

January 2013

Graceful, Scholarly, and Illuminating: The Books of James F. Simon

Edward A. Purcell Jr.
New York Law School

Follow this and additional works at: https://digitalcommons.nyls.edu/nyls_law_review



Part of the [Judges Commons](#), [Law and Politics Commons](#), [Legal History Commons](#), [President/Executive Department Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Edward A. Purcell Jr., *Graceful, Scholarly, and Illuminating: The Books of James F. Simon*, 57 N.Y.L. SCH. L. REV. (2012-2013).

This Article is brought to you for free and open access by DigitalCommons@NYLS. It has been accepted for inclusion in NYLS Law Review by an authorized editor of DigitalCommons@NYLS.

EDWARD A. PURCELL, JR.

Graceful, Scholarly, and Illuminating: The Books of James F. Simon

57 N.Y.L. SCH. L. REV. 483 (2012–2013)

ABOUT THE AUTHOR: Joseph Solomon Distinguished Professor of Law, New York Law School.

Jim Simon has written eight books.¹ Each is valuable and impressive in its own right, but together they far transcend their individual achievements. Collectively, they constitute a comprehensive body of work that vividly brings to life and brightly illuminates many of the enduring issues of American constitutional government. Gracefully and lucidly written, they are as readable as the most popular novels; broadly and scrupulously researched, they are as solid as the finest scholarship. They are, in short, superb pieces of work that merit our highest admiration.

This body of work is far too extensive to consider fully in a brief essay. In the short space available, however, I would like to discuss its general nature, identify a few of its central themes, and note some of the basic lessons it teaches.

I. SCOPE AND NATURE

Jim's eight books fall into two basic categories: those that examine the relationship between the executive and judicial branches of the federal government and those that explore the inner workings of courts, particularly the U.S. Supreme Court. His very first book established his expertise in exploring both subjects. *In His Own Image* told two stories: first, the interbranch story of Richard Nixon's attack on the Warren Court and his effort, as President, to end it by replacing the Chief Justice and three Associate Justices with "strict constructionists"; and, second, the intrabranched story of the subsequent judicial behavior of those four new appointees and their interactions with one another and with the five holdover Justices.²

His next four books explored that latter subject, the inner workings of judges and courts. In the first of these, Jim sought to understand the judicial process by studying a single state criminal court judge, spending hundreds of hours interviewing him and observing his behavior on the bench, in professional settings, and in private life.³ Then, Jim turned to writing about the U.S. Supreme Court, his true métier, completing two books that examined the constitutional transition that came with the New Deal and that ultimately helped produce the Warren Court. Focusing on the lives of Justices William O. Douglas, Felix Frankfurter, and Hugo L. Black, the two books probed the ways in which the personal views of the three Justices and their relationships with one another helped shape the Court's internal debates and constitutional rulings from the 1930s to the 1970s.⁴ The last book in the series, *The Center Holds*, picked up the Court's story in the 1970s where Jim's two previous books, and his first one as well, had ended. It examined the beginning of another constitutional transition, this one away from the liberal rulings of the Warren Court

1. I refer to Dean James F. Simon throughout this essay as "Jim," for we have been friends and colleagues for more than twenty years. I have read and commented on drafts of his three most recent books, and over the years he has returned the favor many times over.

2. JAMES F. SIMON, *IN HIS OWN IMAGE: THE SUPREME COURT IN RICHARD NIXON'S AMERICA* (1973).

3. JAMES F. SIMON, *THE JUDGE* (1976).

4. JAMES F. SIMON, *INDEPENDENT JOURNEY: THE LIFE OF WILLIAM O. DOUGLAS* (1980) [hereinafter SIMON, *INDEPENDENT JOURNEY*]; JAMES F. SIMON, *THE ANTAGONISTS: HUGO BLACK, FELIX FRANKFURTER AND CIVIL LIBERTIES IN MODERN AMERICA* (1989) [hereinafter SIMON, *THE ANTAGONISTS*].

and toward the “conservative” reaction of the Burger and Rehnquist Courts.⁵ Relying on extensive research and drawing on a substantial amount of confidential and truly “inside” information, Jim traced the internal tensions and struggles that a steady stream of Republican appointments brought to the Court and that drove its clear, if somewhat ragged and incomplete, shift toward the political right.

Then, with the story of the Court’s inner workings brought up to date, Jim turned back to the other major subject that his first book had addressed, the struggle between the executive and judicial branches of the federal government. Proceeding chronologically, and demonstrating that his mastery of the eighteenth and nineteenth centuries equaled his mastery of the twentieth, he studied three famous periods of acute conflict between President and Court. The first explored the decades-long struggle between Thomas Jefferson and John Marshall over the scope of both national and judicial power.⁶ The second examined the dramatic confrontation between Abraham Lincoln and Roger B. Taney over executive and judicial power during the time of the nation’s gravest crisis, the Civil War.⁷ The third considered the pivotal battle over the New Deal between Franklin D. Roosevelt and Charles Evans Hughes, a battle that ultimately reshaped constitutional law and, ironically, expanded the power of the executive while at the same time conferring, at least for a time, a nearly sacred status on the Court itself.⁸

Taken collectively, these eight books cover the sweep of American constitutional history, addressing many of the most important issues and events that roiled the nation and challenged the Court. They convey a deep understanding of both the internal processes of Supreme Court decisionmaking and the external pressures that helped shape that decisionmaking. They show both a genuine respect for the legal elements that channeled the Court’s decisionmaking and an acute sense of the personal and social forces that ultimately determined the direction of that decisionmaking. They illuminate, in other words, the crucial interaction between the formal and the practical, the ideal and the real, the twin forces that drive the complex operations of American constitutional government.

