United States Senate
Committee on the Judiciary

Questionnaire for Judicial Nominees

Attachments to Question 12.d.

Amy Coney Barrett
Nominee to be Associate Justice
of the Supreme Court of the United States

In the hit musical Hamilton, Angelica Schuyler sings a phrase from the Declaration of Independence: "We hold these truths to be self-evident, that all men are created equal." And then she adds: "And when I meet Mr. Jefferson I'm-a compel him to put women in the sequel."

There has been no sequel to the Declaration itself, but we have certainly seen the sequel unfold in American history. This year, we celebrate the 100th anniversary of the 19th Amendment, which gave women a constitutionally protected right to vote. And in the century that we have been full members of the political community, we have certainly accomplished a lot.

But my talk to you today is not about the empowerment of women in American history. You've asked me to talk about my own experience as a woman working in a male-dominated field. There is a lot I could say, but I'm supposed to keep this brief. My message to you this morning is about the importance of having confidence, especially for girls.

I am the oldest of seven children—the first six are girls and the youngest is the only boy. So I grew up in a female-dominated household, and my parents always encouraged their many daughters to be confident and to realize their full potential. I don't remember it ever crossing my mind that I should think of myself as less able than any boys. In fact, one of my clear childhood memories is about a rivalry I had with a boy early in grade school. Every time we competed in a spelling bee, my dad would sing "anything boys can do, girls can do better." And what he sang to me in second grade, he continued to sing to my sisters and me the whole time we were growing up.

Now, my lighthearted dad didn't literally mean that boys are inferior to girls—in other words, he didn't give my brother a complex. What he meant is that girls should have no reason to lag behind boys in confidence—that girls should never assume that boys can do it better.

I was fortunate to have been educated in an environment that never gave me reason to make that assumption. I went to an all-girls Catholic school in New Orleans, so boys trying to dominate in class simply wasn't an issue. I was encouraged by my teachers, all of whom were women, and supported by my

close-knit friends, with whom I remain close today. When I went off to college, it literally didn't occur to me that the boys in my classes would be smarter than I was.

But when I went off to college, I found myself assuming that *everyone*—both the boys and the girls—would be smarter than I was. During my second semester in college, I was the only freshman in an upper-level English class. I looked around and saw that all the rest of them were junior and senior English majors. And I assumed that I was totally inadequate. I was so nervous the first time I presented in front of the class—I was sure that I would crash and burn. But I made myself do it, and afterward, my professor pulled me aside and told me that it was one of the best presentations that she had ever seen. I became an English major and graduated with the award fort the most distinguished graduate in my department. That professor, who became my advisor, gave me a bound collection of Truman Capote's works when I graduated, because she remembered that my very first presentation had been on Capote's Breakfast at Tiffany's. I had been more than up to the task in that first class, even though I had doubted myself.

It is this lack of confidence that I want to talk about in the context of empowering women. I certainly hope that you are growing up at a time in which it does not cross your mind that any boy is more able than you just because he is a boy. (And if it does, just think of my dad's song: anything boys can do, girls can do better.) But you may doubt your ability more generally. I'm going to speak in generalities here, but in my experience watching women over the course of my career—and especially during the almost eighteen years that I have taught in the Law School—women are far quicker to doubt themselves than men are. To be sure, this is not true of every woman or of every man. But I have seen it often enough to think it is a phenomenon worth talking about.

When women walk into a new situation, they are more apt than men to think they can't do it. I see that in first-year law students—in fact, I felt that way myself when I started law school. It was just like that day in my freshman English class. It was a new situation, I was unproven, and I assumed that I couldn't do it until the evidence showed otherwise. Men don't typically

operate that way. They make the opposite assumption—that they can do it unless the evidence shows otherwise. In first-year law classes, it's new for *everyone*. No one knows if they'll be any good at it. But while women often self-doubt, men walk in thinking they're going to kick butt. They assume that they'll succeed. They assume they have what it takes. Now, as a longtime professor, I can assure you that those assumptions do *not* always pan out. But there is something to be gained by having them.

When I went out to work, first in clerkships for judges and later in law firms, I saw this time and again. A project would come up that seemed really hard, involving new territory that none of my cohort had tried before. I was sometimes hesitant—along with other women—to step up and volunteer because I wasn't sure whether I'd fail. My male colleagues didn't feel that way; they didn't tend doubt themselves. And here's where that matters: if women don't project confidence in the workplace, they won't get the more challenging work. They won't get those chances to prove themselves. And then they'll lag behind the men who have a chance to prove themselves by succeeding at the challenging tasks.

So how do you handle that? Here's another piece of advice from my dad: control your emotions or they'll control you. One way in which I have succeeded is by disciplining myself to be confident in new situations even when I don't *feel* that way. It's your actions, not your feelings that count. Don't wait for yourself to feel confident. Act that way. Whether it's your first-class presentation, your first semester of graduate school, or your first tough assignments in a new job, step up and believe in yourself. I think you'll find that emotions follow actions. If you repeatedly force yourself to project confidence, you'll start feeling confident.

I'll end with one small anecdote about the pay gap. There are a lot of complicated reasons why women are underpaid relative to men, so I'm not attempting here to untangle a difficult social problem. But in my own life, one factor at play was my reticence. At one point, I discovered—to my fury—that I was being underpaid relative to men, even though my performance was equal to or better than theirs. When I approached my boss about this—who, incidentally, was a woman—she said, "Well, you never

asked for a raise." I had assumed that every year, when we filled out self-evaluations and had performance reviews, my boss awarded raises based on merit. It turned out that the men—and some of the women—had been more aggressive than I had been in making the case for themselves. I hated talking about money and tooting my own horn, so I didn't do it. Being paid less was the consequence of not standing up for myself.

As you complete your education and head out into the world, believe in yourselves. That's not to say that you should have a chip on your shoulder or develop a sharp edge. In most cases, gracious confidence can be the foundation for your success. Don't doubt yourselves. Sometimes, you will fail. But if you fear failure, you won't have the chance to succeed.

News, views and ticket deals
DC Theatre Scene.com

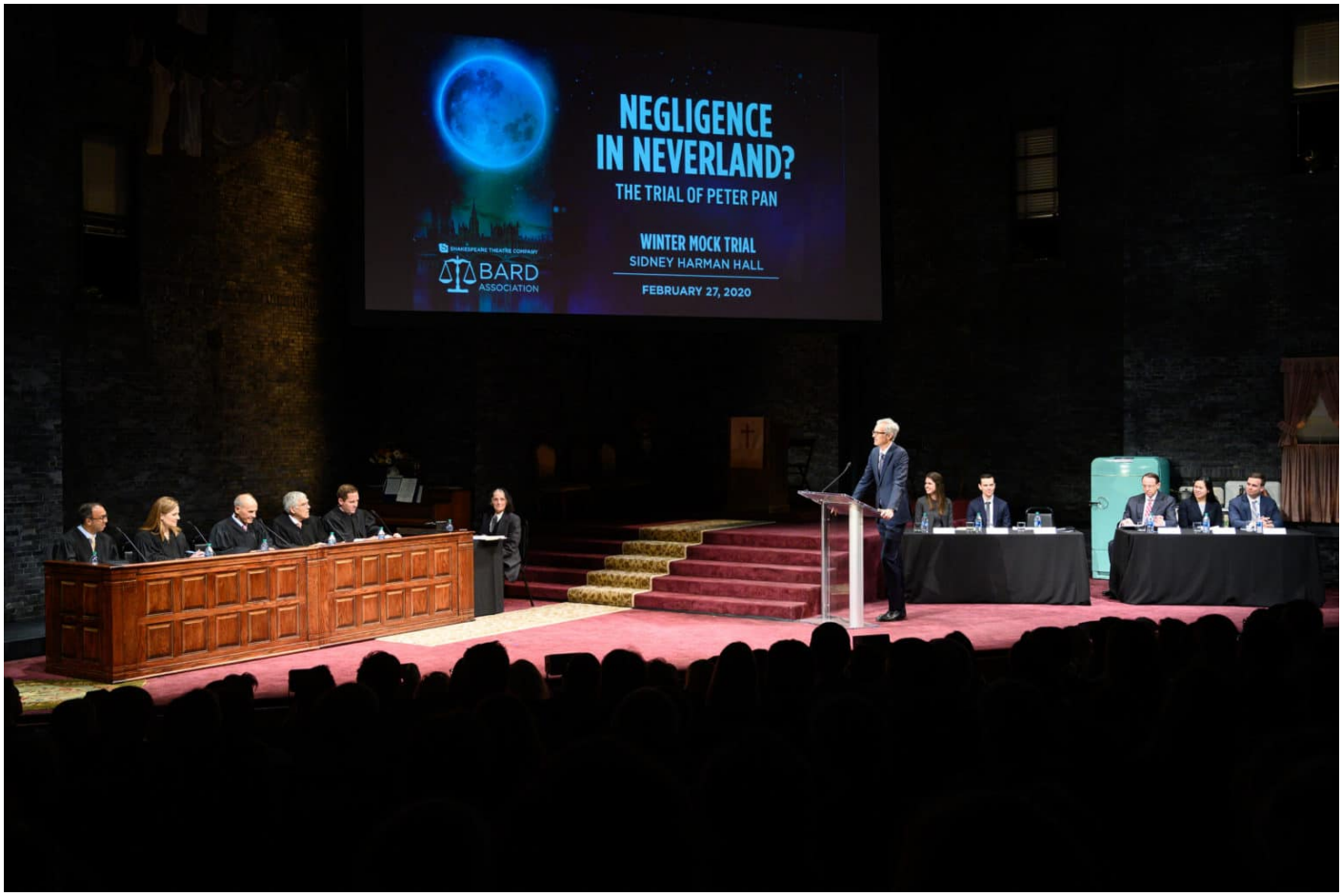
Shakespeare Theatre mock trial gives a speedy – and witty – hearing to The Trial of Peter Pan

February 28, 2020 by Tim Treanor (https://dctheatrescene.com/author/tim-treanor/)

Peter Pan, having swept the Darling children up into the sky with fairy dust, brought them to Neverland, a venue full of pirates and mermaids. There, along with the lost boys, they did battle with the worst of them. The children returned that very night with memories of fantastic adventures and resolved to live lives full of wonder.

This being 2020, Peter was then hit with a restraining order. (In England, where the play took place, people are already more restrained than they are in America, so this is called a “stay-away” order).

And thus we are gathered in the 33rd Bard Association-sponsored mock trial at the Shakespeare Theatre, where a Marshal Pamela Talkin (in real life, Marshal of the Supreme Court of the United States) has assembled a gaggle of distinguished judges will decide whether a trial court’s determinations that Pan shall never return to Earth, and also that the Darling parents better shape up, will be reversed on appeal.



Shake peare Theatre' 2020 Mock Trial The Trial of Peter Pan, Profe or Jeffrey L Fi her (center) (Photo Kevin Allen)

Because: *lawyers.*

Washington is lousy with them (or, to disclose completely, with *us*) more per capita than in any real estate in the universe, except Hell. There was a glittering array of them on display last night at Harman Hall. For Pan: Professor Jeffrey L. Fisher of Stanford University's School of Law (and Special Counsel for O'Melveny & Myers), seconded (in non-speaking roles) by Mulvany & Myers' Ephraim McDowell and Ashley Robertson

For the anti-Pandanistas (variously styled "the Queen" and "the Crown Prosecutor"): Rod Rosenstein. Yes, *the* Rod Rosenstein, who as Deputy Attorney General steered the Mueller Report through the storms caused by the tweeter-in-chief, and now enjoys less surreal (and, I'm certain, more lucrative) days as a partner at King & Spalding Gabriel Krimm and Christina Kung, of his firm, joined him on his brief and at his table.

They argued before the Supreme Court of England which, in a notable coincidence, was mostly peopled last night by American Judges. Presiding was the Honorable David S. Tatel, a Court of Appeals Judge for the DC Circuit whose gentle manner belies a mind so terrifyingly precise that he has brought underprepared lawyers close to tears. His colleague Amy Coney Barrett, who sits on the Seventh Circuit (Illinois, Indiana and Wisconsin) joined him, as did U.S. District Court Judge (and hip-hop enthusiast) (https://www.cnn.com/2019/05/09/politics/who-is-judge-amit-mehta-dc-district-court/index.html) Amit P. Mehta and DC Court of Appeals (a local appellate court; not the same thing as the Federal Court of Appeals for the DC Circuit) Judge Joshua Deahl. The only English judge was Lord Nicholas Phillips, late the President of the Supreme Court of the United Kingdom.

Which brings us to another startling distinction between English and American courts. In U.S. courts, we call the judge "your honor," a title which is sometimes more aspirational than descriptive. But in England a male judge is the *Lord,* a title with particular impact here given that the hearing was on the gorgeous set of STC's gorgeous *The Amen Corner, (https://dctheatrescene.com/2020/02/21/review-the-amen-corner-at-shakespeare-theatre/)* where religious imagery abounded. (In England, sadly, women judges are known by the prosaic title "Lady".)

The record in this case can readily be found in the text of Lauren Gunderson's *Peter Pan and Wendy* (https://dctheatrescene.com/2019/12/12/review-lauren-gundersons-peter-pan-and-wendy-a-sensational-reimagining-for-a-new-generation/), a 2019 reimagining of J.M. Barrie's one hundred fifteen-year-old story. In this retelling, which celebrates girl power and the rights of indigenous people, Peter comes off — as the Brits say — as a bit of a rotter. This somewhat complicated Professor Fisher's attempts at hagiography. Fisher's remedy was to include the 1953 Disney film, which was much more Pancentric, in the record, but even that was not enough for Judge Tatel. "I'm an originalist," he announced, before putting Barrie's 1905 story in the record too.

The night was as much spin doctoring as it was lawyering. To Fisher and his team, Peter was "a precocious young man widely proclaimed Neverland's head of state."

"Despite his youthful demeanor, Peter has run the rural, mid-celestial country of Neverland for nearly a decade and has high hopes of an even more expansive political career." Before the Court, Fisher explained that due to his youthful charisma and sterling military record (Fisher noted that he had overthrown a "crusty old man") Pan's followers were beginning to call him "Mayor Pete." Fisher's argument, in essence, was that as a head of state, Pan was immune to the British Court's authority; that there was no kidnapping (the basis of the stay-away order) but even if there was, it was in Neverland, where the Court had no authority; and that fairy dust was not a hallucinogenic but simply a performance-enhancing substance which allowed the children to fly.

To team Rosenstein, Pan was “a grown man with an unhealthy obsession for spying on children in their bedrooms and luring them from the safety of their family homes. Beneath Peter Pan’s green tights and elvish features lurks the tortured soul of a narcissist * * * Lurking about London without conscience or even a shadow, Pan stalked the Darling children, greedily feeding off their dreams and bedtime yarns.” What Pan gave the children was not a mere performance enhancer but an “unknown dangerous substance called by its street name, ‘Fairy Dust,'” by which “Pan fooled unsuspecting young minds into following him on life-threatening adventures serving no apparent purpose outside of his own twisted amusement.”

(You can read the briefs here (http://www.shakespearetheatre.org/events/winter-mock-trial/).)

The second part of the trial court’s order — requiring the senior Darlings to raise their children with more attention and imagination — received less attention and imagination in the proceedings. Rosenstein pointed out that the Darlings showed great imagination in assigning a dog, Nana, to watch over the children while they went to the theater, and both sides praised Wendy’s maturity and intelligence.

The hearing itself was longer on amusing references to the contemporary political scene than it was on legal arguments. Rosenstein promised to build a “big, beautiful wall” between England and Neverland, and added “the pirates will pay for it.” (He introduced himself as the “*acting* Attorney General,” explaining that the Attorney General had recused himself because of the help he had given to the Queen in settling her own family contretemps). Judge Barrett wanted to know whether Pan, by entering the Darlings’ British home, was an illegal alien. And Fisher, though he admitted that the two most compelling figures on the record were women (Tiger Lily and Wendy), argued that “they never be elected.”

While the Judges retreated to deliberate, Bard Association Management Committee Chair Abbe Lowell treated us to an interview with the veteran actor Edward Gero, an affiliated artist with Shakespeare Theatre. Gero, who is not a Judge but who played him on the stage (specifically, Justice Antonin Scalia in *The Originalist (https://dctheatrescene.com/2015/03/20/battle-constitution-originalist-winner/)*), gave several insights into his life and process in response to Lowell’s questions, including that his original ambition as a child was to become a priest; that he takes as long as a year to prepare to play historical characters (among other preparations, he read The Federalist Papers to play Scalia) and that he teaches, at least in part, because it gives him an opportunity to become more familiar with the texts he plays as an actor — he teaches, in short, to learn.

The Judges came back loaded for bear. By a 4 to 1 vote (Judge Mehta being the sole dissenter; as a trial judge, he said, he always votes to uphold the trial judge) the Court reversed *both* orders. Judge Tatel would have gone even further, requiring the Queen and the Attorney General to

increase their attention and imagination, but fortunately for rule-givers and rule-enforcers everywhere, his opinion on that score was mere *dicta.*

The audience, fat with lawyers, was asked another question: was Peter Pan or the Darling parents primarily responsible for the difficulties captured in the record? We voted with red and blue tokens, which were subsequently weighed on the scales of justice. William Faulkner once advised writers to “kill the darlings,” by which he meant to excise phrases which sounded good but did not add to the story. The audience last night was not quite so carnivorous, but by an overwhelming margin we voted to *blame* the Darlings.

Abbe Lowell, assisted by Jerry Block, Carol Elder Bruce, Gregory Cooke, Nina Laserson Dunn, Burton Fishman, Michael Kades, Lloyd Randolph, John Vogel, and Carolyn Wheeler, created the mock trial scenario.

