Book Review

Lucas A. Powe, Jr., *The Supreme Court and the American Elite, 1789–2008*, Cambridge: Harvard University Press, 2009, pp. 432, $29.95.

Reviewed by Joerg Knipprath

Near the beginning of his historical excursion through American constitutional law, *The Supreme Court and the American Elite, 1789–2008*, Professor Lucas A. Powe, Jr., relates that Thomas Jefferson in 1792 wrote to James Madison, his political ally and fellow-Virginian, to express his displeasure with the political activities of another Virginian. The target of Jefferson's spleen was, as on many an occasion, John Marshall, his distant cousin and political burr-under-the-saddle. Jefferson opined that Marshall should be retired from politics. Towards that end, the best thing to do was to make Marshall a judge. Powe dryly tosses off a one-liner: "If only Jefferson had a sense of irony" (42).

Lack of a sense of irony is certainly not Powe's flaw. The account exemplifies several of the qualities that make this book a wonderful read. First, there is Powe's understated and puckish humor. Second, there is the pleasure of the minor historical detail that enhances one's understanding of major characters, cases, and events. Third, there is the sense of keen appreciation of the drama and complexity of the Supreme Court's interactions with other political entities as their orbits crossed within the constitutional firmament of what is broadly called separation of powers.

I purposely use the characterization of the Supreme Court as a political entity here, because it is that dimension that Powe explores. This is not a history of the Court's *habeas corpus* jurisprudence or its development of implied private rights of action in federal securities laws. Rather, it is an examination of that most essentially political aspect of its jurisdiction, the exercise of constitutional judicial review.

Before proceeding with some more specific observations about the book, I want to consider the overall approach. Trying to contain more than two centuries of Supreme Court history in a book of merely 350 pages of text, and rather small pages at that, would seem an almost fanciful undertaking. But Powe succeeds remarkably. The book's coverage maintains its structure through a deft combination of personalities, topics, and eras. There is an impressive concision of language that successfully condenses the historical influences that must be mentioned for a full context of a major theme, but

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where their fuller development might needlessly detract from the flow of the story. On the whole, the balance between enlightening detail and thematic panorama works quite well.

The prose is very fluid. There is none of the turgidity to which one is too frequently condemned when reading the works of academics. The pace moves along, and the different eras of the Court are given similar attention. The allocation of coverage is judicious, and one is not left with the sense that any era is given short shrift. If I had to judge by the number of pages and the degree of detail, I should think that Powe is particularly fond of the Court's founding decades. About one-quarter of the book is devoted to the years until the death of John Marshall. That attention is eminently warranted, given the importance of that time for the emergence of an independent judiciary and for the foundations of so much constitutional doctrine.

An author has to decide for which audience he or she will write the book. This becomes a particularly tricky matter when the approach is that of neither the basic John Grisham-style legal thriller nor that of something with a ponderous title suitable mainly for a flurry of academic presentations. In the latter case, once the initial excitement wears off, the work will sit in calm repose on a bookshelf at a law school library to be checked out once a decade by some hapless student writing a seminar paper or a law review article. In either of those cases, the author's decision is easy.

Powe's book is not directed at those whose taste in books never rises above Michael Crichton, Dean Koontz, or John Grisham. Now, I hasten to add that they are all fine writers whose works are entertaining distractions that also offer much factual information as part of their tales. But they write for mass entertainment, and Powe's book is not that.

The book as a whole, with its interplay of cases, justices, and events reminds one of a more compact and less academically intense (and, thereby, more accessible for the lay reader) version of Bernard Schwartz's superb *A History of the Supreme Court*.[1] Powe's book should appeal to anyone with a fondness for the larger-than-life American epic and who seeks more detail about one of the institutions that has shaped that story. Some general background in American history and government is necessary, but not beyond what even an amateur enthusiast would develop with readings in the field. It probably also would help to have some passing familiarity with constitutional law issues. Though not a categorical requirement, that familiarity would be helpful in dealing with the rapidity with which cases often appear and quickly recede before one has gotten settled with the new arrivals. But the bigger cases are discussed in a sufficiently generous manner that, even as a constitutional law novice, one can appreciate their significance.

1. Bernard Schwartz, A History of the Supreme Court (Oxford Univ. Press 1993). Professor Schwartz wrote in his preface that he hoped his book would appeal to the general reader as well as specialists. While the book deserves all accolades it has received, I am not sure that Schwartz's hope was realized.

