

A Dozen Experts Explain the Court

BY ANDREW J. MORRIS

A Year at the Supreme Court

Edited by Neal Devins and Davison M. Douglas
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The Supreme Court may or may not be the least dangerous branch, but it certainly is the least understood. Supreme Court justices speak to the world only through written legal opinions—which even the best-informed among us rarely read. Ordinary citizens follow the Court’s work only at second hand, mostly by reading the newspaper or spending a few minutes with the nightly news.

To give these citizens a more-in-depth look at the Supreme Court, a dozen Supreme Court experts—journalists, law professors, and Supreme Court advocates—have written *A Year at the Supreme Court*. Writing specifically for “readers who do not make their lives as lawyers,” these authors explain “the dynamics inside the Court and the Court’s role in American life.” Addressing cases from the Supreme Court’s 2002-03 term, they discuss such issues as abortion, gay rights, cross burning, three-strikes sentencing laws, and race in college admissions.

I cannot review each essay—which is too bad, because almost all are provocative and warrant further discussion—but I can note some unifying strands that run through them. Taken together, the essays show that widely varied cases repeatedly raise the same few questions about the Supreme Court, important questions that media coverage frequently must skip over. How is the Supreme Court different from the other branches of government? What issues should it have the power to resolve? As a court, what may it consider when it does decide cases? *A Year at the Supreme Court* shows that the experts disagree vehemently about the answers to these questions.

To many Americans, the prime Supreme Court issue is the Court’s role in addressing the great social questions of the day. A deep fissure splits the public on this point, of course, and *A Year at the Supreme Court* includes champions for each side.

This is most obvious in essays on *Lawrence v. Texas*, the

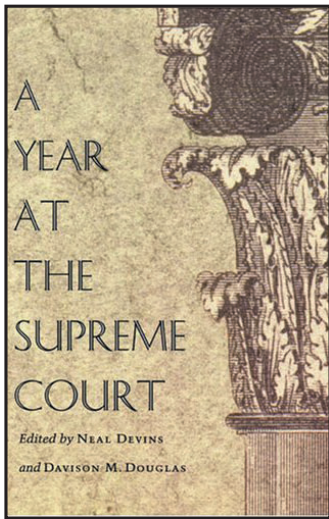
decision that struck down a Texas law that banned sodomy by gays and lesbians. On one side is Jeffrey Rosen, a law professor and the legal affairs editor of *The New Republic*. Rosen’s work often probes for the proper border between law and politics, and here he asks whether matters such as gay rights and abortion are the proper business of the government’s judicial branch. Rosen notes the “extent to which social reformers of all stripes have increasingly turned to the courts for victories that could not have been procured in the political process,” and he voices doubts whether decisions such as *Lawrence* and *Roe v. Wade* can be called constitutional “law” at all. Rosen can be understood as a kind of constitutional Little Englander, a skeptic about expanding the Court’s territory.

Other writers advocate the opposite view: judicial expansionism, pursued to protect rights from the political process. Professor and historian David Garrow argues outright that the Supreme Court should be a “crusading force.” He portrays *Lawrence* as one battle in a campaign to expand gay and lesbian rights.

Garrow lays out the case that this expansion follows obviously from the Constitution’s references to “liberty.” He also explains the argument that the failure to recognize gay marriage—the issue teed up by *Lawrence*—is unconstitutional because that failure is, literally, irrational. This argument introduces ordinary citizens to that powerful constitutional tool, the “rational basis” test. The Supreme Court can use this test to strike down, as unconstitutional, laws that it deems irrational.

To some observers, this test creates a modern puzzle. They question whether the Supreme Court should rule certain legislative choices impermissible, on the ground that the choices are irrational, during an era when citizens are accepting of ever wider ranges of moral choices. To these observers, questions about what is “rational” are best decided by majority vote. Garrow clearly rejects that concern for the democratic process. To him, the Supreme Court should not hesitate to strike down laws, such as sodomy laws that apply only to gays, precisely to protect our increased diversity from the democratic process.