Through all eight books the reader hears Jim’s distinctive voice and recognizes the values he holds dear. It seems fair to say that the ideas and attitudes associated with modern political liberalism fare rather well. Earl Warren, for example, appears as a national hero. The Chief Justice’s personal warmth, attention to individuals of all ranks, and manifest commitment to both legal and moral ideals, Jim wrote, created a “communal bond” between Court and bar, inspired law students across the nation, and helped swing the majority of Americans behind the Court’s controversial

5. JAMES F. SIMON, *THE CENTER HOLDS: THE POWER STRUGGLE INSIDE THE REHNQUIST COURT* (1995).

6. JAMES F. SIMON, *WHAT KIND OF NATION: THOMAS JEFFERSON, JOHN MARSHALL, AND THE EPIC STRUGGLE TO CREATE A UNITED STATES* (2002).

7. JAMES F. SIMON, *LINCOLN AND CHIEF JUSTICE TANEY: SLAVERY, SECESSION, AND THE PRESIDENT’S WAR POWERS* (2006).

8. JAMES F. SIMON, *FDR AND CHIEF JUSTICE HUGHES: THE PRESIDENT, THE SUPREME COURT, AND THE EPIC BATTLE OVER THE NEW DEAL* (2012).

jurisprudence.⁹ Warren “exemplified to America’s majority the values they most admired: honesty, fairness, patriotism and idealism.” Consequently, “Americans accepted the most important decisions of the Warren Court because, deep down, they knew those decisions were right” for a simple reason. “The chief justice told them so.”¹⁰

It seems equally fair to say that the opponents of modern liberalism fare less well. Warren’s conservative successor emerges not as a hero but as a harsh and narrow-minded nag.¹¹ “In Chief Justice Earl Warren’s judicial world, there was always a place for the noble gesture, the ethical imperative,” Jim commented. “In Warren Burger’s legal cosmos, more than one of the Ten Commandments had better be at issue.”¹² Similarly, the majority Justices on the Rehnquist Court also appear in an unflattering light. While “Jefferson’s states’-rights philosophy was developed in 1798, in part, to protect individual liberties from incursions by the federal government,” Jim declared, “the Rehnquist Court conservatives have expressed no such intent.” Indeed, they “are highly selective in the application of their states’-rights philosophy” and deploy it for a purpose precisely the opposite of Jefferson’s, to “cut off governmental protection of individuals.”¹³

In spite of his apparent political and social views, however, Jim’s treatment of both liberals and conservatives, Justices and Presidents, is invariably well-grounded in the available sources and remarkably fair-minded in the balance struck. Although Aaron Burr engaged in dubious and highly dangerous plotting, and one of Chief Justice John Marshall’s early opinions suggested that Burr’s actions were treasonous, Jim nonetheless insisted as a legal matter that Burr “should not have been convicted of treason.”¹⁴ Although Chief Justice Roger Taney’s later decisions “were influenced by his southern heritage,” Jim explained, there was “much more to Taney’s legacy than his southern perspective or a single ill-fated opinion, even one as momentous as *Dred Scott*.”¹⁵ The charge that William Rehnquist’s jurisprudence as an Associate Justice stemmed from “racial prejudice,” Jim declared flatly, was “false and unfortunate.”¹⁶ Franklin Roosevelt was “the greatest president of the twentieth

9. SIMON, *supra* note 2, at 72–73.

10. *Id.* at 73.

11. *See id.* at 133–41.

12. *Id.* at 86.

13. SIMON, *supra* note 6, at 296.

14. *Id.* at 257. The early Marshall opinion was in *Ex parte Bollman*. See 8 U.S. (4 Cranch) 75, 126–27 (1807) (accepting the doctrine of “constructive treason”). Marshall rejected the doctrine, though failing to distinguish *Ex parte Bollman*, in *United States v. Burr*. See 25 F. Cas. 55, 161 (C.C.D. Va. 1807) (No. 14,693) (Marshall, C.J., sitting on circuit).

15. SIMON, *supra* note 7, at 271.

16. SIMON, *supra* note 2, at 232–33. Jim may have been too generous in his judgment, as the dispute over Rehnquist’s motivations and values continues. See Brad Snyder & John Q. Barrett, *Rehnquist’s Missing Letter: A Former Law Clerk’s 1955 Thoughts on Justice Jackson and Brown*, 53 B.C. L. REV. 631 (2012).

century,”¹⁷ but he was beaten in the “larger war” over the Court’s role in American government by Chief Justice Charles Evans Hughes who was “a shrewder politician” and “a wiser statesman than Roosevelt.”¹⁸ And Hughes, whom Jim praises for guiding the Court “through a period of judicial turbulence” and preserving “both the image and reality of a strong Supreme Court,”¹⁹ nonetheless merited criticism as well as praise. Hughes was uncertain and far too cautious during the mid-1930s, and some of his key votes and opinions were simply unconvincing or even “puzzling.”²⁰