About Tim Treanor

Tim Treanor is a senior writer for DC Theatre Scene. He is a 2011 Fellow of the National Critics Institute and has written over 700 reviews for DCTS. His novel, "Capital City," with Lee Hurwitz was published November 1, 2016. He lives in a log home in the woods of Southern Maryland with his dear bride, DCTS Editor Lorraine Treanor. For more Tim Treanor, go to timtreanorauthor.com. (http://www.timtreanorauthor.com)

EDGEMEDIANETWORK

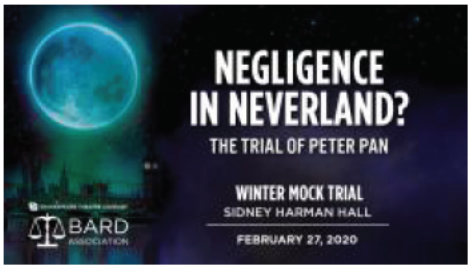
Print This Page

« Back to article

Entertainment » Theatre

'Negligence in Neverland' Asks: Was Peter Pan Guilty of Kidnapping?

by Kelly May
EDGE Media Network Contributor
Monday Mar 2, 2020



Peter Pan is on trial. We may think of Peter Pan as a lovable adventurous kid, but George and Mary Darling disagreed - and they sued. **"Negligence in Neverland? The Trial of Peter Pan"** presented the appeal of an earlier court decision that saw both Peter Pan and the Darlings holding some blame. (For more on the court case, click here. During the appeal, judges and the audience had to decide: Is Peter Pan guilty of kidnapping? Did the court go beyond its power in its order against the parents? Should the parents be more responsible?

Part of a yearly mock trial series, Negligence in Neverland was a wholly Washington DC experience. It was an amusing evening that took its fun seriously, largely to the fact that all the 'actors' upon the stage were real judges and lawyers. The side jobs of these 'actors' include being a judge on the United States Court of Appeals for the District of Columbia Circuit, a former United States Deputy Attorney General, the Marshall of the Supreme - and a former President of the Supreme Court of the United Kingdom (this happened in Great Britain, after all!).

During the course of the evening, the petitioner and the respondent stated their arguments to a panel of judges, with the judges asking pointed questions about the case. The judges and lawyers use the court framework to roast politics, people, and events over the last year. The jokes were well written and sharply delivered, covering a large range of topics: Bernie Sanders, Ukrainian favors, Mayor Pete, DREAMers, and the ongoing struggle for women in politics.

In addition to the trial, audiences were also provided some pre-reading homework before the event. The pre-reading included the Winter Mock trial scenario, brief for petitioner, and brief for respondent. The pre-show homework was a good preview for the evening, and showcased comedic chops in written form. However, if you go, pre-reading adds to the experience, but it is not a requirement.

Born in 1994, the annual Mock Trial Series explores the connection of classical theatre and modern-day law. The Winter Mock Trial series is hosted by the Shakespeare Theatre Company and sponsored by the Bard Association, STC's affinity group for Washington's legal community. Every year, different judges and lawyers participate. This year's participants were:

Bench:
Judge David S. Tatel, United States Court of Appeals for the District of Columbia Circuit
Judge Amy Coney Barrett, United States Court of Appeals for the Seventh Circuit
Lord Nicholas Phillips, Former President of the Supreme Court of the United Kingdom
Judge Amit P. Mehta, United States District Court for the District of Columbia
Judge Joshua Deahl, Associate Judge of the District of Columbia Court of Appeals

Court Marshal

Marshal Pamela Talkin, Supreme Court of the United States

Advocates
Jeffrey L. Fisher, Professor of Law, Stanford Law School, and Special Counsel, O'Melveny & Myers
Rod J. Rosenstein, Former United States Deputy Attorney General

Shakespeare Theatre Company presented "Negligence in Neverland" on February 27. For more on their season, including the current productions of "The Amen Corner" and "Timon of Athens," visit the theater's website.

CONSERVATIVE WOMEN WEEKLY: 4 Ways Conservative Women Dominated The Week

FACEBOOK

TGIF, am I right ladies? Before you're off to start your weekend, we're here with Conservative Women Weekly. From op-eds to style to advocating for issues they care about, here are 4 ways that conservative women dominated the week.

Conservative Judge Amy Coney Barrett Joins Shakespeare Theater Company for Winter Mock Trial

Several times a year, the Shakespeare Theater Company invites distinguished judges and lawyers from around the country to the theater to perform a mock trial based on a play the theater has performed that season. This year's **Winter Mock Trial** was based on Peter Pan and featured conservative Judge and Supreme Court hopeful Amy Coney Barrett.

Judge Barrett currently serves on the United States Court of Appeals for the Seventh Circuit. She flew into DC to perform the mock trial to determine if Peter Pan had maliciously kidnapped the Darling children or if it was just harmless fun. Judge Barrett's questions focused on the legality of Pan's entrance to the United Kingdom from Neverland

during their trip. Her final decision on the panel ruled in Pan's favor, advocating that Wendy was a trailblazer for women's rights in Neverland.

Nikki Haley has Double Feature in Clapping Back at Biden and Publishing WSJ Op Ed

Nikki Haley is standing up for conservative women and capitalism this week. When Biden began to say that Haley "didn't have the brains" for her position, Haley clapped back **in a tweet** saying challenging Biden to a debate to prove her intelligence. As usual, Haley did not back down. She stood up for herself and challenged Biden to put his money where his mouth is. And of course, she ended it with some southern charm dropping #GodBlessJoe.

Also this week, Haley dropped a **Wall Street Journal op ed** defending capitalism as the left moves toward socialism. Her historical take on the benefits of free markets do not only remind us how dangerous socialism is, but also why capitalism must be as open and free as possible. Haley's defenses on multiple fronts is a good reminder that advocacy has many different angles.

Transportation Secretary Elaine Chao Pushes for Innovation on Aging Infrastructure

Before the U.S. House Appropriations Committee on Thursday, Transportation Secretary Chao told Appropriators that "a faster and more cost effective method" should be pursued to fix the Hudson River tunnels, instead of waiting to build new tunnels. The tunnels have been badly damaged since the 2012 Superstorm Sandy.

"New and innovative methods for repairing the
operation, could allow Amtrak to commence rep
10 years ahead of schedule," she said in **her bu**

Seventh Circuit judges share advice, insights on clerkships

Published: February 05, 2020
Author: Kevin Allen [link:/news-events/news/authors/kevin-allen/]

From left, Judge Michael S. Kanne, Judge Kenneth F. Ripple, and Judge Amy Coney Barrett of the U.S. Court of Appeals for the Seventh Circuit speak to students on February 3, 2020. Professor Roger Alford is at the podium. Photo by Alicia Sachau/Notre Dame Law School.

Notre Dame Law students received valuable advice about clerkships on Monday from some very reliable sources.

Judge Kenneth F. Ripple, Judge Michael S. Kanne, and Judge Amy Coney Barrett of the U.S. Court of Appeals for the Seventh Circuit spoke to students during a lunchtime panel discussion. The three judges shared insights from their own clerkships as well as their experiences hiring and supervising clerks.

While introducing the panel of judges, Professor Roger Alford urged students to apply for clerkships and not self-select themselves out of the process. Notre Dame Law School graduates have historically been successful in landing clerkships, typically with around 15% of students from each class securing state or federal clerkships.

The judges started by talking about the value of serving in a clerkship.

Judge Ripple, who has been a member of the Notre Dame Law School faculty since 1976 and served on the Seventh Circuit since 1985, described a clerkship as a prestigious residency. It allows a new lawyer to see the huge variety of problems that come into the courts for resolution, and to work next to a judge as the judge wrestles those problems to the ground.

“A clerkship is a grind — it’s awful hard work — but it’s an awfully big dedication to the United States to be able to make such a contribution at such an early stage in your professional development. That’s the first reason you should do it,” Ripple said.

“The second reason you should do it is because it will make you a seasoned lawyer,” he added. “The third reason you should do it is it will make you a monsignor in the legal profession. … In the bar, when a former law clerk talks, people listen. They listen to you because you donated your services to the United States when you first got out of law school, you’ve been to headquarters, you’ve seen how judges decide cases. You are a very valuable person in the bar.”

Judge Barrett, who has been a Notre Dame Law School faculty member since 2002 and served on the Seventh Circuit since 2017, said a clerkship could also be analogized to a post-doc.

“It’s a more intense and more one-on-one opportunity to work closely with someone who has a great deal of experience in the law,” she said. “Not only will you learn a lot from the judge by virtue of working closely with the judge for the year, but then that judge also becomes your advocate for life. The judges for whom I clerked became my mentors. They went to bat for me when I was looking for jobs, and they gave me advice about jobs.”

Barrett said the network of fellow lawyers who have clerked for the same judge — most judges call it their “clerk family” — also becomes a resource for job referrals and client referrals throughout a lawyer’s career.

“A clerkship is not just a feather in your cap,” she said. “There’s a lot of practical value to you in seeing the way the courts work. You’re seeing the inside of how the courts function. When you return to the outside, and you’re practicing in front of the courts, you have a sense of what’s going on in that decision-making process.”

Different judges have different processes for selecting clerks.

“We get a substantial number of applications. It ranges depending on the circuit, but anywhere from 300 applications down to 150 applications per judge per year,” said Judge Kanne, who was appointed to the Seventh Circuit in 1987.

“In my chambers, my law clerks take a substantial hand in selecting their following law clerks. They do all the initial screening. What I usually get is about 20 to 15 applications that I’ll screen myself and then determine to interview maybe eight to 10 of those finalists,” he said. “One of the things I look for is compatibility among the law clerks.”

Although every judge has different criteria, there are some universal rules that applicants for clerkships need to follow.

For example, students should cultivate meaningful references. Students can do this by maintaining relationships with law professors and making good impressions on attorneys they work with during summer internships. Judges want to be confident that a clerk is going to work well and get along with others; personal references are key to demonstrating these qualities.

On the other hand, students should not decide whether to apply for a clerkship based on the political party that was in power when a judge was appointed to the bench. Furthermore, students should not try to game the application system by creating Democrat and Republican versions of their resume — the judges will catch on to that and will not react favorably.

Barrett said it is worthwhile for students to try to find out how a judge prefers to run his or her chambers and the types of responsibility clerks have in those chambers. Some judges prefer to write the first drafts of their opinions, for example, while other judges assign clerks to write first drafts.

"In a way, it’s hard to generalize, because it’s almost like judges each have their own law firm," she said. "Each judge can run their chambers very differently."

Ripple also reiterated Professor Alford’s point that students should apply for clerkships and not self-select themselves out of the application process. The judge emphasized that there is a wide variety of clerkships in different courts. If a student wants to specialize in tax law, for example, that student may want to clerk in a tax court.

“Don’t take yourself out of the running,” Ripple said. “There are a lot of clerkships.”

Notre Dame Law students and prospective students who are interested in clerkship opportunities should contact Chris Kozelichki [link:/directory/chris-kozelichki/] in the Law School’s Career Development Office.

THE DAILY
PRINCETONIAN

NEWS

Judge Amy Coney Barrett speaks at the University about US Constitution

Judge Amy Coney Barrett and Professor Robert George discuss the Constitution.

Photo Credit: Sandeep Mangat / The Daily Princetonian

Sandeep Mangat

October 18, 2019 | 12:22am EDT

Judge Amy Coney Barrett, a judge in the U.S. Court of Appeals for the Seventh Circuit and Professor at the Notre Dame Law School, opened her Oct. 17 talk on campus by arguing, "The story of the United States can't be told without the Constitution."

Barrett, who delivered the annual Walter F. Murphy Lecture in American Constitutionalism, went on to allege the U.S. Constitution's superiority derives from its concision and continuity, as opposed to the constitutions of the United Kingdom and France.

"The average constitution is replaced every 19 years. Ours [has been] the same for 250 years," she said.

Barrett explained that the significance of the Constitution lies in the very geography of the United States. She recalled that the creation of West Virginia revolved around a disputed interpretation of Article IV of the Constitution, which stipulates that a new state cannot be established without the consent of the surrounding states.

Virginia did not express explicit consent for the formation of West Virginia, which split from its parent state during the Civil War. Barrett said that Abraham Lincoln grappled with this constitutional dilemma, but justified the lack of consent since secession would be considered unconstitutional to begin with.

Barrett further related the Constitution to congressional power, citing the example of Alexander Hamilton's establishment of the First Bank of the United States. Hamilton served as the first Secretary of the Treasury.

According to Barrett, Congress was concerned that such a national institution would infringe on the powers of individual states. Hamilton, however, justified the institution by using the Constitution, since having such a bank would allow the country to hold up the ideals of citizens' success and happiness, values that the Constitution enshrines.

Barrett observed that this rationalization has since been validated, given that the Bank of the United States eventually allowed for the creation of a minimum wage and the establishment of Social Security.

This relationship between the Constitution and Congress is, according to Barrett, mirrored in the relationship of the document to individual people, as illuminated by the issue of slavery. Barrett argued that the debate over abolition had both constitutional and moral sides, since the Constitution had to be amended for slavery to become unconstitutional.

She then extended this view of a debate between morality and constitutionality to contemporary issues, alluding to her view that abortion and same-sex marriage present similar contested understandings of what is constitutionally and morally correct. She did not specify where the conflict lay within these two particular cases.

Barrett has previously faced criticism from politically liberal organizations over her views on abortion and gay marriage. In 2017, 27 LGBT advocacy groups and 17 women's rights groups wrote to the Senate Judiciary Committee, calling on its members to oppose Barrett's nomination for the Seventh Circuit. In 2003, she published an article calling *Roe v. Wade* "an erroneous decision."

In 2017, Barrett, then an appeals court nominee, drew national attention during her Senate confirmation hearing, when some senators questioned whether her religious convictions would unduly inform Barrett's judicial philosophy, particularly in light of her previous writings on the matter. During the hearing, Senator Dianne Feinstein (D, Calif.) controversially claimed, "the dogma lives loudly within you."

Despite those concerns, the Committee voted to confirm Barrett.

In the talk, Barrett then shifted her focus to the active role the Constitution serves today.

"We need more than political agreement to get things done," she said, adding that the Constitution speaks to this effect, given that it supersedes politics with well-defined guiding principles, which must be followed.

She deemed the Constitution a "supermajority checker," serving to keep even the President accountable.

Still, Barrett pondered whether "it would be better if Congress were free to pursue the best policy" without this constitutional restraint. She argued that doing so would most likely have allowed slavery to be abolished sooner.

Barrett praised the diverse population of the United States, saying that "we are all under one roof" and in that way unified. She argued, however, that the Constitution divides us through federalism. She claimed that the United States is, "after all, one country and not fifty states," and that the Constitution distinguishes between state and national law.

Barrett also discussed her role as a judge and reflected on the act of deciding on cases and laws. She compared these processes to a scene from Homer's Odyssey, in which Odysseus confronts the Sirens. Barrett noted that "democracy is dangerous" insofar that it might be attractive for a democratic majority to, for instance, "trample civil rights in [a] time of a national crisis." As agents of the Constitution, the courts, as however, bar that from happening.

She added that this fact provides consolation in what she described as a "polarizing time." She finished her lecture by quoting Benjamin Franklin, saying that the constitution is dynamic and not static, because "in this world, nothing is certain except death and taxes."

Robert P. George, McCormick Professor of Jurisprudence, moderated the event. George currently occupies the professorship that Walter Murphy, for whom the annual lecture is named, once held.

After Barrett's remarks, George joined Barret in an open conversation. He spoke about what he views as "American exceptionalism."

George postulated that unlike the constitutions of other countries, that of the United States is unique in that it "constitutes the American people" — namely, that the people are defined in and by the Constitution.

He said, "the French will continue to be the French if they throw out their constitution," but claimed this assertion does not hold true for Americans, for whom the Constitution begins with the assertive phrase, "We the People."

Barrett agreed, arguing that Americans frequent museums to observe and learn more about the Constitution, and that this is not the case in other countries, tempering her assertion by adding that "she hasn't seen surveys" proving this fact.

George added that Germany has a "good constitution that we [the United States], in effect, imposed," a remark followed by laughter.

The floor was then opened for questions, among which included a student asking the Judge for her thoughts on how the likely appeal in the *Students for Fair Admissions v. Harvard* case will conclude. Barrett refused to answer on the grounds of judicial impartiality.

The lecture took place at 4:30 p.m. in the Friend Center, room 101, on Thursday, Oct. 17.

U.S. News: No Obama or Trump Judges Here, Appointees of Both Declare

The Wall Street Journal

September 16, 2019 Monday

THE WALL STREET JOURNAL.
U.S. EDITION

Section: Pg. A3

Length: 715 words

Byline: By Jess Bravin

Body

WILLIAMSBURG, Va. -- Federal judges including potential Supreme Court pick

Amy Coney Barrett bemoaned a partisan political environment that has seen President Trump and some others label them as extensions of the presidents who appointed them.

In comments Saturday at a panel at William & Mary Law School, Judge Barrett backed Chief Justice John Roberts's public statement last year that judges shouldn't be seen as ideological mirrors of their patrons, which came after President Trump called a ruling that he opposed on immigration the product of an "Obama judge."

"The chief justice, I think, articulated what members of the judiciary feel," Judge Barrett said of his comments to Mr. Trump. "The chief justice responded and pushed back and said, 'You know, we don't have Obama judges.'"

In the November 2018 statement issued by the court, Chief Justice Roberts said: "We do not have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them."

Mr. Trump then rejected the chief justice's position, tweeting "Sorry Chief Justice John Roberts, but you do indeed have 'Obama judges.'"

