

AMERICAN HISTORY AND THE STUDY OF CONSTITUTIONAL LAW

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I. INTRODUCTION

I thank whoever is responsible for selecting me to deliver the Justice Weintraub Lecture. Your selection gives me the opportunity to recall and reflect upon one of the great jurists of our time. It gives me the opportunity to try out on a captive audience some embryonic thoughts of my own, which began crystallizing during the last two fall semesters as I taught a constitutional law course at Seton Hall Law School.

First let me savor for a moment the memory of the Chief Justice who is honored by this lecture series. Upon a few occasions I argued before the Weintraub Court.¹ It was always an awesome experience. I had the feeling that the Chief Justice, sitting in the center, paying full attention, already knew everything I had to say about my case and probably much more. I met him from time to time at social occasions, but always found conversation difficult. What can one say to an intellectual and judicial giant that would either interest or amuse him?

Like most persons, I knew him more by his deeds than by personal association.

This brilliant Chief Justice had a flair for court administration. He was a champion of fairness in criminal proceedings;² he nevertheless was a severe but rational critic

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1. See, e.g., *In re* Supervision and Assignment of the Petit Jury Panels in Essex County, 292 A.2d 4 (N.J. 1972); *New Jersey Highway Auth. v. Sills*, 278 A.2d 489 (N.J. 1971); *Jackman v. Bodine*, 208 A.2d 648 (N.J. 1965); *O'Brien v. Virginia-Carolina Chem. Corp.*, 206 A.2d 878 (N.J. 1965), *cert. denied*, 389 U.S. 825 (1967); *Burton v. Montclair*, 190 A.2d 377 (N.J. 1963); *In re Armour's Will*, 166 A.2d 376 (N.J. 1960).

2. For example, the Weintraub Court expanded the areas in which criminal defendants could obtain pretrial discovery. See, e.g., *New Jersey v. Johnson*, 145 A.2d 313 (1958) (holding that defendant who cannot

of the Warren Court's decisions in the field of criminal law;³ he was the author of *Robinson v. Cahill*,⁴ which struck down, on state constitutional grounds, New Jersey's property-based tax system of financing public education. It was also Justice Weintraub who wrote the majority opinions in the reapportionment cases⁵ as New Jersey revised the structure of its legislative bodies to meet the one man-one vote mandate of the United States Supreme Court.⁶

As one of his former law clerks wrote, under his leadership "[t]he Court took a practical approach [to the reapportionment crisis] which produced results and avoided collisions with the legislature and the governor. Realizing the limits of the judiciary in this delicate area, it coaxed the more appropriate organs of the government into the proper action."⁷

II. DYNAMICS OF CONSTITUTIONAL CHANGE

It is this concept—the limits of the judiciary in delicate areas—which leads into my subject this afternoon, American History and the Study of Constitutional Law. It may seem pretentious of me to undertake this subject, since I am neither an historian nor a professor, but I am giving it a try. It is my observation that the seminal developments in constitutional law stem not from the works of particular Supreme Court Justices or of a particular Supreme Court. Rather, constitutional developments are the product of the on-going historical and political processes which dictate who will and

recall details of statements made at the time of defendant's arrest is entitled to inspect statements prosecutor intends to use at trial), *appeal dismissed*, 368 U.S. 145, and *cert. denied*, 368 U.S. 933 (1961).

3. See *State v. Gerardo*, 250 A.2d 130 (N.J. 1969), *application for bail denied*, 400 U.S. 859 (1970), in which Chief Justice Weintraub emphasized the values which are affected by application of an exclusionary rule, i.e., the ability to ascertain the truth is impaired; the toll of victims is increased; the deterrent effect of the criminal law is lessened. For a full discussion of the Chief Justice's critique of the decisions of the United States Supreme Court in the area of criminal justice see Dominick A. Mazzagetti, *Chief Justice Joseph Weintraub: The New Jersey Supreme Court 1957-1973*, 59 CORNELL L. REV. 197, 203-08 (1974).

4. 303 A.2d 273 (N.J. 1973), *modifying* 287 A.2d 187 (Super. Ct. Law Div. 1972).

5. For a review of these cases, see Mazzagetti, *supra* note 3, at 213-20.

6. See *Reynolds v. Sims*, 377 U.S. 533 (1964).

7. Mazzagetti, *supra* note 3, at 220.

who will not be appointed to the Supreme Court. Further, these processes inevitably influence the Justices who happen to be sitting on the Court at any particular time.

We are still mourning the loss and celebrating the life of Justice Thurgood Marshall. If my observation is correct, his principal contribution to the profound constitutional changes effectuated by the 1953-1968 Warren Court came long before he was a member of that Court. These contributions were made in the days of an earlier Little Rock; in the days when Montgomery, Birmingham and Selma were headline news. He was part of that heroic army of men and women whose deeds aroused and transformed a nation.

I would suggest that without their struggle our courts would have had neither the opportunity nor the stamina to dramatically extend the protections of the Constitution. It in no way demeans the courts to suggest that they are not the initiators of constitutional change. It is sufficient honor to serve as the instruments through which the American people, slowly over extended periods of time, cause constitutional change. It is sufficient to perform the important, though secondary, task of articulating the changes and integrating them into the great body of existing law developed over the course of our nation's history.