Perhaps the most striking example of Jim’s fair-mindedness as a scholar is his treatment of Justice Douglas. Admiring Douglas’s bold and path-breaking opinions that affirmed the values of free speech and personal privacy, Jim set out—with some personal assistance from the Justice himself—to write the biography of another judicial hero. The long course of research and reflection, however, led Jim to conclusions that he must have drawn with regret. Personally, Douglas was “cold” and “often calculating,” and he could treat those around him with “callousness.” He was “easier to admire than to like.”²¹ Even more disappointing, Jim concluded that Douglas was unreliable as a historical source,²² sometimes sloppy and careless in writing his opinions,²³ and, most important, hardly unwavering as a defender of individual rights. Douglas, Jim declared, “was not always true to his public image as the forthright humanitarian.”²⁴ He stood, for example, with the Court’s majority in both *Hirabayashi* and *Korematsu*.²⁵ More striking, before his dramatic intervention to stay the execution of Julius and Ethel Rosenberg,²⁶ “Douglas had voted against

17. SIMON, *supra* note 8, at 402.

18. *Id.* at 341–42.

19. *Id.* at 392.

20. *Id.* at 204, 263; *see id.* at 282, 304.

21. SIMON, INDEPENDENT JOURNEY, *supra* note 4, at 2.

22. *E.g., id.* at 190 (contending that the record shows that Douglas “shrewdly worked” to win a seat on the Court, though he later declared that he “never dreamed, let alone wished, that I would sit there”); *id.* at 304 (noting that Douglas apparently gave Black a false explanation for his behavior during one of the conferences on the Rosenberg case).

23. *E.g., id.* at 252–53 (noting that Douglas showed “inattention to legal detail and indifference to precedent” and “often showed an impatience with tightly reasoned argument”).

24. *Id.* at 2.

25. *Id.* at 242–43. The cases, *Hirabayashi v. United States*, 320 U.S. 81 (1943), and *Korematsu v. United States*, 323 U.S. 214 (1944), involved the evacuation from the West Coast and internment of more than 100,000 Japanese Americans during World War II.

26. Julius and Ethel Rosenberg were charged under the Espionage Act of 1917 with spying for the Soviet Union, and they were convicted and sentenced to death. A series of appeals raised grave questions about the fairness of their trial, but the Supreme Court repeatedly affirmed their convictions and denied relief. The day before their scheduled executions, Douglas issued a stay. The full Court promptly convened and vacated the stay, and the Rosenbergs were executed on schedule. *See* RONALD RADOSH & JOYCE MILTON, *THE ROSENBERG FILE* (Yale Univ. Press 2d ed. 1997) (1983); WILLIAM M. WIECEK, *THE BIRTH OF THE MODERN CONSTITUTION: THE UNITED STATES SUPREME COURT, 1941–1953*, at 602–18 (2006).

hearing arguments presented by attorneys for the Rosenbergs on *five* separate occasions.”²⁷ On each of those occasions, an affirmative vote from Douglas would have been decisive and would have brought the case to the Court for a full hearing. After a careful review of the available evidence, Jim reached a “profoundly unsettling” conclusion: Douglas’s five negative votes had placed the Rosenbergs in an unfair and untenable legal position, forcing them into the procedural equivalent of “a game of Russian roulette.” The Justice’s conduct in the case was “inconsistent with his whole judicial approach and philosophy.”²⁸

II. PRINCIPAL THEMES

While Jim’s books range across the sweep of American history, they center in large part around three recurring themes. The first is the influence of the personal on judicial decisionmaking, the significance of the distinctive character and values of individual judges and their relationships with their colleagues. The second is the fundamental importance of civil liberties in a democratic society. The third is the differing roles of the President and the Supreme Court—and the uncertain and often erratic performances of both in the face of national crises—in preserving those fundamental liberties.

A. *The Personal and the Judicial*

Most of Jim’s books are biographical, and even the two with more general orientations nonetheless focus for the most part on a handful of individuals. “Personal relationships, as chief justices from Marshall to Warren proved,” Jim explained in his first book, “could count for a great deal on the Supreme Court.”²⁹ In *What Kind of Nation* he noted that Justice Joseph Story was impressed not only with Marshall’s substantive legal views but also with his “towering intellect” and “unwearied patience.”³⁰ Early on, he developed “an affection for John Marshall” and “delighted in Marshall’s company.”³¹ That personal relationship made it easier to understand why a loyal Republican appointed by James Madison became a stalwart supporter of the old Federalist Chief Justice.³² Similarly, Jim’s latest book recounts the story of Felix Frankfurter’s first Saturday Court conference, when the new arrival was embarrassed to appear in casual clothes and an alpaca jacket while the other Justices all wore suits. During the lunch break Frankfurter rushed home to change into a suit, only to return to find Chief Justice Hughes—who, obviously, had also rushed home during the

27. SIMON, *INDEPENDENT JOURNEY*, *supra* note 4, at 299.

28. *Id.* at 312–13.

29. SIMON, *supra* note 2, at 148.

30. SIMON, *supra* note 6, at 267.

31. *Id.* at 266, 267.

