

2013

Foreword: Supreme Court Narratives: Law, History, and Journalism

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Recommended Citation

New York Law School Law Review, Vol. 57, Issue 3 (2012-2013), pp. 429-434

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JAMES F. SIMON

Foreword

57 N.Y.L. SCH. L. REV. 429 (2012–2013)

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FOREWORD

I was thrilled, and humbled, by the *Supreme Court Narratives: Law, History, and Journalism* symposium held in my honor at New York Law School in April 2012,¹ and again by reviewing this special issue of the *New York Law School Law Review* featuring essays presented at the symposium.² Reading these marvelous essays has prompted me to reflect on my legal education at Yale Law School and the professors who most influenced my books on constitutional law, politics, and American history.

Professor Alexander M. Bickel introduced me to constitutional law in my first semester at the law school and immediately impressed upon me, and every other intimidated member of my class, that the study of Supreme Court opinions required intense concentration and finely honed analytical skills. To make his point, Professor Bickel spent the first six weeks of the course on one Court decision, *Marbury v. Madison*.³

Professor Bickel's rigorous classroom lessons were followed a year later by those of Professor Fred Rodell in his seminar on the modern Supreme Court. Professor Rodell was a skeptic when it came to distilling constitutional principles from Supreme Court opinions. He maintained that the study of Court opinions could not be understood by textual analysis alone, but that a reader must also consider the backgrounds, values, and personalities of the Justices writing the opinions. Bickel's and Rodell's contrasting perspectives on constitutional law were further reflected in their allegiances to different Justices on the Warren Court. Bickel had clerked for Justice Felix Frankfurter and, like Frankfurter, was a proponent of judicial restraint.⁴ Rodell, a close friend of Justice William O. Douglas, was a passionate champion of civil rights and liberties and embraced the jurisprudence of the two leading liberals on the Court, Justices Douglas and Hugo L. Black.⁵

Despite Bickel's and Rodell's very different interpretative models, I owe each of them a profound debt of gratitude for laying the foundation to my own approach to constitutional law and history. I have attempted to emulate Professor Bickel's intellectual rigor in analyzing individual Supreme Court decisions. But I also have considered the political climate in which the cases were decided as well as the backgrounds and values of the individual Justices writing the opinions. I owe Professor Rodell a further debt: in a second seminar, on writing about law for a general audience, he planted the seed for my future writing career—first as a journalist for the *St. Louis Post-Dispatch* and *Time Magazine*, and later as an author.

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1. See *Supreme Court Narratives: Law, History, and Journalism*, N.Y.L. SCH. L. REV. (Apr. 12, 2012), <http://www.nylslawreview.com/supreme-court-narratives-law-history-and-journalism/>.
 2. Symposium, *Supreme Court Narratives: Law, History, and Journalism*, 57 N.Y.L. SCH. L. REV. 423 (2012–2013).
 3. 5 U.S. 137 (1803).
 4. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 133–42 (Vail-Ballou Press, Inc. 2d ed. 1986) (1962).
 5. FRED RODELL, *NINE MEN: A POLITICAL HISTORY OF THE SUPREME COURT FROM 1790 TO 1955* xi (2d prtg. 1955).

In the first essay of this special issue, Professor Akhil Reed Amar of Yale Law School provides a fascinating analysis of Chief Justices and Chief Executives.⁶ He explores the structural tensions between Presidents and Chief Justices, discussing the transformative presidencies of Thomas Jefferson, Abraham Lincoln, and Franklin D. Roosevelt—and the Chief Justices who attempted to thwart their political ambitions. Professor Amar’s essay offers fresh insights into the clashes between Jefferson and Chief Justice John Marshall, Lincoln and Chief Justice Roger B. Taney, and FDR and Chief Justice Charles Evans Hughes, even for someone, like me, who has devoted many years to the study of those tumultuous clashes.

My colleague, R.B. Bernstein, documents the complicated, unpredictable story of the appointment of our greatest Chief Justice, John Marshall.⁷ His cogent analysis underscores the role of politics, and chance, in changing the direction of our constitutional history. We can only speculate on how different the history of the Supreme Court would have been had John Jay, President John Adams’s first choice to succeed Chief Justice Oliver Ellsworth, accepted the appointment.