In that vein, Powe writes that "[t]his is a law professor's book enlightened by political science and history" (viii). Though this sounds vaguely like the academic mea culpa of law professors that their discipline is not of quite the same intellectual pedigree as the latter two, I think that Powe's purpose was to demonstrate that the reader need not fear being subjected to large doses of "whereas," "to wit," and odd Latin phrases for points just as easily made in English. In short, the book does not require a juris doctor degree.

There is one more choice that the author of such a historical overview of the Supreme Court has to make. Powe declares that he wants to make the Court more than a supporting actor with an occasional cameo appearance, as is its fate in the typical survey book about American history. But the Supreme Court is both an institution and a collegial body composed of intelligent and, mostly, assertive individuals. The author, therefore, needs to make a strategic decision about which aspect to emphasize, the institutional or the personal, and to what extent.

One of the classic non-encyclopedic works on the doctrinal history of the Supreme Court by Kelly, Harbison, and Belz, *The American Constitution*,[2] overwhelmingly falls on the institutional side of the line. The individual justices and their personal backgrounds, ideological convictions, and jurisprudential assumptions, even as these might work themselves out within collegial deliberations, have little influence on the narrative. The justices appear more as opinion readers than active participants. Instead, that book's focus is on the product that emerges from the Court and which represents the institution's contribution to American ideas and policies. The individual justices, if I may be permitted a bit of hyperbole, might as well be anonymous functionaries. This doctrinal and institutional approach lends itself very well to academic study but requires an intellectual commitment that relatively few lay people will make casually. That is not a fault of the authors, who have produced an intense but, at least to the constitutional law savant, surprisingly readable book. The fault, if any, lies with the ability of most readers to relate more to persons than to abstract ideas.

On the other hand, *Justices, Presidents, and Senators*,[3] Henry Abraham's important history of appointments of members of the Supreme Court, emphasizes the roles and personalities of the individual justices. Abraham covers the evolution of doctrine, as well, but his effort portrays that evolution as the result of a succession of personalities, both presidents and justices. The justices occasionally appear as somewhat uncertain agents or limited judicial extensions of the appointing president. More significantly, they are portrayed

2. Alfred Kelly, Winfred Harbison & Herman Belz, The American Constitution (7th ed., W.W. Norton & Co. 1991).

3. Henry Abraham, Justices, Presidents, and Senators: A History of U.S. Supreme Court Appointments from Washington to Bush II (5th ed., Rowman & Littlefield Publishers, Inc. 2008).

as the craftsmen of the Court's doctrine, with their individual backgrounds, views, and personalities tempered, but not amalgamated, through the Court's collegial decision-making process.

Powe attempts a middle course, though he lists towards the institutional side. His analysis of the impact of the personalities and backgrounds of the justices on the evolution of doctrine is often accomplished with a remarkable economy of verbiage. Here, for example, is his description of Chief Justice Salmon P. Chase: "Whatever else might be said about *Hepburn v. Griswold* [the Legal Tender Case], Chase, *always angling for a presidential nomination* [emphasis added], had badly overplayed his hand, probably in the hopes of being the hard-money choice of the Democrats in 1872" (132). This wonderfully terse six-word interjection not only helps explain Chase's decision to overturn the very same law that he had advocated less than a decade earlier as Abraham Lincoln's Secretary of the Treasury to make the unbacked greenback dollar legal tender for all debts. It also encapsulates the very personality of Salmon P. Chase, who sought the Republican presidential nomination in 1856 and 1860, even maneuvered for it a while in 1864 as Lincoln's political future and the Union's shifting military fortunes were entwined, and sought the nomination of both major parties in 1868.

As promised earlier, I want to take the opportunity to mention some of the particulars that make Powe's book such a good read. There is that dry sense of humor, often contained in the easily-overlooked quick throw-away phrase. Here is Powe's description of Theodore Roosevelt's well-known reaction against Oliver Wendell Holmes's dissent in the *Northern Securities*[4] case, a government-brought antitrust action TR was sure Holmes would support: "Roosevelt, who trucked no dissent on important matters, supposedly stated that he 'could carve out of a banana a judge with more backbone than that,' though he truly wanted invertebrates" (164). This is followed a few lines later by his description of the first justice John Marshall Harlan, known for his solitary dissents in some of the era's great cases, as "a leader without followers." Learning about a challenge to the constitutionality of state provisions that allowed popular initiatives, the reader finds that, "Perhaps understanding that it is easier to buy half a legislature than half the electorate…, Pacific Telephone and Telegraph challenged initiative and referendum as inconsistent with Article IV's requirement of a republican form of government"(178). Describing the Court's upholding the constitutionality of the application of the infelicitously-named Mann Act (intended to combat interstate prostitution rings) to private flings, Powe summarizes thus: "When state lines are crossed, *Gibbons v. Ogden* held that commerce was intercourse; almost a century later, *Caminetti v. United States* inverted that equation: nonmarital intercourse was commerce" (183).