32. Marshall succeeded brilliantly because his “skillful lobbying” allowed him “to develop unanimity among six diverse, highly independent men” and over time “to change the perception of the Court as the surrogate voice for the Federalists.” *Id.* at 170, 152, 171.

break—sitting at the conference table in casual clothes and an alpaca jacket. “Frankfurter,” Jim noted, “was soon effusively praising Hughes’s leadership skills, comparing him to Arturo Toscanini in his mastery of the Court’s business.”³³

Personal animosities, of course, could be equally significant. The antagonism between Douglas and Frankfurter “had to do with personality as much as judicial principle.”³⁴ In fact, much of the bitter discord on the Court during the 1940s and 1950s stemmed from personal rancor and jealousy, emotions that widened the jurisprudential gulf that divided Frankfurter, Owen Roberts, and Robert Jackson from Douglas, Black, and Frank Murphy.³⁵ Indeed, in the early 1940s Frankfurter lost his leadership position over Roosevelt’s other Court appointees not simply because of jurisprudential disagreements but because he could not deal effectively with eight diverse and independent-minded colleagues. “Black, with his expert political skills,” Jim explained, “was better equipped to influence the brethren.” Unlike Frankfurter, he “knew how to talk persuasively without lecturing like a Harvard professor.”³⁶ Similar to Frankfurter, Chief Justice Burger bristled at his colleagues’ alleged “activist” inclinations, accused them of “being unreasonable and irrational,” and repeatedly issued “[s]hrill denunciations” of their work.³⁷ As a result, in his first years Burger became increasingly “isolated” and ineffective, and the Court “rarely heeded the chief justice’s advice.”³⁸

Moving beyond the mesh or clash of personalities, Jim’s books also examine the impact of the Justices’ substantive views and values on their individual decisionmaking and on their influence in shaping the Court’s jurisprudence. The books carefully delineate both the irregular contours that often marked a Justice’s constitutional views and the faint and shimmering lines that sometimes separated the views of one Justice from another. *In His Own Image* deftly charts the often subtle but nonetheless significant differences that distinguished Nixon’s four “conservative” appointees,³⁹ while *The Center Holds* incisively identifies the specific factors that from case to case divided or united Justices with differing views and values. In considering the Court’s 5–4 decision voiding a state anti-flag-burning statute in *Texas v. Johnson*,⁴⁰ for example, Jim adroitly explained a highly controversial case decided by an unusual lineup that witnessed Brennan split from Stevens, Scalia from Rehnquist, and O’Connor from Kennedy.⁴¹

33. SIMON, *supra* note 8, at 363.

34. SIMON, *THE ANTAGONISTS*, *supra* note 4, at 188.

35. *E.g.*, *id.* at 114–19; SIMON, *INDEPENDENT JOURNEY*, *supra* note 4, at 204, 216–22, 245–46, 279, 297–99.

36. SIMON, *THE ANTAGONISTS*, *supra* note 4, at 127. “Once again, Black showed his expert political skills and proved that he, rather than Frankfurter, was the better negotiator.” *Id.* at 182 (discussing the Court’s decision in *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948)).

37. SIMON, *supra* note 2, at 134, 136 (internal quotation marks omitted).

38. *Id.* at 134, 138.

39. SIMON, *supra* note 2, *passim*.

40. 491 U.S. 397 (1989).

41. *See* SIMON, *supra* note 5, at ch. 11.

It may be, too, that Jim’s consideration of the Court’s rightward shift in *The Center Holds* led him to rethink his own views about the proper relationship between the Justices’ individual values and the formal constraints of the law. In his biography of Douglas in 1980, he was highly sympathetic—though not wholly uncritical—toward his subject’s “functional” and result-oriented jurisprudence.⁴² Fifteen years later, however, he seemed far more appreciative of those who showed a meticulous regard for rules and precedents and who pressed for careful, tightly focused opinions. It was, after all, his thesis in *The Center Holds* that centrist Justices were able to check their more ardent conservative colleagues and hold the Court to a relatively moderate course by stressing the need to honor precedents and produce doctrinally narrow and fact-based opinions.

B. Civil Liberties

The second major theme that threads through Jim’s work is the crucial importance of civil liberties, especially the paramount values enshrined in the First Amendment. Jim fairly explained that *Texas v. Johnson* was a difficult case because substantial values supported both sides of the argument, but he nonetheless happily approved of the majority’s action in voiding the statute. Using Charles Fried, President Ronald Reagan’s former solicitor general, as his spokesman, Jim summarized Fried’s testimony before the Senate Judiciary Committee as a compelling plea that Congress “must rise above politics” and reject all proposals to overturn the Court’s decision in the case by either statute or constitutional amendment. However offensive flag burning might be, protecting the right of individuals to speak and write freely was absolutely essential to sustain—again in Jim’s paraphrasing words—“a deep and humane tradition of democratic values.”⁴³

From his discussion of the Federalists’ Alien and Sedition Acts and Lincoln’s suspension of habeas corpus to the “hysteria” of McCarthyism⁴⁴ and the cumulating challenges that confront the modern Court, Jim’s commitment to the fundamental importance of civil liberties stands out in sharp relief. Anchoring his favorable portrayal of Hughes to the Chief Justice’s “outspoken” and career-long defense of First Amendment rights, Jim declared that during the 1930s Hughes “was at his dominant best in leading the Court toward an era of expansive protection of civil

42. SIMON, *INDEPENDENT JOURNEY*, *supra* note 4, at 251. Had Douglas been less bold and more committed to legal technicalities,

he might not have reached the substantive issues that would be crucial to future generations of Americans. But he did reach those substantive issues—the fundamental right to vote in state elections, for example, and the high place of free speech in our society—and his opinions became increasingly important in the second half of the twentieth century.