The fairly recent constitutional developments in which Justice Thurgood Marshall participated are not unique. From the earliest days of the Republic, constitutional change has always been the product of political and social forces. It would follow from this observation that one cannot truly understand the development of constitutional law unless he or she has some familiarity with these political and social forces as they manifested themselves during the life of the nation. To limit one's study of constitutional law simply to a series of cases results in an artificial and bloodless view of both the cases and the process.

Let me give an example of what I mean. I will refer to two fairly familiar though no longer terribly important cases: *Trustees of Dartmouth College v. Woodward*⁸ and *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*.⁹

In *Dartmouth College* a New Hampshire jury, on special verdict, had found that in 1769 George III had granted a corporate charter to Reverend Eleazar Wheelock to enable him,

8. 17 U.S. (4 Wheat.) 518 (1819).

9. 36 U.S. (11 Pet.) 420 (1837).

with the assistance of other well disposed persons, to carry the gospel to the Indian tribes.¹⁰ The charter conferred upon the corporation's board of trustees the right to fill all vacancies.¹¹

The New Hampshire legislature, successor to George III, increased the size of the board, giving the State the power to fill all vacancies, and created a board of overseers with the power to inspect and control most important acts of the trustees.¹²

When the challenge to this act of the legislature reached the United States Supreme Court, Daniel Webster argued the College's case and the Court in ringing terms endorsed the sanctity of contracts. In a concession which might disturb strict constructionists, Chief Justice Marshall noted that the preservation of corporate charters "was not particularly in the view of the framers of the constitution, when the [contract clause] was introduced into that instrument."¹³ The Court nevertheless held that an act of a state altering a corporate charter impairs the obligation of the charter and is unconstitutional and void.¹⁴ That was in 1819.

Eighteen years later *Charles River Bridge* came before the Supreme Court. Harvard, not Dartmouth, was at the root of this case. In 1650, the Massachusetts legislature granted to Harvard College the right to set up a ferry between Charlestown and Boston.¹⁵ The College received the profits.¹⁶ In 1785, the Massachusetts legislature granted a charter to The Proprietors of the Charles River Bridge to build a bridge at the ferry site.¹⁷ The bridge company was to pay Harvard 200 pounds a year.¹⁸ The charter's original forty year life was later extended to seventy years.¹⁹

In 1828, long before the expiration of 70 years, the Massachusetts legislature chartered the proprietors of the Warren Bridge to build a bridge virtually adjacent to the original bridge.²⁰ Passage over the new bridge was to be free

10. *Dartmouth College*, 17 U.S. at 625-26, 631.

11. *Id.* at 626.

12. *Id.*

13. *Id.* at 644.

14. *Id.* at 650.

15. *Charles River Bridge*, 36 U.S. at 536.

16. *Id.*

17. *Id.*

18. *Id.* at 537.

19. *Id.*

20. *Id.*

after the lapse of several years.²¹ The Proprietors of the Charles River Bridge attacked the legislation as a violation of its contract with the Commonwealth.²² It does not appear that Harvard intervened to protect its 200 pound annual stipend, although once again Daniel Webster argued on behalf of the sanctity of contractual obligations.

The matter came before the Supreme Court. At the outset of its opinion the Court, speaking through Chief Justice Taney, recognized competing interests—the pecuniary interests of the corporation's shareholders as against the interests of a state in relation to the corporations it had chartered.²³ The Court recognized its duty to guard the rights of property but at the same time it recognized an obligation to abstain from encroaching on the powers of the states.²⁴ Balancing these competing interests the Court found the interests of the community outweighed those of the corporate entity, stating, “[a] state ought never to be presumed to surrender [the power to promote the happiness and prosperity of the community], because, like the taxing power, the whole community have an interest in preserving it undiminished.”²⁵

The Court upheld the Massachusetts legislation even though,²⁶ as a practical matter, it destroyed rights previously conferred upon the proprietors of the Charles River Bridge on the basis of which the proprietors had invested their energies and money.

While perhaps the result in *Charles River Bridge* can be squared with *Dartmouth College*, the emphasis and spirit is totally different. *Dartmouth College* emphasized the almost sacred, inviolable rights of private property. *Charles River Bridge* emphasized the rights of the state to legislate in the interests of its people with respect to corporations it creates.

As one reads these cases in a constitutional law case book, this change of emphasis appears to be simply a rational development in the thinking of the Court. While this impression may contain an element of truth, it neglects the reality of the situation which is to be found in the history of the times.

21. *Id.*

22. *Id.*

23. *Id.* at 536.

24. *Id.*

25. *Id.* at 547-48.

26. *Id.* at 553.

In 1819, when *Dartmouth College* was decided, John Adams' appointee, John Marshall, was Chief Justice and the Court was sympathetic to a strong national government—a government which would advance the nation's agricultural, commercial and manufacturing interests and protect property rights.²⁷

In 1828, however, the Democratic Party, bearer of the Jeffersonian tradition, secured power upon the election of Andrew Jackson—the hero of New Orleans and the idol of the humbler classes. Jackson had ridden the tide of discontent arising from the ranks of farmers in the west and workers in the burgeoning new industries which were the beneficiaries of the American System. Defying the notion that those with property should rule, the new classes sought such reforms as universal suffrage, the end of imprisonment for debt, a ten hour day for industrial workers.

