"A Supreme History"
REVIEW: 'The Most Powerful Court in the World: A History of the Supreme Court of the United States' by Stuart Banner
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BY David J. Garrow

UCLA law professor Stuart Banner's new book is simply *the* finest and most valuable book ever written about the U.S. Supreme Court, a work of such erudite breadth and interpretive sophistication that in a world governed by merit it would be a slam-dunk winner of an upcoming Pulitzer Prize. Yet in today's deeply degraded media landscape, only one major publication—the *Wall Street Journal*—has seen fit to give it the review attention it so richly deserves.

Banner served as a law clerk to the late justice Sandra Day O'Connor in 1991-92 (the term best known for *Planned Parenthood* v. *Casey*), so he brings an insider's familiarity with the institution. But to this reader his book's greatest originality concerns the Court's many decades preceding World War II, times less familiar to most of us than the post-1945 era.

Everyone who knows most anything about the pre-Civil War Court can cite two names: John Marshall, chief justice from 1801 until his death in 1835, and his best known opinion, *Marbury* v. *Madison* (1803), which is widely understood as having created the Court's power of judicial review of all state and federal statutes. Yet Banner convincingly demonstrates that "the Court had the power of judicial review from the very beginning." Creating the Court received "unanimous approval" at the otherwise often-discordant Constitutional Convention, and in the ensuing state ratifying conventions there was likewise "no debate over whether the new Supreme Court would have the power to declare statutes unconstitutional." While "the Court's judicial review cases of the 1790s," most importantly *Ware* v. *Hylton* (1796), "are not well-known," by 1803, when *Marbury* struck down for the first time a *federal* statute, "there was nothing new or controversial about judicial review. American courts had been invalidating legislation as unconstitutional for many years."

Yet John Marshall was without question *the* dominant justice of his era; during his 34 years as chief justice he authored 547 opinions while *all* the other justices combined penned 574. Banner rightly highlights *McCulloch* v. *Maryland* (1819) as the most important of Marshall's decisions, for it "would become the canonical expression of the view that the federal government can wield broad powers implied by, but not explicitly set forth in, the Constitution."

Twentieth-century justice Felix Frankfurter would write in 1955 that Marshall's declaration in *McCulloch* that "it is a *constitution* we are expounding" was "the single most importance utterance in the literature of constitutional law," and Banner correctly concludes that Marshall's jurisprudence "helped create the vision of the United States that is by and large taken for granted today."

Prior to the late 1860s, all of "the justices spent most of their time serving as circuit judges rather than as members of the Supreme Court," for the young nation's incipient lower federal courts depended upon the justices' regular presence, a practice known as "riding circuit" and which was "a grueling job" when all interstate travel was via horse and carriage or if lucky a riverboat. Thus "the justices were not in Washington very much," and when they were they "lived together in a boarding house, where they ate their meals, discussed their cases, and wrote their opinions."

Without a building of their own, oral arguments were heard in a small chamber deep in the Capitol. "Living together seems to have encouraged the justices to downplay their differences and to speak with one voice most of the time," Banner observes, for published dissents were surprisingly infrequent. What's more, since the justices did not control their own docket, almost always "the Supreme Court was an ordinary court that decided banal legal disputes with no political implications." Thus "the great cases are unrepresentative" of the justices' pre-Civil War toils, and "this was a Court that scarcely resembled the institution it would become."

Nonetheless, "the justices' policy views profoundly affected their decisions in politically inflected cases," most notoriously in *Dred Scott* v. *Sandford* (1857) when the Court unnecessarily yet fulsomely embraced race slavery. While critics "were not shy about proposing legislation to curtail the Court's authority," the justices' embrace of white supremacy survived the postwar adoption of the 13th, 14th, and 15th Amendments. When in 1876 the Court fundamentally gutted the 14th's protections for the newly freed African Americans, even northern commentators embraced the decision, with the *New York Times* praising "the impartiality and wisdom of the court." As Banner observes, "the justices considered racial inequality an ineradicable fact of life" and thus "the Court normally acquiesced in the southern states' establishment of the Jim Crow regime of race discrimination."

Although not nearly as famous as John Marshall, former president William Howard Taft, who served on the Court for less than nine years (1921-30), was an almost equally consequential chief justice, although not for any opinions he authored.

