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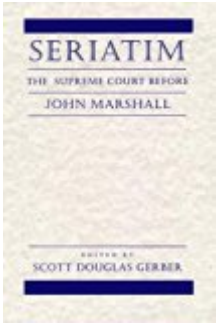
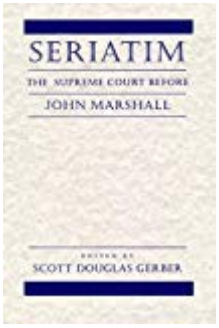


William R. Casto. *Oliver Ellsworth and the Creation of the Federal Republic.* New York: Second Circuit Committee on Historical and Commemorative Events, 1997. xix + 151 pp. $199.00, cloth, ISBN 978-0-9618400-2-0.



Scott Douglas Gerber, ed.. *Seriatim: The Supreme Court before John Marshall.* New York: New York University Press, 1998. xi + 362 pp. $49.95, cloth, ISBN 978-0-8147-3114-7.

Reviewed by R. B. Bernstein

Published on H-Law (December, 1999)

In her new book on the elder Justice John Marshall Harlan, Linda Przybyszewski, assistant professor of history at the University of Cincinnati, challenges the prevailing focus on "greatness" in the writing of judicial biography: "[T]he definition of greatness [that judicial biographers] happen to be using is a historical artifact. The result of this anachronistic approach is that topics that fall outside the current twentieth-century definition of judicial greatness, such as religious faith or literary accomplishments, are neglected despite the importance they had for their subjects."[1]

The problem that Przybyszweski addresses with such cogency plagues the early years of the federal judiciary. The period between the enactment of the Judiciary Act of 1789 and the end of the eighteenth century has languished in neglect, though we would expect it to receive attentive examination as the formative era of the federal bench. As Scott Douglas Gerber shows in his introduction to *Seriatim*, the few historians and legal scholars who have studied the subject have done so with barely-concealed contempt, apologetic embarrassment, or fulsome defensiveness (*Seriatim*, 1-11).

The reasons for this neglect are not hard to find. First, study of the federal judiciary tends to reduce itself to study of the United States Supreme Court. Before the mid-1980s, few scholars ventured into the thorny world of the pre-1801 lower federal courts, hampered by the lack of reliable

judicial reports or of accessible primary sources. Only with the launching of the ***Documentary History of the Supreme Court of the United States, 1789-1801***, under the editorship of Maeva Marcus of Georgeton University Law Center, have scholars had convenient access to published sources documenting the docket and caseload of the early federal courts.[2]

Second, overshadowing the early Supreme Court is the towering figure of Chief Justice John Marshall. Just as Franklin D. Roosevelt became the touchstone of presidential greatness for all Presidents who have succeeded him,[3] so Marshall has become the touchstone of judicial greatness for all members of the United States Supreme Court -- except that Marshall's shadow falls over both his predecessors and successors. Law professors regularlyclaim to be able to teach the entire basic course of Americanonstitutional law out of one case -- Marshall's opinion for the Court in ***Marbury v. Madison*** (1803).[4] It is a cliche of American constitutional history that Marshall's great judicial opinions helped form the modern Supreme Court as a powerful and respected institution of government. Thus, historians and legal scholars have used Marshall as the measuring rod to evaluate the strengths and weaknesses of the pre-Marshall federal judiciary. Indeed, so vigorous and learned a champion of John Jay as the late Richard B. Morris of Columbia University in his 1967 lectures on Jay, sought to show that Jay was great largely because he anticipated Marshall.[5]

In light of these tendencies, scholars should apply to the Jay and Ellsworth Courts the lesson that Linda Przybyszewski recommends with regard to Harlan, who held judicial office a century after Jay, Ellsworth, and their colleagues. The two books under review do just that, challenging the prevailing ahistorical approach to the federal bench's formative era. (A third such book is William R. Casto's pathbreaking ***The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth***.)[6]

Scott Douglas Gerber, the presiding spirit of ***Seriatim***, teaches law at Florida Coastal School of Law in Jacksonville; he has written two previous books, on the Declaration of Independence and constitutional interpretation and on the jurisprudence of Justice Clarence Thomas.[7] He chose the title "Seriatim" for three reasons. First, it accurately reflects the nature of the Court in the years before John Marshall established the "opinion for the Court" as the way the Justices addressed constitutional decision-making; previously, each Justice spoke "seriatim," in turn, as was the practice in British, colonial, and state courts.[8.] Second, it acknowledges that the volume approaches its subject through a series of biographical essays focusing on individual Justices. Third, it notes the methodological diversity of the contributors (***Seriatim***, 20-21).