4. N. Sec. Co. v. U.S., 193 U.S. 197 (1904).

Interesting historical tidbits and details about cases, personalities, and events are so numerous that a very few examples will have to do. One learns, for example, that, in *Gibbons v. Ogden*[5], the future steamship and railroad magnate Cornelius Vanderbilt was employed as the pilot of Thomas Gibbons's Hudson River ferry service that operated in defiance of Aaron Ogden's license from Livingston and Fulton's New York steamship monopoly (75). Edward White, who was elevated by President Taft from associate justice to chief, "had a good mind," Powe wrote, "but tortured the interminable sentences he composed" (179). Having read some White opinions, I wholeheartedly agree. Powe makes no such claim, but I attribute that style to White's Jesuit education. His sentences in those opinions have the complexity and structure of works written in Latin and subsequently translated into a vulgar (in the original meaning of the word) tongue.

Commenting on the pugnacious reactionary James McReynolds, a former Vanderbilt law professor and attorney general under Woodrow Wilson, Professor Powe informs us that McReynolds could have been (but was not) a member of the Ku Klux Klan. "Later in his career, when Charles Houston, the first Negro on the *Harvard Law Review* and the NAACP's head of litigation, was arguing, McReynolds turned his chair and faced away from Houston for the entire argument (and then dissented)" (179). Ouch! Things got worse for McReynolds. "To McReynolds's chagrin, the next appointee was a Jew—the highly intelligent, humorless, self-righteous Louis D. Brandeis, who during the presidential campaign had become a principal advisor to the highly intelligent, humorless, self-righteous Wilson"(179). Combined with the highly intelligent, humorless, self-righteous McReynolds, that is a lot of intelligence and self-righteousness, though very little humor, among those protagonists.

Regarding Franklin Roosevelt, there are some revelations that lessen the great man's aura. Those must come as a surprise to many, though not to those who understand that the FDR program was the supreme reification of the American Progressivism whose humorless and self-righteous march through history had been stopped temporarily by the worldly optimism of the Roaring Twenties.

> Roosevelt was urged by some, including Walter Lippmann, to consider a dictatorship. His inaugural address hinted at the possibility…. [T]he line that got the most applause was Roosevelt's asking Congress "for the one remaining instrument to meet the crisis—broad executive power to wage a war against the emergency, as great as the power that would be given to me if we were in fact invaded by a foreign foe." [Citation omitted.] With Hitler taking over in Germany, Mussolini holding the reins in Italy, and Stalin controlling the Soviet Union, applause at such a suggestion was so disconcerting that even Eleanor Roosevelt was troubled. Imagine, then, the reaction of those wedded to the Constitution, especially as it was construed by the Four Horsemen [a reference to the conservative justices, Willis Van Devanter, James McReynolds, George Sutherland, and Pierce Butler] (202).

5. 22 U.S. (9 Wheat.) 1 (1824).

Imagine, indeed. If Progressivism combined with the political tools of war was to be the rule, the result for those who did not get with the program was likely to be that expressed by another of Wilson's attorneys-general, Thomas Gregory, about opponents of World War I: "'May God have mercy on them, for they need expect none from an outraged people and an avenging government [Citation omitted.] (190).'" The current administration can only look on in envy at the follow-the-leader "non-partisanship" such a program was intended to cajole.

One more detail has to be mentioned, something of importance to those of us who have to read Supreme Court opinions. Powe vents for us: "The Court of the Carter-Reagan period could compete with any for producing lengthy, ponderous opinions on top of more lengthy, ponderous opinions, necessitating reducing the type size in the *United States Reports*. A contributing factor was the proliferation of law clerks, doubling in number from the 1960s"(289). I have often thought that cutting off heating and air conditioning to the White House, Congress, and all government offices, along with requiring the justices to research and hand-write their opinions personally, would take care of the problem of ever-expanding government.

