent opinion. This might be taken to illustrate a more general phenomenon, which we might associate with moderate legal realism. To a moderate legal realist, the Supreme Court considers a set of cases characterized by the possibility of reasonable disagreement over the result required by the standard sources for legal analysis. When Justice Black and Justice Harlan disagree, it need not be because one is a good lawyer and the other an incompetent, but because they assess and

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Author of Don Quixote," in FICCONES 45 (Anthony Kerrigan ed. 1962) (a story about an author who sought to reproduce Cervantes's book word for word, but as a creative writer and not a copyist).

<sup>40</sup> As the joke goes, "The more you write, the less I understand."

<sup>41</sup> The possibility that a judge may not be a very good lawyer is the reason that the strong version of the cynic's view may be the only defensible one. The cynic can defeat the claim that this particular opinion is inadequate because the judge was not a good lawyer only by asserting that *all* opinions are inadequate.

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process the legal materials differently. And then it becomes quite reasonable to ask why these two, or any other judges, assess and process the materials as they do, because we know that not all judges do so in the same way.

One response might look to social and psychological characteristics: One judge was raised a Catholic, the other an Episcopalian; one practiced corporate law in New York, the other was a politician before each became a judge.<sup>42</sup> Another, the one Professor Powe provides, looks to politics.

### C. Politics in the American Supreme Court

Politics might play a role in Supreme Court decision-making in at least two ways. First, we might think of the justices as politicians seeking to implement the policies they prefer, without examining why they prefer those policies.<sup>43</sup> As politicians, the justices know that they are working in an environment with other political actors – members of Congress, state legislators, the president, lower court judges, and the like. And the justices know that those other actors may disagree with the justices about what policies should be advanced. Such judicial politicians will act strategically, developing the law in a way that gets them as far as they can before they meet insurmountable resistance by other politicians.<sup>44</sup> Second, we might try to identify the justices' preferences, as we do when we call one a liberal and another a conservative and use those labels to predict what the justices will do in a pending case.<sup>45</sup>

The primary difficulty with both approaches is evidentiary. How do we know what the justices' preferences are when our only evidence is their published opinions? The quantifiers can make some head-way, but hardly enough, by looking to other sources of evidence.

Those who see the justices as strategic decision-makers might be able to rely on internal Court documents, and particularly the memoranda the justices send to each, which might reveal

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<sup>42</sup> For a discussion of this approach to causal analysis, see BAUM, *supra* note —, at 31-32.

<sup>43</sup> They might have substantive policies they seek to advance, or they may want to maximize their own power for its own sake, without much regard to what they can do with it once they have it. My own view is that the former goal is more important than the latter for nearly all justices, but that the latter goal is not absent.

<sup>44</sup> For an explication of the strategic view of Supreme Court decision-making, see LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998).

<sup>45</sup> Again, this is the approach taken in the so-called attitudinal model. *See* note — above.

strategic thinking.<sup>46</sup> Professor Powe provides a useful example in his discussion of the 1964 sit-in cases (pp. 227-29). The cases were pending just as Congress was considering a major civil rights bill proposed initially by President John F. Kennedy and then pushed more vigorously by President Lyndon Johnson. Initially the Court voted 5-4 to affirm the convictions of civil rights protesters for violating state laws against trespassing. Justice Brennan urged the Court “to reverse the convictions lest the Court accidentally derail the civil rights bill” (p. 228), but he did not prevail, at least at the outset. Justice Brennan then engaged in a series of maneuvers aimed at delaying the announcement of a decision, eventually, in Professor Powe’s words, “concoct[ing] a reason to avoid the merits” (p. 229) that persuaded Justices Tom Clark and Potter Stewart to vote to reverse the convictions.

