

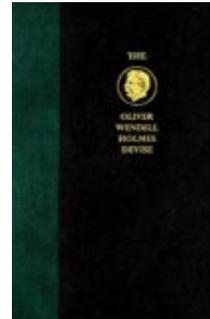
# H-Net Reviews

in the Humanities & Social Sciences

William M. Wiecek. *The Birth of the Modern Constitution: The United States Supreme Court, 1941-1953*. Cambridge: Cambridge University Press, 2006. xvii + 733 pp. \$100.00 (cloth), ISBN 978-0-521-84820-6.

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It has been a somewhat unfortunate fate. With the Hughes and Warren Courts serving as their siblings, the Stone and Vinson Courts have traditionally suffered as the proverbial middle children for legal scholars exploring the second third of the twentieth century. In part, this inattention is linked to the short duration of these two Courts, with both chief justices dying suddenly after only five and seven years (respectively) in the center chair. But more importantly, they have their siblings to blame. The Hughes Court (1930-41), after all, went to war with Franklin Roosevelt over the constitutionality of the New Deal, before making its “switch in time” and thereby sparking the “Constitutional Revolution of 1937.” The Warren Court (1953-69) offered a constitutional revolution of its own, remaking doctrine in a range of legal domains, including civil rights, criminal law, and the right to privacy.

While in recent years scholars had paid more attention to the important work done by the Stone and Vinson Courts, no one has offered a thorough treatment of their nature and significance until William M. Wiecek’s *The Birth of the Modern Constitution: The United States Supreme Court, 1941-1953*. In this well-written volume, Wiecek devotes most of his attention to masterfully taking his readers through the doctrinal developments of these two Courts. Before doing so, he explores the philosophical underpinnings of the Stone/Roosevelt Court and provides fairly detailed biographies of FDR’s nine appointees (and the holdover Owen Roberts). In part 2 of the book, Wiecek covers the Court’s work on the First Amendment Freedoms in wonderful detail, with two chapters on Free Speech and two on the religion clauses. His explanations of the various tests the Court developed to guide lower court judges facing similar cases are

clear, and thoughtfully incorporate historical developments. He begins part 3 (“World War II and the Constitution”) with a chapter that persuasively makes the case that “the Court’s first encounter with political speech issues after 1941 indicated that it cherished a greater respect for speech and press freedoms than had its predecessor in the previous war” (p. 291). He then recounts the Court’s “uneven” record on military courts and treason before exploring the world of 1944 to understand the Japanese Internment experiment by understanding how the justices “reacted to the challenge they confronted” (p. 339). He ends this part of the book with a discussion of the Court’s “acquiescent” role in the permanent growth of federal and presidential power as America emerged as one of the world’s two superpowers.

In part 4, Wiecek moves onto the Vinson/Truman Court, covering similar ground as he did with his early chapters on the makeup of FDR’s Court before delving into the “problem of incorporation” that often dominates discussion of the high bench in these years. Here, he pays careful attention to the great debate between Justices Felix Frankfurter and Hugo Black over incorporation and the foundational 1947 case of *Adamson v. California*. In part 5, Wiecek focuses on the Cold War, explaining the Court’s uncertain handling of these cases—with special attention to *Dennis v. United States* (1951)—that defined the tension of the times. As he writes, in these cases “the Court was divided or splintered, the Justices sometimes tentative or ambivalent, the issues clouded. The results, however, were clear; in all but two of the cases, the Court did support governmental regulatory power when it intruded on First Amendment Freedoms” (p. 579). Professor Wiecek concludes his book with a section on civil rights, an area where these two Courts

played a substantial—yet often overlooked—role in the development of legal doctrine that culminated in the 1954 *Brown v. Board of Education* decision.