Powe has a good mind for the broader interplay between the Court and the political branches, and between the Court and the states. He provides much insight into the elaborate choreography of the participants in the separation of powers and the blending and overlapping of functions among the branches that the Constitution prescribes. Not surprisingly, given the historical significance of the era for the establishment of the Court as a co-equal branch, that insight comes through most strongly in his review of the Marshall Court. Marshall was a first-rate judicial politician, whom good fortune (from the standpoint of the Court's defenders) brought to the Court at the exact moment of need. He was someone who proved himself masterful, tenacious, and, fortunately for the Court, long-lived. Powe distills the essence of Marshall's political skills with the observation that Marshall, when one looks past the rhetorical fencing and institutional posturing, never denied Thomas Jefferson what the latter wanted, save a conviction of Aaron Burr for treason.

The discussion of the *Dred Scott*[6] decision of 1857 is informed and insightful. Powe provides the expected thorough analysis of Chief Justice Taney's complex legal reasoning. But there is more. Powe explains the political aspect of the decision that has to be considered when evaluating the merits of the legal one. He contends that the case offered the last, best hope for settling the slavery issue. With political institutions increasingly stalemated on the issue, diverse politicians from the North and the South favored a judicial resolution. "Even the Whig-turned-Republican Abraham Lincoln did, publicly stating to an audience in Galena in the summer of 1856 that 'the Supreme Court of the United States is the tribunal to decide such questions, and we will submit to its decisions; and if you do also, there will be an end of the matter'" (105).

6. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

This was a quite different sentiment from that subsequently expressed by Lincoln during his 1858 debates with Stephen Douglas in the contest for one of the Senate seats from Illinois. In those debates, Lincoln rejected the finality of the political element in the Court's constitutional ruling by decrying the notion that the judges could be the "ultimate arbiters of all constitutional questions." Americans would be placed under "the despotism of an oligarchy" (114). Lincoln sounded like Jefferson, Jackson, FDR, Nixon, and most other presidents who have insisted on (at most) judicial equality, not supremacy, when they have fumed publicly or privately over an inconvenient decision.

I am puzzled, however, that Powe names his last chapter, about the last twenty years, "An Imperial Court," suggesting that to be a distinguishing characteristic of the current Court. While there have been a larger-than-normal number of federal laws declared unconstitutional, the premises of judicial supremacy were implied (though not stated and certainly not actualized) even in *Marbury v. Madison*.[7] Since then there have been numerous declarations and decisions by the Court proclaiming its own greatness. It is true that one of the most egregious declarations, the plurality opinion in the abortion case *Planned Parenthood v. Casey,*[8] addressing as it did not just the Court's superiority over the states and the political branches, but over the American people itself, came in 1992. Indeed, Justice Scalia in his dissent in that case characterized the Court similarly when he contemptuously summarized the most breath-taking passages of the plurality's paean to judicial supremacy with the dismissive, "The Imperial Judiciary lives."[9]

But the imperial judiciary is not new. Just judging by verbal bravado, there are many expressions of judicial supremacy in the *United States Reports*. There is Justice Robert Jackson's famous aphorism in *Brown v. Allen*[10] in 1953, "We are not final because we are infallible, but we are infallible only because we are final."[11] There is the classic opinion in *Cooper v. Aaron*[12] in 1958, where the justices, stretching the language of *Marbury*, scolded the segregationist massive resistance movement, "This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system."[13] Similar embellishments of the actual language in *Marbury* appear in *Baker v. Carr*[14] in

7. 5 U.S. (1 Cranch) 137 (1803).
8. 505 U.S. 833 (1992).
9. *Id.* at 996.
10. 344 U.S. 443 (1953).
11. *Id.* at 540.
12. 358 U.S. 1 (1958).
13. *Id.* at 18.
14. 369 U.S. 186 (1962).

1962 (describing the Court as the "ultimate interpreter of the Constitution"[15]), *Powell v. McCormack*[16] in 1969 (declaring that it is the Court's responsibility "to act as the ultimate interpreter of the Constitution"[17]), and *United States v. Nixon*[18] in 1974 (quoting approvingly the "ultimate interpreter" language from *Baker v. Carr*[19]). Moving from verbal bravado to actual jurisprudence, the proudly unabashed activism of the Court, accompanied by hosannas from the legal elites, has been felt by society over the last half century, at least. The judicial take-over of prisons and schools, for example, is the result of the Court's activist approach to criminal procedure, and desegregation.

As a rule, though, Powe's analysis of the dynamism of what Justice Jackson once referred to as enjoining on the branches "separateness but interdependence, autonomy but reciprocity,"[20] is thoughtful and convincing. Nothing in my preceding comments is intended to detract from that.