Id. at 256.

43. SIMON, *supra* note 5, at 277.

44. *See* SIMON, *supra* note 2, at 24.

rights and liberties.⁴⁵ Favoring Black over Frankfurter, he announced that it was Black's uncompromising "vision of the First Amendment's protection," not Frankfurter's flaccid balancing approach, that "again and again" proved the "sturdy bulwark against intrusions by legislatures or the Court itself."⁴⁶ In Frankfurter's timid approach to civil liberties, Jim declared bluntly, "something vital was lost."⁴⁷

Indeed, exhibiting his capacity for rendering fair and soundly based judgments, Jim even found some merit in the early Burger Court. "[I]f anything be true," he noted, "it is that the Burger Court's overall record on the issues that most touch libertarians is more impressive than the Vinson Court's."⁴⁸ Not high praise, but praise nonetheless. As Lear complimented his "pelican" daughter, Regan: "not being the worst / Stands in some rank of praise."⁴⁹

C. Civil Liberties and National Crises: The Executive and the Judiciary

Flowing from his concern with civil liberties, Jim's third principal theme is the shifting and uncertain performance of the executive and judiciary in protecting those liberties. Both branches, of course, are sworn to protect the Constitution, but wars, crises, depressions, and angry or frightened outcries from the public have frequently tested the wisdom and resolve of both. When such pressures led the executive to threaten or violate constitutional rights, the Court faced crucial separation-of-powers questions about whether, when, and to what extent it should intervene. Given the exceptional difficulty of some of the judgments involved, Jim pointed out, previously proclaimed values often proved unreliable indicators of how individuals would respond.

The "ironic reversal of roles" of Jefferson and Marshall in the treason trial of Aaron Burr illustrated the point. Jefferson, the "author of the Declaration of Independence and a supporter of many of the individual rights contained in the Bill of Rights, pursued Burr and his associates with a vengeance that ignored basic civil liberties." In contrast, Marshall, "whose major libertarian concern was the protection of private property, became the vigilant defender of criminal suspects' constitutional rights."⁵⁰

Sometimes, as in the Burr episode, Justices did check the executive, even when they had to reject their prior views to do so. As attorney general, Taney had identified "deep wells of presidential authority, totally independent of both Congress and the Supreme Court," but as Chief Justice during the Civil War he adopted a position "starkly at odds" with that earlier view in his effort to limit Lincoln's use of military

45. SIMON, *supra* note 8, at 195, 391; *see, e.g., id.* at 46–48, 117–18, 195–99.

46. SIMON, *THE ANTAGONISTS*, *supra* note 4, at 121; *see also* SIMON, *supra* note 2, at 36.

47. SIMON, *THE ANTAGONISTS*, *supra* note 4, at 200.

48. SIMON, *supra* note 2, at 284. The Warren Court had been "light years ahead of its conservative predecessors." *Id.* at 39.

49. WILLIAM SHAKESPEARE, *THE TRAGEDY OF KING LEAR* act 3, sc. 4, l. 81, act 2, sc. 4, ll. 295–96 (Barbara A. Mowat & Paul Werstine eds., Wash. Square Press 2005) (1623).

50. SIMON, *supra* note 6, at 258. Jefferson had been a staunch opponent of the Alien and Sedition Acts. *Id.* at 57–58.

arrests.⁵¹ Similarly, Robert Jackson found the President to have expansive and unprecedented powers while he was attorney general, but as a Justice he subsequently joined the Court in declaring President Harry Truman's seizure of steel mills during the Korean War an unlawful exercise of authority.⁵²

At other times and perhaps more commonly, however, the judiciary refused to act. Prior to the election of 1800, the nation's first free speech crisis witnessed an exemplary failure. "Under the Sedition Act, twenty-five persons were arrested, fourteen indicted, and ten tried and convicted, all of them supporters of the Republicans and critics of the governing Federalists."⁵³ The "procedural safeguards against repression," Jim declared, were "largely ignored by the federal judges, exclusively Federalists," who readily enforced the repressive laws their party had enacted.⁵⁴ Similarly, the anti-Communist fervor of the early 1950s led the Court essentially to abandon the First Amendment and allow the government to prosecute and convict eleven leaders of the Communist Party for little more than abstract speech. "Aside from the legal niceties involved, the Court was saying that it simply would not challenge the prevailing political passions of the day," Jim concluded with undisguised scorn. "If Americans wanted their government to track down Communists, even at the expense of Bill of Right guarantees, the Court would not stop them."⁵⁵

While Jim favors and usually sides with an active and interventionist judiciary willing to challenge the executive, he appears relatively conflicted when he discusses the actions of two of the Presidents he most admires, FDR and Lincoln. Dealing with the former, Jim criticizes Roosevelt's handling of the Court-packing episode as both politically inept and constitutionally dangerous,⁵⁶ but he nonetheless may underplay the President's private threats—which Jim terms "startling"—to defy the Court if it continued to void New Deal legislation.⁵⁷ More significant, Jim seems to go a bit too easily on the "ugly underside" of Roosevelt's wartime treatment of civil liberties, a record that includes spectacular abuses which, it must also be said, the Court itself sanctioned.⁵⁸

51. SIMON, *supra* note 7, at 193, 191; *see id.* at 192–95 (discussing *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487) (Taney, C.J., sitting on circuit)).