Since the brevity of this review and the length of the book (some 760 pages) prevent me from discussing in much detail the author's treatment of the doctrinal developments of the Stone and Vinson Courts, I will instead focus on the general nature in which Wiecek approaches the justices' work during this time period. As traditional constitutional history, Professor Wiecek's book is first-rate. It should instantly become the go-to source for anyone interested in understanding more about the Court during these years. My main objection centers on Wiecek's traditional treatment of the Court, viewing it mostly as a legal entity untouched by the world of politics. For example, he is quick to accept interpretations of the "Constitutional Revolution of 1937" as an internal transformation (pp. 32-33), despite clear evidence to the contrary.[1] In his discussion of the flag salute cases (pp. 220-237), he makes no mention of the work of the Justice Department in helping to convince a Court often willing to defer to the executive branch that its 1940 *Minersville School District v. Gobitis* decision had unleashed a wave of attacks against Jehovah's Witnesses (although he does mention the violence).[2] In examining the World War II civil rights cases (pp. 634-657), he offers criticism of the Roosevelt Justice Department for its decision to avoid involvement in *Smith v. Allwright* (1944), but fails to mention the department's vital role in the 1941 *United States v. Classic* decision. In fact, in response to FDR's inquiry ("There is a good deal of howl because the Department of Justice has refused to participate as *amicus* in the Texas Primary case. How about it?"), Attorney General Francis Biddle stressed that the Department was not participating in *Allwright* because it had already "established the right to vote in primaries as a federal right enforceable in the federal courts in the *Classic* case." He then cautioned against intervening again because "the South would not understand why we were continually taking sides." Nevertheless, Biddle allowed Department attorneys to publicly comment on the relationship between *Classic* and the white primary and to work with the NAACP on post-*Allwright* litigation.[3] Significantly, Wiecek does not discount the importance of *Classic*—writing the decision "heralded a new ideological approach to the old problem of majorities and minorities in a republic (p. 636)—just the role of the executive branch in advocating for the result. To be sure, Wiecek does not always view the Court's members as "closeted in the hermetic world of the Marble Palace (p. 294); nevertheless his justices are largely reacting to un-

folding events rather than being driven by political forces in their decision-making.

Others have suggested that the justices are not so independent in their thinking. In particular, recent political science scholarship examines—primarily through historical institutional analysis—the political foundations of Supreme Court decisions. As Howard Gillman and Cornell Clayton have written, this work "examines how judicial attitudes are themselves constituted and structured by the Court *as an institution* and by its relationship to other institutions in the political system at particular points in history." [4] In a recent review essay, Mark Graber places great import on such studies that emphasize the "political construction of judicial review," believing they represent a "new paradigm" for understanding Supreme Court decision-making.[5] Wiecek might have benefited from these observations in placing the work of the Stone and Vinson Courts in political and institutional context.

This concern aside, Professor Wiecek has produced a rich volume worthy of significant attention and respect. It is packed with an impressive amount of information and (more importantly) keen analysis of two Courts that have finally received the scholarly attention they have long deserved.

#### Notes

[1]. See, for example, William E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (New York: Oxford University Press, 1995).

[2]. See Justice Department attorneys Victor W. Rotnem and Fred G. Folsom's article, "Recent Restrictions Upon Religious Liberty," *The American Political Science Review* 36 (1942): pp. 1053-1068.

[3]. Francis Biddle, *In Brief Authority* (Garden City, NY: Doubleday, 1962), p. 187; and Steven Lawson, *Black Ballots: Voting Rights in the South, 1944-1969* (New York: Columbia University Press, 1976), p. 50. Also see Justice Department attorney Fred G. Folsom's article, "Federal Elections and the 'White Primary,'" *Columbia Law Review* 43 (1943): pp. 1026-1035.

[4]. Howard Gillman and Cornell Clayton, *The Supreme Court in American Politics* (Lawrence: University Press of Kansas, 1999), p. 2.

[5]. Mark A. Graber, "Constructing Judicial Review," *American Review of Political Science* 8 (2005): pp. 425-451.

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