Mr. Trump and Senate Majority Leader Mitch McConnell (R., Ky.) have made a priority of filing the federal bench with conservative appointees, and Mr. Trump has embraced the issue as a central point of his re-election bid. On the Supreme Court, Mr. Trump's two conservative picks have tilted the balance to the right, highlighting the importance of the president in determining the federal courts' makeup and the future course of the law.

"Historic Milestone indeed!" the president tweeted Friday, along with an article noting he has filled 150 judgeships.

Three other federal circuit judges on the panel Saturday, all either Trump or Obama appointees, joined Judge Barrett in rejecting partisan characterizations of the judiciary, also criticizing news reports that emphasize which president picked a judge for the bench.

"We certainly are not viewing ourselves as members of teams or camps or parties. It's a very frustrating thing about the way the media portray us," said Judge Stephanos Bibas, a Trump appointee to the U.S. Court of Appeals for the Third Circuit, in Philadelphia. "My boss is not my chief judge. My boss is not my appointing president, my boss is the Constitution and the laws," he said.

"We will interpret the law somewhat differently. And we have different legitimate understandings of how to do that. But none of us would have taken this job if we wanted to be legislators," said Judge Bibas, a former law professor at the University of Pennsylvania.

"We really aren't thinking, 'I'm here to do the bidding of the party of the president that put me here,' " said Judge Cornelia Pillard, an Obama appointee to the District of Columbia Circuit. "One of the things that really feels threatening, and frustrating -- although I understand why -- is how much what the public hears through the press is about the partisan lineups" on the courts.

The moderator, William & Mary law professor Allison Orr Larsen, asked the judges what they perceived as the greatest threat to the judiciary.

Judge Barrett said it was "people perceiving us as partisan." While judges differ in their legal theories and methods -- and their votes sometimes can be predicted along ideological lines -- they aren't driven to produce specific outcomes, she said.

Judge Barrett, a University of Notre Dame law professor before Mr. Trump appointed her to the Chicago-based Seventh Circuit in 2017, is a favorite of social conservatives who was considered for the Supreme Court vacancy that went to Justice Brett Kavanaugh. She has been suggested as a particularly serious contender should Justice Ruth Bader Ginsburg, age 86, or another female justice step down during Mr. Trump's term.

"I don't really understand why it is that people want so badly to put us on teams," said Judge Kevin Newsom, a Trump appointee to the Atlanta-based 11th Circuit.

"You know, my Democratically-appointed colleagues on the 11th circuit, I love them, and I think they love me, and lots of times we see eye to eye. And when we don't, we're all still friends," he said.

Notes

PUBLISHER: Dow Jones & Company, Inc.

Load-Date: September 16, 2019

Dodgy Cites, 'Kitchen Sink' Briefs Among 7th Circ. Pet Peeves

By Celeste Bott

Share us on: By Celeste Bott

Law360, Chicago (May 29, 2019, 9:04 PM EDT) -- If Seventh Circuit Judge Michael Y. Scudder, a former Skadden Arps Slate Meagher & Flom LLP partner, could change anything about how he once approached legal briefs in private practice, he'd "double down" on quality control around citations to the record, he said Wednesday.

Now on the other side of the bench, Judge Scudder, appointed to the Seventh Circuit in 2018, said inaccurate citations make his job harder. Speaking at a roundtable event hosted by the Illinois Appellate Lawyers Association, Judge Scudder said bad citations force judges to hunt for important information when they need to get up to speed quickly on cases that are being argued before the appellate court.

Judge Scudder and the Seventh Circuit's three other newest judges spoke on the panel, where they shared advice on what attorneys should avoid in their appellate briefs, what's surprised them most about the job so far and how their respective backgrounds prepared them for the federal bench.

One tactic that's never effective in a brief? The "kitchen sink" approach, said U.S. Circuit Judge Amy St. Eve, a former district court judge who was confirmed to the appellate bench along with Judge Scudder. Judge St. Eve said there's little benefit to making a long list of arguments and hoping something sticks.

"Pick and choose your issues. Give us your best ones," she said.

And she urged attorneys to remember they are arguing before the Seventh Circuit and should cite Seventh Circuit cases whenever they can.

U.S. Circuit Judge Amy Coney Barrett, who was confirmed to a seat on the court in 2017, urged attorneys to submit clear, focused briefs. Some briefs allocate too much space to issues that aren't pressing for the case at hand, she said.

But some context is also key, Judge Scudder said. Attorneys may be so deeply invested in a case or have worked on it for so long that they forget to include background as to who the parties are, what they do and why they're fighting in the first place, he said.

"Don't get into the thick of the issues before the table is set," he advised.

Following U.S. Circuit Judge David Hamilton's 2008 appointment, the Seventh Circuit went eight years without a new judge before the four judges who spoke Wednesday were appointed in a two-year span.

They have all adjusted to a workload that includes hearing 12 to 18 cases a month spread over two or three sittings, with 2,000 pages to read per sitting, said U.S. Circuit Judge Michael B. Brennan.

"There are rules and unwritten rules. And you have to learn them both," he said of adjusting to the Seventh Circuit bench.

Judge Brennan, who has a background in state court as a Milwaukee County Circuit judge and who was a partner at Gass Weber Mullins LLC before joining the federal bench, said he tends to rely heavily on the

record, searching what went on in the lower courts to prepare for hearing cases.

Judge Barrett said she felt her time as a law professor at University of Notre Dame, the Law School, prepared her well for her newest role because she was exposed to a wide breadth of legal issues.

“I was used to a steady diet of things that fell outside my comfort zone,” she said.

--Editing by Alanna Weissman.

Originalism Boot Camp Keynote
(30-45 minutes followed by discussion)

Thank yous.

It is inspiring to see a group of talented young lawyers who have had the benefit of thinking intensely about originalism. I'm grateful that Randy has given you this opportunity.

My topic for this evening is one that you spent some time thinking about on Monday: stare decisis. Stare decisis is a problem that occupies constitutional interpreters of all stripes. The scholarship on stare decisis is voluminous. Most of it analyzes the doctrine from an internal standpoint: For example, in considering whether to preserve a precedent, what kinds of reliance interests count? Should the strength of precedent be the same in constitutional and statutory cases? How wrong must a precedent be before a court should overrule it?

Originalists are concerned with these questions. But originalists are also concerned with a first-order question: is the doctrine of stare decisis itself consistent with the original meaning?

Stare Decisis is within "the judicial power"

At a high level, this question is easy to answer: yes. Developing a doctrine of precedent is encompassed within "the judicial power" conferred by Article III. The Supreme Court has told us that stare decisis is a common-law doctrine. It is one that the courts have fashioned to guide the exercise of "the judicial power." In this respect, stare decisis is similar to res judicata—the doctrines of issue and claim preclusion—which courts have also fashioned to flesh out the exercise of the judicial power.

And stare decisis was familiar to the founding generation. Alexander Hamilton in Federalist ___ "tied down by precedents." [Other evidence, Tom Lee]

As a prudential matter, stare decisis makes sense. Factors [efficiency, predictability, consistency, reliance]

That is not to say that stare decisis has always looked exactly like it does today. For one thing, a strong system of stare decisis depends on a reliable reporting system, and we didn't have that until the end of the nineteenth century. [Insert some of Tom Lee's research]

I think it is hard to dispute that the doctrine of stare decisis is perfectly consistent with Article III. [Hard to say that it is *required* by Article III—e.g., district courts, who also exercise "the judicial power" have never considered themselves bound by horizontal precedent.]

If stare decisis is consistent within the judicial power, as it was originally understood, why do some people say that stare decisis poses a problem for originalists?

Let me start by saying that stare decisis isn't just a problem for originalists; it's a problem for *everybody*. No one objects to stare decisis when they think the precedent is a correct or at least permissible interpretation. In that event, a judge is simply grateful that she doesn't have to come up with complicated balancing tests to decide [whether a regulation infringes first amendment rights. Her

predecessors have done the thinking for her, and she can simply apply the frameworks of public forum, limited public forum, etc.] Stare decisis brings huge efficiency benefits to judges.

Things get sticky when a judge thinks that a precedent is clearly wrong. And let's be clear about this: no one—not an originalist or anyone else—thinks that every case the Court has decided is right. And this is where the rubber meets the road. When a judge confronts a case that she thinks was wrongly decided, then she has a different stare decisis calculus to make: should she follow it anyway? And again, let me stress that this is not just a problem for originalists. As Justice Scalia once put it, [stare decisis makes me have to say that what is wrong is right.] Any constitutional interpreter is going to confront cases that are wrongly decided according to whatever metric that interpreter employs. Justices Thomas and Breyer employ different methods of constitutional interpretation, but they will both encounter decisions that they think conflict with what the best interpretation of the Constitution requires. Now-retired Justice Stevens has urged the Court to overrule *Heller* even though it is Supreme Court precedent. [Other examples, RBG? Shelby County?]

The doctrine of stare decisis accounts for this possibility. The Court has repeatedly emphasized that stare decisis is not an inflexible doctrine. Following precedent is the rule, but the doctrine expressly acknowledges that the Court must sometimes overrule cases. If that were not the case, *Plessy v. Ferguson* would remain the law of the land.

Thank you so much for having me, and special thanks to Jana Minich for coordinating the details. I couldn't be happier to share this evening with you.

When I speak at law school events, I often address topics like Originalism and Textualism. But I decided that something heavy and academic might not go well with dinner. So I'm going to talk about something else—something that has less to do with the substance of the ideas that we lawyers debate and more to do with the manner in which we do it. I'm going to talk about balancing a commitment to ideas with respect—indeed, true affection—for people who do not share them.

I can't help but think of what Justice Scalia had to say about this: "I attack ideas. I don't attack people. And some very good people have some very bad ideas. And if you can't separate the two, you gotta get a different day job. You don't want to be a judge—at least not on a multi-member panel."

What he said is true not just for judges, but for all of us. Debate ideas, respect people. Separating the two can be difficult, especially for those of us who care passionately about ideas—and not just abstract ideas, but ideas with real impact on the American constitutional order. What is the role of the courts? How should the Constitution be interpreted? What is the scope of presidential power? Those questions might animate any family dinner table, but in this room, passions might rise if we start on the legitimacy of Auer deference or Chevron.

We lawyers like to argue. Law school trains us to do it, and in the life of the law, there are a lot of important things to argue about. My theme tonight is this: Preserve friendships even with those with whom you vehemently disagree. In my view, that is critical to both personal happiness and productivity.

I want to flesh this out with some examples of what this looks like. And in this crowd, where better to look than American history?

John Marshall

I'm going to start with the great John Marshall. When he became chief justice, the justices were hardly a cohesive unit and the fate of the Court was hardly certain. We all know the end of the story: he solidified the Court as an independent and powerful third branch. In the casebooks, Marbury is emblematic of that. But I want to highlight some of Marshall's behind-the-scenes work.

<u>Friendship</u>

When Marshall began, the Court was full of strong personalities. Many were older than Marshall, and each was notable in his own right. Marshall was determined to have them work together and to build a spirit of friendship and unity among them. It was not inevitable that that would happen. At the time, they worked independently—seriatim opinions, for example.

One of Marshall's innovations was to have all the justices stay at the same boardinghouse when they were in Washington hearing cases. They had their meals together during those weeks. They got work done around the table, but they also grew in friendship. The other justices attributed that largely to Marshall's convivial personality.

One anecdote that I love about those times they spent in the boardinghouse. If it was raining, they would have a glass of wine with dinner. (Marshall was known for his love of a good Madeira.) They looked forward to this ritual, and one day were expressing regret that the weather outside was fair and sunny. But Marshall said "somewhere in our broad jurisdiction it must surely be raining"—and from then on, they had a glass of wine with dinner every day.

There is a connection between food and friendship. We try to observe that on our court. [Panel lunches]

Humility

Personal

It takes humility and good-naturedness to maintain friendships, and Marshall—while an indisputably confident man—was also a humble one. He was notorious for sloppy dress. And that meant that ordinary people treated him as, well, ordinary.

Richmond residents reported seeing him with mop in hand, leading his servants in the weekly housecleaning. Marshall would have his sleeves rolled up and a handkerchief tied about his head, helping to scrub the floors and set the house to order.

So who could blame the poor new guy to town, who saw the poorly dressed chief justice at the market and offered him a small coin to carry a plump turkey he had just purchased? Marshall obligingly added the turkey to his own provisions and trudged respectfully behind his new employer to a house not far from his own. When asked about it, Marshall demurred "Well, it seemed only neighborly; his house was on the way."

Adams and Jefferson

The story of Adams and Jefferson is worth recounting, because it illustrates the hard work it takes for a friendship to overcome differences—especially political differences. Adams and Jefferson began as friends. They met in 1775 as delegates in the Continental Congress and spent time together during diplomatic missions to Europe. Their families were very close while living abroad. Abigail Adams was like a mother to Jefferson's daughter Patsy, and Jefferson took John Quincy Adams under his wing.

As Abigail confided to Jefferson, there had been seldom in her husband's life with whom he could associate with such "perfect freedom and unreserve." Jefferson, she wrote, was "one of the choice ones of the earth." (And given that we are at Jefferson's University, I assume that those in this room share the sentiment.)

But as political differences sharpened, their relationship became increasingly strained. Adams was a Federalist committed to a strong central government; Jefferson, on the other hand, was a Democratic Republican committed to keeping more power in the hands of the states.

These ideological pressures led to a falling out in the aftermath of the 1796 election, where these former friends ran against each other. The tension increased in the rematch, the election of 1800. Both campaigns engaged in ad hominem attacks and smear tactics. After Jefferson's victory, the two went 12 years without speaking.

But in 1812, Adams and Jefferson began to correspond again. With the perspective of age and experience—not to mention humility in letting go of pride and old wounds—they were able to rekindle their friendship, exchanging 158 letters over the next 14 years. As time went on, they opened up to each other about some of the more difficult parts of their history.

In their later correspondence, Adams told Jefferson: "To me then it appears that there have been differences of opinion, and party differences, from the establishment of governments to the present day, and on the same questions which now divides our country, that these will continue through all future times . . . that opinions, which are equally honest on both sides, should not [a]ffect personal esteem or social intercourse…" Truly, a lesson for us today.

Famously, they died on the same day: on July 4, 1826, which was the 50th anniversary of Independence Day. Adams's last words are reported to be "Thomas Jefferson still lives."—his old friend on his mind til the end.

[See also: John Adams: "That I have no friendship for [Benjamin] Franklin I avow. That I am incapable of having any with a man of his moral sentiments I avow. As far as fate shall compel me to sit with him in public affairs, I shall treat him with decency and perfect impartiality."]

Abraham Lincoln

Fast forward to the Civil War and the example of Abraham Lincoln.

He populated his cabinet with the men who had been his rivals for the Republican presidential nomination. If you haven't read Doris Kearns Goodwin's book about this "Team of Rivals," do—it is a remarkable story about how Lincoln navigated relationships with men who were his competitors to carry the nation through the Civil War. Disagreements and rivalry didn't make it impossible for these men to work together; on the contrary, Lincoln counted as a benefit the diversity of viewpoints in his cabinet. He structured it that way deliberately, both to sharpen his own thinking and to help the factions within the fledgling Republican party to hang together despite disagreements.

His approach was particularly striking when it came to William Seward, Lincoln's Secretary of State. Lincoln invited him to the White House nearly every day just to talk. And, by simply listening to Seward's ideas, although they did not agree on all things, Lincoln and Seward bridged the gap between them, and ultimately became close friends. Lincoln and Seward taught us that, despite ideological and political differences, you can work together—because diversity of thought is a good thing and should be encouraged.

He not only tolerated disagreement but affirmatively sought it out. And of course, he presided over the deepest, most divisive moment for all Americans—the Civil War. His words to Americans about healing division are worth repeating:

In his First Inaugural, he insisted: "We are not enemies, but friends. We must not be enemies . . . The mystic chords of memory, stretching from every battlefield, and patriot grave, to every living heart and hearthstone, all over this broad land, will yet swell the chorus of the Union, when again touched, as surely they will be, by the better angels of our nature."

And in his Second Inaugural, after the war had ended, he choice generosity and peace rather than punishment and revenge: "With malice toward none, with charity for all, with firmness in the right as God gives us to see the right, let us strive on to finish

the work we are in, to bind up the nation's wounds, to care for him who shall have borne the battle and for his widow and his orphan, to do all which may achieve and cherish a just and lasting peace among ourselves and with all nations."

Lessons for Us

Like those who have gone before us, we too are faced with the challenge of balancing a commitment to our ideas with respect for our intellectual opponents.

As you well know, it is important to engage with rather than retreat from those who disagree with you. Debate sharpens ideas. Subjecting ideas to the criticism of opponents reveals the ones that ought to be abandoned; at the same time, it strengthens and refines those that ought to have staying power. Well-articulated ideas persuade; *ipse dixits* don't. Moreover, if you want your ideas to have influence, you need to get out of an echo chamber. There is no need to persuade those who already agree with you, and in any event, talking to only the like-minded enables intellectual laziness. Talking to those who will challenge you involves more wit and more fun than preaching to the choir. Don't live a homogenous life. And in fact, for our profession in particular, the open and serious exchange of ideas is—or at least ought to be—part of the air we breathe.

At the same time, we'd all do well to keep Justice Scalia's words in mind: I attack ideas, not people. When tensions rise—and they inevitably will—it's better to end things like John Adams and Thomas Jefferson than like Alexander Hamilton and Aaron Burr. Die in friendship, not in a duel. Live life like Justices Scalia and Ginsburg, who accompanied serious and vigorous public debate with warm personal friendship and mutual respect. That's how it's supposed to be done—no matter your political or philosophical views.

ORIGINALISM AND THE CONSTITUTION

Originalism has been in the news lately. It was a theme in the confirmation hearings of both Neil Gorsuch and Brett Kavanaugh, both of whom President Trump appointed to the Supreme Court. I came up during the 2016 presidential election, when President Trump promised to appoint originalists to the bench, and it will probably come up again in the 2020 election.