Gerber's lucid introduction sets the stage for this collaborative enterprise. He begins with a brisk survey of the historiography of the pre-1801 federal judiciary, outlining reasons for Marshall's primacy in shaping later generations' understanding of the federal courts' history and roles. He also makes a spirited case for viewing the pre-Marshall Court as providing an alternative, equally legitimate understanding of the federal courts' role in the constitutional system.

Then Gerber and nine other contributors -- including historians, political scientists, legal scholars, and one judge -- each examine a Justice named to the Supreme Court before Marshall's appointment in 1801. (The book omits three men. Robert Hanson Harrison of Maryland, named by President George Washington to the Court in 1789, resigned due to ill health without having taken office; Washington named James Iredell of North Carolina to replace Harrison. Thomas Johnson of Maryland, whom Washington named to the Court in 1791 to succeed Associate Justice John Rutledge of South Carolina, served two years and resigned,

to be succeeded by William Paterson of New Jersey. Alfred Moore of North Carolina, named by President John Adams in 1797 to succeed Iredell, served four years and resigned in 1801; President Thomas Jefferson named William Johnson of South Carolina to succeed him. Harrison, Johnson, and Moore left no discernible imprint on either the Supreme Court or the circuit courts, and Thomas Johnson and Moore left virtually no useful primary sources behind them [***Seriatim***, 4-6].)

Sandra vanBurkleo, associate professor of history at Wayne State University, presents a challenging reinterpretation of John Jay (***Seriatim***, 26-69) reprinted from the ***Journal of the Early Republic***. She takes issue with key elements of the favorable view of Jay offered by Richard B. Morris, who painted Jay as a natural diplomat at home and abroad and a forerunner of John Marshall. Emphasizing Jay's pessimism (flavored, as was that of his successor Oliver Ellsworth) by Calvinism, and noting his occasional prickliness and contentiousness in domestic politics (as opposed to the field of diplomacy), vanBurkleo stresses that Jay was a deliberate, self-consious conservative who sought as Chief Justice to bolster the authority of the general government and the constitutional system by allying the less democratic executive and judicial branches to counter democratic spasms both in the legislative branch and among the people.

James Haw, professor of history at Indiana University/Purdue University at Fort Wayne, assesses John Rutledge of South Carolina, the Court's first senior Associate Justice and almost its second Chief Justice (***Seriatim***, 70-96). His moving essay portrays a shrewd politician who, like most members of the early Court, was a moderate conservative, a skilled legal practitioner, and a friend of federal constitutional stability. In particular, Haw elucidates the financial and emotional pressures that gradually wore Rutledge down and helped, along with his vehement opposition to the Jay Treaty, to doom his chances to win confirmation as Chief Justice.

Gerber offers a skilled and useful re-examination of William Cushing of Massachusetts (97-125), who (he shows) is unfairly brushed aside as a lightweight who suppposedly owed his high office to family connections. Gerber's portrait of Cushing reveals another moderate, skilled judicial craftsman who might not have aspired to intellectual greatness but provided a steadying and professional influence throughout his tenure as a Justice. The essay's only flaw is its invocation of the clunky and distracting terminology of deconstruction. For example, Gerber gives the mistaken impression that he is deconstructing Cushing himself, whereas he actually is demolishing the conventional wisdom about Cushing.

Mark David Hall, who teaches political science at Eastern Central University at Ada, Oklahoma, author of a superb monograph on James Wilson,[9] distills that 1997 study into an excellent brief treatment of Wilson's life and career (***Seriatim***, 126-154). Wilson was the one jurist on the early Court who aspired to intellectual leadership, and thus Hall devotes special care to elucidating Wilson's democratic theory, his fascination with natural law, and his blending of the two in his legal and constitutional writings.