The evidence about Justice Brennan’s strategic actions in the sit-in cases is about as clear as one could find. Unfortunately, the evidence is quite unusual, though not unique.<sup>47</sup> It is not that justices do not engage in strategic action; rather, the problem is that, if they do, they rarely leave the kind of paper trail that Justice Brennan did. The internal documents only infrequently express in any explicit way whatever strategic judgments their authors have made.<sup>48</sup>

Professor Powe’s analysis of the Supreme Court’s decisions on the retroactivity of its criminal procedure decisions provides a useful illustration. The Court typically held that its most far-reaching decisions did not affect the validity of convictions already entered. Here is Professor Powe’s explanation:

Warren, Brennan, and Fortas voted for nonretroactivity because it freed them to do good. They understood that if the criminal procedure rules were retroactive, then there would a huge backlash against the changes and the Court. Making the decisions nonretroactive muted that backlash. Clark, Harlan, Stewart, and White also wished to minimize the effects of the criminal procedure decisions, not to free them to do more but because they

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<sup>46</sup> Professor Powe writes, “Because this is an external rather than an internal history of the Court, I placed little interest or reliance on the papers of the individual justices” (p. 534). For the reasons given in the text, I do not think this is adequate in light of the kind of external history Professor Powe offers.

<sup>47</sup> See, e.g., p. 72 (reporting Frankfurter’s comment to a law clerk on the Court’s unprincipled affirmance, after a remand failed to induce the lower court to act as the justices hoped, in *Naim v. Naim*, a challenge in the immediate aftermath of *Brown* to laws barring interracial marriage: “One bombshell at a time is enough.”)

<sup>48</sup> Interviews, either with justices or law clerks, might be another source of evidence. H.W. PERRY, *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* (1991), relies on interviews that reveal strategic decision-making at the stage of selecting cases for full-scale review. Perry’s work does not report on inquiries into decision-making on the merits. I would be skeptical about the candor (of justice-interviewees) and accuracy (of law-clerk-interviewees) in interviews about the process of actually deciding argued cases.

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believed the decisions were wrong. They voted nonretroactivity to minimize the damage, not the backlash, the decisions would cause (pp. 426-27).

Professor Powe does not cite any internal documents in which a justice mentioned these strategic considerations, and I recall seeing none in my examination of the papers of Chief Justice Warren and Justice Brennan.<sup>49</sup> Further, Professor Powe notes that the latter four justices “did not perceive” that full retroactivity actually would limit the damage more than nonretroactivity would, by increasing the political cost of adopting new constitutional rules (p. 427). And, of course, his analysis of law-and-order politics shows that the three liberals who supported nonretroactivity failed in their effort to “mute[] th[e] backlash.”<sup>50</sup> One might infer from these observations either that the justices were not very good at acting strategically, or that they were not trying to act strategically.

Even more, if the justices act strategically, they do so not just with respect to external political actors like Congress, but with respect to each other as well. So, for example, a reference in a memorandum to what Congress might do might not represent its author’s concern but might rather be a statement the author calculates is likely to persuade the recipient.

I turn now to those interested in the justices’ preferences. They too can look outside the opinions for evidence. So, for example, they might try to identify the justices’ preferences by examining what the justices said before they were judges, or what the president who nominated them said about them, or what newspaper editorialists said about them before they were confirmed. Here the problem is that this evidence is likely to be extraordinarily thin, because the actual cases presented to the Court frequently implicate values about which these pre-judicial sources say little or nothing.<sup>51</sup>

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<sup>49</sup> I examined those papers almost a decade ago, however, and the retroactivity cases were not a focus of my research. Such memoranda may exist.

<sup>50</sup> It could be, of course, that the politics of law and order would have been even more adverse to the liberals had they made the decisions fully retroactive. In that sense the retroactivity decisions would have “muted the backlash,” but not by enough to ensure that the liberals’ victories would survive in the political arena. At the same time, of course, the liberals did prevail in the sense that major Warren Court criminal procedure decisions, including *Miranda*, remain at least formally good law.

<sup>51</sup> One can thicken the evidence somewhat, by noting that a justice’s comments before appointment locate him or her in some broadly defined ideological camp, that after the appointment people in that camp take a particular position on a specific issue, and that the justice too takes that position on that issue. Here the difficulty is that there are frequently differences among people in broadly defined ideological groupings, which lead them to take varying positions on specific issues. Consider, for example, contemporary differences between libertarian conservatives and traditionalist ones. To say that we know that, prior to a judge’s appointment, he or she was a conservative does not let us infer that the judge’s decision in a case

The up-shot of the evidentiary difficulties is that the argument typically proceeds on an “as if” basis. Strategic analysts impute a preference to a justice, then argue that the justice’s behavior is consistent with a strategic effort to implement that preference. Analysts who want to explain a justice’s preferences invoke extra-legal considerations that are consistent with the justice’s actions.