But while the term "originalism" is thrown around in the news a lot, it may not necessarily be clear to everyone what it actually means. In this talk, I'm going to try to give you an overview of the topic. Whether you find the theory appealing or unappealing, my hope is that you will all leave with at least a sense of what people are talking about when they use the word "originalism."

Before we dig into originalism, however, I'm going to back up and say a few words about the judicial role in interpreting the Constitution. That will place the debate about originalism in context.

SLIDE: CONSTITUTIONAL COMMITMENTS

What is the Constitution? I like to describe it to my students with an analogy to Odysseus resisting the call of the Sirens. The Sirens appear as beautiful women with enchanting voices who lure sailors to their death. To resist the Sirens, Odysseus has his men tie him to the mast of his ship and instructs his men not to untie him, no matter how much he begs. Sure enough, when they pass the Sirens, Odysseus strains against the ropes, urging his men to free him. But true to their commitment, the men refuse to do it.

In the Constitution, we have made a series of fundamental, non-negotiable commitments. Legislation represents the will of a majority, but the Constitution represents the will of a super-majority: ratification on the assent of ¾ of the states. Supermajority rules tie our hands so that we can resist the temptations of the moment.

We, the people, are Odysseus. There will be times when a democratic majority will be tempted to take actions that violate our fundamental commitments. For example, in a national security crisis, a democratic majority might be willing to take actions that violate our civil liberties. We've tied our hands, like Odysseus to the mast, so that we can resist that temptation in the moment.

SLIDE: JUDICIAL REVIEW

Judicial review is a mechanism for adhering to those commitments. When someone believes that legislation or executive action violates the Constitution, they can often go to a court to try to remedy that error.

That error might be structural (e.g., separation of powers) or related to an individual right (e.g., the First Amendment).

- Speech no one needs protection for popular speech. But if speech is unpopular, those in power sometimes try to ban it.

- Time of War: fear and civil liberties.

Insofar as the courts enforce constitutional limits, we might say that they are a little like Odysseus' crew—they restrain current democratic majorities from violating our fundamental commitments.

SLIDE: COUNTERMAJORITARIAN DIFFICULTY

This is a good thing. It is also a big deal. (Explain countermajoritarian difficulty.)

The debate about judicial review is largely a "Who decides" question. What questions should be left to democratic majorities, and what questions should be settle by unelected judges?

SLIDE: SOURCE OF POWER

Where do federal courts get this significant power? Not express in the Constitution, but in a famous case entitled Marbury v. Madison, the Supreme Court recognized it.

SLIDE: EMPHATICALLY THE PROVINCE

It is a foundational principle of our constitutional order. But again, it's a big deal. We want judges to stop the state and federal governments from violating the Constitution. But if the state and federal governments take measures that the Constitution permits, we don't want them superimposing their will.

And this brings us to originalism: The debate about originalism is intertwined with the debate about when judges should set aside legislative or executive action as exceeding the limits of the Constitution and when their doing so is illegitimate.

Judges have to decide some hard questions. [Examples]

SLIDE

Living Constitutionalism

- One approach is to say that the Constitution, as a living document should evolve, and that the Supreme Court should interpret the Constitution to push the country forward in accordance with an evolving sense of morality.
- Critics say "whose morality?" The moral views of the 9 elite justices are not necessarily consistent with those of most citizens, and so to impose those views on the country is anti-democratic. The Constitution is law, these critics say its text means something, and it's the job of the Supreme Court to interpret it, not invent it.

SLIDE

Originalism rejects the idea that the meaning of the Constitution's words can change over time. It maintains that the words have the meaning that they did at the time they became law.

Explain. Not What James Madison would think.

SLIDE

Text Controls

SLIDE

Tools for Discerning the OPM: Federalist Papers, Anti-federalist Papers, ratification debates, contemporary commentary, contemporary judicial decisions, contemporary legislation, contemporary legislative debates. (CLICK after each)

Critiques of Originalism

SLIDE

Dead Hand

- *One response is Steven Calabresi's witty one: Living constitutionalists do not contend that statutes like the Civil Rights Act or the Social Security laws or the 16th Amendment giving congress the power to impose an income tax should be ignored because those laws were made by dead people. They do not contend that any SCt opinion ceases to bind once the justices in the majority die. A continuous society presupposes the ongoing validity of laws made by preceding generations. Those laws do not derive their force from the command of the*

dead mouth, but from our continuing acceptance of a legal system in which we treat the law on the books as retaining effect until we change it through the agreed-upon processes. We're not bound to accept what our ancestors said; we are free to change it. The disagreement between living constitutionalists and originalists is about whether we must change it through the constitutionally prescribed processes.

SLIDE

Law office history

- Judges, not to mention most lawyers, are not trained historians. They are therefore ill equipped to discern the original public meaning of the text.

- *Response: Judicial capability of doing the task that living constitutionalists would require of them is equally shaky. Are they well-suited to identify what values a majority of contemporary society deems fundamental? Or, worse, what values ought to be "fundamental" even if a majority of modern society does not treat them as such? (I.e., if only elites believe them so).*

SLIDE

Originalism is Inflexible

- Permitting historical meaning to control renders the Constitution unable to handle changed circumstances.

- *There are two answers to this objection. One is that originalists can easily apply timeless constitutional commands to new technologies, like wiretapping or tv broadcasting. The text, history, and structure of the Constitution provide the originalist not with a conclusion, but with a premise. That premise states a core value that the Framers intended to protect. The originalist judge must then supply the minor premise in order to protect the constitutional freedom in circumstances that those who ratified the document could not foresee. We apply the core First Amendment principle to broadcasting and cable tv, and the core Fourth Amendment principle to electronic wiretaps. The framers need not have foreseen every situation to which the principles they adopted would apply.*

- *The other is that the Constitution doesn't purport to answer every question. It leaves legislative majorities a lot of room within which to work, and legislative majorities are the ones charged with responding to new circumstances. To the extent that the Constitution becomes outdated in a way that hinders progress, constitutional amendment is the answer.*

- *And it is worth remembering that in some respects, inflexibility is the very point of the Constitution. The First Amendment protects offensive political speech, period. The point of a Constitution is to tie us to certain principles, like Odysseus tied to the mast of the ship to resist the Sirens. Those inflexible restraints help us resist our worst selves, so that our better nature prevails.*

SLIDE

It doesn't all ride on the Supreme Court

SLIDE

Congress Interprets

SLIDE

The President Interprets

SLIDE

The People

THE END

What Would James Madison Do?

Originalism and the Constitution

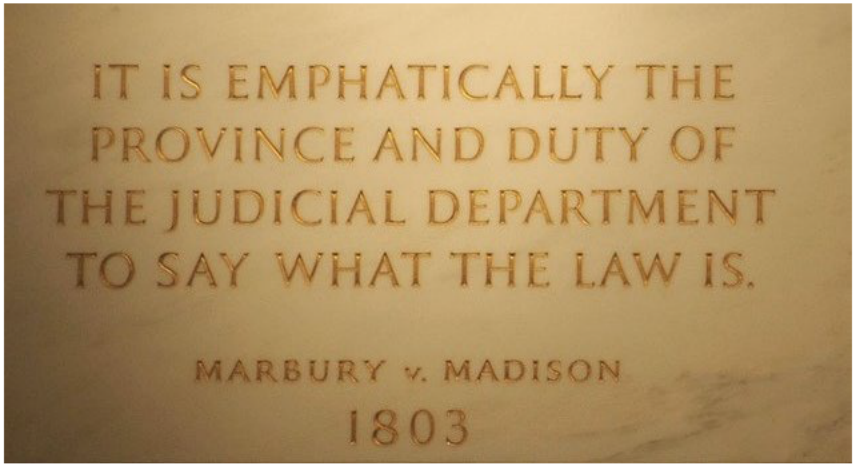
Constitutional Commitments

What is Judicial Review?

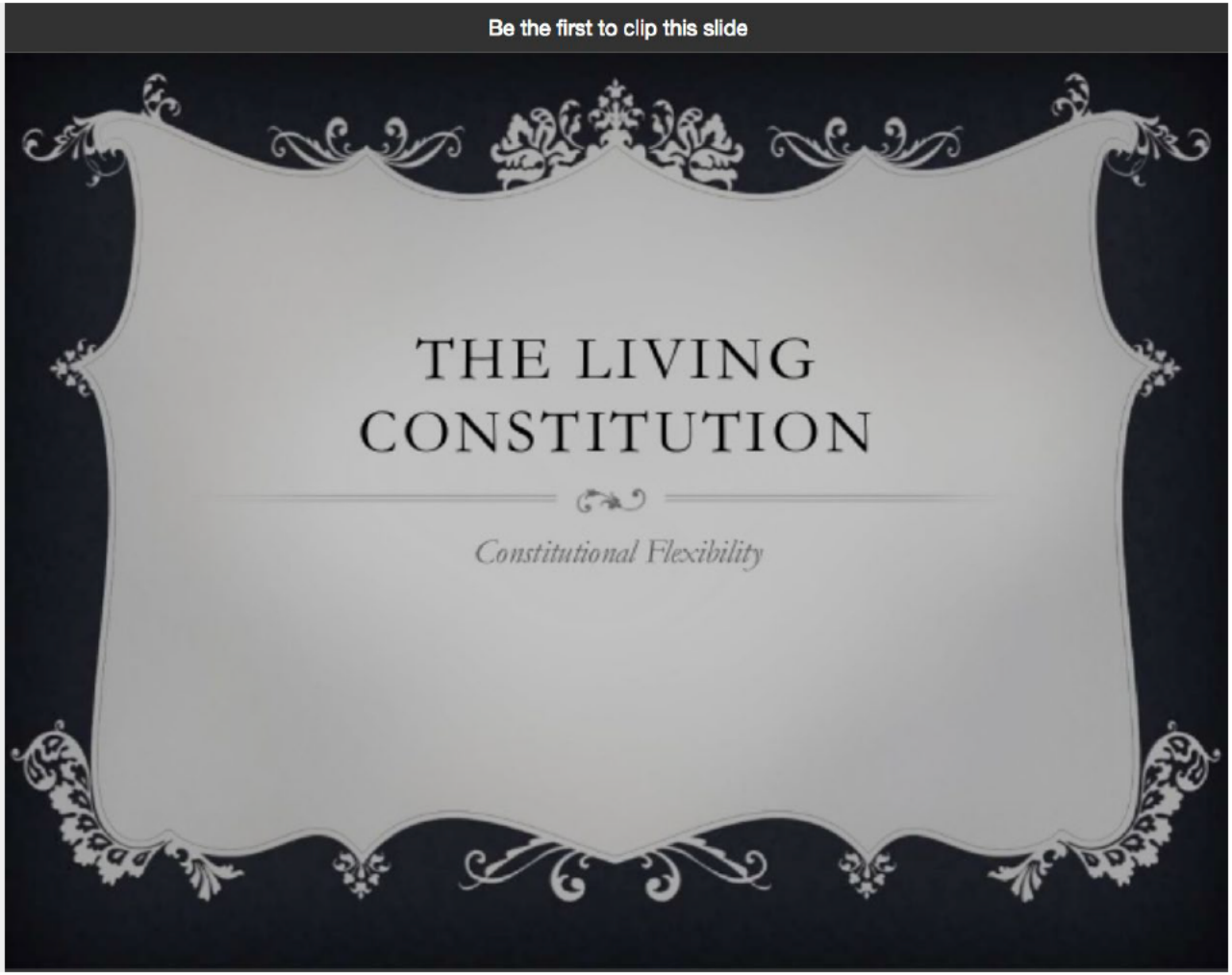
COUNTERMAJORITARIAN DIFFICULTY

SOURCE OF POWER
Marbury v. Madison

INSCRIPTION ON WALL OF SCOTUS



Living Constitution



Originalism

TEXT CONTROLS

- The meaning of the words at the time they were ratified is the meaning that we apply today.

- The original PUBLIC meaning of the text, not the PRIVATE understanding of any individual.

Tools for Discerning the Original Public Meaning

- Federalist Papers
- Antifederalist Papers
- Ratification debates
- Contemporary dictionaries
- Contemporary commentary
- Contemporary judicial decisions
- Contemporary legislation

DEAD HAND OF THE PAST

LAW OFFICE HISTORY

Lawyers are advocates, not historians.

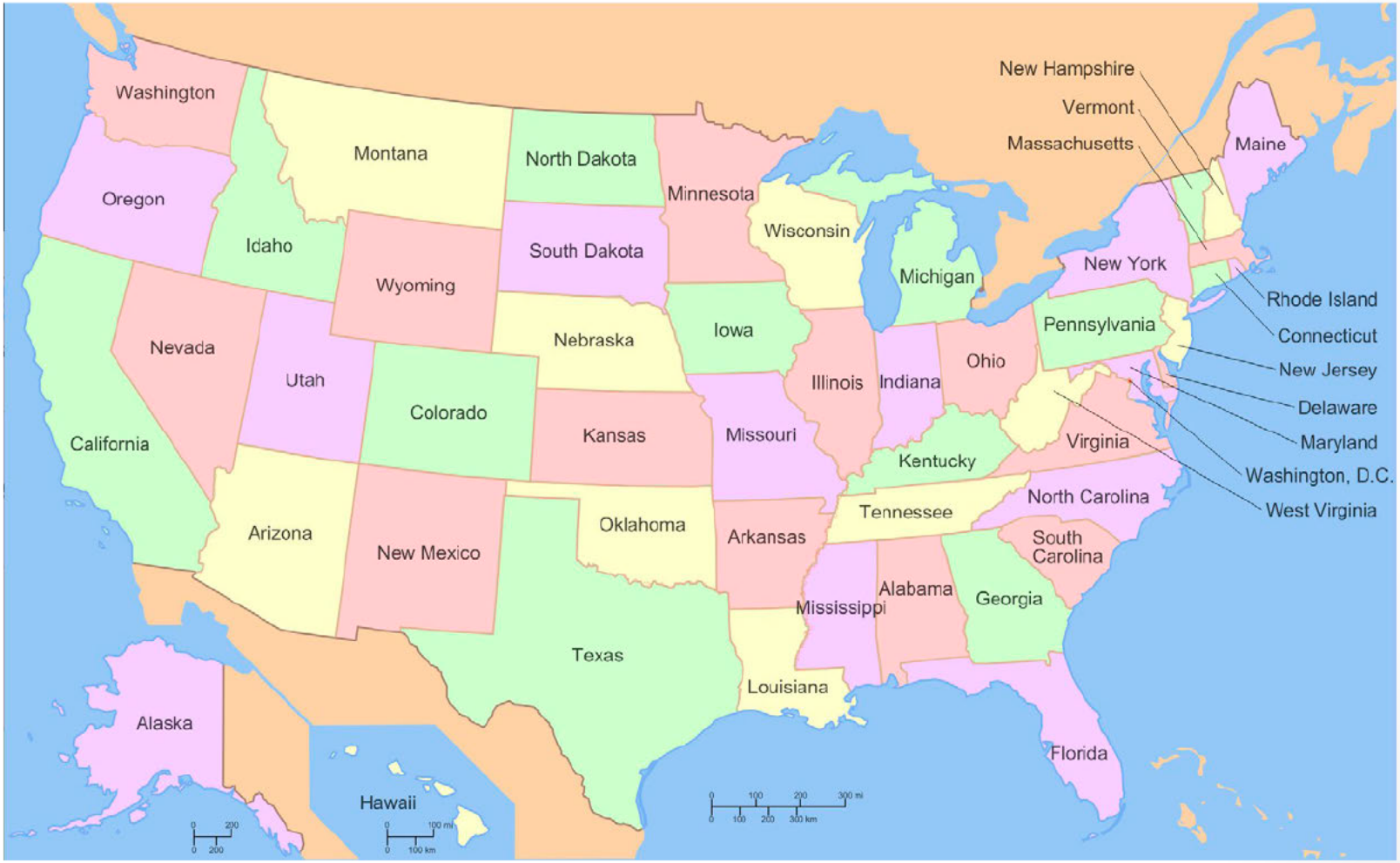
INFLEXIBLE

The Supreme Court?

Congress

The President

The States


Washington
Oregon
California
Idaho
Nevada
Montana
Wyoming
Utah
Arizona
Colorado
New Mexico
North Dakota
South Dakota
Nebraska
Kansas
Oklahoma
Texas
Minnesota
Iowa
Missouri
Arkansas
Louisiana
Wisconsin
Illinois
Michigan
Indiana
Ohio
Kentucky
Tennessee
Mississippi
Alabama
Georgia
Florida
South Carolina
North Carolina
Virginia
West Virginia
Pennsylvania
New York
Maryland
Delaware
New Jersey
Connecticut
Rhode Island
Massachusetts
Vermont
New Hampshire
Maine
Washington, D.C.
Alaska
Hawaii

You


At Trinity, we've learned more than we've ever learned before.
3:11 / 3:34

THE END

Peter Cornick '20 and Elizabeth Holden '20 win 2019 Bass Berry & Sims Moot Court Competition

Feb 12, 2019

Peter Cornick '20 and Elizabeth Holden '20 won the 2019 Bass Berry & Sims Moot Court Competition, held at Vanderbilt Law School Feb. 1, receiving the John A. Cortner Award and a cash prize for their win.

Cornick and Holden faced finalists **Joline Desruisseuax '20** and **Braden Morell '20**. The competition began last fall with 62 teams and a total of 123 participants. **Dora Duru '20** received the Richard Nagareda Award for Best Oralist, and the team of **Natalie Komrovsky '20** and **Rachel Miklaszewski '20** received the award for Best Brief. Semi-finalists included **Charlotte Gill**, **Dora Duru**, **Carlie Malone** and **Shiva Mohan**, all Class of 2020.