Wythe Holt, who teaches at the University of Alabama Law School at Tuscaloosa, tackles the quiet, reserved John Blair of Virginia in a first-rate essay blending historical context, biographical detail, and legal and constitutional analysis (***Seriatim***, 155-197). Blair emerges from Holt's essay as "a safe and conscientious judge," one who easily and skillfully joined with his colleagues in vindicating federal judicial authority as a bolster of the nascent constitutional system.

Justice Willis P. Whichard of the Supreme Court of North Carolina chronicles James Iredell (***Seriatim***, 198-230). He ably traces Iredell's legal career, his key role in winning the adoption of the Constitution in his native state against consider-

able odds, and his ardent, skilled presentation of his views of such loaded questions as judicial review, the purposes of a constitution, and the proper relations between federal and state governments. Although, occasionally, it strays from the historical and analyticial into the realm of the celebratory, Whichard's essay also benefits from his own firsthand familiarity with judicial service.

Daniel A. Degnan, S.J., who teaches law at Seton Hall Law School, presents the other previously published essay in this volume, a study of William Paterson (***Seriatim***, 231-259), which appeared in the ***Seton Hall Law Review***. Although Degnan's study is a useful sketch of Paterson's life and career, it tends to skate over the surface of the man, his thought, and his political and judicial activities. It pales by comparison with the other essays in this volume.

Stephen B. Presser, who teaches law at Northwestern University Law School and is the author of a combative, enlightening 1991 study of thecontroversial Samuel Chase of Maryland[10], presents an essay that tries to do at least two things (260-291). Presser wants to rescue Chase from what the late historian E. P. Thompson in a different context called "the enormous condescension of posterity."[11] His essay makes a convincing effort to do just that, but at the same time Presser also wants to rescue his 1991 book of Chase from what he might have dubbed "the enormous condescension" of reviewers. Readers unfamiliar with Presser's book on Chase may find themselves lost in the "inside baseball" passages of his essay. Moreover, Presser cannot resist the temptation to link the past and the present, whether by redeeming Federalist support for the 1798 Sedition Act in part to justify the recurring 1990s push for a constitutional amendment criminalizing flag-burning (278) or by taking barbed swipes at what he limns as the excesses of that old bugbear, political correctness (279). Presser raises the issue whether scholars should make the past answer the concerns of the present, and ends his essay with a nuanced and modest claim for his larger enterprise (281-283). Readers might wish,however, that he had taken his own advice.

William R. Casto, who teaches law at Texas Tech Law school, follows with a wonderfully enlightening essay on Jay's eventual successor as Chief Justice, Oliver Ellsworth of Connecticut (292-321). In addition to this essay,Casto also has written a terse, enlightening compact life of Ellsworth, the second book under review. That book, which the Second Circuit's Committee on Historical and Commemorative Events published in 1997 to accompany an exhibition marking the bicentennial of Ellsworth's service on the Court, focuses on Ellsworth's "role in the creation of the federal government" (Casto xiii).[12] Both these studies presage Casto's full-length biography of Ellsworth, now in progress, and draw on and complement his 1995 study of the Jay and Ellsworth Courts. The core of Casto's interpretation of Ellsworth is the centrality of the teachings and moral force of Calvinist Protestant Christianity for Ellsworth and other "New Light" Protestants. Casto persuasively shows how Ellsworth guided his political, Senatorial, and judicial careers by reference to his Calvinism. Taken together, Casto's several publications underscore the need for a comprehensive life of this significant but neglected figure in the Revolutionary generation of Americans.

James R. Stoner, Jr., who teaches political science at Louisiana State University, chronicles yet another underrated Justice, Bushrod Washington of Virginia (322-350). Washington's unusual first name (his mother's maiden name) and his status as George Washington's nephew combine with his natural tendency to modesty and collegiality to eclipse his real achievements as a member of the Court. Washington read law with James Wilson and, ironically, was one of two candidates for the Pennsylvanian's seat on the Court following Wilson's tragic death in 1798. When John Marshall turned down the appointment, Washington re-

ceived it from President John Adams; he had established his credentials as an able lawyer with a scholarly bent, in part due to his publication of two volumes of reports of notable Virginia cases. Bushrod Washington later commissioned his friend (and eventual colleague on the Court) John Marshall to write the authorized life of George Washington. Stoner ably shows that the younger Washington was far more than the sum of his family and political connections -- in other words, that he does not deserve (any more than William Cushing does) to be labeled as a lightweight beneficiary of nepotism. In Stoner's account, Washington was devoted>to his judicial duties, functioning well on both the "seriatim" Supreme Court of Oliver Ellsworth and the more vigorously led Court of John Marshall. In essence, Stoner shows the legacy of the Ellsworth Court in the person of Bushrod Washington blending harmoniously into the significantly revised judicial and institutional world of the Marshall Court.