Jackson won his titanic battle against Nicholas Biddle, President of the Second National Bank of the United States, and against the old time Federalists and commercial interests who were Biddle's allies. He established that a popularly elected president, rather than the nation's powerful commercial interests, was to preside over the economic destinies of the United States.

Roger Brooke Taney was a Jackson ally throughout these populist struggles, serving as Jackson's Attorney General and later as his Secretary of the Treasury. The revolution in American politics was carried into the Supreme Court when Jackson and his successor Martin Van Buren filled the Court with their nominees.²⁸ Taney replaced John Marshall after the

27. Chief Justice Marshall and Justice Bushrod Washington were appointed by President John Adams. COMMISSION ON THE BICENTENNIAL OF THE U.S. CONSTITUTION, THE SUPREME COURT OF THE UNITED STATES: ITS BEGINNINGS & ITS JUSTICES 1790 - 1991 268, 270 (1992) [hereinafter SUPREME COURT JUSTICES]. Justices H. Brockholst Livingston, William Johnson and Thomas Todd were appointed by President Jefferson. *Id.* at 270. Justices Joseph Story and Gabriel Duvall were appointed by President Madison. *Id.*

28. When the year 1837 opened there were seven Justices of the Supreme Court. Justice Joseph Story and Justice Smith Thompson (an appointee of President Monroe) were the only ones who were not appointed by President Jackson. Predictably they dissented in *Charles River Bridge*. The Jackson appointees were Chief Justice Taney and Justices Henry Baldwin, Philip P. Barbour, James M. Wayne, and John McLean. In 1837 Congress increased the number of Justices on the Supreme Court to nine, and President Jackson's continuing influence

latter's death in 1835.⁴⁹

By 1837 when *Charles River Bridge* was decided, five of the seven Supreme Court Justices were Jackson appointees and it can hardly be doubted that this fact, rather than pure logic, shaped the decision in that case. The non-Jackson appointees dissented.

More dramatic were the events of the next twenty years, which led to the fateful *Dred Scott v. Sanford* decision⁵⁰ authored by the same Chief Justice Roger B. Taney, whose respect for private property revived when the issue was a citizen's ownership rights in his slave. There is not time even to allude to the developments which transformed the major wing of a populist party and one of its erstwhile leaders into the champions of states' rights and slavery.

III. AMERICAN HISTORY AND THE STUDY OF CONSTITUTIONAL LAW

A course in constitutional law is not a course in American history. To cover the subject matter adequately no doubt it is necessary that the Constitution be examined in accordance with traditional categories—the powers and limitations of the judicial branch, the powers of Congress under section 8 of Article I, the powers of the executive, due process (procedural and substantive), and so on. But I return to my thesis: Despite this organizational necessity, to understand the process, seminal cases in constitutional law must be viewed in the context of the historical events of which they are but a part. It is my experience that most students come to a constitutional law course with little background in American history; so the problem is how to fill the void during the limited time available.

By happenstance one of my law clerks suggested a partial solution. She mentioned that her constitutional law professor had required her class to read Flexner's *Washington, The Indispensable Man*.⁵¹ She urged me to read it, which I did, and I found it to be not only a fine account of a remarkable person, but also an excellent background for the Constitutional

upon the Court was further assured when in March 1837 he appointed Justice John Catron and when in September 1837 his successor, President Van Buren, appointed Justice John McKinley.

29. SUPREME COURT JUSTICES, *supra* note 27, at 268.

30. 60 U.S. (19 How.) 393 (1856).

31. JAMES T. FLEXNER, *WASHINGTON, THE INDISPENSABLE MAN* (1969).

Convention and the critical developments which took place during the first eight years of the new federal government.

Building on this I decided to assemble a series of biographies and histories which I have enjoyed and which cover the two hundred plus years of American history. One could not expect students to read all these books during a single semester, particularly if they were evening students, as mine were. So I proposed to write a review of each book, which would summarize its theme and set forth some high points. I would invite the students to read the reviews and one of the books during the semester. To encourage reading a book I would give them a question addressed to the book they read which would appear on the final exam for extra credit. I would suggest that in future years they might read the other books both for pleasure and understanding.

I tried this last fall. I had only been able to prepare material for the period 1777, the year of the Convention, to 1877, the year which traditionally marks the end of Reconstruction. I picked eleven books, but was only able to complete reviews for six of them. But I gave the students the list and the six completed reviews.

To cover the 100 year period I selected: Flexner's *Washington* which I have mentioned; two books covering the Constitutional Convention, St. John's *Constitutional Journal*³² and Bowen's *Miracle at Philadelphia*;³³ Shepherd's *The Adams Chronicles*,³⁴ which covers each generation of that famous family, particularly its two prickly members who became President of the United States; Schlesinger's *The Age of Jackson*³⁵ and Remini's *Henry Clay*,³⁶ which cover in good

32. JEFFREY ST. JOHN, *CONSTITUTIONAL JOURNAL: A CORRESPONDENT'S REPORT FROM THE CONVENTION OF 1787* (1987).

33. CATHERINE DRINKER BOWEN, *MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION, MAY TO SEPTEMBER, 1787* (1986).

34. JACK SHEPHERD, *THE ADAMS CHRONICLES: FOUR GENERATIONS OF GREATNESS* (1975).

35. ARTHUR M. SCHLESINGER, JR., *THE AGE OF JACKSON* (1945, reprinted with new Prologue by Schlesinger in 1989).

Schlesinger wrote *The Age of Jackson* in 1945. In an introduction to the 1989 edition he notes inadequacies in the economic theories he espoused in 1945. Two of his other re-evaluations are of interest. First, Schlesinger has amplified his view of the Federalists and the Whigs (the party of Henry Clay):

