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Edward F. Mannino. *Shaping America: The Supreme Court and American Society*. Columbia: University of South Carolina Press, 2009. xxiv + 321 pp. \$44.95 (cloth), ISBN 978-1-57003-857-0.

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U.S. Supreme Court Decisions in Historical Context

One challenge in teaching constitutional law courses is supplying historical context for the U.S. Supreme Court rulings found in standard casebooks. Most casebooks are primarily concerned with tracing the evolution of judicial Court doctrine and providing extensive excerpts from leading opinions. However, the meaning and significance of these decisions can often only be fully appreciated by situating them in historical context and examining their consequences for American political development, as scholars have increasingly worked to demonstrate. *Shaping America: The Supreme Court and American Society* will be useful in this regard for both constitutional law students and lecturers, in that it undertakes “a detailed study of important decisions, examining both what the justices who decided them said in the texts of their opinions, as well as the underlying contexts in which they were decided by specific justices who were products of their times and political cultures” (p. 1).

Shaping America proceeds in three parts. The first part covers the founding to the Civil War and concentrates on decisions regarding federalism, commercial development, and slavery. The second part examines decisions handed down from the Civil War to the Cold War, focusing on cases concerning civil and voting rights, regulation of business and commerce, and civil liberties. The third part, “From the Cold War to the Twenty-first Century,” includes chapters on race, religion, abortion, and federalism. Edward F. Mannino, a trial lawyer who has taught at the University of Pennsylvania and the Tem-

ple University Law School, proceeds in a straightforward manner in each chapter, by identifying the key U.S. Supreme Court cases and putting them in their historical context, and at times discussing their aftermath and responses undertaken by other institutions.

Students in constitutional law courses would benefit from reading Mannino’s careful narrative of the historical context of the leading Supreme Court decisions on each of these topics. At times, Mannino provides the sorts of extensive quotations from majority, concurring, and dissenting opinions that are accessible in most casebooks. In a number of places, though, Mannino supplements standard legal analysis with a fine attention to historical detail, as when he traces the evolution and enactment of state railroad regulations that came before the Court beginning in the 1870s and the particular stages of segregation laws adopted in southern states from the late nineteenth century onward.

Shaping America not only supplies historical context for Supreme Court decisions but also offers a general framework and argument for explaining their evolution and degree of success in resolving controversial issues. At times, this framework and argument surface in the body of the book. For the most part, though, the substantive chapters proceed in narrative form and focus closely on providing a rich description of the evolution and context of U.S. Supreme Court decision-making. As a result, the introduction, and more so the conclusion, contain the

clearest statement and support for Mannino's arguments.

Mannino's framework for explaining Supreme Court decision-making is relatively unexceptional. He writes: "To understand the outcomes of Supreme Court decisions at any point in its history requires an assessment of three factors—the presence of strong-willed justices who helped to shape the Court's jurisprudence, the influence of the dominant political culture of the times, and the existence of deeply held public attitudes on specific controversial issues" (p. 270). Some scholars would give more weight to the role of legal argument and reasoning in influencing Supreme Court decision-making, alongside of these factors. Scholars are also engaged in ongoing debates about the relative influence of the factors he identifies and the circumstances under which one or the other of these factors will predominate. But few would deny the influence on Supreme Court decisions of "the appointments made to the Court," the "dominant political cultures," and the "attitudes of the general public on specific issues" (p. 3).

Mannino goes on to illustrate the influence of each factor. Regarding the appointment process and role of particular justices, for instance, he writes that "the appointments by President John Adams and Andrew Jackson of Chief Justices John Marshall and Roger Taney dramatically shaped the Supreme Court in its early years, while the appointments of Justices Antonin Scalia and Clarence Thomas more recently by Presidents Ronald Reagan and George H. W. Bush steered the Court in a more conservative position in several areas of constitutional law" (p. 270). As for "the influence of the dominant political culture on Supreme Court decisions," he notes, for instance, that "the evolution of the limits placed upon government regulation of business in the post-Civil War period through the early 1930s reflects the ascendancy of generally accepted principles supporting the domestic growth of industrial capitalism" (p. 274).