I trust that I have been (justifiably) enthusiastic about Powe's book. This is the place where, in studied dispassion, a reviewer will utter his or her reservations, if any are to be had. Initially, I have a few minor and moderate quibbles. I found his conclusion that Thomas Jefferson supported a re-charter of the Bank of the United States by 1811 puzzling (67). Powe provides no source for this claim, and my research has turned up none. James Madison had certainly changed his mind by 1815 from his earlier opposition, but all that I have found regarding Jefferson is evidence of unwavering opposition expressed in letters during his Presidency and at least as late as 1816.

Similarly provocative is the assertion that the Fourteenth Amendment's Equal Protection Clause is founded on Andrew Jackson's 1832 message vetoing the re-chartering of the Second Bank of the United States (137). There is a reference in that message to equal protection, as Powe notes. But in my research I have found no evidence in either the debates about the Fourteenth Amendment or in the *Slaughterhouse Cases*[21] opinions that those who proposed and adopted that amendment thought they were constitutionalizing Old Hickory's anti-Bank ideology. Perhaps that evidence is there, but it would have been enlightening to have those sources cited, as well as Jefferson's support of the Bank.

A less minor concern is that the book loses its by-and-large ideologically detached tone when Powe discusses the most recent eight years of the Court's decisions. That is the danger from an all-too-common professional hazard, a lack of needed historical distance when analyzing recent events.

15. *Id.* at 211.

16. 395 U.S. 486 (1969).

17. *Id.* at 549.

18. 418 U.S. 683 (1974).

19. *Id.* at 704.

20. 36 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

21. 83 U.S. (16 Wall.) 36 (1873).

For example, his offhand reference to the religion of the majority in the latest "partial-birth abortion" case, *Gonzales v. Carhart,*[22] is at once entirely gratuitous and subversive of the legitimacy of the decision by insinuating that it was based on the Justices' theological beliefs rather than fidelity to (as they saw it) constitutional principles (343). Quite appropriately, he undertakes no similar religious litmus testing of other justices' opinions, not even in the religion cases. Justices Breyer and Ginsburg's Judaism and Justices Stevens and Souter's mainline Protestantism are not suggested as the reason for their support for an unenumerated constitutional right of partial-birth abortion.

Powe also adopts too easily the standard contemporary law professor's pose of treating all enhanced interrogations of suspected terrorists as "torture" (346, 348–49). Indeed, he mis-characterizes the Military Commissions Act of 2006 as permitting the use of evidence obtained by torture, when the statute in fact barred the use of such evidence (though it permitted use of coerced statements obtained through methods short of torture).[23] He editorializes that the Republicans were "supine" and the Democrats "electorally frightened" when the Congress approved President Bush's request for the 2006 Act (348), the very path that the Supreme Court had overtly instructed the political branches to follow in *Hamdan v. Rumsfeld*.[24] One may be permitted to observe that the same policies (with a few modifications of debatable impact) are being followed by the (still electorally frightened?) Democratic-controlled Congress and Obama Administration in the recent Military Commissions Act of 2009.[25]

But those comments pale in significance to another reservation, one that nonetheless does not ultimately detract from the merits of the book itself. Still, it is an irritation. The problem is the book's title. When I first saw *The Supreme Court and the American Elite*, I expected a book about, well, the Supreme Court and the American elite. My expectation was not met.

One might debate the meaning of the term "elite." But most people probably would understand that term to mean in a republic, the thin upper crust of the population that naturally emerges in a society without an unduly restrictive caste system based on birthright. Those are the people who, to a degree disproportionate to their numbers, control the institutions that make the commonwealth what it is. They would include political statesmen; leaders of production and commerce; perhaps military chieftains (to borrow Henry Clay's pejorative about Andrew Jackson); prominent artists, composers, and writers; and influential members of the academy, the legal profession, the media, and the scientific community. It might also include members of socially dynastic families and, in a reflection of the state of today's culture, prominent entertainers.

22. 550 U.S. 124 (2007).

23. *See* Joanne Mariner, A First Look at the Military Commissions Act of 2009, Part Two, Nov. 30, 2009, http://writ.news.findlaw.com/mariner/20091130.html (last visited Jun. 23, 2010).

24. 548 U.S. 557 (2006).

25. 123 Stat. 2574 (2010) (to be codified at 10 U.S.C. § 948 *et seq.*).

