1992


William P. LaPiana
New York Law School, william.lapiana@nyls.edu

Follow this and additional works at: http://digitalcommons.nyls.edu/fac_articles_chapters
Part of the Supreme Court of the United States Commons

Recommended Citation

This Article is brought to you for free and open access by the Faculty Scholarship at DigitalCommons@NYLS. It has been accepted for inclusion in Articles & Chapters by an authorized administrator of DigitalCommons@NYLS.
BOOK REVIEW


Reviewed by William P. LaPiana*

The fourth volume of The Documentary History of the Supreme Court of the United States, 1789-1800 is subtitled Organizing the Federal Judiciary: Legislation and Commentaries. The subtitle neatly summarizes the contents. The first part of the work sets forth the legislation of the first six Congresses concerning the federal judiciary, including some bills that were never enacted. Each section has an appropriate and helpful introduction. The work’s second part consists of extracts from periodicals and private correspondence that comment on the legislation. The chronological scope thus carries the reader from the Judiciary Act of 1789 to the ill-fated Judiciary Act of 1801, which gave John Adams the opportunity to appoint the midnight judges and created the situation that led to Marbury v. Madison. Although the drama and intrigue of that case is outside the scope of this volume, anyone interested in a full understanding of the political passions that lay behind it will find the current volume useful.

* Professor of Law, New York Law School.

2. See 4 id. at 1-361.
3. See 4 id. at 19, 176, 212, 216, 223, 243.
4. See 4 id. at 362-722.
5. Ch. 20, 1 Stat. 73 (codified in scattered sections of 28 U.S.C.); see 4 THE DOCUMENTARY HISTORY, supra note 1, at 38-108.
6. 2 Stat. 89 (repealed 1802); see 4 THE DOCUMENTARY HISTORY, supra note 1, at 295-310.
7. See 4 THE DOCUMENTARY HISTORY, supra note 1, at 294 (stating that passage of the Judiciary Act of 1801 allowed President Adams to fill “all the new judicial positions [created by the Act] in the few weeks before he left office”).
8. 5 U.S. (1 Cranch) 137 (1803).
Although both the legislative and commentary sections' organization
is chronological, the extensively detailed index is an excellent tool for
pursuing specific topics. Every section of each major piece of
legislation is given a separate entry, with a summary of its provisions and
page references to both legislative materials and commentaries. Entries for
individuals are carefully detailed allowing the researcher to find comments
on specific subjects as well as all letters to or from the individual included
in the commentary section.

Some of those subjects include highly controversial topics, such as:
the role of the common law in the federal courts; the very existence of a
common law of the United States; and the place of politics in the federal
judiciary. The material does not provide any startling revelations; in
fact, on some subjects the editors take no position. For example, in the
much debated role—if any—of a federal common law, the editors
reproduce Section 34 of the Judiciary Act of 1789 along with Oliver
Ellsworth's famous first draft referring to “the Statute [sic] law of the
several States in force for the time being, & their unwritten or common
law.” The introductory editorial note simply states that “when or why”
the change from the precise description “Statute law” to the simple term
“Laws” was made “is not known . . . nor can it be determined exactly
when or how this section came into being.”

The editors did include, however, several documents, listed in the
index under the topic “Common Law,” that give interesting insights into
the issue involved in Section 34. In August 1790, the House of
Representatives requested a report from Attorney General Edmund
Randolph on improving the administration of justice. Randolph
produced a comprehensive report and a draft for a new judiciary act. The
draft provided an explicit adoption of the common law as a rule of
decision “so far as the same be not altered by the supreme law, by the
laws of particular states, or by statutes.” In his report, Randolph

10. See 4 THE DOCUMENTARY HISTORY, supra note 1, at 751-800.
11. See, e.g., 4 id. at 774 (showing topics relating to John Jay, including various
letters, comments, orders, and positions).
12. See, e.g., 4 id. at 769 (referring to Oliver Ellsworth's comments on common
law); id. at 783 (referring to John Lowell's comment on proposed alterations to the
judicial system).
13. Ch. 34, 1 Stat. 73 (codified in scattered sections of 28 U.S.C.); see 4 THE
DOCUMENTARY HISTORY, supra note 1, at 105.
14. 4 THE DOCUMENTARY HISTORY, supra note 1, at 105-06.
15. 4 id.
16. 4 id. at 760.
17. 4 id. at 122.
18. Edmund Randolph, Report of the Attorney-General to the House of
explained this provision, noting that “[i]t is conjectured that the common
law was omitted among the rules of decision, as having been already the
law of the United States.” That was, of course, a controversial
assertion, and Randolph was quite wrong when he added: “[m]ost probably [the existence of a common law of the United States] will be
seldom if ever controverted.” More interesting, however, is his
rationale for making the adoption of the common law explicit. He believed
that without a statutory provision, the federal courts might use common-
law doctrine either only to the extent that it was used in federal statutes
or, in diversity cases, the doctrine might be limited to a particular state’s
common law. Because some parts of the common law “do not fall
within either of these characters” those parts would “be estranged from
our system.”