52. SIMON, *supra* note 2, at 240 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 647, 648 n.17 (1952) (Jackson, J., concurring)).

53. SIMON, *supra* note 6, at 52.

54. *Id.*

55. SIMON, *supra* note 2, at 25. Even during the late 1950s the Court only "stumbled along the libertarian path" that it would travel more confidently by the 1960s. *Id.* at 39.

56. SIMON, *supra* note 8, at 306–42. Further, Jim minimizes the President's claim that he "won the war" with the Court, *id.* at 344, and questions his contention that the Court-packing plan caused the Court's famous change of direction in 1937, *see id.* at 302–03, 344–45.

57. *Id.* at 284.

58. *Id.* at 395–97; *see, e.g., Ex parte Quirin*, 317 U.S. 1 (1942); *Korematsu v. United States*, 323 U.S. 214 (1944). For Roosevelt's intrusions on civil liberties, *see, e.g., FRANCIS MACDONNELL, INSIDIOUS FOES: THE AXIS FIFTH COLUMN AND THE AMERICAN HOME FRONT* 137–55, 163–71 (1995); *ATHAN THEOHARIS, SPYING ON AMERICANS: POLITICAL SURVEILLANCE FROM HOOVER TO THE HUSTON PLAN* 66–76, 157–60 (1978);

Jim seems even more conflicted—and understandably so—when he evaluates Lincoln’s actions during the Civil War. Taking firm control of the Union war effort, Lincoln ordered a blockade of Southern ports and suspended the writ of habeas corpus, both actions taken initially without congressional authorization.⁵⁹ Further, he authorized army commanders to arrest and try civilians before military tribunals, and he supported his Secretary of War, Edwin Stanton, in issuing orders for federal marshals and local officials to arrest and imprison persons “who may be engaged, by act, speech, or writing” in hindering military recruitment or who otherwise engaged in any “disloyal practice.”⁶⁰ In Baltimore the army jailed the editors of seven newspapers that had criticized the federal government, Jim notes, and in the first month after Stanton’s order more than 350 civilians were arrested, many on the flimsiest evidence of wrongdoing.⁶¹ Most confrontationally, Lincoln defied direct orders from Chief Justice Taney supporting the habeas corpus petition of John Merryman, a Maryland state legislator, who had been abruptly arrested and jailed for allegedly harassing Union troops.⁶² “None of these executive actions,” Jim noted, “was expressly sanctioned by the Constitution.”⁶³

Lincoln, of course, had his defenses. Naturally, he appealed to the Constitution for claims of inherent executive power, and Attorney General Edward Bates—like Attorneys General Taney before him and Jackson after—dutifully issued an elaborate opinion supporting the President’s actions.⁶⁴ More compelling, Lincoln appealed to practicality, emergency, and necessity. “[A]re all the laws, *but one* [habeas corpus], to go unexecuted,” the President asked rhetorically, “and the government itself go to pieces, lest that one be violated?”⁶⁵ The outcome of the war, and the Union itself, literally hung in the balance, Lincoln argued, and that paramount reality not only validated his actions but positively mandated them.⁶⁶

Leo P. Ribuffo, *United States v. McWilliams: The Roosevelt Administration and the Far Right*, in *AMERICAN POLITICAL TRIALS* 179, 179–205 (Michal R. Belknap ed., Praeger Publishers rev. ed. 1994).

59. See SIMON, *supra* note 7, at 205, 233.

60. *Id.* at 236–37.

61. *Id.* at 233, 237. The military made more than 14,000 arrests during the war and conducted more than 4200 trials by military commission, more than half in the border states of Missouri, Kentucky, and Maryland. The trials were generally marked by fairness and procedural regularity. See MARK E. NEELY, JR., *THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES* 161, 168, 232–35 (1991).

62. SIMON, *supra* note 7, at 186–98; see *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487) (Taney, C.J., sitting on circuit).

63. SIMON, *supra* note 7, at 195.

64. See *id.* at 196–97.

65. *Id.* (internal quotation marks omitted).

66. For Lincoln’s defense of his policies, including the suspension of the writ of habeas corpus, see 4 ABRAHAM LINCOLN, *Message to Congress in Special Session (July 4, 1861)*, in *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 421 (Roy P. Basler ed., 1953).

Jim’s judgment on Lincoln’s actions is careful and nuanced, and he terms the President’s constitutional legacy “ambiguous.”⁶⁷ Lincoln’s prompt and vigorous efforts early in the war, especially those directed at actions in wavering and endangered states, including the arrest of Merryman and even the defiance of Taney’s *Ex Parte Merryman* orders,⁶⁸ were fairly justified on “pragmatic” grounds.⁶⁹ Lincoln’s later and more widespread suspension of habeas corpus and his continued policy of military arrests, however, were not. In particular, Jim rejects Lincoln’s defense of the arrest and conviction of Ohio Peace Democrat Clement Vallandigham who, Jim declares, did nothing more than criticize the government’s conduct of the war. “That is political speech and should have been protected under the First Amendment.”⁷⁰