Looking back, I think I did Hamilton, Adams, and Clay a great deal less than justice in *The Age of Jackson*. It is true

detail the period from about 1815 to 1850; the biographies of two abolitionists, Sterling's *Abby Kelley*³⁷ and McFeely's *Frederick Douglass*;³⁸ McPherson's superb *Battle Cry of Freedom*³⁹, which covers the decades preceding the Civil War as well as the four years of conflict; Bernstein's *The New York City Draft Riots*,⁴⁰ a social, economic and political history of the nation's principal city during the period from the 1850's through the 1870's; and finally Foner's myth destroying work, *Reconstruction, America's Unfinished Revolution*.⁴¹

You may ask what effect all this had upon the students taking the course. I must say I was curious myself and hoped to find out when I corrected their final examinations last January.

Thirty-two of my fifty-six students elected to read one of the books. Ten read Flexner's *Washington*; twelve read either the *Constitutional Journal* or *Miracle at Philadelphia*; two read

that the American system, internal improvements, the protective tariff, and the Bank of the United States were designed to benefit the business classes, but this was not the whole truth. The Whig program was also designed to benefit the whole nation and to accelerate the pace of economic growth. The Hamiltonians had a sounder conception of the role of government and a more constructive policy of economic development than the Jacksonians.

Id. at xxiv.

Second, three significant groups were excluded from the Jacksonian populist movement—the Indian and the slave (Jackson behaved with utmost cruelty to both groups) and women.

History reflects the age. As new preoccupations seize historians in the present we discern new possibilities in the past. In this sense, the present persistently re-creates the past. When I wrote *The Age of Jackson*, the predicament of women, of blacks, of Indians, was shamefully out of mind. The perspective of 1990 is bound to be different from that of 1940. So, one may be sure, will be the perspective of 2040.

Id. at xxxii.

36. ROBERT V. REMINI, *HENRY CLAY—STATESMAN FOR THE UNION* (1991).

37. DOROTHY STERLING, *AHEAD OF HER TIME, ABBY KELLEY AND THE POLITICS OF ANTISLAVERY* (1991).

38. WILLIAM S. McFEELY, *FREDERICK DOUGLASS* (1991).

39. JAMES M. McPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* (1988).

40. IVER BERNSTEIN, *THE NEW YORK CITY DRAFT RIOTS: THEIR SIGNIFICANCE IN AMERICAN SOCIETY AND POLITICS IN THE AGE OF THE CIVIL WAR* (1990).

41. ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877* (1988).

The Adams Chronicles; five read the *Douglass* biography and one the *Abby Kelley* biography; two read *Battle Cry of Freedom*. I corrected and marked all of the examinations before reviewing answers to the optional question, so no one was penalized for not reading one of these works.

Not all the efforts were a total success. One student wrote: "I've bought a book and read 50 pages—I'm looking forward to finishing next week when I'm more relaxed."

One read Flexner's *Washington* and wrote: "My understanding of the development of Constitutional law has been greatly enhanced after reading this Pulitzer Prize winning novel." Perhaps I should have told him or her at the outset that *Washington* is not a fictitious character. Still another who read Flexner's book concluded his essay with the comment, "[f]or a man who never had kids, he was the perfect father of our country." I am still trying to figure out if this is simply puerile or deeply profound.

By and large, however, the essays were of good quality. They demonstrated that these students had grasped some of the drama of the times about which they read and the personalities of the men and women who shaped those times. Several expressed insights which previously had totally escaped me. A number tied their readings directly to the development of our constitutional law.

One wrote of Flexner's book:

To say I have existed in a vacuum totally accepting of my surroundings and unaware of the strife and struggle that allowed me to continue in this manner, would be an accurate statement. Although an avid reader, my pleasures run to fiction. The biography of *Washington* was as interesting a recitation as any I have encountered.

....

Reading the Preamble [of the Constitution] I now realize how much heart and feeling and fervor went into the wording: *Washington* brought life to my reading of the Articles [of the Constitution] and Amendments. Now I see the men behind the words. I felt profound pride as the greatness of his contribution unfolded.

Reviewing *Miracle at Philadelphia*, one commenced his or her answer: "Step by step, personality by personality, Bowen brought me through the hot and humid summer of 1787 and introduced me to the framers of the Constitution on a deeply personal level." After several pages of discussion he or she concluded: "In sum, although Bowen refers to this book as

telling of a 'Miracle' in Philadelphia, I would have called it a 'Compromise' in Philadelphia—the likes of which have not been seen since."

The student who read the biography of Abby Kelley had this to say:

I was amazed how the election of one woman to a committee [in New York City in 1840] could cause the split it did in the abolitionist movement. And how later with the [advent] of the Republican Party and Abe Lincoln the movement could rupture again. And I guess that is the most remarkable feature—the passions of the people.

Through this simple set of readings and undoubtedly through countless other sets of readings covering the same hundred years, one can acquire some sense of the passions of the people, individuals and groups, which have shaped our constitutional destiny.