Thus, before opening the book, I expected an examination of the connection between the Supreme Court and these evolving elites, with explicit consideration of shared values and goals and of the justices' backgrounds and class connections. Upon seeing the book's compact size, I was astonished that such a task could be undertaken in 350 text pages. Frankly, I was also hesitant about the writing style that such an effort was likely to induce.

Going by this definition of elites, there is very little of what the title promises. Such references as there are tend to the brief and indirect. Indeed, I wonder whether, in my desire to find evidence of what the title promises, I read too much into these snippets. Powe, however, seems to have a different concept of elites. He sees the Court "as a part of a ruling regime doing its bit to implement the regime's policies"(ix). But in the next paragraph, he identifies as the book's dominant theme the Court's essence as a "majoritarian institution."

Now, if Powe is seeking to align himself with various scholars who have rejected the traditional view that the Court is an anti-democratic institution (which, in the traditionalists' opinion may well be a good feature, not a drawback), fine. There are respectable arguments of exactly that type. Those are arguments that I find too attenuated to be persuasive, but they are intellectually respectable. One of them is that the Court may not be quite as democratic in the everyday sense as the people's tribune, the president, but it still reflects the popular attitudes of the times. Presidents appoint new justices whose personalities and outlook are shaped by comparatively recent events and broad societal trends. Moreover, in the words (minus the Irish brogue) of Finley Peter Dunne's fictional sardonic, yet wise, barkeeper Mr. Dooley, "the Supreme Court follows the election returns."

The problem with Powe's definition is two-fold. One is that it is not the definition of an elite; it is that of a temporary electoral majority. It is impressive conceptual alchemy to turn a majority into an elite, even counting that significant numbers of people do not vote in any particular election. The other problem is that, even accepting his definition, the cases he cites as often as not show the opposite, namely, the Court as, at least in the particular result, an anti-majoritarian institution.

As to the first, even leaving aside the definitional contradiction, it strains credulity to believe that the electoral majorities that propelled Andrew Jackson, William Henry Harrison, James Polk, Richard Nixon, and Ronald Reagan, to name a few that won significant popular victories, reflected the "elites." Certainly it would have surprised those worthies and their campaign staffs. Of course, Powe might counter with other examples, such as the elections of William McKinley, Franklin Roosevelt, Lyndon Johnson, and, most recently, Barack Obama that do suggest a convergence of the preferences of the elites and the popular majority. Still other elections, such as those of Abraham Lincoln and Woodrow Wilson, were ambiguous for various reasons. It is less than settled, though, that electoral majorities represent anything more than electoral majorities.

As to the second, Powe recounts numerous examples where the Court opposed the popular majority. The lengthy discussions of the Court's push-back against the aggressively (in the Court's view) class-based policies of the Progressives is one example. As mentioned above, the Court redoubled that effort in the early years of the New Deal's nascent corporatism. Judging by both polls and at least occasional Congressional and presidential reaction, much of the Court's modern liberal-leaning jurisprudence in criminal procedure, establishment clause cases, capital punishment, and terrorist detentions has had a definite anti-majoritarian tilt.

At the same time, that counter-majoritarian element may well represent the attitudes of the then-regnant political and cultural elites. The well-reported phenomenon of "growing in office," a euphemism for absorbing the attitudes of the dwellers in the salons of Georgetown, affects some number of Supreme Court appointees. Those elites have the same views as are expressed in the Court's opinions in the above-mentioned constitutional topics. But they are not those of the majority. As Powe points out, "*Furman v. Georgia*'s prediction that the nation no longer wished for capital punishment proved disastrously wrong as the decision created its own opposition. Support for capital punishment jumped decisively after *Furman*, reaching far better than 2–1 by 1976" (294). As a consequence, capital punishment as a concept was found constitutional in *Gregg v. Georgia*.[26]

That discussion of the death penalty also contains one of those seemingly inadvertent references to the connection between the justices and the elites. Referring to Justice Thurgood Marshall's bitter dissent in *Gregg*, Powe writes that, "when he [Marshall] said in *Furman* that Americans were opposed to the death penalty, he had meant informed Americans, and he insisted that still held. By claiming that an informed American would hold the same beliefs he held, Marshall effectively consigned over two-thirds of the nation to the uninformed category" (294).

The previously-discussed plurality opinion in *Planned Parenthood v. Casey*[27] is an even more flagrant example of anti-majoritarianism. The plurality (O'Connor, Kennedy, Souter), perhaps cognizant of *Roe v. Wade*'s[28] strike against democratic decision-making and the continuing political friction that case produced, channels Chief Justice Taney's spirit in *Dred Scott* to settle a divisive issue. The very continuation of popular opposition to *Roe* was perceived as a reason not to overrule the case, even if the usual considerations would militate in favor of overruling. The plurality there saw the American people's ability to connect to their constitutional ideals as inextricably tied to their acceptance of the legitimacy of the Court as the proper authority to decide constitutional issues once and for all.