Randolph’s assertions and recommendations illustrate the ambiguity
of the word “Laws” as used in Section 34. Such a view of the nature
of law made it possible to assert, as did Pennsylvania Judge Edward
Shippen in a letter to Robert Morris, that “it should not be left to the
Judges to make the Law, but only to declare it.” The common law,
however, is bigger than the laws of any one jurisdiction, and its doctrines
exist and should be “rules of decision” even if they have not been reduced
to the written formulae of statutes or specific decisions of a particular
jurisdiction.

This brief discussion of one small topic covered in this volume
reminds us that in some ways legislators who initially defined the federal
judiciary thought differently from us. Indeed, the whole message of
history, especially for lawyers who are so committed to the idea of
precedent, is that the past can be very different from the present, and that
the same words can mean one thing in 1790 and a very different thing

20. Id.
21. See id.
22. Id.
23. See, e.g., id. at 161, 166-67 (discussing the difference between law and fact in
the context of the Process Act of 1789).
24. Letter from Edward Shippen to Robert Morris (July 13, 1789), in 4 THE
DOCUMENTARY HISTORY, supra note 1, at 464, 466 [hereinafter Shippen Letter].
25. See William P. LaPiana, Swift v. Tyson and the Brooding Omnipresence in the
771, 779-80 (1986) (stating that the First Congress, in passing the Judiciary Act of 1789,
“tied the hands of the federal courts by requiring that the law of the several states be
regarded as the rules of decision”).
years later.\textsuperscript{26} We have trouble accepting Randolph's\textsuperscript{27} and Shippen's\textsuperscript{28} idea of the common law and Story's holding in \textit{Swift v. Tyson},\textsuperscript{29} which faithfully reflects it, because nineteenth-century positivism has thoroughly transformed legal culture.\textsuperscript{30} This is exemplified by John Austin's ideas about law, which in turn helped inspire modern American legal education.\textsuperscript{31} Today, law is what the legislature and judges say it is, and, in a simple way, we are all legal realists.

We all may be realists, but that does not keep many of us from looking for some basis for law more consistent, and more dignified, than the judge's breakfast menu or the legislative influence of special-interest groups and the skill of their lobbyists. In recent years, the idea of "original intent" has become one of the most popular of these more permanent bases for the law.\textsuperscript{32} This volume puts one more nail in the coffin of that idea—no one knows what Ellsworth meant when he altered the wording of Section 34 of the 1789 Act—\textsuperscript{33} and on a much bigger scale, the entire book shows over and over the importance of political compromise in forming the federal judiciary.\textsuperscript{34} "Politicks are very