In a related essay, veteran Supreme Court reporter David Savage explains the roots of *Lawrence* in Justice Anthony Kennedy’s highly theorized, philosophical approach to the



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confident and ambitious, contrasts sharply with the modest spirit of Jeffrey Rosen's piece.

FAIR GAME?

Still other essays consider the related question of what considerations are fair game for the Supreme Court when it does decide cases. An example is *Slate* editor Dahlia Lithwick's discussion of the Court's ideological "swing" justices. Focusing on Justices Sandra Day O'Connor and Kennedy, Lithwick considers whether these justices have cast their votes in critical cases based on "legal convictions"—a good thing for a court—or based instead on "extrajudicial" factors. Lithwick concludes that legal convictions best explain their votes. To reach this conclusion, she adopts a generous view of what counts as a "legal" input; she includes in her definition considerations such as the Court's reputation and the desire to do what the justices "think is right." This illustrates a basic point: If you want to give the Supreme Court a bigger role in the world, you

Constitution. Savage explains why, in Kennedy's view, the Constitution's reference to "liberty" places concrete issues such as gay rights and abortion squarely in the Supreme Court's lap. Savage captures the spirit of this approach when he quotes the opening line of Kennedy's opinion in *Planned Parenthood v. Casey*, the 1992 decision that reaffirmed constitutional abortion rights: "Liberty finds no refuge in a jurisprudence of doubt."

This statement is something new under the constitutional sun, because it marries liberty with certitude. (It is new unless you believe that it revives the maligned *Lochner* era, a suggestion Savage certainly would reject.) Traditionally, our constitutional culture has viewed certitude as liberty's natural enemy; this was the point of Learned Hand's much-quoted statement that "the spirit of liberty is the spirit which is not too sure." The spirit of certitude, a sign of a Court that is

define law more broadly. As Chief Justice John Marshall wrote in *Marbury v. Madison*, "the province and duty" of the Supreme Court is "to say what the law is." Defining law broadly gives the Supreme Court "say" about more things, while also preserving the authoritative "legal" ring to its decisions.

Legal journalist Stuart Taylor Jr., whose columns appear in *Legal Times*, takes a darker view of this kind of decision making. He writes about the two decisions that preserved affirmative action, or racial preferences, in university admissions, *Grutter v. Bollinger* and *Gratz v. Bollinger*. Taylor contends that the Court had a responsibility in these cases to follow legal principle in the form of existing case law, but failed to do so. Taylor also believes the Court has a strong duty of candor about the facts. He hits the Court hard for what he considers distortion of the record in order to "conceal the nature and magnitude of racial preferences." He particularly criticizes Justice O'Connor's *Grutter* opinion for "hiding the ball." This sleight of hand gave the decision the feel of constitutional law. But in fact, Taylor argues, the determining factors in the case were policy sympathies and concern about "establishment" opinion—not legal considerations at all.

On the whole, I liked *A Year at the Supreme Court* a lot. It is heavier going than the pleasantly gossipy books in the line of *The Brethren*, but its treatment of the Supreme Court is more sophisticated. It presents real debate about long-running constitutional questions, and it places that debate in the rich context of specific cases. Still, I found a few weaknesses. In particular, I found myself wishing that some of the essays had done more to explain both sides of the relevant arguments. While most writers in the book give roughly fair accounts of the positions they are rejecting, others decidedly do not. They sketch constitutional battles that are positively Manichean: right-thinking good guys fighting bad guys who are veritable cartoons. That approach gives readers no idea why intelligent people could possibly take a position different from the author's. It risks missing the point of *A Year at the Supreme Court*, which is to help "the public assume its critical role as a player in the ongoing constitutional dialogue."

As a whole, however, the book does this job well. It makes a valuable contribution to the public's understanding of the Supreme Court.

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Editor's note: ALM Supreme Court correspondent Tony Mauro and *Legal Times* columnist Stuart Taylor Jr. contributed essays to *A Year at the Supreme Court*. They took no part in choosing the reviewer of the book or in editing this review.