Jim points out, too, that the judiciary did almost nothing to try to effectively check Lincoln’s actions.⁷¹ The lower courts were “unresponsive” to Vallandigham’s appeal, and—in spite of the merits of his constitutional claim—the Supreme Court refused to hear his appeal.⁷² The courts, Jim concludes, were simply unwilling to challenge the executive in time of war, a judicial practice that “continued through every major war of the twentieth century.”⁷³ The Supreme Court’s famous 1866 decision in *Ex parte Milligan*,⁷⁴ which rejected the President’s use of military tribunals in areas where the civil courts were open, came safely and with little practical consequence only “after the war was over.”⁷⁵

Ultimately, however, Jim comes down firmly, if perhaps uneasily, on Lincoln’s side. The President saved the Union from an immediate and potentially lethal threat, and that overarching crisis justified limited violations of constitutional rights, even if it did not justify them all. Compared to the actions of other American Presidents in wartime, moreover, Lincoln’s actions were not “extreme.” He “consciously weighed the legitimate security needs of the nation under siege against the individual rights of its citizens.” Most important, “Lincoln’s moral compass remained steady, and so did his respect for the rule of law.” His overriding purpose was “not to seize authority

67. SIMON, *supra* note 7, at 280.

68. *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487) (Taney, C.J., sitting on circuit).

69. SIMON, *supra* note 7, at 282.

70. *Id.*

71. Indeed, the willingness of five Justices in *The Prize Cases*, 67 U.S. (2 Black) 635 (1863), to uphold Lincoln’s power to wage war against the Confederacy and to blockade its ports, even without an initial authorization from Congress, prevented “a judicial calamity from which the Union might not have recovered.” SIMON, *supra* note 7, at 232. Not surprisingly, Taney was one of the four dissenters in the case. 67 U.S. (2 Black) at 699.

72. SIMON, *supra* note 7, at 282; see *Ex parte Vallandigham*, 28 F. Cas. 874 (C.C.S.D. Ohio 1863) (No. 16,816); *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1863).

73. SIMON, *supra* note 7, at 282–83. “During the early 1940s, the constitutional separation of powers between the Court and the president, which Chief Justice Hughes had fought so hard to preserve, effectively collapsed.” SIMON, *supra* note 8, at 393.

74. 71 U.S. (4 Wall.) 2 (1866).

75. SIMON, *supra* note 7, at 282.

that was unchecked by the other co-equal branches of the federal government,” but simply and honestly to preserve the Union and “the constitutional government established by the framers” in its time of gravest peril.⁷⁶ Lincoln, Jim could not resist declaring, was wholly unlike George W. Bush, a President who attempted “to escape judicial scrutiny in the name of national security” in order to conduct an amorphous “War on Terrorism” that “has no discernible end.”⁷⁷

III. SOME LESSONS AND CONCLUSIONS

Jim’s rich histories teach their most general lessons almost by osmosis, through their sensitive, specific, and context-rooted narratives. Some lessons are simple and obvious. One would hardly be surprised at the vastly corrupting effects of the Supreme Court’s recent decision in *Citizens United*,⁷⁸ for example, if one had read Jim’s discussion of the revelations produced by Charles Evans Hughes’s insurance investigations in New York in 1905.⁷⁹ Other lessons are broader and more complex. Jim’s books, for example, limn the massive growth of both executive and judicial power over the past two centuries and suggest implicitly the relative decline of Congress, not as matters of overt constitutional theory or express constitutional powers but as matters of the ongoing operations of American government.

Among Jim’s more general contributions to the understanding of American constitutionalism, two interrelated lessons stand out. The first is the importance of recognizing the essential ambiguity of “originalist” sources, including the generalities, imprecisions, and silences of the constitutional text itself. Jim’s book on Jefferson and Marshall—indeed, its very title: *What Kind of Nation*—makes that point convincingly. The Founders shared many fundamental values, but they also sharply and continuously disputed the meaning, relative significance, and proper political and social institutionalization of those values. Jefferson and Marshall exemplified that conflict dramatically. The two were exceptionally similar: both were white males who were republicans, constitutionalists, Virginians, revolutionaries, lawyers, students of the same teacher, and prominent slave owners who led relatively prosperous but debt-ridden lives. On top of that, they were cousins, descendants of the same eminent Virginia family. Yet, they disagreed about the meaning of the

76. *Id.* at 285, 286.

77. *Id.* at 285. Some readers might wish to add one further point to Jim’s comparison. Lincoln also differed from Bush in that Lincoln waged war only against those who had attacked the United States. To have been like Bush, Lincoln would have had to respond to the Confederate attack on Fort Sumter by, for example, invading Denmark.

78. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

79. SIMON, *supra* note 8, at 30–36. The investigation uncovered massive financial wrongdoing in all the nation’s major insurance companies, including a steady stream of substantial and covert contributions to politicians at all levels of government. It found, for example, that in 1904 the New York Life Insurance Company secretly gave \$48,000 to President Theodore Roosevelt’s reelection campaign. *See id.*

Constitution passionately and nearly across the board. “[E]ach man viewed the other as a leader of political forces the other believed could devastate the nation.”⁸⁰