IV. NUGGETS FROM THE PAST

John Marshall, a Virginian, served with Washington during the American Revolution. As Justice Felix Frankfurter stated, "Valley Forge made him a nationalist."⁴² John Marshall remained an American rather than a Virginian when, for instance, he and his Court construed Congress' power under the Commerce Clause⁴³ and the Necessary and Proper Clause⁴⁴ in the broadest terms. He was an American, not a Virginian, when his Court ruled that the Supreme Court must set aside the judgment of the highest court of a state which conflicts with the Constitution, laws or treaties of the United States, whether the state judgment be in a civil or a criminal case.⁴⁵

42. SAMUEL J. KONEFSKY, *JOHN MARSHALL & ALEXANDER HAMILTON: ARCHITECTS OF THE AMERICAN CONSTITUTION* 192 (1964).

43. See, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194 (1824) (holding that Congress' power under the Commerce Clause extends to all "commerce which concerns more States than one").

44. See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413 (1819) ("Congress is not empowered by [this clause] to make all laws which may have relation to the powers conferred on the government, but such only as may be 'necessary and proper' for carrying them into execution.").

45. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 351 (1816) (holding that the Supreme Court has appellate jurisdiction to review a state court's civil decision); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264,

Revealing also are the passions of John Quincy Adams and Henry Clay, though "passions" may not be quite the word to use when speaking of any member of the Adams family. In 1814, Adams and Clay were two of the American commissioners sent to Ghent to negotiate the termination of the War of 1812. Each morning Adams rose at 4:30 to read the Psalms and, after a frugal breakfast, got to work. Likely as not, at the same moment Henry Clay's nightlong card party and drinking bout would be breaking up in the room next door.

Adams went on a decade later to a frustrating single-term presidency between 1825 and 1829. Thereafter, as a representative, he almost single-handedly kept the voice of antislavery alive in Congress.

Clay, on the other hand, though an unsuccessful candidate for the presidency on frequent occasions, was perhaps the preeminent American statesman of the times. Though a slave owner, he hated slavery and sought to end it. Abraham Lincoln referred to him as "my beau ideal of a statesman, the man for whom I fought all my humble life."⁴⁶ Democratic Party hagiography keeps in the forefront the names of Jefferson and Jackson. Clay's party, the Whigs, is long since dead, so none can benefit from the incantation of his name.

Clay was a champion of the so-called "American System," urging, usually successfully, that the national government should act aggressively to further agricultural, commercial and manufacturing interests. In Congress he did battle with those who saw in all this an unconstitutional expansion of federal power. Out of this conflict came the cases in which the Supreme Court vindicated those seeking the expansion of that power.⁴⁷

Clay's ruling passion was the American Union. To him belongs much of the credit for the Missouri Compromise and the Compromise of 1850. Through his efforts, probably more than the efforts of any other person, the North gained sufficient time to discover an Abraham Lincoln and to develop the strength and the will to prevent permanent destruction of

391 (1821) (holding that the Supreme Court may review the constitutionality of a criminal state conviction).

46. REMINI, *supra* note 36, at xiii.

47. *E.g.*, *Osborne v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 867-68 (1824) (holding that a state may not tax the Bank of the United States); *McCulloch*, 17 U.S. at 316 (holding that Congress has the power to incorporate a national bank under the Necessary and Proper Clause).

the Union and the creation of a new slave nation (a western hemisphere South Africa, if you will) in the South and Southwest.

The passionate convictions of the abolitionists and the radical Republicans led to adoption of the Thirteenth, Fourteenth and Fifteenth Amendments and the various Civil Rights Acts.⁴⁸ Anticipating today's Act Up, Abby Kelley's husband, Stephen Foster, invaded a Protestant church each Sunday to condemn it as a man-stealing, woman-whipping, adulterous and murderous church for condoning slavery. Massachusetts passed a criminal statute prescribing interruption of church services, but Foster gloried in the number of his arrests.

On July 18, 1863, Robert Shaw fell in front of the parapets at Fort Wagner and was thrown into a common grave with the black troops of the 54th Regiment of Massachusetts Volunteers. His abolitionist parents directed that his body not be disturbed. His glory was to remain with the men he had led.⁴⁹

After the Civil War, Thaddeus Stevens, Congressional leader of the Radical Republicans, was so committed to the cause of equal justice for the former slaves that he insisted on being buried in a pauper's grave, the only cemetery where black and white persons could be buried together.

All this illustrates some of the passions of the people to which the student who read the biography Abby Kelley referred. These persons and countless others are the ultimate makers and shapers of our constitutional law. Law students should have some awareness of them, their passions and their works.

This assemblage of books encompasses only 100 years. From even so small a collection a student can discern how far back in time our current constitutional issues go.

Equality for women is not a new cause.

In 1776 when John Adams, a member of the Continental Congress, was in Philadelphia working for independence, his

48. For a summary of the struggles in Congress to secure voting rights for black citizens, see Benno C. Schmidt, Jr. *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 3: Black Disfranchisement from the KKK to the Grandfather Clause*, 82 COLUM. L. REV. 835, 837-41 (1982).

