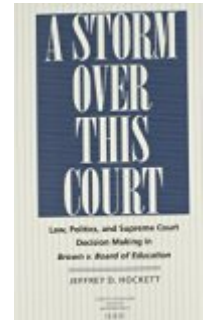


Jeffrey D. Hockett. *A Storm over This Court: Law, Politics, and Supreme Court Decision Making in Brown v. Board of Education.* Charlottesville: University of Virginia Press, 2013. x + 267 pp. \$39.50, cloth, ISBN 978-0-8139-3374-0.



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Why, after six decades of established precedent, did the Supreme Court in 1954 overturn the doctrine of “separate but equal,”--and unanimously at that? It is to this question that Jeffrey D. Hockett turns in *A Storm over This Court*, his second book and a natural progression from his earlier study of New Deal jurisprudence. The answer: it’s complicated. Whereas prior book-length studies tended to focus on single factors influencing the justices’ decisions, and particularly those of the newest member of the court--and sole Republican appointee--Chief Justice Earl Warren, Hockett primarily draws his ideas from the articles of Rogers M. Smith in *American Political Science Review* (1988) and *Polity* (1995) to take a comprehensive look at all the known and theorized possibilities.[1]

Most prior studies fall into one of two major categories: “instrumental decision making--the self-interested pursuit of a favored policy preference” (p. 6), and noninstrumental factors, such as concern for the prestige and honor of the Court, a desire to horse trade with other justices so as to

get favorable results in future cases, and the attempt to rule based on a disinterested interpretation of the Constitution, either from a constructionist viewpoint or the doctrine of the “living Constitution.” Hockett does not fall into either of these camps, but proceeds from what should have been an obvious thesis: not only did each of the nine justices who decided the *Brown* case have his own motivations for the decision, but each of these justices had multiple motivations. The overall decision-making process is therefore the result of multiple instrumental and noninstrumental factors. Each of these factors Hockett methodically examines in this book, going into copious explanatory detail for each individual justice affected by each factor.

The first chapter outlines the legal barriers to overturning the prior decision, *Plessy v. Ferguson* (1896), which held that the Fourteenth Amendment did not prohibit segregation as long as segregated groups were treated equally. These barriers included the fact that the same Congress which passed that amendment also legalized seg-

regation in the District of Columbia. In addition, case law since *Plessy* had not weakened the right of states to segregate on the basis of race: the World War II cases *Hirabayashi v. United States* (1943) and *Korematsu v. United States* (1944) had reaffirmed the government's right to classify people according to race, and intern Japanese-Americans during a war with Japan (despite the plaintiffs' contention that this ruling limited detention by race to military emergency); and *Sweatt v. Painter* (1950), which desegregated state law schools, did so on the grounds that segregation in law school limited African American students' ability to network, which the justices agreed was a major handicap for a legal career. To make the case that segregated primary schools (as in *Brown*) resulted in a similar handicap--and therefore that segregation of any kind was inherently unequal (which was made by the justices, not the plaintiffs), was a difficult leap. Additional barriers, noted by the defendants, were possible flaws in the methodology of the social science presented (and the fact the Court had never before used such evidence to determine constitutional questions).

The second chapter looks closely at the attitudes of the individual justices to cover an aspect of instrumental decision making. To do this, Hockett examines both the justices' actions and statements prior to appointment and then their "ideological drift"--the notion, based on opinions authored and votes rendered, that they changed their minds on civil rights or race relations once seated. The eight Democratic appointees represented the mixed bag of ideologies of the New Deal coalition, including northern liberals such as Felix Frankfurter (who stated that, as a Jew, he could empathize with the sufferings of blacks) and southerners like Hugo Black (who had been a member of the Ku Klux Klan). The sole Republican appointee, Warren, had advocated for a state fair employment law as governor of California. However, as Hockett is quick to point out, even the elite white liberal attitude towards civil rights

at the time of the *Brown* decision did not encompass desegregation, but focused more on voting rights and anti-lynching legislation. President Truman had ordered desegregation of the armed forces, but that was considered very different from desegregating public elementary schools (and judging by the resegregation of the post-civil rights era, still is). Likewise, chapter 4 continues this exploration of the individual histories of each justice vis-à-vis their opinions on civil rights and desegregation.

The third chapter points to a strategic model of decision making, wherein justices horse trade in hopes of support for future opinions; consider the political importance of the *amicus* briefs of the executive branch (whose support would be necessary to enforce any decisions); and look to the integrity of the Court, a sense of duty which can apparently move justices to vote against their own policy preferences for the sake of Court unity. This latter motivation appears to have at least partially applied to Justice Robert Jackson, who--despite being a northern New Dealer and a judge at the Nuremberg trials--took issue over the constitutionality of forcing the end of segregation and in particular had a problem with the use of social science evidence. In the end, Jackson sufficiently agreed with the legal merits to vote with the majority, but had to be lobbied to avoid issuing a concurrence--which might have weakened the political power of Warren's majority opinion--for the sake of Court unity. The chapter makes excellent use of primary sources to examine the conference statements of individual justices on the case, going so far as to compare the handwritten notes of justices, several of whom apparently wrote down their colleagues' comments.

Demonstrating thorough dialogue with the latest trends in historical studies, chapter 5 looks at how the Cold War influenced the *Brown* decision, citing in particular the work of Mary Dudziak, and noting that executive-branch *amicus curiae* were used to push the Court towards a policy

seen by the White House as necessary but politically fraught.[2] The executive could accomplish its foreign policy goals through decisions such as *Brown*, but the judicial branch would take the political heat. The persistence of segregation and racial discrimination was being used as a propaganda tool by the Soviet Union to win over adherents in the decolonizing Third World, especially in Africa. The Court on the whole may have already been inclined to rule in *Brown* based partially on such international concerns, following the strategic model discussed in chapter 3, but Hockett finds no evidence that the decisions of individual justices were consciously influenced by the Cold War. This theory is borne out by the dramatic split in justices' votes during the period: most voted in favor of civil rights most of the time, but in opposition to civil liberties, which were seen as antithetical to patriotic unity in the face of supposed Soviet aggression.

In an apt pairing with the previous argument, chapter 6 looks at the importance of domestic politics on the decision-making process in *Brown*. Herein are examined the politics of the New Deal, and the discussion is less about the civil rights positions of those appointing presidents (Roosevelt and Truman) than their use of such appointments to build the case for an imperial executive and increased federal role in American life. Civil rights issues posed a potential political problem for Democrats, for outright advocacy in the party could result (and in 1948 had resulted) in a regional split. Republicans were divided between supporting black rights as an attempt to retain African American voters out of loyalty to the Party of Lincoln or work towards what would later be known as the Southern Strategy--peeling off white southern votes from the Democratic Party.

The end result is a well-crafted, well-researched argument in favor of a more complex understanding of the motivations of individual justices which led to the *Brown* decision. The writing is oftentimes thick and has occasional re-

course to jargon, and so it is not recommended for the general reader and will be a difficult book for most undergraduates. With that said, I highly recommend it for specialists in the history of the Supreme Court, civil rights, and the evolution of modern jurisprudential theory.

Notes

[1]. Rogers M. Smith, "Ideas, Institutions, and Strategic Choices," *Polity* 28 (1995): 135-40, and "Political Jurisprudence, the 'New Institutionalism,' and the Future of Public Law," *American Political Science Review* 82 (1988): 89-108.

[2]. Mary L. Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy* (Princeton: NJ: Princeton University Press, 2000).

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