Under the leadership of Vanderbilt Moot Court Board Chief Justice **Natalie Pike '19**, Executive Justice **Ahsin Azim '19** managed a team of third-year students who organized and ran the competition.

The competition's final round was argued before a panel of three federal appellate judges, including Judge Stephen A. Higginson of the U.S. Court of Appeals for the Fifth Circuit, who served as the round's Chief Justice, Judge David J. Barron of the U.S. Court of Appeals for the First Circuit, and Judge Amy Coney Barrett of the U.S. Court of Appeals for the Seventh Circuit.

The 2018-19 Vanderbilt Moot Court Problem, *Burgundy v. the State of West Hugo*, asked competitors to consider two issues of constitutional law:

1. Whether a licensing scheme that requires applicants to demonstrate an "undeniable need" to carry a concealed firearm passes constitutional muster, and
2. Whether the Fourteenth Amendment prohibits the use of a peremptory challenge against a juror based solely on that juror's sexual orientation.

The problem, written by executive problem editor **Caroline Barnett '19** and associate problem editors **Sam Heller '19** and **Ian Joyce '19**, followed the appeal of *West Hugo v. Burgundy*. Jean Burgundy, a gay activist who also worked for anti-gun and women's rights groups, was convicted of violating the State of West Hugo's concealed-carry restriction on handguns after a pistol was discovered in a backpack in his possession. Burgundy had been denied a concealed-carry permit by the State of West Hugo after state regulators determined that his fear for his personal safety as a gay activist did not meet its standard of "undeniable need" for concealed carry. He was sentenced to three years in prison for violating West Hugo's concealed-carry statute. During *voir dire* in Burgundy's case, two openly gay potential jurors were removed by peremptory challenges. Burgundy's appeal before the Supreme Court addressed two issues: Whether the State of West Hugo's requirement that an individual prove "undeniable need" for concealed carry of firearms before the state would grant a permit violated the Second Amendment, and whether the use of peremptory challenges to strike jurors on the basis of sexual orientation violated the Fourteenth Amendment.

Cornick and Holden argued for the petitioner, Jean Burgundy, and Desruisseuax and Morell argued for the respondent, the State of West Hugo.

The John A. Cortner Award, which goes to the winners of Vanderbilt's annual Bass Berry & Sims Moot Court competition, honors **John Cortner '85**, who served as the Moot Court Board's chief justice. Cortner joined Bogle & Gates in Seattle after graduation, but was diagnosed with Hodgkin's disease soon after and died within the year. His family endowed the award in 1988 in his memory.

Alumni (https://law.vanderbilt.edu/news/section/alumni/) General News (https://law.vanderbilt.edu/news/section/general-news/) Home Page News (https://law.vanderbilt.edu/news/section/home-page-news/)

Recent News (/news)

Free Justice, a book by Sara Mayeux chronicling the history of public defenders, featured in Princeton Alumni Weekly (https://law.vanderbilt.edu/news/free-justice-a-book-by-sara-mayeux-chronicling-history-of-public-defenders-featured-in-princeton-alumni-weekly/)

Associate Dean for Clinical Affairs Susan Kay '79 elected to ABA Council on Legal Education and Admission to the Bar (https://law.vanderbilt.edu/news/associate-dean-for-clinical-affairs-susan-kay-79-elected-to-aba-council-on-legal-education-and-admission-to-the-bar/)

Jake Epstein and Evan Kowalski are VLS Bass Military Scholars for the Class of 2023 (https://law.vanderbilt.edu/news/jake-epstein-and-evan-kowalski-are-vls-bass-military-scholars-for-the-class-of-2023/)

Spring Miller receives 2020 B. Riney Green Access to Justice Award from Tennessee Alliance for Legal Services (https://law.vanderbilt.edu/news/spring-miller-receives-2020-b-riney-green-access-to-justice-award-from-tennessee-alliance-for-legal-services/)

Vanderbilt Law Review members make collective gift to support minority students with ABA diversity scholarship (https://law.vanderbilt.edu/news/vanderbilt-law-review-members-make-collective-gift-to-support-minority-students-with-aba-diversity-scholarship/)

Publications

Vanderbilt Law Review (http://www.vanderbiltlawreview.org/)

Journal of Transnational Law (http://www.vanderbilt.edu/jotl/)

Environmental Law & Policy Annual Review (ELPAR) (/academics/academic-programs/environmental-law/environmental-law-policy-annual-review/index.php)

Thank you so much for having me, and special thanks to Athie for arranging the details. Athie gave me pretty free rein in choosing a topic. I decided that something heavy and academic may not go well with dessert; but still, I wanted to say something meaningful and relevant to the reason we're gathered tonight: to celebrate the contributions that you, as members and friends of the Federalist Society have made to Yale Law School.

To that end, I've decided to talk about the benefits of public debate. After all, the Federalist Society says that its "main purpose is to sponsor fair, serious, and open debate about," among other things, the role of the courts in our constitutional structure. I think it's worth spending a few minutes reflecting on why it's important.

Debate sharpens ideas. Subjecting ideas to the criticism of opponents reveals the ones that ought to be abandoned; at the same time, it strengthens and refines those that ought to have staying power. Well-articulated ideas persuade; *ipse dixits* don't. Moreover, if you want to ideas to have influence, you need to get out of an echo chamber. There is no need to persuade those who already agree with you, and in any event, talking to only the like-minded enables intellectual laziness. Talking to those who will challenge you involves more wit and more fun than preaching to the choir.

But a commitment to debate must be real, not a fig leaf that covers up say, an originalist love-fest. I think that the Federalist Society does a pretty good job of following through on its commitment to debate. I was at the National Lawyer's Convention a few weeks ago, and I moderated a panel that included not only card-carrying members of Fed Soc, but also Neil Eggleston, the extremely impressive former White House Counsel in the Obama administration. His views—unsurprisingly—differed in key respects from those of others on the panel, and he was a formidable advocate for his positions. My experience on that panel is consistent with my experience with Fed Soc. When I was a faculty member visiting law school chapters, I almost always shared the stage with someone who had a different way of thinking about the Constitution—usually, another faculty member, but one time I did debate Ian Milhiser from ThinkProgress. Ian was lovely, and it was fun.

As students trained at one of the nation's preeminent universities, you are well-equipped to enter the arena of ideas. That, in fact, is what lawyers do. Advocates square off in court. Judges who write majority opinions must sometimes respond to a dissent, and vice versa. Some of you may be interested in the academy—law professors present papers publicly and debate other academics in print. In this profession, the open and serious exchange of ideas is part of the air you breathe.

Heated debate, however, can rupture relationships. Guard against that. History can show us both how it's done—and how it ought not be done. Let's just say that it's better to end things like John Adams and Thomas Jefferson than like Alexander Hamilton and Aaron Burr. Burr, of course, killed Hamilton in a duel. Adams and Jefferson, by contrast, pushed through enmity to die in friendship.

The story of Adams and Jefferson is worth recounting, because it illustrates the hard work it takes to overcome political divisions. Adams and Jefferson began as friends. They met in 1775 as delegates in the Continental Congress and spent time together during diplomatic missions to Europe. But as political differences emerged, their relationship became increasingly strained. Adams was a Federalist committed to a strong central government; Jefferson, on the other hand, was a Democratic Republican committed to keeping more power in the hands of the states.

These ideological pressures led to a falling out in the aftermath of the 1796 election, where these former friends ran against each other. The tension increased in the rematch, the election of 1800. Both campaigns engaged in ad hominem attacks and smear tactics. After Jefferson's victory, the two went 12 years without speaking.

But in 1812, Adams and Jefferson began to correspond again. With the perspective of age and experience, they were able to rekindle their friendship, exchanging 158 letters over the next 14 years. As time went on, they opened up to each other about some of the more difficult parts of their history. Famously, they died on the same day: on July 4, 1826, which was the 50th anniversary of Independence Day. Adams's last words are reported to be "Thomas Jefferson still lives."

Of course, it would have been better if they could have avoided their 12 years of not speaking. But history also contains examples of intellectual opponents able to maintain relationships without rupture.

Abraham Lincoln, for example, populated his cabinet with the men who had been his rivals for the Republican presidential nomination. If you haven't read Doris Kearns Goodwin's book about this "Team of Rivals," do—it is a remarkable story about how Lincoln navigated relationships with men who were his competitors to carry the nation through the Civil War. Disagreements and rivalry didn't make it impossible for these men to work together; on the contrary, Lincoln counted the diversity of viewpoints in his cabinet as a benefit. He structured it that way

deliberately, both to sharpen his own thinking and to help the factions within the fledgling Republican party to hang together despite disagreements.

In the not-so-distant past, my favorite example of that is Justices Scalia and Ginsburg. On the Court, they were frequently intellectual opponents. Off the Court, they were close friends. Their mutual respect and shared love of opera knit them together as people in spite of their substantial differences in matters of law.

We should all aim for that: vigorous and serious public debate accompanied by warm personal friendship and respect. Now that's how it's done.

THE SUPREME COURT: FROM JOHN JAY TO JOHN ROBERTS

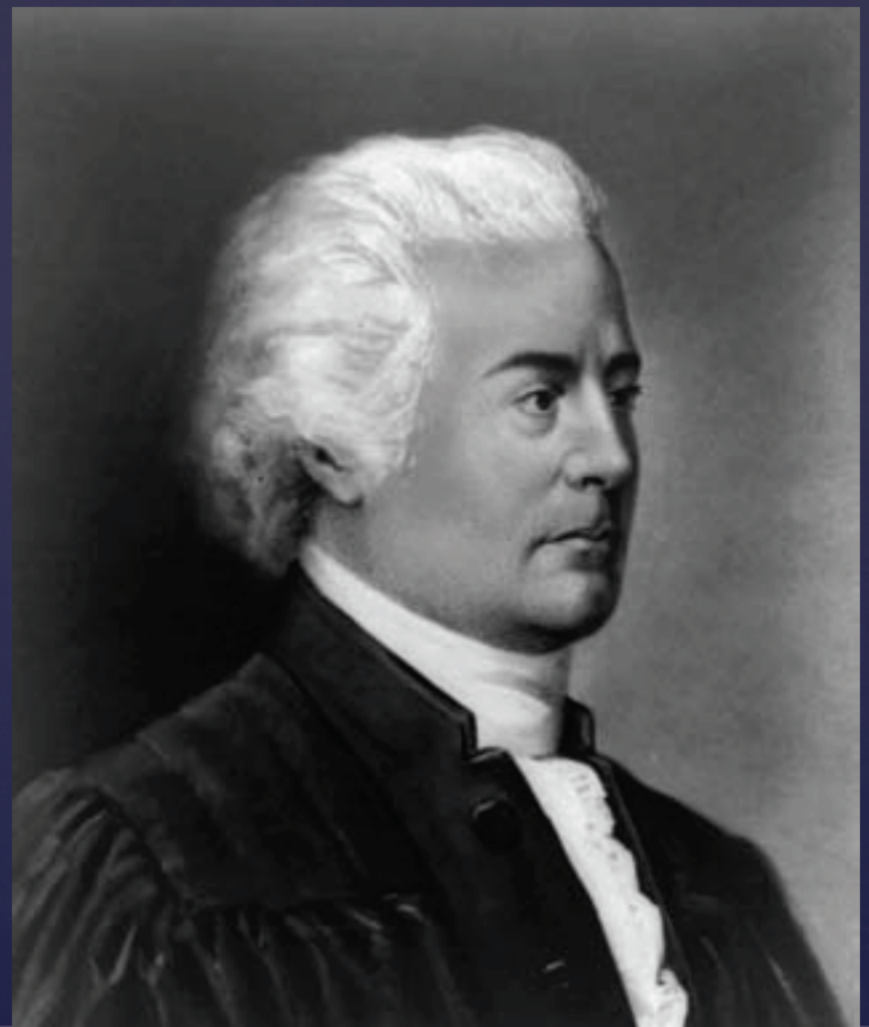
AMY CONEY BARRETT

John Jay

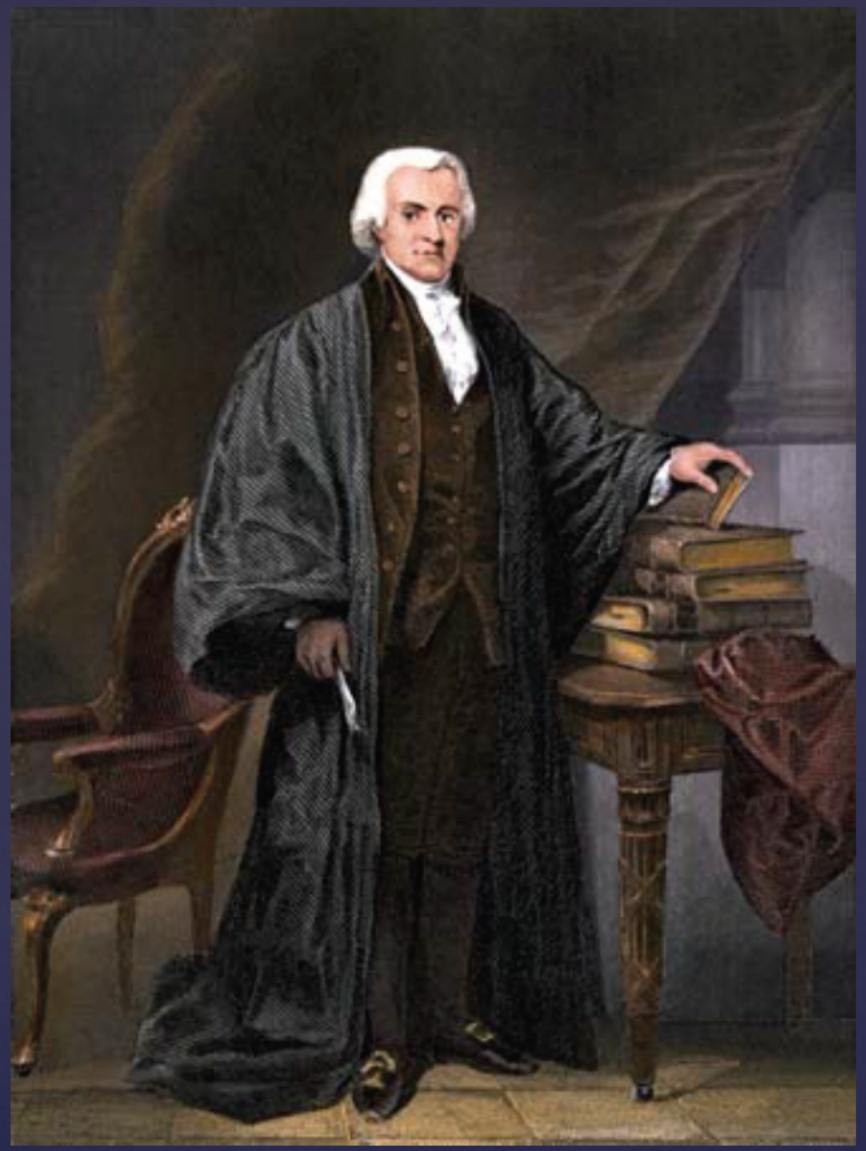
{

John Rutledge

{



William Cushing



Oliver Ellsworth

MONDAY, NOVEMBER 5, 1787. THE NUMBER 1189.

Connecticut Courant,

AND

WEEKLY INTELLIGENCER.

HARTFORD: PRINTED BY HUDSON AND GOODWIN, NEAR THE BRIDGE.

To the Holders and Tillers of Land.

NUMBER I.

THE writer of the following paſſed the firſt part of his life in mercantile employments, and by induſtry and œconomy acquired a ſufficient ſum on retiring from trade to purchaſe and ſtock a decent plantation, on which he now lives in the ſtate of a farmer. By his preſent employment he is intereſted in the proſperity of Agriculture, and thoſe who derive a ſupport from cultivating the earth. An acquaintance with buſineſs has freed him from many prejudices and jealouſies, which he ſees in his neighbours, who have not intermingled with mankind, nor learned by experience the method of managing an extenſive circulating property. Conſcious of an honeſt intention he wiſhes to addreſs his brethren on ſome political ſubjects which now engage the public attention, and will in the ſequel greatly influence the value of landed property. The new conſtitution for the United States is now before the public, the people are to determine, and the people at large generally determine right, when they have had means of information.

It proves the honeſty and patriotiſm of the gentlemen who compoſed the general Convention, that they choſe to ſubmit their ſyſtem to the people rather than the legiſlatures, whoſe deciſions are often influenced by men in the higher departments of government, who have provided well for themſelves and dread any change leaſt they ſhould be injured by its operation. I would not wiſh to exclude from a State Convention thoſe gentlemen who compoſe the higher branches of the aſſemblies in the ſeveral ſtates, but chooſe to ſee them ſtand on an even flour with their brethren, where the artifice of a ſmall number cannot negative a vaſt majority of the people.

This danger was foreſeen by the Fœderal Convention, and they have wiſely avoided it by appealing directly to the people. The landholders and farmers are more than any other men concerned in the preſent deciſion, whe-

Blame not our merchants, the fault is not in them but in the public. A fœderal government of energy is the only means which will deliver us, and now or never is your opportunity to eſtabliſh it, on ſuch a baſis as will preſerve your liberty and riches. Think not that time without your own exertions will remedy the diſorders. Other nations will be pleaſed with your poverty; they know the advantage of commanding trade, and carrying in their own bottoms. By theſe means they can govern prices and breed up a hardy race of ſeamen, to man their ſhips of war when they wiſh again to conquer you by arms. It is ſtrange the holders and tillers of the land have had patience ſo long. They are men of reſolution as well as patience, and will I preſume be no longer deluded by Britiſh emiſſaries, and thoſe men who think their own offices will be hazarded by any change in the conſtitution. Having opportunity, they will coolly demand a government which can protect what they have bravely defended in war.