Taft's two institution-redefining achievements usually go unacknowledged, although not by Banner: championing congressional passage of the Judiciary Act of 1925, which gave the justices almost total control of their docket, and initiating the construction of the Court's own building, the "Marble Palace," into which the justices moved in 1935.

Giving the Court mastery over the docket "transformed" the justices "from passive recipients of cases to active participants in the making of the law," Banner emphasizes. Additionally, "once the Court gained the power to choose which cases it would hear, the norm against expressing dissent evaporated." In 1925 only 6 percent of cases featured a published dissent, but 20 years later that figure had risen to 50 percent. Likewise, "as the composition of the Court's caseload shifted from mostly humdrum cases to mostly important ones, the Court's physical surroundings changed to match," Banner writes, as the huge, grand new building "made the Court seem like a more august institution" than when it had been relegated to the innards of the Capitol. "The Court of 1935," Banner adds, not only "looked very different from the Court of 1920. It had become much more like the Court we know today."

Another consequential byproduct of the 1925 Act was how the Court's control of its caseload soon began to witness "the biggest burst of new constitutional rights in the Court's history" as the justices gradually restored the 14th Amendment to meaningful life. Prior to the late 1930s the Court was always "a profoundly conservative institution," but between 1937 and 1941 President Franklin D. Roosevelt was able to appoint *seven* new justices, "all political allies with no judicial experience." Roosevelt's appointees pushed the Court in decidedly more liberal directions even as several duos among them came to loathe each other, with William O. Douglas calling Felix Frankfurter "utterly dishonest intellectually" and Frankfurter in turn labeling Douglas "completely evil."

"No President has ever transformed the Court so thoroughly" as Roosevelt, Banner notes, and four additional new appointees followed under FDR's successor, Harry S. Truman: two former Senate buddies and two of his own cabinet members. "All four of Truman's appointees remained close to Truman while they were on the Court," Banner notes, especially Chief Justice Fred M. Vinson, and FDR appointee Hugo Black refused to recuse himself from a case being argued by his former law partner.

Vinson's death in 1953 paved the way for President Dwight D. Eisenhower's appointment of California governor Earl Warren, "a politician who had never been a judge on any court." Everyone of course speaks of "the Warren Court" and

associates it first and foremost with its unanimous landmark 1954 ruling in *Brown* v. *Board of Education*, striking down racial segregation in public schools. *Brown* "was intensely controversial in its day," Banner reminds us, and not only among Southern white racists but also among top-rank law professors. Warren was "an unlikely figurehead for any liberal movement or institution," but "for a brief period," lasting "scarcely a decade and a half," the Court "became a force for social change."

"Neither before nor since has there been a period in which the Court changed the law so much" as 1954-69, especially with regard to criminal procedure, but "perhaps the most fundamental change the Court made to the American legal system during this period was to require equality in political representation" per *Baker* v. *Carr* (1962) and *Reynolds* v. *Sims* (1964), Banner accurately observes.

"When people with life tenure wield enormous power, much can depend on precisely when they die," as occurred in late 2020 when President Donald Trump was able to replace liberal icon Ruth Bader Ginsburg with top-notch conservative Amy Coney Barrett. All three of Trump's appointees were "well regarded court of appeals judges … who could have been appointed by any Republican president," Banner rightly states.

Banner's impressively expert, nonpartisan judgment suffuses this wonderful book. People who envision "the past as a time when the Court was not as controversial as it is now" are "mistaken," for no such time has ever existed. "The Court's importance lies in its decisions," and some of those decisions "have always aroused great controversy." Detractors who assert that the justices are embracing politics rather than the law "have *always* leveled this criticism at decisions they did not like," and their complaints "have been the same critiques for a very long time."

"The Court has changed much less than is commonly believed," Banner concludes, and "ordinary cases" still occupy "most of the justices' time." Implicitly invoking his own year there in 1991-92, Banner writes that "the Court can look very different from the inside, where most workdays are consumed with the daily grind of cases that most people will never hear of. It is hard to feel powerful or political while laboring" on such seeming minutiae.

Anyone—indeed *everyone*—seriously interested in today's Supreme Court is frankly *obligated* to read this meticulous, masterful, and compelling book.

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by Stuart Banner
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David J. Garrow's books include the Pulitzer Prize-winning Martin Luther King Jr. biography Bearing the Cross *and* Rising Star: The Making of Barack Obama.