Common themes pervade these essays. (1) The essayists adopt William Casto's sound view that the early Supreme Court was a "national security" Court -- one devoted to bolstering the authority of the new constitutional system for a fragile republic in a dangerous and hostile world; all the Justices understood and cleaved to that position (though, as with Iredell's lone dissent in the notorious case of ***Chisholm v. Georgia*** [1793],[13] with occasional waverings). (2) The early Justices, with the prominent exception of James Wilson, all follow the pattern of modern Justices so often decried by legal scholars: they were, as Holt notes of Blair, "safe and conscientious" judges, accomplished in the technical legal craftsmanship of their time, rather than leading intellectual lights with controversial "paper trails." (3) The essayists emphasize the profound intermingling of law and politics in the 1790s, and note that the behavior of the Justices suggests that they did not recognize the sharp distinction between the two realms that their successors (perhaps under John Marshall's influence) embraced. (4) The Jay Treaty assumes remarkable significance for federal judicial history, and not just because it took Chief Justice Jay away from his colleagues for a year. Rather, its repercussions led to the resignation of one Chief Justice, the rejection of a second, and the confirmation of a third, and to the further politicization of law and foreign policy for the rest of the decade. (5) All the essayists, benefitting from the increased accessibility of documentary sources on the lower federal courts, make the Justices' work on those courts a key part of the story of the early Supreme Court. (6) A last point deserves separate treatment in light of the essayists' agreement that they hope to extract the early federal judiciary from the shadow of John Marshall. Readers will note wryly how many of the essayists seek for their subjects in particular and the pre-Marshall Court in general credit for articulating and practicing judicial review, both while riding circuit in the famed but murky ***Hayburn's Case*** (1792) and other such >>cases, and on the Court itself in ***Hylton v. United States*** (1796).[14]

In some ways, the inconsistencies among the essays are just as suggestive as the parallels. Thus, for example, Presser's dismissal of the charges that John Rutledge was mentally unstable as overheated partisan rhetoric (277) clashes with Haw's affecting treatment of the evidence that Rutledge indeed suffered bouts of depression of sometimes suicidal intensity (84-86). Also, Gerber, Hall, Whichard, and Degnan all seem bent on winning laurels for Cushing, Wilson, Iredell, and Paterson as the ablest Justice of the early Court. Finally, the essayists have not sorted out among themselves whether, in the "Case of the Petitioners," the various federal circuit courts pronounced on the Invalid Pensioners Act (which vested them with authority to hear and decide Revolutionary War veterans' pension claims subject to review by the Secretary of War) as advisory opinions or in refusing to hear actual petitions by actual claimants. Study of the records of the circuit courts on which Jay sat shows that Jay and Associate Justice William Cushing and the various district judges

did confront petitioner-claimants, and thus were dealing with actual cases or controversies rather than advisory opinions.

One added quibble about advisory opinions suggests itself. Many of the essayists see no difference between advisory opinions proffered by individual Justices such as Jay, Wilson, Ellsworth, and Cushing, and advisory opinions issued by the Court. Individual Justices, including Jay and Wilson and Ellsworth, saw no difficulty in individual consultations with various members of the executive branch. In 1793, however, the Justices declined en masse a request by Secretary of State Thomas Jefferson on behalf of President Washington. Washington wanted to know whether he had the constitutional power to issue the Proclamation of Neutrality declaring that the United States would take no sides in the world war raging between revolutionary France and its adversaries led by Britain. The Justices themselves saw the distinction; their refusal to proffer an official advisory opinion was based on their desire to preserve the integrity and independence of the Court as an institution in a time of political uncertainty and foreign crisis.[15]

These quibbles and disagreements do not detract from the value of both books under review. These valuable contributions to historical scholarship illuminate an unjustly neglected era of the history of the federal judiciary. They also force historians and legal scholars to reconsider how they have studied the history of the federal courts, and they also demand that general historians include the history of the federal courts as a key thread of the political and constitutional history of the early American Republic.[16]

Notes

I dedicate this review essay to the memory of Jack Bonomi, Esq. (1926-1993), a symbol of integrity in the New York legal profession who was also deeply interested in American history. I also gratefully acknowledge the swift and sure editing of Dr. Gaspare J. Saladino, coeditor of the ***Documentary History of the Ratification of the Constitution***.