A LANDHOLDER.

New-London, 26th Sept. 1787.

SIR,

WE have the honour to tranſmit to your Excellency a printed copy of the conſtitution ſubmitted by the Fœderal Convention, to be laid before the legiſlature of the ſtate.

The general principles which governed the Convention in their deliberations on the ſubject are ſtated in their letter addreſſed to Congreſs.

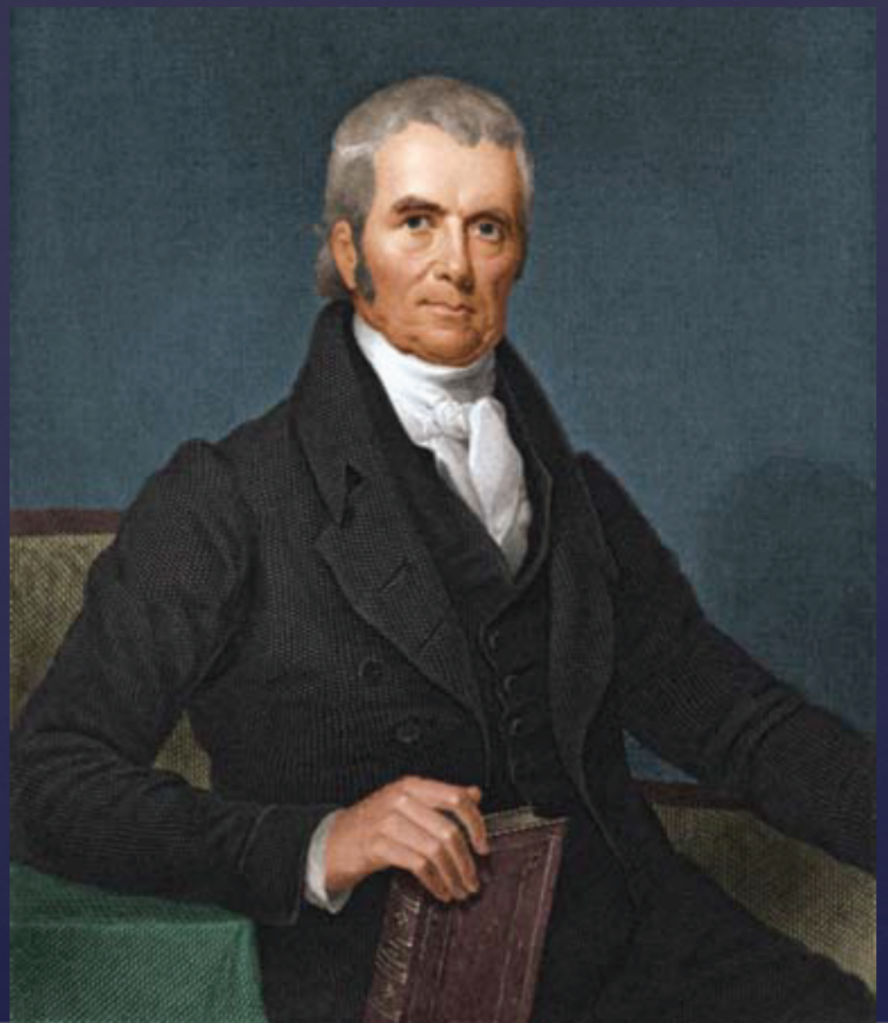
We think it may be of uſe to make ſome further obſervations on particular parts of the conſtitution.

The Congreſs is differently organized, yet the whole number of members and this ſtate's proportion of ſuffrage, remain the ſame as before.

The equal repreſentation of the ſtates in the ſenate, and the voice of that branch in the appointment to offices, will ſecure the rights of the leſſer as well as the greater ſtates.

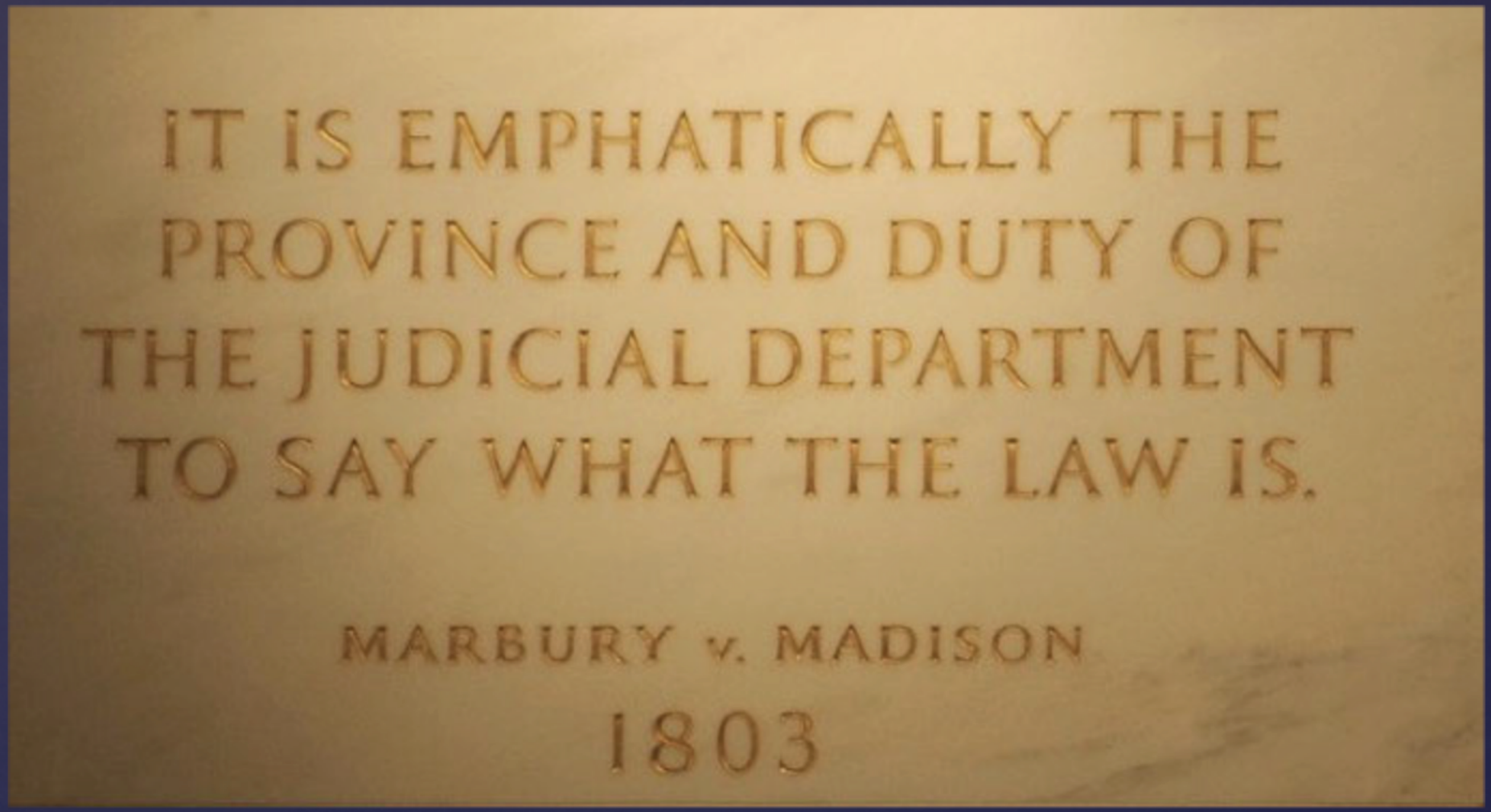
John Marshall

{



Marbury v. Madison

Thomas Jefferson



Inscription of Wall of SCOTUS

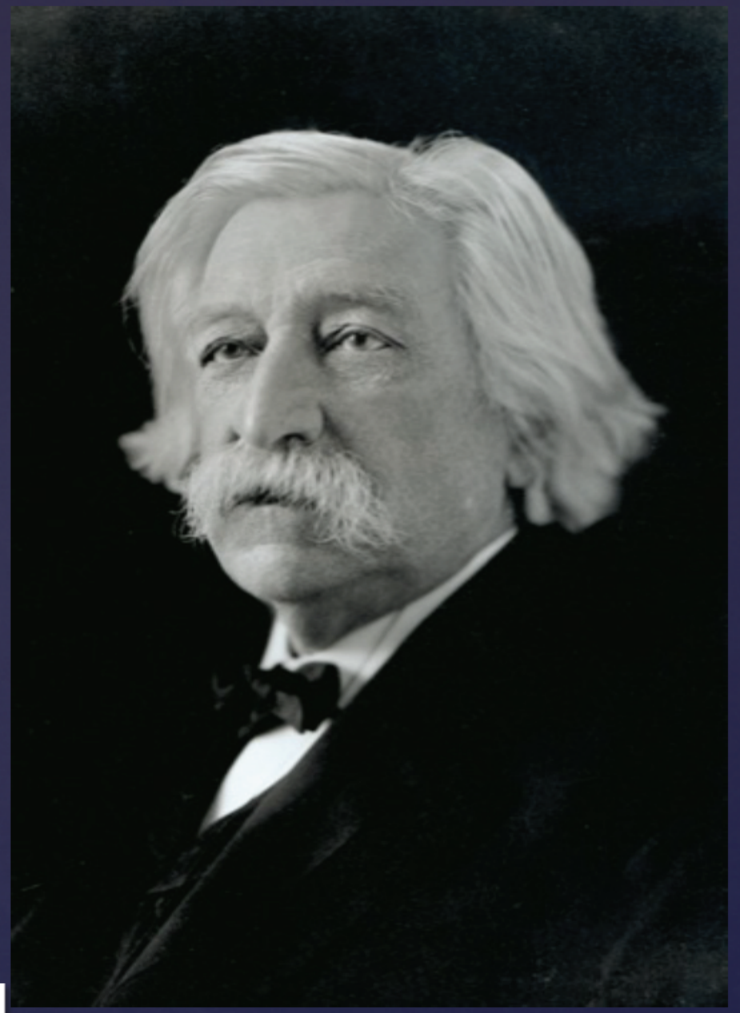
William Howard Taft

Old Supreme Court Chamber

Old Senate Chamber

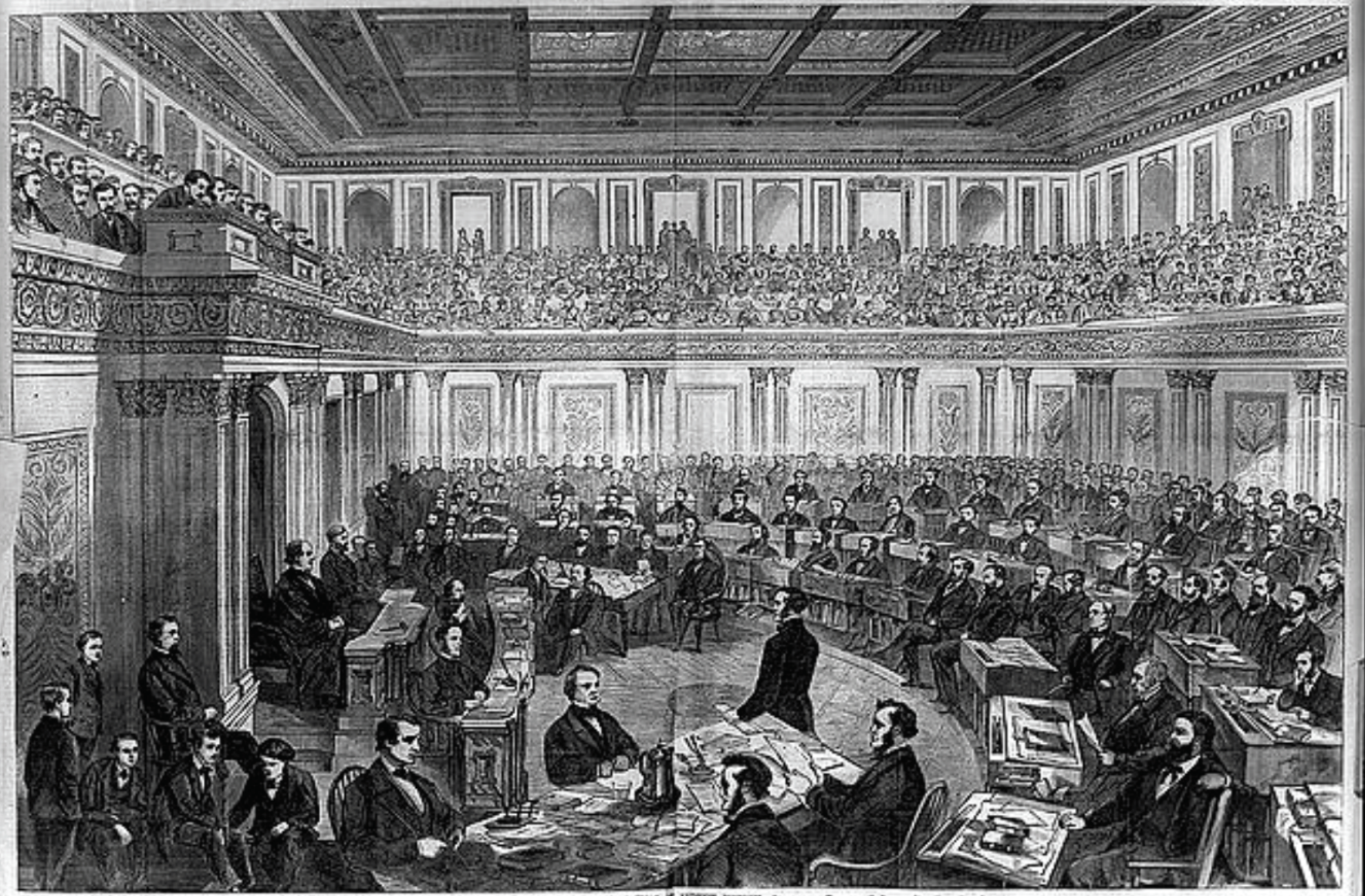

EQUAL JUSTICE UNDER LAW

John G. Roberts, Jr.



Melville Weston Fuller

Robert Jackson



THE SENATE AS A COURT OF IMPEACHMENT FOR THE TRIAL OF ANDREW JOHNSON.—[SKETCHED BY THOMAS R. DAVIS.—[SEE FIRST PAGE.]

106TH CONGRESS—FIRST SESSION

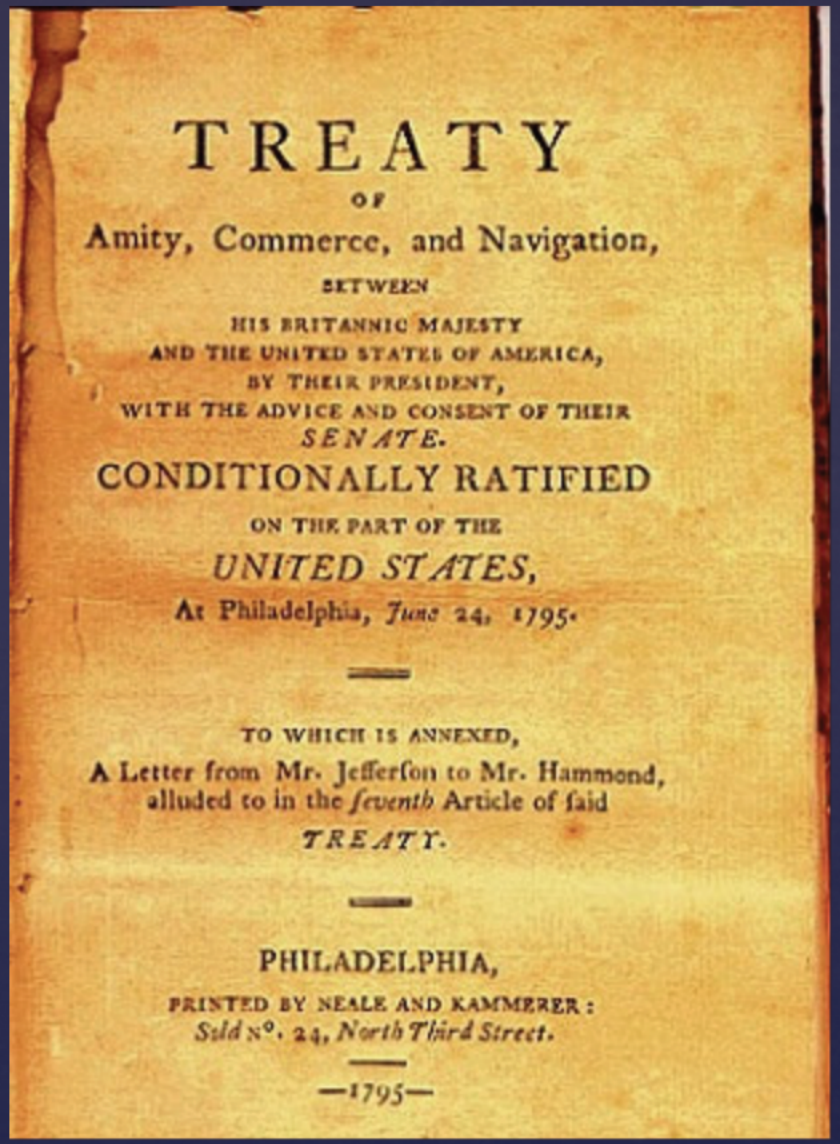
United States Senate

Impeachment Trial of the
PRESIDENT OF THE UNITED STATES

DATE FEB 06 1999

ADMIT BEARER TO THE SENATE GALLERY

Sergeant at Arms United States Senate



TREATY

OF

Amity, Commerce, and Navigation,

BETWEEN

HIS BRITANNIC MAJESTY
AND THE UNITED STATES OF AMERICA,
BY THEIR PRESIDENT,
WITH THE ADVICE AND CONSENT OF THEIR
SENATE.