26. 428 U.S. 153 (1976).

27. 428 U.S. 153 (1976).

28. 410 U.S. 113 (1973).

Justice Scalia's dissent in *Planned Parenthood v. Casey* unloads on the plurality's posturing with all the devastating analytical and rhetorical firepower he can muster. Powe's critique is spot on. He touches on the anti-majoritarian elitism that streams through the plurality's rhetoric:

> [The troika] asserted that the belief Americans hold of themselves as a people who live according to the rule of law "was not readily separable from their understanding of the Court…[as] speak[ing] before all others for their constitutional ideals." [Citation omitted.] "Before" meant way above…. The troika spoke as though to say, "We do it all for you, our people" (314).

But Powe ignores Justice Scalia's barbs and misses an opportunity to address how the Court majority (including the two, Blackmun and Stevens, who were not part of the plurality) reflects the attitudes of the American cultural and political elites.

In none of these examples was there consideration of the attitudes of the contemporary elites against which the Court's decisions might be contrasted. There is the occasional inchoate reference to elites, such as the putative effect on the Supreme Court's Reconstruction-era civil rights jurisprudence from the Republicans' emerging combination with the interests of big business (144). Another example is Powe's description of the reaction to *Lochner v. New York*[29] in 1905, when the Court struck down a maximum-hour law on the basis of a posited liberty of contract that was protected under the Constitution's due process clauses. Reviewing Justice Oliver Wendell Holmes's claim in his dissent that a large part of the country disagreed with the Court's theory, Justice Powe points out that, whether or not Holmes was correct, "the *Nation*, the *Washington Post*, the *New York Times*, and three other New York dailies saluted the decision" (169). Still, there is no systematic analysis of the connection between the Court's decisions and elite opinions.

Another such example is the controversy surrounding the Dorr War, a civil war in Rhode Island in the early 1840s, as small as the state itself. The constitutional side of this contretemps was brought to the Supreme Court in *Luther v. Borden*[30] in 1849. Powe ably discusses these events and the Court's eventual (non)-decision (89–91). But aside from a brief reference to American Lockeanism, there is no discussion of what was pointedly argued by the parties' attorneys as a clear clash between popular majoritarianism and elite republicanism. The Court, by punting the dispute as non-justiciable, took the side of the elite that controlled the constitutional debate and the military facts on the ground (if not the eventual political resolution) in Rhode Island.

One final example comes tantalizingly close. As Powe relates, President Reagan's attorney general Edwin Meese ignited a firestorm among the legal-journalistic elites by reiterating the entirely sensible distinction between the Constitution and the Court's opinions about the Constitution. His arguments

29. 198 U.S. 45 (1905).

30. 48 U.S. (7 How.) 1 (1849).

were a reprise of a distinction that emphasized popular sovereignty over judicial supremacy, one made in powerful arguments about institutional constitutionalism by Jefferson, Jackson, Lincoln, and Franklin Roosevelt, among others. Unfortunately, this event and the roughly contemporaneous attacks on the constitutional ideas of Judge Robert Bork (whose confirmation Powe also addresses) do not lead to an examination of the influence of organized elite groups on the selection of justices and the Court's decisions. All the reader gets is, "A cascade of anathemas, pronounced by the leaders of the bar, prominent academics, and columnists, rained down upon Meese. They all claimed that his position would undermine the rule of law" (302). With an eye on the book's title, the reader expects more. Other such missed opportunities are found in sentences spread throughout the book.

There are works that investigate the connection between the Supreme Court and American elites, a connection that is not only evident, but, in light of the judicial function, natural. For example, there is G. Edward White's fine study of the Marshall Court, a project that resulted in two volumes of the *Oliver Wendell Holmes Devise History of the Supreme Court* and in an abridged version, *The Marshall Court & Cultural Change, 1815–1835*. As White explains, he analyzed the Marshall Court as a cultural institution operating "in a cultural matrix in which the…decisions are seen as not merely set but in a sense imprisoned, so that the Court and its [j]ustices come to be characterized as distinctively time- and place-bound."[31] As a part of that effort, he investigated contemporary literature "on the ideologies of republicanism and liberalism, ideologies that have been identified by historians of the early Republican period as pervasive and potentially contradictory belief systems structuring American elite thought in the late eighteenth and early nineteenth centuries."[32]

White conspicuously lashed the Marshall Court, its opinions, and its practices to the cultural aspects that defined the American elite from which the justices were drawn. While erudite in style and intellectually rich in substance, that work is almost overpowering. It covers only two decades, though with generous references to earlier events especially in the first two chapters, yet requires nearly 800 pages for its treatment of the topic. To repeat, that is the "abridged" version. Even someone keenly interested in the topic would need to muster a tremendous reserve of intellectual curiosity to read every word of that book.