Much of the external account of Supreme Court decision-making that Professor Powe offers falls into this second category. To give a flavor of the argument, I will first simply compile a series of descriptions and quotations that reveal Professor Powe’s interpretive strategy. As to each example, we have to ask ourselves, “What precisely is the evidence for that?”<sup>52</sup> Then I will examine some of Professor Powe’s accounts in more detail.

Writing of the Supreme Court’s decision in 1957 that obscene materials were not protected by the First Amendment, Professor Powe says, “Imagine the headlines” if the Court did find them protected. “This Court was being hit from too many sides to now bring every minister in the nation into battle against it” (p. 115). Of the Court’s decisions in *Cox v. Louisiana* and *Brown v. Louisiana*, reversing convictions of civil rights demonstrators while indicating that the First Amendment did not protect every act of political dissent, Professor Powe writes that the cases “indicated that the era of seeing demonstrations as pristine exercises of First Amendment rights had passed. It was now the era of mobs and anarchy” (p. 274).<sup>53</sup> *Jones v. Alfred H. Mayer* found that the 1866 Civil Rights Act provided a cause of action for discrimination in the sale of housing even though “[t]he most logical decision . . . would have been to dismiss certiorari as improvidently granted” because of the intervening enactment of the 1968 Civil Rights Act (p. 299). But, Professor Powe writes, “The Court too wished to do its part to help quell the urban violence” (*ibid.*). Turning to good use Justice Black’s observation in *Griswold v. Connecticut* that the “Court certainly has no machinery to conduct a Gallup Poll,” Professor Powe observes that the justices “had the ability to read Gallup Polls” and could infer that popular disdain for the anti-contraceptive statute at issue there made *Griswold* “a free case” (pp. 375, 376).<sup>54</sup>

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in a manner consistent with the libertarian position resulted from the judge’s ideological commitment rather than his or her view of what the law required, because the judge might have been a traditionalist conservative prior to appointment.

<sup>52</sup> I will not repeat this question for each example, but the question must be asked each time.

<sup>53</sup> See also p. 324 (“the time for toleration of youth had passed” when the Court decided *United States v. O’Brien* and upheld a statute making it a crime to burn a draft card).

<sup>54</sup> A.E. Dick Howard’s review of *The Warren Court and American Politics*, Washington Post, May 7, 2000, p. X-6, cites this passage to support his conclusion that Professor Powe “overreaches the evidence.”

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I turn now to a more detailed examination of some of Professor Powe's arguments. His account of the origin and persistence of the period of stalemate from 1958 to 1962 gives Justice Frankfurter a central role. The stalemate occurred after Congress came close to passing bills eliminating the Supreme Court's jurisdiction over controversial cases. Professor Powe writes that "[t]he Court tried not to send any tactical nukes toward Congress in 1958," offering Congress several "peace offerings" (p. 127). These included a decision indicating rather clearly how governments could fire people who invoked their Fifth Amendment right against self-incrimination as the reason for their refusal to answer questions about their affiliations with the Communist party.<sup>55</sup> But these "peace offerings were too little, too late" (p. 139), and Congress turned against the Court.

Once again Professor Powe offers a strategic account. That account is less satisfying than others he provides. The Fifth Amendment decision might have been a peace offering, but at virtually the same time the Court refused to allow the Secretary of State to deny passports to suspected communists.<sup>56</sup> True, the passport decision's holding was the seemingly narrow one that the Secretary's practice lacked statutory authorization. But the Red Monday decisions were merely statutory too, and they had provoked Congress. Why would a Court intent on making peace offerings wave a red flag at the same time? And why use one case rather than the other as the vehicle for making the peace offering?