[1]. Linda Przybyszewski, ***The Republic According to John Marshall Harlan*** (Chapel Hill: University of North Carolina Press, 1999), 8, and see also ***id.***, 1-9.

[2]. Maeva Marcus et al., eds., ***The Documentary History of the Supreme Court of the United States, 1789-1801***, 6 vols. to date (New York: Columbia University Press, 1985). Another project, ***The Papers of John Jay*** (launched by the late Richard B. Morris, Gouverneur Morris Professor emeritus of history at Columbia University), generated two volumes covering Jay's life and career through 1784. The Librarian of Columbia University, Elaine Sloan, shut down this project as of 31 January 1997. On this matter, see note 8 to R. B. Bernstein . "Review of Mark David Hall, The Political and Legal Philosophy of James Wilson, 1742-1798," H-Law, H-Net Reviews, August, 1998. URL: http://www.h-net.msu.edu/reviews/showrev.cgi?path=13344904050793.

[3]. See the valuable study by William E. Leuchtenburg, ***In the Shadow of FDR*** (Ithaca, N.Y.: Cornell University Press, 1983; 2d rev. ed., 1993).

[4]. 5 U.S. (1 Cranch) 137 (1803).

[5]. Richard B. Morris, ***John Jay, The Nation, and the Court*** (Boston: Boston University Press, 1967). For other of Morris's publications concerning Jay, see note 8 to the review cited supra, note 2.

[6]. William R. Casto, ***The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth*** (Columbia, S.C.: University of South Carolina Press, 1995). This is the first volume of the series "The Chief Justiceships of the United States Supreme Court," edited by Melvin I. Urofsky of Virginia Commonwealth University.

[7]. Scott Douglas Gerber, ***To Secure These Rights: The Declaration of Independence and Constitutional Interpretation*** (New York: New York University Press, 1995); Scott Douglas Gerber,

First Principles: The Jurisprudence of Clarence Thomas (New York: New York University Press, 1998).

[8]. G. Edward White, "The Working Life of the Marshall Court, 1815-1835," *Virginia Law Review* 70 (1984): 1-52.

[9]. Mark David Hall, *The Political and Legal Philosophy of James Wilson, 1742-1798* (Columbia: University of Missouri Press, 1997). On this book, see the review cited in note 2, supra.

[10]. Stephen B. Presser, *The Original Misunderstanding: The English, the Americans, and the Dialectic of Federalist Jurisprudence* (Durham, N.C.: Carolina Academic Press, 1991).

[11]. E. P. Thompson, *The Making of the English Working Class* (London: Victor Gollancz, 1963; New York: Pantheon, 1964), 12.

[12]. A limited number of copies of this study can still be secured. Interested readers should write to: Office of the Circuit Executive, Attention -- John Coffey, U.S. Courthouse, 40 Foley Square, Room 2904, New York, N.Y. 10007.

[13]. 2 U.S. (2 Dallas) 419 (1793).

[14]. 3 U.S. (3 Dallas) 171 (1796).

[15]. For an exposition of this view, see Ene Sirvet and R. B. Bernstein, "John Jay, Judicial Independence, and Advising Coordinate Branches," *Journal of Supreme Court History* 2 (1996): 22-29. For an interpretation stressing the political context that led Chief Justice Jay and his colleagues to demur to a request for an advisory opinion, see Stewart Jay, *Most Humble Servants: The Advisory Role of Early Judges* (New Haven: Yale University Press, 1997).

[16]. By contrast, a prize-winning book hailed as a culminating synthesis of the history of the early American Republic devotes virtually no discussion to the federal courts. Stanley Elkins and Eric L. McKitrick, *The Age of Federalism, 1788-1800* (New York: Oxford University Press, 1993).

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