49. RUSSELL DUNCAN, *BLUE-EYED CHILD OF FORTUNE, THE CIVIL WAR LETTERS OF ROBERT GOULD SHAW* 54 (The University of Georgia Press, ed. 1992).

wife Abigail wrote a lengthy letter to him. Its theme is encapsulated in this passage:

If particular care and attention is not paid to the Ladies, we are determined to foment a Rebellion and we will not hold ourselves bound by any Laws in which we have no voice or Representation. That your Sex are Naturally Tyrannical is a Truth so thoroughly established as to admit of no dispute, but such of you as wish to be happy willingly give up the harsh title of Master for the more tender and endearing one of Friend.⁵⁰

As reported in *The Chronicles*, "Adams was unmoved."⁵¹

In 1840, the American Anti-Slavery Society split into two factions when Abby Kelley was elected to its business committee. The conservative wing adopted a constitution which forbade women to vote or hold office. The Garrisonian and Frederick Douglass wings continued the struggle against slavery with women playing a full and heroic role.

In 1869 and 1870, the women's movement itself split over the question of support for the Fifteenth Amendment. The Amendment enfranchised black men, but it did not extend the vote to either white or black women.

In 1874, in Worcester, Massachusetts, "a City Collector's Notice" was published in the local papers. The Foster homestead in the Tatnick district would be sold at public auction on February 20, 1874, unless they paid taxes of \$69.60 plus interest and costs.⁵² Kelley and her husband had refused to pay taxes enacted by legislators for whom she could not vote. She carried out Abigail Adams' threat to hold herself not bound by laws in which women had no voice or representation.

As significant as the individuals who shaped our constitutional law, are the social conditions which provided the stage on which they acted.

Bernstein's *The New York City Draft Riots* gives a dramatic account of the five days in July 1863 when immigrant mobs, largely of Irish and German extraction, rioted in protest against federal conscription. The riots, which dwarfed anything we have seen in our cities in recent times, were directed against blacks; against the Republican Party, its City, and national officials; and against the industrial and commercial elite of the City. To suppress the uprising required the

50. SHEPHERD, *supra* note 34, at 76-77.

51. *Id.*

52. STERLING, *supra* note 37, at 368.

intervention of regiments which had fought at the Battle of Gettysburg only two weeks before. They ended the riots and the murder of black working men the day before the 54th Regiment of Massachusetts Volunteers assaulted Fort Wagner.

The primary significance of the book for present purposes, however, is its description of the social structure of New York City, a social structure which was duplicated in Philadelphia, Boston, Chicago and other urban centers. Hordes of newly arrived immigrants toiled in the City's factories, mills, shipyards and foundries, living in crowded tenements and threatened with starvation during the nation's periodic recessions.

The commercial and industrial leaders of the City were prepared to equip and cheer black regiments as they went off to war, but for the most part they were unmoved by the plight of urban workers.

Foner's *Reconstruction* describes the pre- and post-War economy of the South. It describes the fateful shift in the Republican Party which, for a brief period in the years following the Civil War, secured an element of equality for the freedmen. But by 1877 the Party had become a party of freedom, not for human beings, but for the commercial and industrial interests of the North. For the freedmen a dark night descended.⁵³

The nation's industrial, commercial and financial leaders created the economic base which enabled the United States to assume a world role and are the source of our nation's wealth. But there was a heavy social cost. Without some understanding of the grim plight of industrial workers and the struggle for justice during the period from the Gilded Age to the New Deal⁵⁴ the study of our constitutional law is a lifeless task.

The influence of the industrial and commercial interests who were so strongly represented in both political parties is

53. The role of the United States Supreme Court during this dark night of black repression starting in the mid-1870's is magnificently described in the three-part article, Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 1: The Heyday of Jim Crow*, 82 COLUM. L. REV. 444 (1982); *Part 2: The Peonage Cases*, 82 COLUM. L. REV. 646 (1982); *Part 3: Black Disfranchisement from the KKK to the Grandfather Clause*, 82 COLUM. L. REV. 835 (1982).

54. See, e.g., ALAN DAWLEY, *STRUGGLES FOR JUSTICE: SOCIAL RESPONSIBILITY AND THE LIBERAL STATE* (1991).

reflected in the Supreme Court's opinions limiting Congress' power under the Commerce Clause⁵⁵ and under the Taxing⁵⁶ and Spending Clauses⁵⁷ to address the plight of women, children and industrial workers generally. The same influence was reflected in the Court's opinions applying the Fourteenth Amendment to limit the states' power to deal with pressing social problems.⁵⁸

Similarly, without some understanding of the social and political history of the late nineteenth century and the first third of the twentieth century, it would be hard to appreciate the revolutionary change that took place commencing with Chief Justice Hughes' decision in *N.L.R.B. v. Jones & Laughlin Steel Corp.*⁵⁹ In short order, previous restraints upon

55. *E.g.*, *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 549-50 (1935) (unanimous decision) (holding that Poultry Code adopted under National Industrial Recovery Act invalidated as beyond Congress' power under the Commerce Clause); *Hammer v. Dagenhart*, 247 U.S. 251, 276 (1918) (holding that a federal statute prohibiting interstate shipment of goods from a firm employing child labor exceeds Congress' power under the Commerce Clause); *United States v. E.C. Knight Co.*, 156 U.S. 1, 17 (1895) (holding that an attempt to monopolize or a monopoly of manufacture of refined sugar did not have a sufficiently "direct" effect upon commerce to be subject to Congressional regulation under the Commerce Clause because manufacturing is not commerce).