The preceding examples are all unexceptional; however, when Mannino turns to discuss rulings that can be explained by "strong public attitudes on particular topics," his examples are at times open to discussion, as when he writes that the 2008 decision in *District of Columbia v. Heller* "is a good example, since it reflected a strong public sentiment in favor of an individual's right to own a handgun for self-defense" (p. 275). Certainly, the majority opinion in *Heller* can be deemed in line with public opinion. It is another matter, though, to conclude that the decision can be explained by reference to public attitudes. More would have to be done to consider alter-

native explanations and make a convincing case for the influence of public opinion on the outcome of this ruling, as opposed to other possible influences.

Shaping America is at its most provocative when Mannino argues in the book's concluding pages that "the interaction of the three factors we have discussed in this chapter helps to explain why some decisions of the Supreme Court on controversial questions of constitutional law gained general acceptance while others did not. The history of the Supreme Court suggests that it has been most successful when its judgments reached the same outcomes as those suggested by both the dominant political culture and the strongest public attitudes on the issues presented" (p. 276). As examples of "a successful resolution of an important constitutional issue," he points to the 1964 rulings upholding the Civil Rights Act of 1964 in *Heart of Atlanta Motel v. U.S.* and *Katzenbach v. McClung* (p. 276). "By contrast," he argues, "the Supreme Court has been largely unsuccessful when it has attempted to resolve an issue of constitutional law where both the dominant political culture and public attitudes were strongly divided on the proper outcome" (p. 277), as in *Dred Scott v. Sandford* (1857) and *Roe v. Wade* (1973). Of the latter decision, he writes, "By announcing a broad constitutional right of a woman to choose to abort a fetus, and by setting out in minute detail precise parameters for that right, the Supreme Court entered an area of deep public division over fundamental religious and moral issues, where, as in *Scott v. Sandford*, no consensus had emerged, either in the dominant political culture or in the attitudes of the public" (p. 277).

Mannino concludes from these examples that "the Supreme Court's continued authority and acceptance by the public will generally require the avoidance of broad pronouncements where the country is deeply divided on an issue and the political process has not yet come to a consensus or an acceptable political compromise. Premature attempts at a Court-imposed solution are often unsuccessful, particularly where, as in *Scott v. Sandford* and *Roe v. Wade*, the political process is actively addressing the issue" (p. 277). He goes on to advise that "one way out when the Court is obliged to confront such an issue is to proceed in small steps over time and to leave a final resolution to a later date while the issue receives additional attention in the political process or until public passion has been dissipated" (p. 278).

This argument raises a number of questions, and although some are addressed in a brief conclusion others deserve more consideration. Perhaps the crucial ques-

tion is whether “successful” decisions can and should be equated with decisions that gain “general acceptance” (p. 276). Mannino acknowledges in the book’s final paragraph that there may be good reasons not to evaluate a ruling’s success solely by its capacity to command general acceptance. As he notes, “There will, of course, be cases in which the Supreme Court must act at once to resolve an issue even when the dominant political culture and/or strong public attitudes will not welcome its judgment. Cases such as *Brown v. Board of Education*, the school-prayer cases, and *Bush v. Gore* must either be avoided completely or decided when presented, even in the absence of public support for their outcome” (pp. 278-279). As he goes on to note, in deciding how to approach cases of this sort, “the Court must not abandon a

class of litigants to illegal discrimination or unfair treatment” (p. 279). In the end, this concluding discussion does more to highlight than resolve the critical questions that have long engaged public law scholars concerning the proper judicial role in deciding controversial cases. Much remains to be done in particular to engage with the public law scholarship regarding the legitimacy and capacity of judicial efforts to bring about social and political change, which is a literature that remains largely outside the scope of Mannino’s inquiry in this book. However, *Shaping America* provides a useful supplement to standard casebooks insofar as it supplies detailed and accessible historical context for leading U.S. Supreme Court rulings from the founding to the present.

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