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# The Documentary History of Supreme Court of the United States, 1789–1800; Volume IV: Organizing the Federal Judiciary: Legislation and Commentaries

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## BOOK REVIEW

# THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800; VOLUME IV: ORGANIZING THE FEDERAL JUDICIARY: LEGISLATION AND COMMENTARIES. Edited by Maeva Marcus. New York, Columbia University Press, 1992. Pp. 800. $95.00

*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*.[1] 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.[2] Each section has an appropriate and helpful introduction.[3] The work's second part consists of extracts from periodicals and private correspondence that comment on the legislation.[4] The chronological scope thus carries the reader from the Judiciary Act of 1789[5] to the ill-fated Judiciary Act of 1801,[6] which gave John Adams the opportunity to appoint the midnight judges[7] and created the situation that led to *Marbury v. Madison*.[8] 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.[9]

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1. 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800 ORGANIZING THE FEDERAL JUDICIARY: LEGISLATION AND COMMENTARIES (Maeva Marcus ed., 1992) [hereinafter THE DOCUMENTARY HISTORY].

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6. 2 Stat. 89 (repealed 1802); *see* 4 THE DOCUMENTARY HISTORY, *supra* note 1, at 295-310.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).

9. *See generally* RICHARD E. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC (1971) (analyzing the relationship between an independent judiciary and the development of American democracy).

Although both the legislative and commentary sections' organization is chronological, the extensively detailed index is an excellent tool for pursuing specific topics.[10] 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.[11]

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.[12] 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[13] along with Oliver Ellsworth's famous first draft referring to "the Stat ute [sic] law of the several States in force for the time being, & their unwritten or common law."[14] 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."[15]

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.[16] In August 1790, the House of Representatives requested a report from Attorney General Edmund Randolph on improving the administration of justice.[17] 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."[18] In his report, Randolph

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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."[19] 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."[20] 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.[21] Because some parts of the common law "do not fall within either of these characters" those parts would "be estranged from our system."[22]

Randolph's assertions and recommendations illustrate the ambiguity of the word "Laws" as used in Section 34.[23] 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."[24] 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.[25]

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 200

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Representatives, *in* 4 THE DOCUMENTARY HISTORY, *supra* note 1, at 128, 160.

19. Randolph, *supra* note 18, at 138.

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 Sky: An Investigation of the Idea of Law in Antebellum America*, 20 SUFFOLK U. L. REV. 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.[26] We have trouble accepting Randolph's[27] and Shippen's[28] idea of the common law and Story's holding in *Swift v. Tyson*,[29] which faithfully reflects it, because nineteenth-century positivism has thoroughly transformed legal culture.[30] This is exemplified by John Austin's ideas about law, which in turn helped inspire modern American legal education.[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.[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[33]—and on a much bigger scale, the entire book shows over and over the importance of political compromise in forming the federal judiciary.[34] "Politicks are very

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26. *See* Paul Brest, *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).

27. Randolph, *supra* note 18, at 138.

28. Shippen Letter, *supra* note 24, at 466.

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, *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").

30. *See generally* LaPiana, *supra* note 25 (using Justice Story's opinion in *Swift v. Tyson* as a basis for examination of American law in the 19th century).

31. *See* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (1832); *see also* WILFRID E. RUMBLE, 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, *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").

32. *See* James A. Gardner, *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, 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).

33. *See* 4 THE DOCUMENTARY HISTORY, *supra* note 1, at 105.

34. *See* 4 *id.* at 3-18 (discussing the numerous areas of controversy surrounding ratification of Article III of the Constitution).

irritable matters,"[35] 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.[36] One lesson of the materials gathered here is the skill with which the Judiciary Act of 1801[37] was drafted to meet serious shortcomings that the previous decade had revealed.[38] To some degree, everyone accepted the idea that the 1789 Act was an experiment that would have to be revisited sooner or later[39]—sooner, especially given Randolph's report of 1790.[40] 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[41] and was repealed by Republicans equally determined to frustrate the Federalists.[42] 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.[43]

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.[44] 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.

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35. Letter from James Sullivan to John Langdon (Mar. 29, 1789), *in* 4 THE DOCUMENTARY HISTORY, *supra* note 1, at 372, 372.

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).

44. William E. Nelson, *Reason and Compromise in the Establishment of the Federal Constitution, 1787-1801*, 44 WM. & MARY Q., 3d ser., 458-84 (1987).

One such principle, revealed by the editors, could be described as access to the law.[45] Much of the political struggle over the forming of the federal judiciary involved geography: where would the courts sit?[46] While it is easy to dismiss this controversy as a struggle over the economic benefits of legal business,[47] 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.[48] It is fashionable today to deprecate Americans' willingness to rely on the law.[49] 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.[50]

Today, geography is not much of a barrier to litigants, certainly not the sort of barrier it was 200 years ago.[51] 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,

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45. *See, e.g.*, 4 *id.* at xxi ("Congress conceived and fashioned a system of courts that would 'bring justice to every man's door.'") (quoting "Brutus," *Letter No. XIV, part 2*, N.Y. J. & WKLY. REG., Mar. 6, 1789, *reprinted in* William Jeffrey, Jr., ed., *The Letters of "Brutus"—A Neglected Element in the Ratification Campaign of 1787-88*, 40 U. CIN. L. REV. 643, 765 (1971) [hereinafter *Letter No. XIV*]); William Patterson, Notes for Remarks on Judiciary Bill, *in* 4 THE DOCUMENTARY HISTORY, *supra* note 1, at 414, 416 (observing that federal circuit courts will "carry Law to their [the people's] Homes [and] Courts to their Doors [and] meet every Citizen in his home State").

46. *See* 4 THE DOCUMENTARY HISTORY, *supra* note 1, at 28-29 (describing the debates over locations of the federal courts).

47. *See* 4 *id.* at 29 ("Since a town that was chosen as the site of the federal court immediately gained prestige and business, there was intense competition for this honor.").

48. *See* 4 *id.* at xxi ("The documents published in this volume . . . reveal how Congress conceived and fashioned a system of courts that would 'bring justice to every man's door.'") (quoting *Letter No. XIV*, *supra* note 45, at 765).

49. *See, e.g.*, Deborah R. Hensler, *Taking Aim at the American Legal System: The Council on Competitiveness Agenda For Legal Reform*, 75 JUDICATURE 244 (1992) (critiquing former Vice President Quayle's Council on Competitiveness, which perceived that the prevalence of lawsuits has had a significant negative impact in the U.S. economy). *But see* Gregory B. Butler & Brian D. Miller, *Fiddling While Rome Burns: A Response to Dr. Hensler*, 75 JUDICATURE 251 (1992) (discussing and supporting the Council on Competitiveness and arguing that the civil justice system is in crisis).

50. *See, e.g.*, 4 THE DOCUMENTARY HISTORY, *supra* note 1, at 15-16 (discussing Alexander Hamilton's view that federal courts were "necessary to defend the people and the Constitution from a grasping legislature").

51. *See* 4 *id.* at 14 (stating the concern of Pennsylvania Antifederalists that many Americans would face difficulty "in traveling to a distant Supreme Court to plead their cases").

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.[52] 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").