CONDITIONALLY RATIFIED

ON THE PART OF THE

UNITED STATES,

At Philadelphia, *June* 24, 1795.

TO WHICH IS ANNEXED,

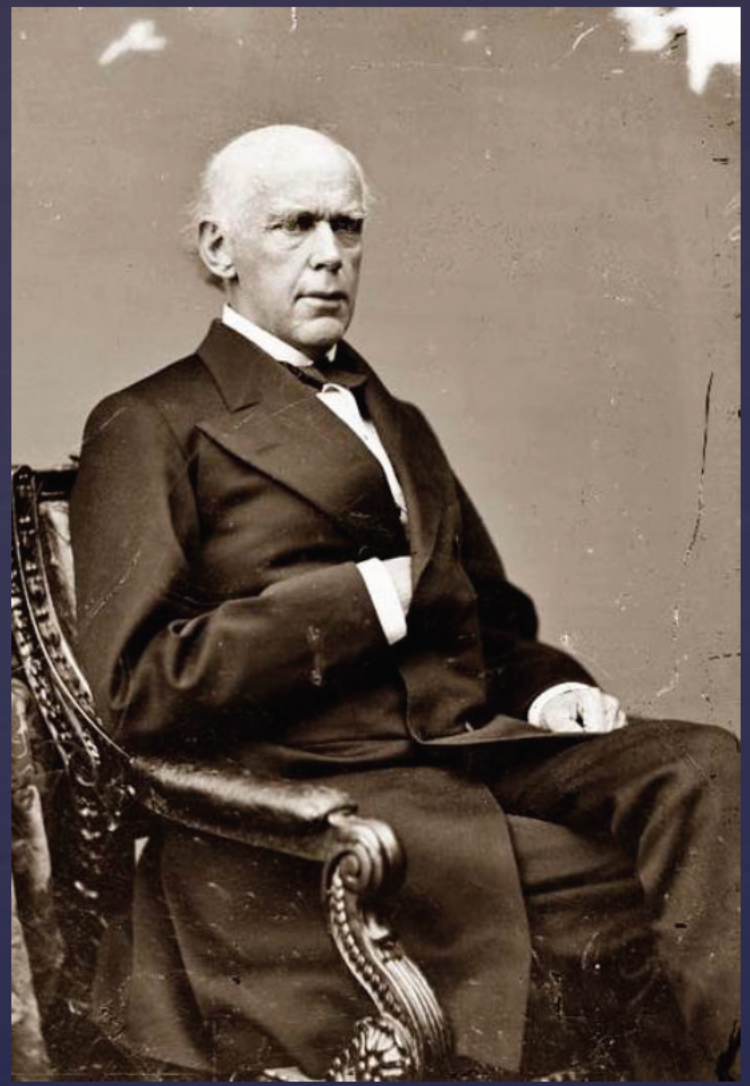
A Letter from Mr. Jefferson to Mr. Hammond,
alluded to in the *seventh* Article of said
TREATY.

PHILADELPHIA,

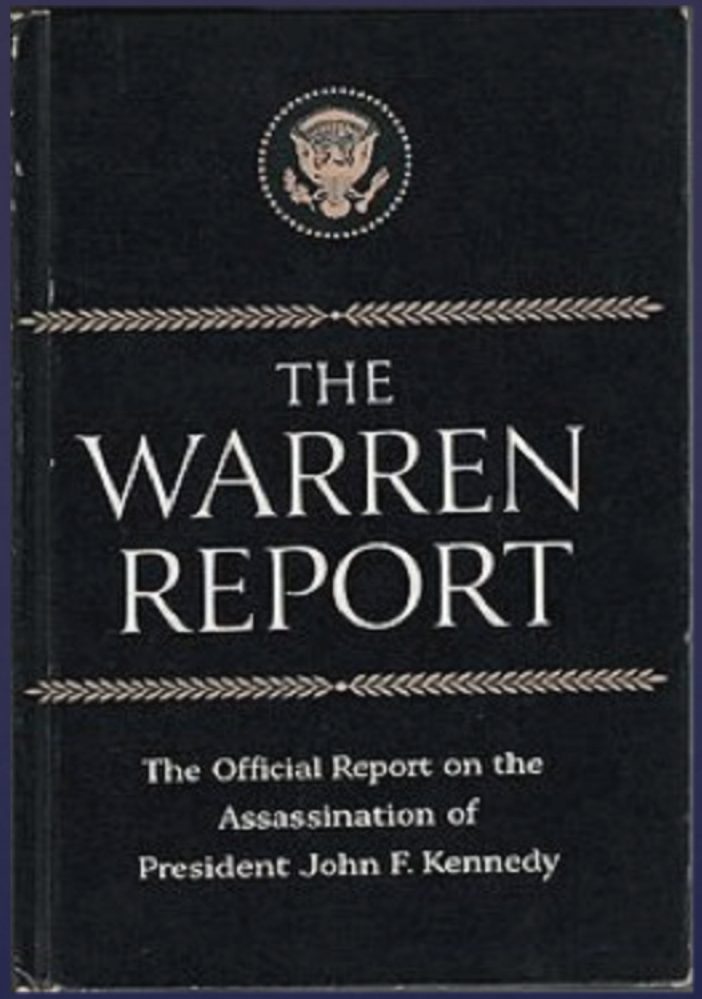
PRINTED BY NEALE AND KAMMERER:
Sold N°. 24, *North Third Street.*

—1795—

John Marshall John Adams

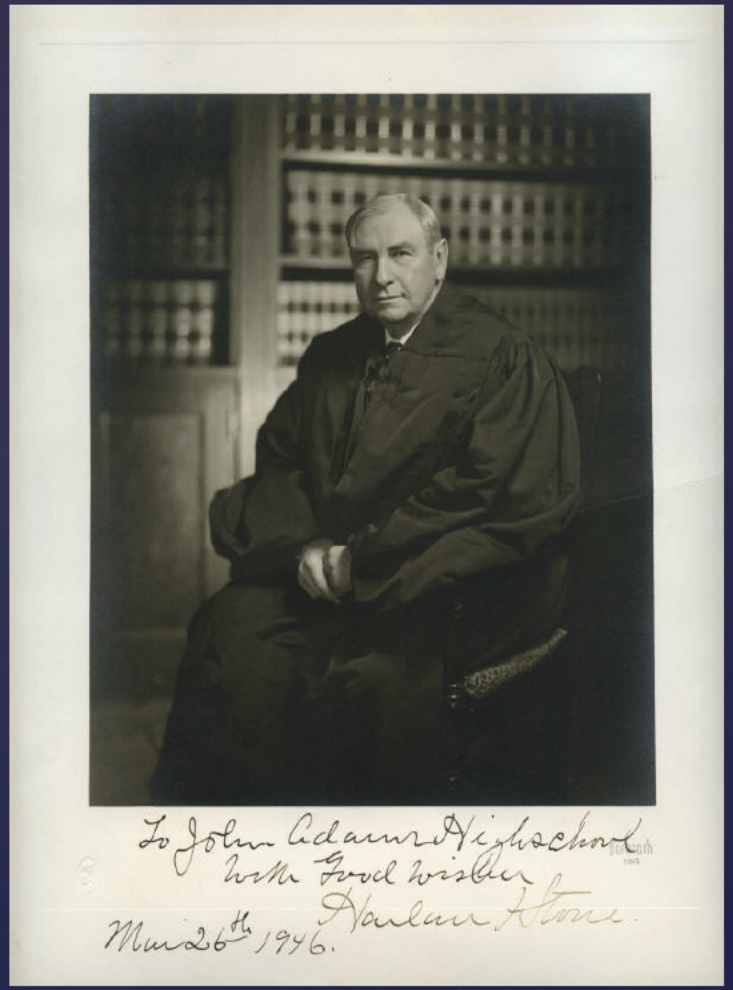


Salmon Chase

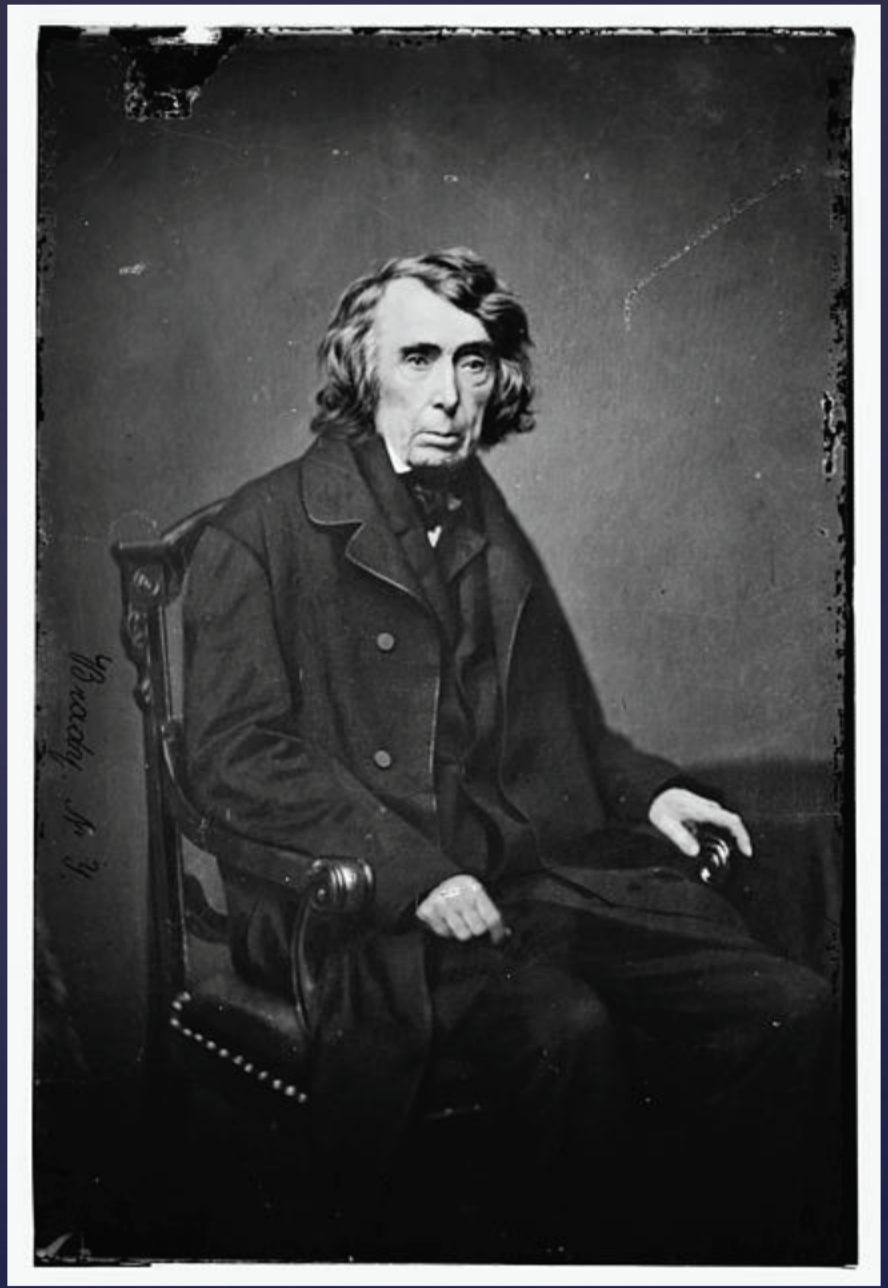

THE
WARREN
REPORT
The Official Report on the
Assassination of
President John F. Kennedy