There are, of course, more abbreviated treatments that connect some aspect of courts to the American elites. For example, Daniel Hulseboch's article "An Empire of Law: Chancellor Kent and the Revolution of Books in the Early Republic" is at the opposite end in length. That article also explores the connection between a judge and his court, on the one hand, and the American elite, on the other. "Kent's republican-inflected conception of the American empire was widely shared. From Thomas Jefferson's '[e]mpire of liberty'

31. G. Edward White, The Marshall Court & Cultural Change, 1815–1835 xiv (Oxford Univ. Press 1991).

32. *Id.* at xv.

and Alexander Hamilton's 'empire, in many respects, the most interesting in the world,' to John Adams's 'empire of laws, and not of men,' many in the founding generation referred to the new Union as a special empire that might avoid the corruption of the Roman and British Empires."[33] It is a fine article, well-researched and informative. It addresses its topic through a mere 32 pages (appendix excluded). But that brevity is purchased at the cost of a very finite and specialized topic that is unlikely to attract a readership beyond a highly-motivated cadre of experts.

Another manner of relating the work of the Supreme Court to the American elite is shown in Dean Larry Kramer's book, *The People Themselves: Popular Constitutionalism and Judicial Review*.[34] Kramer views the Court's history as the tale of a putsch by the elites against a regnant popular constitutionalism, which resulted in the capture of the Supreme Court by the elites and of the Constitution by the Supreme Court. That book, too, is well-written and intellectually powerful. It is of manageable length, though the book is not for the novice. But the volume focuses on one speculative proposition that it seeks to defend by evidence drawn predominantly from the first half-century of the Court's existence; it is not an examination of the Court's relationship with the dominant groups in America over the entire history of judicial decisions.

Other books that seek to connect cases to external events, ideas, and influences abound. In *A People's History of the Supreme Court*, Peter Irons looks at "the people who played leading roles in framing and interpreting the Constitution, and at those whose cases brought its important provisions before the Court."[35] That focus forces him, by his own design and admission, to leave out many important cases and slight some important issues. And, taking account of page length, Irons's book is double that of Powe's. A more extreme example might focus on just a few cases to illustrate certain pre-determined issues—here I point to an older work, *The Supreme Court in American History*,[36] which examines ten great cases, complete with the historical trends and the personalities that shaped them.

There would appear to be a common fate for efforts to connect the Supreme Court (or any other social institution) to broader historical trends, intellectual movements, or societal institutions. To formulate a persuasive explanatory framework and weave the Court's decisions into that framework within a book of manageable length cannot be done unless one finds some way, by era or topic, to limit the scope of the inquiry. It seems, then, that a quest of the

33. Daniel Hulsebosch, Meador Lecture Series 2007–2008: An Empire of Law: Chancellor Kent and the Revolution in Books in the Early Republic, 60 Ala. L. Rev. 377, 392 (2008–2009).

34. Larry D. Kramer The People Themselves: Popular Constitutionalism and Judicial Review (Oxford Univ. Press 2004).

35. Peter Irons, A People's History of the Supreme Court xvi (Penguin 2006).

36. Marjorie Fribourg, The Supreme Court in American History: Ten Great Decisions (Macrae Smith Co. 1965).

sort that Powe's panoramic title, *The Supreme Court and the American Elite, 1789–2008*, advertises, likely would founder on the Scylla of undue length or the Charybdis of incomplete coverage.

Fortunately, Powe avoids that fate. But he does so by completing an entirely different quest. Powe's book is successful at what it does, just not at what it advertises. If the reader desires a stylishly-written, brisk, informative, and quite thorough overview of the history and evolution of the Supreme Court's body of constitutional jurisprudence (perhaps called "A History/The Evolution of the Supreme Court's Constitutional Jurisprudence"), written by someone whose life has been devoted to teaching that jurisprudence, the reader will not be disappointed.