56. *See, e.g.*, *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 44 (1922) (holding that Congress cannot use the taxing power to regulate child labor).

57. *See, e.g.*, *United States v. Butler* 297 U.S. 1, 53-54, 74 (1936) (striking down Agricultural Adjustment Act which sought to balance production and consumption of agricultural commodities through payments to farmers).

58. *See, e.g.*, *Adkins v. Children's Hosp.*, 261 U.S. 525, 545-62 (1923) (striking down minimum wage law for women on Fourteenth Amendment due process—freedom of contract grounds); *Coppage v. Kansas*, 236 U.S. 1, 26 (1915) (striking down a state law prohibiting "yellow-dog" contracts); *Lochner v. New York*, 198 U.S. 45, 64 (1905) (striking down a New York statute which limited bakery employees' hours to 10 per day and 60 per week as violative of Fourteenth Amendment liberty of contract rights); *Allgeyer v. Louisiana*, 165 U.S. 578, 588-93 (1897) (striking down Louisiana law regulating out-of-state insurance contracts on in-state property on "liberty of contract" principles).

59. 301 U.S. 1, 49 (1937) (contradicting its prior opinions by upholding the National Labor Relations Act of 1935 as within Congress' Commerce Clause power). The Supreme Court's "switch in time, saving nine" is an embarrassment to some who espouse the doctrine of original intent. Not wishing to reject the Court's validation of New Deal regulatory legislation, they prefer to see the *Jones & Laughlin Steel Corp.* case and its progeny, not as a radical departure, but as a return to a true

Congress' power to regulate the nation's economy were gone. The way was paved for regulation by a plethora of administrative agencies housed in an increasingly powerful executive branch.

An equally familiar development since 1936 is the expansion of the categories of rights found to be within the ambit of the Bill of Rights and a parallel expansion of the power of the federal courts to protect those rights, particularly as against state action.

Wise and able Justices crafted the opinions which articulated these profound, even revolutionary, changes in our constitutional law. But in the last analysis, it was not the justices who were responsible for the changes; the changes were the product of social and economic developments; they were the product of men and women and groups of men and women acting under the pressures of those developments.

I see nothing subversive in this process of constitutional change. In fact, I would suggest that it is a process contemplated by the framers of the Constitution. Writing in 1816, Justice Story, a staunch conservative in the old Federalist mold, wrote with an almost Old Testament resonance:

The Constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. It was foreseen, that this

interpretation of the Constitution. Thus, speaking before the D.C. Chapter of the Federalist Society Lawyers Division on November 15, 1985, then Attorney General Edwin Meese III, stated:

Similarly, the decisions of the New Deal and beyond that freed Congress to regulate commerce and enact a plethora of social legislation were not judicial adaptations of the Constitution to new realities. They were in fact removals of encrustations of earlier courts that had strayed from the original intent of the Framers regarding the power of the legislature to make policy.

Speech of Attorney General Edwin Meese III Before Federalist Society Lawyers Division (Nov. 15, 1985), in *THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION* at 38 (The Federalist Society ed., 1986).

Attorney General Meese's proposition that the regulatory state flowing from New Deal was within the original intention of the framers of the Constitution is a difficult one to support. For a refutation of Attorney General Meese's position and for a marvelous concept of constitutional change which does full justice to social and political forces, see generally BRUCE ACKERMAN, *WE THE PEOPLE* (1991).

would be a perilous and difficult, if not an impracticable, task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications, which, at the present, might seem salutary, might, in the end, prove the overthrow of the system itself.⁶⁰

V. CONCLUSION

What a grand time this is to study constitutional law. We are at a great divide. Important constitutional doctrines are being challenged and the outcomes hang in the balance.

Usually, either deliberately or by happenstance, presidents appoint Supreme Court Justices whose thinking is compatible with their own, and usually this thinking will be reflected in the development of constitutional doctrine. Seldom, however, has the process been as starkly evident as it has been during the past twelve years. During that period the executive branch has deliberately sought to effect constitutional change through its appointments to the Supreme Court. There is nothing wrong with this process; just as there is nothing wrong with the Senate considering a nominee's stand on important constitutional doctrines when it decides whether to confirm. The process, however, illustrates my point that the ultimate source of constitutional change, for good or for ill, is in the people, who, after all, elect those who nominate and those who confirm.

That being said, the process has left us at a point where important constitutional decisions are in the making. Last fall Rutgers Law School-Camden conducted a conference on the jurisprudence of Chief Justice William H. Rehnquist. Georgetown University law professor Mark Tushnet observed that "one could account for perhaps 90% of Chief Justice Rehnquist's bottom-line results by looking, not at anything in the United States Reports . . . but rather at the platform of the Republican Party."⁶¹ This is perhaps an exaggeration, but even the most casual observer can see that the battle lines are

60. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816).

61. Michael C. Dorf, *Captain of the Court?*, RUTGERS MAG., Winter 1992, at 12, 12.

drawn. The Chief Justice, usually joined by Justices Scalia and Thomas and sometimes by other Justices, seems intent upon undoing important developments of the Warren era.