In any event, as Professor Powe puts it, "The anti-Court bills caused Frankfurter to get religion again" (p. 141). Concerned that the Court's liberal decisions endangered the Court's independence, Frankfurter ended "his dalliance with the four liberals" (p. 142). And this shift was permanent: "The congressional debates and votes in the summer of 1958 convinced Frankfurter that the Court could not sustain itself against such intense opposition and led him to join the more conservative justices to create an impregnable five-vote bloc" (p. 179). I think that this explanation is probably largely correct, but there are substantial evidentiary problems with it.<sup>57</sup> First, the assault on the Court came close to succeeding, which is to say, it failed. Why would not Frankfurter conclude that congressional liberals were strong enough to thwart attacks on the Court, and that he could continue to "dally" with the liberals without threatening judicial independence? Second, why did Frankfurter continue to vote with the conservative bloc once the immediate threat to the Court passed? Another person might have thought that the liberal advance should slow down or even halt for a while, giving liberals in Congress time to rebuild

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<sup>55</sup> *Lerner v. Casey*, 357 U.S. 468 (1958) (holding that a person could be fired after invoking the Fifth Amendment because the invocation demonstrated a lack of candor).

<sup>56</sup> *Kent v. Dulles*, 357 U.S. 116 (1958).

<sup>57</sup> Morton Horwitz's brief overview of the Warren Court offers the same explanation for what Horwitz calls the Court's retreat from 1957 to 1962. See MORTON J. HORWITZ, *THE SUPREME COURT AND THE PURSUIT OF JUSTICE* 64 (1998) ("The explanation seems to be the Jenner-Butler Bill").

their defenses of the Court. As the issue of domestic communism lost its political salience, Frankfurter could have returned to the liberal fold. Instead, the Court in 1961 supported important domestic-security initiatives in cases that Professor Powe describes as “about as good an example of the dead hand of the past ruling the Court as one gets” (p. 154).

In Professor Powe’s apparent view, Justice Frankfurter was permanently traumatized by the 1958 events. I can fairly easily generate alternative hypotheses. Perhaps Justice Frankfurter was one of the rather large group of people who get more conservative as they get older.<sup>58</sup> Perhaps he simply changed his mind about the issues. Or, as a supporter of the legal model might think, perhaps Justice Frankfurter voted as he did because the later cases presented different issues. Notably, the earlier cases, in which Justice Frankfurter had voted with the liberals, turned on statutory interpretation colored by constitutional considerations, while the 1961 domestic-security decisions presented the Court with pristine constitutional issues uncontaminated by a statutory overlay.<sup>59</sup>

Professor Powe provides a political explanation as well for *Terry v. Ohio*, which upheld the police practice of frisking people they found suspicious even though the officers lacked probable cause to arrest the suspects. Professor Powe “wonder[s] if *Terry* would have been similarly decided two years earlier, but the situation in June 1968 when *Terry* was decided” was dominated by a new “great concern” for ““law and order”” (p. 407). Once again there is an obvious alternative hypothesis. As Professor Powe points out, the Warren Court was not systematically hostile to law enforcement interests. In a series of important cases it upheld the use of police informants, whose presence among wrong-doers revealed to the informants information and statements later used in prosecutions.<sup>60</sup> *Warden v. Hayden*, written by Justice Brennan, abandoned the well-established rule that the police could obtain warrants to search only for contraband, materials used to commit crime, or materials that were the product of crime, in favor of the more prosecution-favorable rule that the police could search for “mere evidence.”<sup>61</sup> After technological developments improved the capacity of the police to engage in sophisticated forms of surveillance, and thus raised more serious questions about invasions of privacy than existed when the technology was more primitive, the Court indicated that they could engage in wire-tapping to obtain evidence, as long as they did it under judicial supervision. The decisions, in Professor Powe’s words, “looked to supervision, not elimination of electronic surveillance” (p. 405).

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<sup>58</sup> See RICHARD POSNER, *AGING AND OLD AGE* — (1995).

<sup>59</sup> Professor Powe himself points this out. See p. 154 (“the 1957 decisions had largely been on non-constitutional grounds. When the issues reappeared in 1961, the solid five-man majority was willing to reach the constitutional merits. . .”).

<sup>60</sup> The cases are discussed at pp. 400-03.

<sup>61</sup> The case is discussed at p. 405.