\begin{itemize}
\item \textsuperscript{26} See Paul Brest, \textit{The Misconceived Quest For The Original Understanding}, 60 B.U. L. REV. 204, 208-09 (1980) (suggesting that statements made "one or two hundred years ago" may have a different meaning in today's society).
\item \textsuperscript{27} Randolph, supra note 18, at 138.
\item \textsuperscript{28} Shippen Letter, \textit{supra} note 24, at 466.
\item \textsuperscript{29} 41 U.S. (16 Pet.) 1 (1842) (interpreting the word "Laws" in Section 34 of the Judiciary Act of 1789 as not including decisions of state courts); see also LaPiana, \textit{supra} note 25, at 773 (stating that Justice Story held that "the word 'laws' in section 34 did not include the decisions of state courts" as those decisions were, "at most, only evidence of what the laws are, and... not of themselves laws").
\item \textsuperscript{30} See generally LaPiana, \textit{supra} note 25 (using Justice Story's opinion in \textit{Swift v. Tyson} as a basis for examination of American law in the 19th century).
\item \textsuperscript{31} See \textit{JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED} (1832); see also WILFRID E. RUMBLE, \textit{THE THOUGHT OF JOHN AUSTIN} 2 (1985) (asserting that "Austin's philosophy is... important because of its pivotal role in the development of legal positivism"); William P. LaPiana, \textit{Victorian From Beacon Hill: Oliver Wendell Holmes's Early Legal Scholarship}, 90 COLUM. L. REV. 809, 811 (1990) (describing Austin as an "exemplar of [one of the] 'modern' approaches to law").
\item \textsuperscript{32} See James A. Gardner, \textit{The Positivist Foundations of Originalism: An Account and Critique}, 71 B.U. L. REV. 1, 4-5 (mentioning the attraction of originalism and its continued application in the courts); see also ROBERT H. BORK, \textit{THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW} 17 (1990) (asserting that original intent is the only appropriate method of statutory and constitutional interpretation).
\item \textsuperscript{33} See 4 \textit{THE DOCUMENTARY HISTORY}, \textit{supra} note 1, at 105.
\item \textsuperscript{34} See \textit{id.} at 3-18 (discussing the numerous areas of controversy surrounding ratification of Article III of the Constitution).
\end{itemize}
irritable matters," as Massachusetts Judge James Sullivan wrote to Senator John Langdon. Nevertheless, politics shaped the judiciary and left that shape open to criticism and attempts at revision. One lesson of the materials gathered here is the skill with which the Judiciary Act of 1801 was drafted to meet serious shortcomings that the previous decade had revealed. To some degree, everyone accepted the idea that the 1789 Act was an experiment that would have to be revisited sooner or later—sooner, especially given Randolph's report of 1790. The 1801 Act, however, was also shaped by the Federalists' desire to keep control of the judiciary in the face of Jefferson's victory in 1800 and was repealed by Republicans equally determined to frustrate the Federalists.

The documentary bases of our system of government are all the products of compromise, and it seems extraordinarily difficult to extract from their words binding principles for a transformed world.

Original intent, however, can signify several different approaches to the record of the past. Although the exact words of our founding documents are the product of political compromise, there may be ideas and beliefs on which no compromise was necessary because they were so widely accepted. Perhaps we should look for guidance not to specific words but to the political and legal culture of the founding period in the hope of finding principles that will serve to inspire governance of our world.

36. See, e.g., Randolph, supra note 18, at 128 (criticizing and proposing revisions to the Judiciary Act of 1789); see also supra note 17 and accompanying text.
37. 2 Stat. 89 (repealed 1802).
38. See, e.g., Letter from James Sullivan to Elbridge Gerry (Mar. 22, 1789), in 4 THE DOCUMENTARY HISTORY, supra note 1, at 372 (expressing dislike for the proposed judicial plan); Letter from James Sullivan to Elbridge Gerry (Apr. 22, 1789), in 4 THE DOCUMENTARY HISTORY, supra note 1, at 376 (describing the difficulty in forming a consensus among the Congressional representatives of the States).
39. See 4 THE DOCUMENTARY HISTORY, supra note 1, at 284.
40. See 4 id. at 35.
41. See 4 id. at 284-95 (discussing the circumstances surrounding the passage of the Judiciary Act of 1801).
42. See 4 id. at 294-95.
43. See, e.g., 4 THE DOCUMENTARY HISTORY, supra note 1, at 5-8 (describing the controversy at the Constitutional convention concerning the creation of inferior federal courts, the jurisdiction of those courts, and the resultant Article III provisions).
One such principle, revealed by the editors, could be described as access to the law. Much of the political struggle over the forming of the federal judiciary involved geography: where would the courts sit? While it is easy to dismiss this controversy as a struggle over the economic benefits of legal business, a careful reading of the material shows a deep and passionate concern for arranging a system that will allow for easier physical access to the courts. It is fashionable today to deprecate Americans' willingness to rely on the law. Our political ancestors, however, knew that the greatest protection for their rights, property, and person lay in the fair and convenient administration of the law.

Today, geography is not much of a barrier to litigants, certainly not the sort of barrier it was 200 years ago. Other barriers abound, however, whether they be economic or cultural. For example, if an aggrieved citizen cannot afford to hire legal representation or if bigotry,
directed against a group to which the citizen happens to belong, blocks a citizen's access to the law, a mockery is made of the promise of due process. If we want inspiration for the American law of today, we should look not to engrossed parchment but to the ideas and ideals of our nation's founders to find what may still guide us in the modern world. Volume Four of The Documentary History of the Supreme Court provides much material for careful contemplation.

52. See Jane Rutherford, The Myth of Due Process, 72 B.U. L. Rev. 1, 99 (1992) (concluding that due process will be viewed by some as nothing more than a myth "[s]o long as women, the poor, and minorities are excluded from meaningful participation and power").