Federal-state relations are being reexamined.⁶² Not only are the rights of criminal defendants being curtailed,⁶³ but also, with the gradual emasculation of the great writ of habeas corpus, the means of protecting remaining rights in the federal courts are being withdrawn.⁶⁴ Important rights of privacy are

62. For example in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 531 (1985) (*overruling* *National League of Cities v. Usery*, 426 U.S. 833 (1976)), the Supreme Court held that the Tenth Amendment did not preclude application of the Fair Labor Standards Act to a municipally owned transit authority. Dissenting, Justice O'Connor championed the principle of federalism in which the states have a constitutionally protected role, stating, "I share Justice Rehnquist's belief that this Court will in time again assume its constitutional responsibility." *Id.* at 589. That the Tenth Amendment still lives is evidenced by Justice O'Connor's decision in *New York v. United States*, 112 S. Ct. 2408, 2427-29 (1992) (striking down, on Tenth Amendment grounds, a federal statute which provided that a state that fails to provide for the disposal of all internally generated nuclear waste by a particular date must take title to and possession of the waste upon request, and become liable for damages suffered by the generator or owner by reason of state's failure to take possession).

63. *E.g.*, *Payne v. Tennessee*, 111 S. Ct. 2597, 2609-11 (1991) (overturning two cases that held that victim impact statements are inadmissible in sentencing phase of capital trial).

64. *Keeney v. Tamayo-Reyes*, 112 S. Ct. 1715, 1717-18 (1992) (rejecting the ruling in *Townsend v. Sain*, 372 U.S. 293 (1963), the Court held that even when state fact finding is inadequately developed, a habeas petitioner is not entitled to an opportunity to prove the facts necessary to his claim unless he first establishes cause and prejudice); *Coleman v. Thompson*, 111 S. Ct. 2546, 2552-53, 2568 (1991) (dismissing petition in death penalty case raising eleven constitutional claims because petitioner's attorney filed a notice of appeal in state proceedings seventy-two hours late).

In *Wright v. West*, 112 S. Ct. 2482 (1992) the Court on its own initiative raised the question whether in habeas cases it should abandon *de novo* consideration of legal and mixed legal-factual questions. *Id.* at 2489. The case was decided on other grounds, *id.* at 2492, but in dictum Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, argued the affirmative position and Justice O'Connor, joined by Justices Blackmun and Stevens, argued the negative. The decision inspired a hard-hitting law review article by Professor James S. Liebman, who sees the future of the writ lying in balance:

To those who value meaningful habeas corpus review, the Court's order (raising the question of the scope of habeas review) augured Apocalypse Now.

in jeopardy,⁶⁵ and the means of securing those rights are being curtailed.⁶⁶

Thus this is a grand time to be a student of constitutional law, studying this remarkable document at the very moment its parameters are being defined and redefined in dramatic ways. We do not know whether the Chief Justice and his allies represent the wave of the future or whether they will become this generation's Van Devanter, McReynolds, Sutherland, and Butler.⁶⁷

That Justice O'Connor . . . responded to Justice Thomas' singular brief in support of deferential review with a point by point refutation—supported on one of those points by Justice Kennedy's separate opinion—only enhances the sense that battle lines are forming for an impending habeas corpus Armageddon.

James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997, 1998 (1992).

65. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791, 2854 (1992), Justice Blackmun's concurring and dissenting opinion noted how precarious is the women's right to reproductive choice:

In one sense, the Court's approach is worlds apart from that of the Chief Justice and Justice Scalia. And yet, in another sense, the distance between the two approaches is short—the distance is but a single vote.

I am 83 years old. I cannot remain on this Court forever, and when I do step down, the confirmation process for my successor may well focus on the issue before us today. That, I regret, may be exactly where the choice between the two worlds will be made.

See also *Rust v. Sullivan*, 111 S. Ct. 1759, 1778 (1991) (upholding federal statute which prohibited facilities that receive Title X funds from engaging in abortion counseling or referral); *Bowers v. Hardwick*, 478 U.S. 186, 190-91 (1986) (holding that state statute prohibiting sodomy between consenting adults was not unconstitutional).

66. See *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992). In addition to holding that under established principles plaintiff environmental groups lacked standing, Justice Scalia's majority opinion holds that by virtue of Article III's case or controversy requirement Congress lacks the power "to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts" *Id.* at 2145. See also *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993) (holding that demonstrations conducted outside abortion clinics do not constitute a private conspiracy under 42 U.S.C. §1985).

67. Justice McReynolds' concluding remarks in his dissent in *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), reflects his and his three fellow dissenters' (Justices Van Devanter, Sutherland and Butler) anguish as the old order passed:

The things inhibited by the Labor Act relate to the

If today's students have any grasp of history at all they will understand that the outcome will not be decided by nine middle-aged and older men and women sitting in Washington. As Chief Justice Weintraub observed such "delicate issues" are not for the Court; the people will ultimately decide. These students will be among the people who decide. In their time they will be making Constitutional history. May they do so with an understanding of all that went before.

management of a manufacturing plant—something distinct from commerce and subject to the authority of the state. And this may not be abridged because of some vague possibility of distant interference with commerce.

Id. at 101.

He then continued,

The right to contract is fundamental and includes the privilege of selecting those with whom one is willing to assume contractual relations. This right is unduly abridged by the Act now upheld. A private owner is deprived of power to manage his own property by freely selecting those to whom his manufacturing operations are to be entrusted. We think this cannot lawfully be done in circumstances like those here disclosed.

It seems clear to us that Congress has transcended the powers granted

Id. at 103.