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The Court rejected the “mere evidence” rule in *Hayden* because it did not make sense in light of the premises upon which search and seizure law had come to rest. The decision, that is, rationalized the law of search and seizure. We might see the Court’s criminal procedure decisions as pursuing a related rationalizing program. As Professor Powe argues, *Gideon v. Wainwright* can be understood as the Court’s effort to modernize antiquated systems of criminal defense. As I suggested above, *Miranda v. Arizona* imposed standards slightly more stringent than those used by the best police investigators in all police departments. The informant and wiretapping cases can be understood as similarly aimed at bringing unprofessional police operations into the modern era of professional law enforcement. The Court was not so much opposed to law and order as it was interested in promoting orderly law enforcement.<sup>62</sup>

My final example comes from Professor Powe’s account of *Powell v. Texas*, where the Court rejected the claim that public drunkenness statutes violated the Constitution by punishing the offender because of his status rather than for what he did. The line-up of the justices in *Powell* is interesting: Justice Marshall wrote the plurality opinion, in which he was joined by Chief Justice Warren and Justice Black and Harlan, and Justice Fortas wrote for himself and Justices Douglas, Brennan, and Stewart.<sup>63</sup> Justice Marshall’s opinion expresses skepticism about the factual record compiled to show that chronic alcoholism in public was a status rather than an action; unlike the painstakingly detailed records Justice Marshall had helped compile in the litigation leading up to *Brown*, here the record consisted of one expert witness’s testimony at a hearing in the Dallas, Texas, police court. Justice Marshall’s opinion also had a pragmatic strain: Public drunkenness was a serious problem both for the public and for the alcoholics, but the public had not yet figured out how to treat chronic alcoholism in any way other than by forcing the alcoholic to “dry out” while in custody. Quoting my own work, Professor Powe writes that the plurality “saw public drunkenness as a practical problem of government” (p. 443).<sup>64</sup>

Not surprisingly, I agree with that assessment. But I am acutely aware of the limited evidence I had for making it. Apart from the short discussion in *Powell* itself, I found nothing in the case files describing the issue in *Powell* as a practical rather than a legal one. My assessment rested primarily on my familiarity with Justice Marshall’s life and his intellectual surroundings. His friends were progressive lawyers imbued with the spirit of professional reformism, and he was a practicing lawyer dedicated to figuring out ways to achieve progressive, professionalist

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<sup>62</sup> Professor Powe makes a point much like this in his discussion of some of the Court’s decisions about what he calls “[t]he [c]riminal [j]ustice [s]ystem” (p. 412). These decisions included the extension of constitutional rights in juvenile court proceedings. The cases “represent a reformist agenda writ large” (p. 443). Professor Powe points out that they were much less controversial than the Court’s decisions dealing with policing itself (p. 444).

<sup>63</sup> Justice White cast the deciding vote, but did not join the plurality opinion.

<sup>64</sup> Quoting MARK TUSHNET, *MAKING CONSTITUTIONAL LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1961-1991*, at 183 (1997).

reforms. He had lived in Harlem for over twenty years, taking the subway to and from work and encountering on the streets those targeted by public drunkenness statutes. It seems to me highly likely that his legal experience brought home to Justice Marshall the practical limits on professionalist reformism, and that his personal experience brought home to him the importance of doing something to help those who needed it, if only by giving them a chance (or forcing them) to “dry out.” Not only quantifiers, but people seeking concrete evidence of political or intellectual influences on judicial decisions would rightly be uncomfortable with the evidence on which I based my judgment.