University of Texas Professor L.A. Powe, Jr.’s book review, *Two Great Leaders*, traces in telling detail the clash between FDR and Chief Justice Hughes, culminating in FDR’s Court-packing plan in 1937 and Hughes’s letter to the Senate Judiciary Committee, which provided a devastating rebuttal to the President’s rationale for the plan.⁸ Professor Powe then discusses Associate Justice Owen Roberts’s votes in three key Supreme Court decisions announced after FDR’s Court-packing plan, each reversing his prior positions in what came to be known as “the switch in time that saves nine.”⁹ Powe considers two competing academic theories to explain Roberts’s votes: Did Roberts feel the political pressure exerted by Roosevelt, as the “externalists” maintain?¹⁰ Or did the Justice change course because the challenged statutes were better drafted than earlier versions that the Court had struck down and, therefore, could withstand careful analysis, as the “internalists” contend?¹¹

My colleague, Professor Edward A. Purcell, Jr., undertakes the daunting task of identifying unifying themes in my eight books, written over a span of forty years.¹² I admire his courage in undertaking the task and am extremely gratified by the result of his study. Purcell concludes that my books have three overarching themes: the influence of the personal on judicial decision, including considerations of the character and values of individual judges and their relationships with their colleagues;

6. Akhil Reed Amar, *Chief Justices and Chief Executives: Some Thoughts on Jim Simon’s Books*, 57 N.Y.L. SCH. L. REV. 435 (2012–2013).

7. R.B. Bernstein, *President John Adams and Four Chief Justices: An Essay for James F. Simon*, 57 N.Y.L. SCH. L. REV. 441 (2012–2013).

8. L.A. Powe, Jr., *Two Great Leaders*, 57 N.Y.L. SCH. L. REV. 465 (2012–2013).

9. *Id.* at 477.

10. *Id.* at 477–78.

11. *Id.* at 477.

12. Edward A. Purcell, Jr., *Graceful, Scholarly, and Illuminating: The Books of James F. Simon*, 57 N.Y.L. SCH. L. REV. 483 (2012–2013).

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the fundamental importance of civil liberties in a democratic society; and the differing roles of the President and the Supreme Court in preserving those fundamental liberties. Whether or not I have been successful in exploring these themes, I would like to think that my two mentors—Professors Bickel and Rodell—would have applauded the effort.

Professor Stephen Wermiel, Fellow in Law and Government at American University's Washington College of Law, and I have journeyed along the same career path. He was first a journalist and later an academic and author.¹³ Professor Wermiel brings a wealth of experience to the task of analyzing the arduous, often frustrating challenge of trying to tell the dramatic inside story of a Court decision without compromising the integrity of the decisionmaking process.¹⁴

I would also like to acknowledge the outstanding presentations and commentaries of the other participants in the *Supreme Court Narratives* symposium: author and columnist Jonathan Alter; television commentator, author, and former judge Catherine Crier; Professor Richard Friedman of the University of Michigan Law School; Pulitzer Prize-winning author and Harvard University professor of history and law Annette Gordon-Reed; *The New York Times*' Supreme Court correspondent Adam Liptak; Professor Nadine Strossen of New York Law School; and author Jeff Shesol. Neither the symposium nor this issue of the *Law Review* would have been possible without the dedication of the editors of the *Law Review* and the generous support of my colleagues, Edward A. Purcell and Nadine Strossen.

Finally, I want to recommend the article in this issue, "Dealing with the Appellate Caseload Crisis": *The Report of the Federal Courts Study Committee Revisited*, written by my dear friend, the late Roger J. Miner, a distinguished member of the U.S. Court of Appeals for the Second Circuit for more than twenty-five years. Judge Miner's article, analyzing the problem of the federal appellate court backlog, was written with intellectual energy, insight, and practical wisdom—attributes so characteristic of his judicial opinions.¹⁵

13. For many years, Professor Wermiel was the Supreme Court reporter for *The Wall Street Journal*. He is coauthor with Seth Stern of *JUSTICE BRENNAN: LIBERAL CHAMPION* (2010).

14. Stephen Wermiel, *Using the Papers of U.S. Supreme Court Justices: A Reflection*, 57 N.Y.L. SCH. L. REV. 499 (2012–2013).

15. Roger J. Miner, "Dealing with the Appellate Caseload Crisis": *The Report of the Federal Courts Study Committee Revisited*, 57 N.Y.L. SCH. L. REV. 517 (2012–2013).

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