Today, Jon Stewart mocks the tendency of contemporary polemicists and propagandists to charge their adversaries with being “Hitler,” a ridiculous charge that does nothing but roil partisan passions and disrupt intelligent debate.⁸¹ Yet, the Founders themselves engaged in a similarly brutal discourse, charging their adversaries with being antirepublican monarchists, Jacobin fanatics, or far worse.⁸² Indeed, as Jim makes clear, the Founders had a charge analogous to the contemporary charge of being a “Hitler.” It was the accusation of being a “Bonaparte.” That practice of partisan vituperation unsurprisingly saw Hamilton condemn Jefferson for plotting “a revolution after the manner of Bonaparte,” while Jefferson castigated Hamilton simply as “our Bonaparte.”⁸³

Thus, the Founders disagreed as frequently, broadly, and bitterly as Americans do today. The fundamental fact is that the Constitution did not settle most of the disputes that divided the founding generation. Rather, it incorporated their disagreements into its general language and protected their ability to continue their debates with its system of separated and counterpoised institutional powers. The Founders’ overarching achievement was not to settle substantive disputes over values and policies but rather to create a workable and enduring structure through which they and their descendants could seek to address their continuing disputes peaceably, rationally, and fairly into an inevitably changing and wholly unknowable future.

Such a point might seem obvious and hardly worth emphasizing, except for one fact. Today many Americans—including some in high government positions who are apparently driven not by commitments to understand either history or constitutionalism but by a determination to advance their own partisan ideologies—claim that “originalist” sources validate their positions on contemporary legal and political issues. Given that misleading polemical practice, it is essential to continue to teach the fundamental truth that such “ideological originalism” is historically unfounded, analytically confused, and constitutionally unwise.⁸⁴ The study of

80. SIMON, *supra* note 6, at 76.

81. See *The Daily Show with Jon Stewart: A Relatively Closer Look - Hitler Reference* (Comedy Central television broadcast June 16, 2005), available at <http://www.thedailyshow.com/watch/thu-june-16-2005/a-relatively-closer-look---hitler-reference>.

82. See, e.g., RICHARD N. ROSENFELD, *AMERICAN AURORA: A DEMOCRATIC-REPUBLICAN RETURNS; THE SUPPRESSED HISTORY OF OUR NATION’S BEGINNINGS AND THE HEROIC NEWSPAPER THAT TRIED TO REPORT IT* (1997).

83. SIMON, *supra* note 6, at 107, 121. Jim quotes another unnamed Federalist who charged that Jefferson “rules both Houses of Congress as Bonaparte rules the people of France.” *Id.* at 164.

84. “Ideological originalism” refers to the “law-office” treatment of the historical sources of the Founding Era as a grab-bag of events, documents, and quotations to be used to justify contemporary social views and policy preferences. It should be distinguished from any “originalism” that seeks to understand the Founders, the Founding, the Constitution, and the struggles of the early Republic in their full historical complexity and to learn what is fairly to be learned from that historical complexity. See, e.g., Edward A. Purcell, Jr., *Barry Friedman’s The Will of the People: Probing the Dynamics and Uncertainties of American Constitutionalism*, 2010 MICH. ST. L. REV. 663, 694–95 & nn.150–51 (2010).

constitutional history, especially the struggles of the Founders, can provide invaluable illumination and inspiration in understanding the institutions, principles, purposes, values, and goals that the Constitution enshrines, but such study can seldom produce timelessly “correct” or “authentic” answers to the challenging questions of modern constitutional government.⁸⁵

A second lesson, flowing readily from the first, is that most constitutional decisionmaking involves complex and to some extent “subjective” reasoning. While many Americans have from the beginning insisted on the preexisting nature of law and the “objective” nature of the judicial process, serious students of law and history have increasingly recognized that both of those ideas are misconceived. The true challenge of American constitutional government is to recognize and follow whatever institutional and principled guidance the Constitution, its underlying values, and the nation’s history offer while shaping the law reasonably and fairly to meet the changing demands of new and radically different ages. Jim’s books help us understand this challenge by illuminating the complex, evolving, and culturally-rooted nature of American constitutionalism.

Jim’s analysis of Black and Frankfurter, for example, makes it clear that there is no algorithm and no “logical” method that can wholly expel the personal and subjective elements of constitutional interpretation. Condemnations of judicial “subjectivism” and judicial “activism” can eliminate neither of those factors, and those who issue such condemnations—as both Black and Frankfurter repeatedly did, and as some still do today—are never themselves free from the alleged transgressions they attribute to their targets. Neither Black’s ostensibly pure textualism nor Frankfurter’s purportedly salutary “judicial restraint” achieved, or can achieve, that result. Indeed, as Jim shows, the jurisprudential positions of both Black and Frankfurter were themselves the products of their respective backgrounds, personal values, political affiliations, and policy goals. The same, of course, can be said—as Jim, in effect, does—about Marshall, Taney, Hughes, Warren, Rehnquist, and all the other Justices who have fallen under his scrutiny.

Through sensitive and detailed historical analyses, then, Jim teaches the agonizingly complex challenge of American constitutional law: that it should be soundly principled and value-affirming, yet shrewdly practical and socially efficacious; that it should be orderly and consistent, yet flexible and adaptive; that it should honor the Constitution’s mandates and restrictions, but recognize their ambiguities and incompleteness. Only by absorbing the kind of deeply informed studies that Jim has produced can we truly understand both the staggering difficulty of that challenge and the real possibility that we can continue to find ways, however imperfect, to meet it.

85. *See generally* JACK M. BALKIN, *LIVING ORIGINALISM* (2011); EDWARD A. PURCELL, JR., *ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL ENTERPRISE* (2007).