I must note that the account I have sketched of the Warren Court’s criminal procedure and criminal justice decisions certainly does invoke extra-legal considerations, and, as my discussion of *Powell* indicates, is subject to just as many evidentiary objections as Professor Powe’s account. Professor Powe’s accounts generally operate relatively close to the ground in identifying the political considerations said to affect the Court’s decisions.<sup>65</sup> My account invokes politics more broadly understood: not what happened in Congress last month or what is likely to have an impact on the next election, but what ideas and values people bring to their actions in public life.<sup>66</sup>

The evidentiary question remains: How do I know that Justice Marshall had the ideas and values I impute to him, and how do I know that those ideas and values came into play in *Powell* in the way I suggest? If there is an answer, it comes from the disciplines other than contemporary American political science. Knowledge at the level that seems to me necessary comes from understanding, not measurement. And understanding comes from a deep immersion in the details of events, not by counting.<sup>67</sup> I have raised the evidentiary questions I have about Professor Powe’s work not because I think his particular explanations are wrong, but because they are in a sense too thin. By focusing on what happened in Congress, Professor Powe places too little weight on what was happening in the intellectual culture of twentieth century liberalism. A more complete treatment of the Warren Court and American politics will expand its view beyond the Beltway.

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<sup>65</sup> In this way they have some of the same “inside the Beltway” tone I find in Professor Powe’s discussion of the Supreme Court’s role in politics. *See* text accompanying note — above.

<sup>66</sup> In some sense that is the sort of account sought by the quantifiers, although in their case that may result as much from a need to aggregate enough cases so that statistical analysis is possible as from a theoretical commitment to the view that high-level ideas and values are what matters. As I have suggested, I doubt that the quantifiers’ project can succeed because the tools they have available for measurement are too crude.

<sup>67</sup> The standard term in the philosophy of the social sciences for understanding of this sort is *Verstehen*, a way of gaining knowledge characteristic of historical and anthropological studies.

## *The Politics of Constitutional Law*

Professor Powe's more general comments offer a broader view, but they are not as well-developed as his more particularized analyses. So, for example, he writes of some liberal decisions in the late 1950s, "when interpreting the Constitution, the Court did not appear to be ahead of the country. . . . [The cases] all offer constitutional interpretations that, while new, nevertheless brought constitutional law into harmony with mid-twentieth century values" (p. 122). The later Warren Court "reach[ed] results that conformed to the values that enjoyed significant national support in the mid-1960s. . . . The goal of government was to match American's ample resources with good and able men working together to solve society's problems and supply its needs" (p. 215). During the 1960s the Court and Congress formed a partnership: "Each was working as hard as it could to improve American life" (p. 265). The theme here is obvious: The Warren Court implemented values already having substantial support in the national political community, against more parochial values concentrated in what mid-century liberals saw as backward areas like the South and cities dominated by Catholic politicians.

This seems to me largely right, and a valuable corrective to the more common view that the Warren Court was a crusader for minorities unable to advance their causes in legislative and executive arenas. But it cannot be completely right, as Professor Powe's comments at the conclusion of his discussion of reforms of the criminal justice system indicate. Professor Powe observes that "Congress was not dealing . . . with the aspects of poverty involving criminal justice. Like *Brown* before, the Court acted because no one else would. Furthermore, unlike *Brown*, the Court also now believed no one else could do it better" (pp. 443-44). Here Professor Powe accurately portrays a Court acting on its own, not as a collaborator with existing legislative forces. How can that portrait be accommodated to the more consensual picture Professor Powe generally draws? It seems to me that the answer again must come on a higher level. The Warren Court and progressive liberals had a vision of the good society. By the end of the Warren Court era, they had come to believe that their vision should be implemented by whoever was able to do so: If Congress got there first, the Court would back it up, and if the Court got there first, progressive liberals would defend the Court against attack. I have sometimes put it this way: In the Great Society, liberals thought, we had to have a Great Court.

In the end, however, the normative legal academics can fairly question the cogency of either Professor Powe's rather narrowly focused accounts or some broader one. Perhaps the best explanation for what the Court does is that the justices are deploying their best understanding of the Constitution. I think that explanations like Professor Powe's and mine are better than that one, but I am reasonably sure that the evidence does not conclusively demonstrate the validity of either the normative explanation or explanations that invoke extra-legal considerations.

### III. Conclusion

Professor Powe's book is, again, spectacularly good. It retrieves the nearly forgotten period of stalemate. Its argument that the South must be seen at the center of the Warren Court's work in free speech, religion, and criminal procedure, illuminates the Court's enterprise better than any other account of which I am aware. While *The Warren Court and American Politics* is

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not the last word on its subject, for a long time it will be the first place to go for anyone seeking to understand what the Warren Court was and did.