William H. Rehnquist

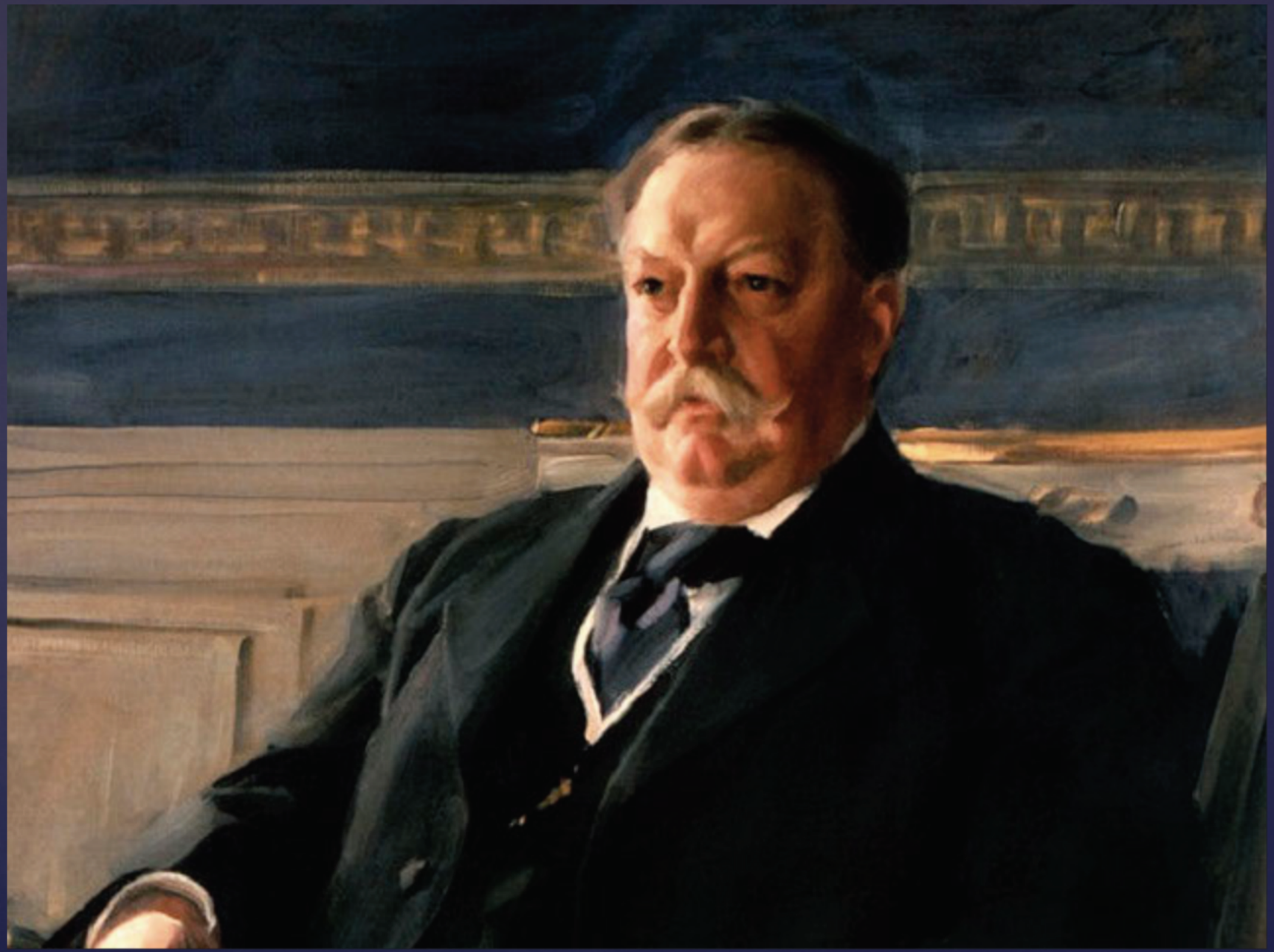
Harlan Fiske Stone



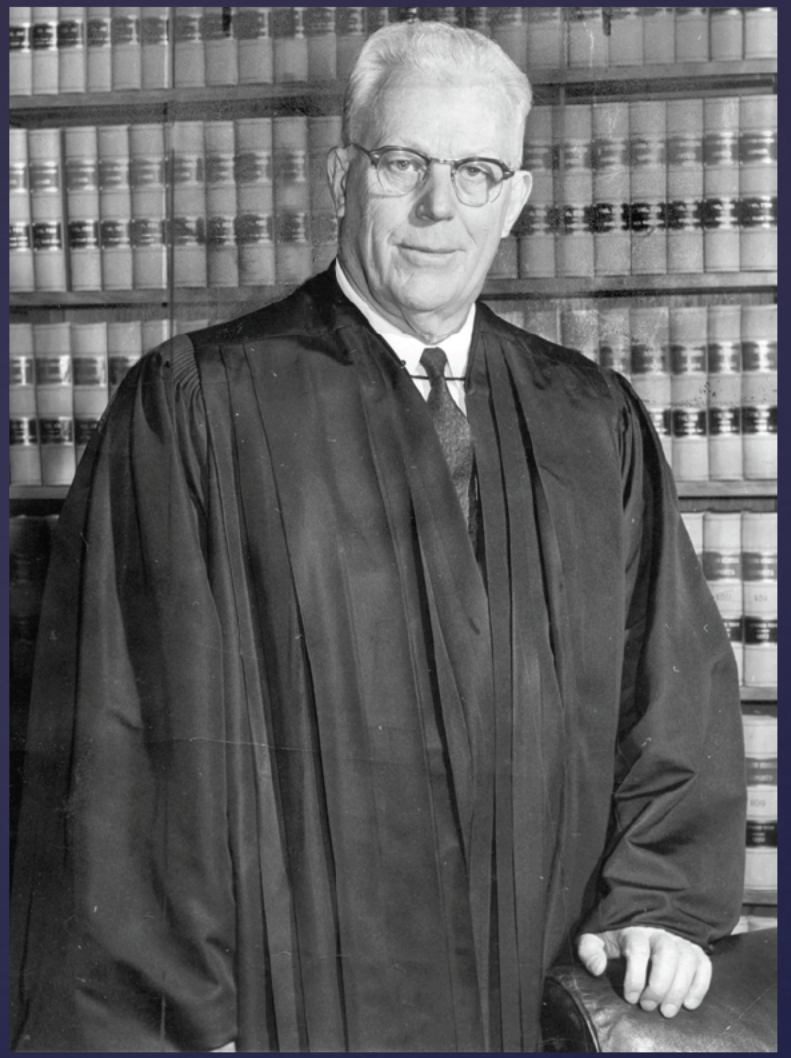
Roger Brooke Taney

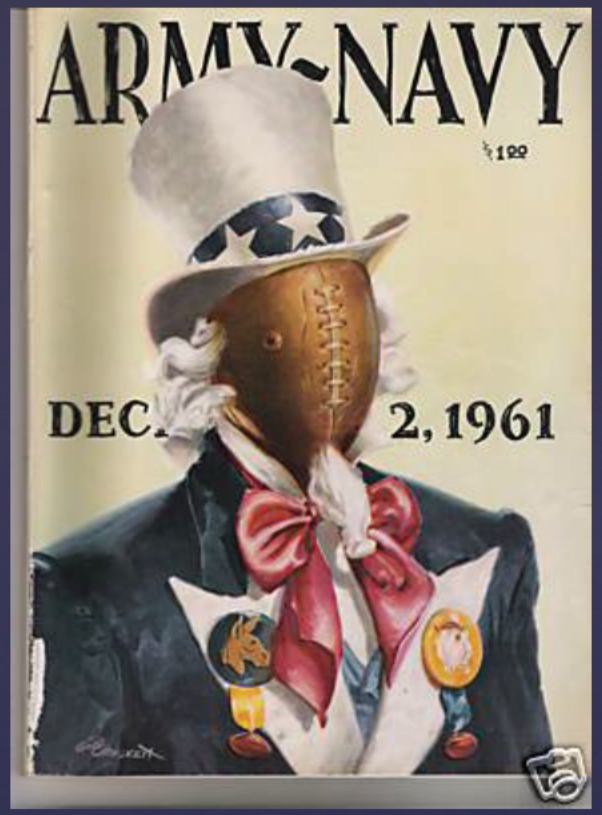


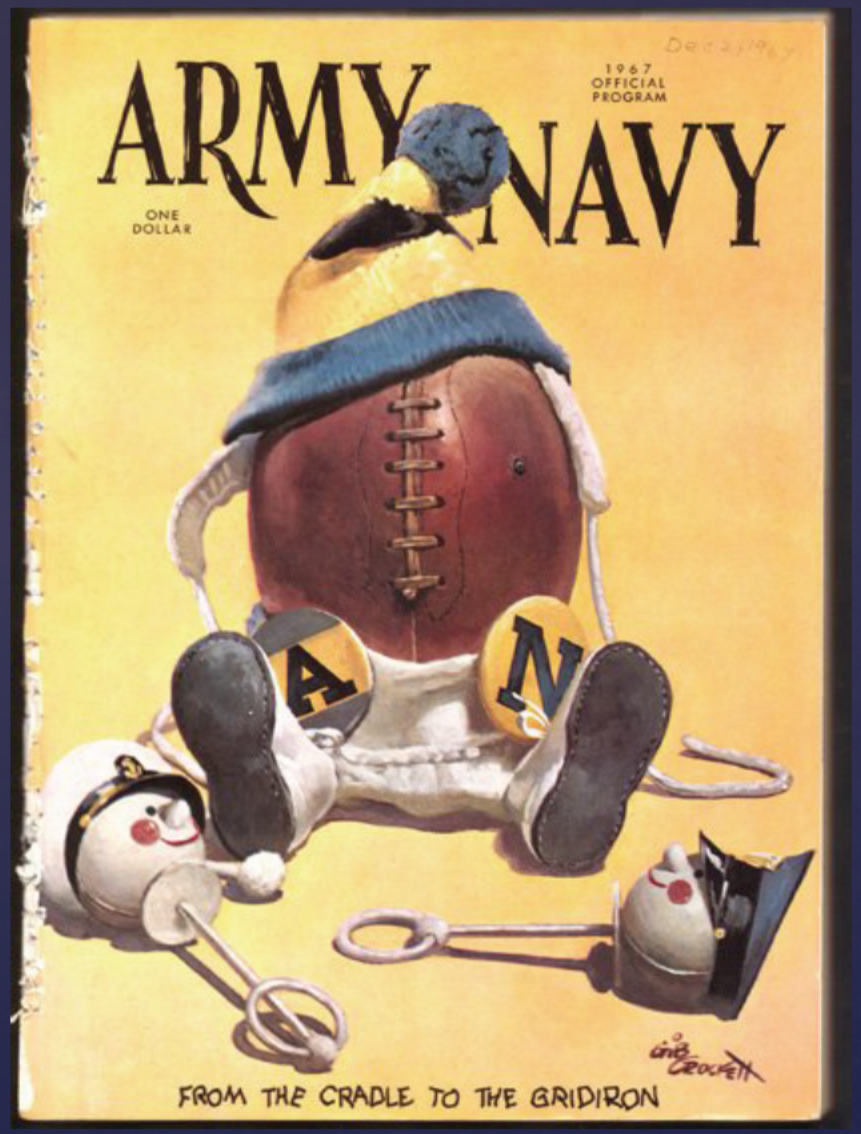

19



Earl Warren




ARMY-NAVY
DEC. 2, 1961

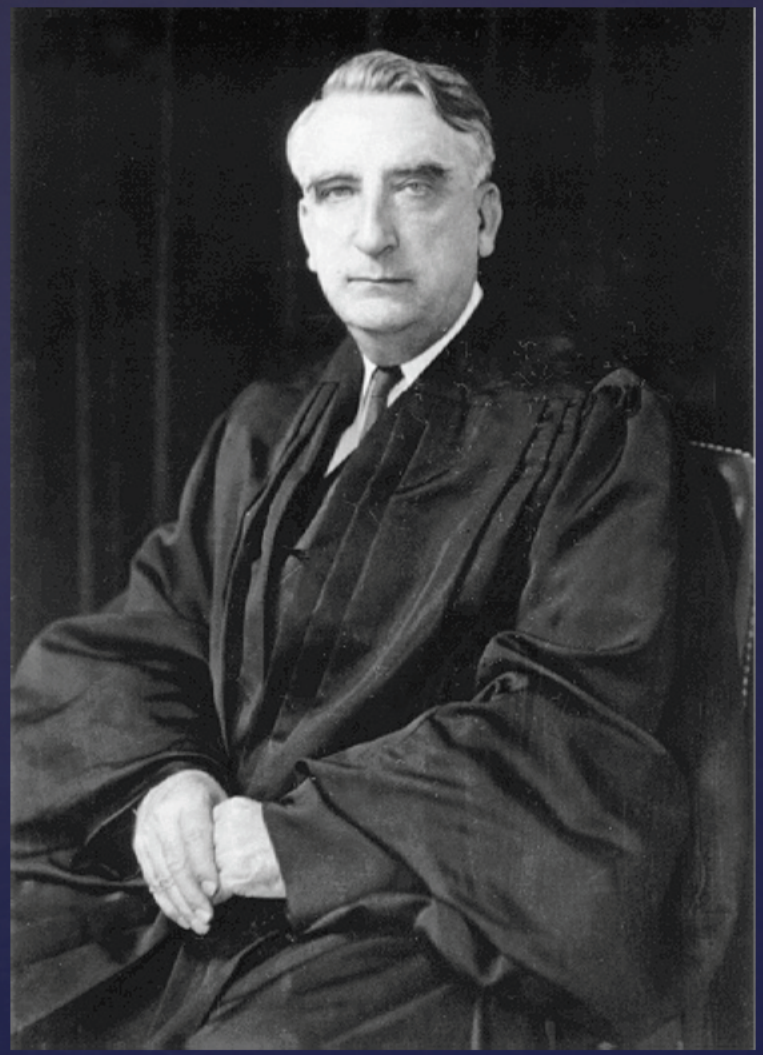

1967
OFFICIAL
PROGRAM
ARMY NAVY
ONE
DOLLAR
FROM THE CRADLE TO THE GRIDIRON

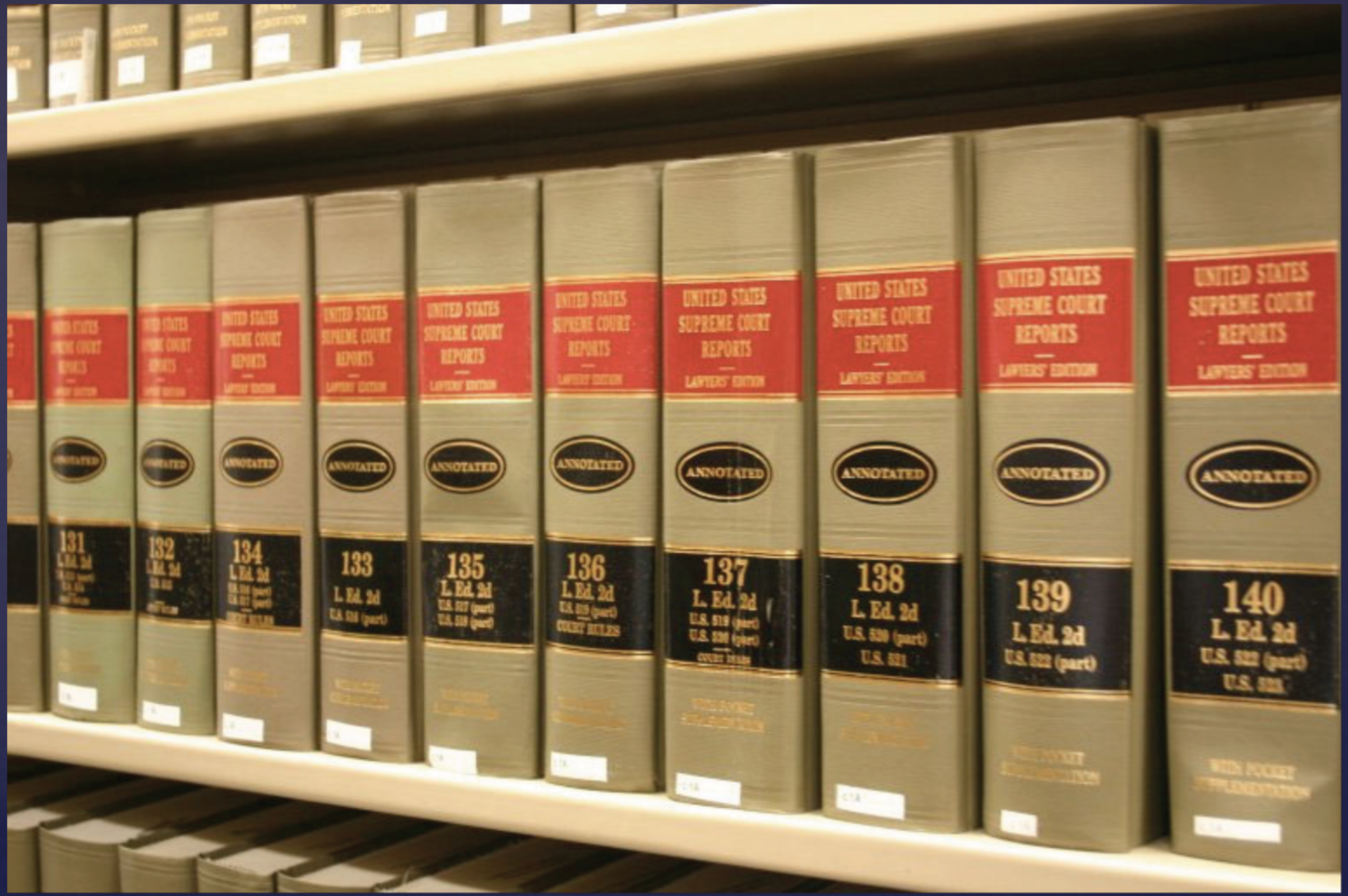

ARMY-NAVY
ARMY
NAVY


ARMY
NAVY

Harlan Fiske Stone

Fred Moore Vinson




UNITED STATES SUPREME COURT REPORTS
LAWYERS' EDITION
ANNOTATED
131 L. Ed. 2d
132 L. Ed. 2d
134 L. Ed. 2d
133 L. Ed. 2d
135 L. Ed. 2d
136 L. Ed. 2d
137 L. Ed. 2d
138 L. Ed. 2d
139 L. Ed. 2d
140 L. Ed. 2d

Justices' Conference Room

It is a pleasure to be here! Thank you so much for inviting me to speak to you.

A few years ago, I had a group of international students in my course on Modern Constitutional Theory. They were interested in taking the course because, among other things, they wanted to understand how our Supreme Court has managed to be stable, powerful, and effective. In their own countries, most of which had much more recent Constitutions, their more recently formed Supreme Courts were not yet at that point.

And at the beginning, neither was the Supreme Court of the United States.

PICTURE OF SCOTUS

While we now see our Supreme Court as powerful, and the role of Supreme Court justice—particularly Chief Justice—as one of the most coveted legal jobs in America, it was not always so.

JOHN JAY

Was the first to hold the job as the Nation's chief justice. He became disillusioned with the Supreme Court, however, concluding that it was impotent, with little real power or authority. Jay was elected governor of New York and he resigned from the Supreme Court to return to New York where he served from 1795 to 1801.

He declined John Adam's offer to return to the Supreme Court as chief justice in 1801 on the ground that the Court lacked "energy, weight, and dignity." He retired to his estate, where he spent the remaining years of his life as a farmer and active abolitionist."

JOHN RUTLEDGE

Next in line, was no more impressed. Bored by the Court's lack of activity, he left to become Chief Justice of South Carolina.

WILLIAM CUSHING

Cushing sat as chief justice for one week in January, 1786, and then declined the appointment and returned to serving as associate justice

OLIVER ELLSWORTH

As a senator, he had been responsible for the Judiciary Act of 1789, which established the basic framework of the federal judiciary still in place today. But he did not find sitting atop that judiciary particularly stimulating. He too left the Court for service in his state government, including as chief justice of the Connecticut Supreme Court. Once off SCOTUS, Ellsworth took up writing a newspaper column dispensing farming advice.

JOHN MARSHALL

The first time he was offered a seat on the Court, he turned it down. But he accepted the next time around, and when he assumed the role of chief, he forever changed the Court. While he was not our first chief justice, he is widely regarded as one of the greatest, if not the greatest. Under John Marshall's leadership, the Court gained strength and prominence.

Perhaps Marshall's greatest achievement was the opinion in Marbury v. Madison, which, for the benefit of the non-lawyers in the room, established the Court's authority to invalidate statutes on the ground that they conflicted with the Constitution. That seems obvious to us today; we take it for granted that deciding whether state and federal laws are consistent with the Constitution is what the Court does. But it was not always self-evident. I will spare you the ins and outs of the case, but it was a masterpiece.

The case essentially charged the Jefferson Administration with behaving unconstitutionally. Marshall and Jefferson were political opponents: Marshall was a Federalist, who favored a strong national government, and . . .

JEFFERSON

Jefferson a Republican, the party favoring states' rights. Jefferson had already made clear that he would ignore any judgment that the Court entered against him. In fact, he was so contemptuous of the Court that he didn't even send a lawyer to argue on the government's behalf. Marshall, therefore, had to play it carefully.

In a brilliant move, Marshall held for technical legal reasons that the Court could not actually decide the case—that saved the Court from having to issue a judgment that Jefferson would ignore. But along the way, the opinion in Marbury v. Madison asserts the authority of the United States Supreme Court to review government action for consistency with the Constitution and hold it unconstitutional when it deviated from it. As Marshall famously put it in that case:

"IT IS EMPHATICALLY THE PROVINCE AND DUTY OF THE JUDICIARY TO SAY WHAT THE LAW IS."

Having dodged the bullet of an unfavorable judgment in Marbury v. Madison, Jefferson may have won the battle. But John Marshall indisputably won the war.

JUSTICE'S PRIVATE DINING ROOMS

The case—and Marshall himself—is so important to having laid the groundwork for the Court's power that portraits of James Madison and William Marbury hang in the "Marshall Dining Room," where the justices eat privately together.

The Court has been on a steady upswing in prestige since Marshall's day.

TAFT

Our early Supreme Court justices may have perceived positions in state government to be preferable to service on SCOTUS, but by the time we got to William Howard Taft, who served as BOTH president of the United States and Chief Justice, we had a man who famously preferred being Chief Justice to being President.

- “Mr. Taft's lifelong ambition to become a Supreme Court Justice, realized by his appointment as Chief Justice by President Harding, was indicated by an incident long before he was mentioned as a candidate for President. The incident occurred at one of the receptions in the White House during the Roosevelt Administration, in the course of a talk in which Mr. and Mrs. Roosevelt and Mr. and Mrs. Taft took part. Colonel Roosevelt, in predicting what the future held for Mr. Taft, declared that eventually he would be called to one of the two highest positions in the country.

  ‘Make it Chief Justice,’ said Mr. Taft.
  ‘Make it President,’ said Mrs. Taft.

PICTURES OF COURT MEETING ROOMS

Taft is responsible for the building that stands as a marker of the Supreme Court today.

To illustrate the low estate of the Supreme Court at this time, the federal government was in the process of moving from Philadelphia, which had been the capital for ten years, to the new capital of Washington in the District of Columbia. The White House - then called the President's House, was finished, and John Adams was the first President to occupy it. The Capitol building had been constructed on Capitol Hill, and was ready for Congress, though it was not nearly the building we know today as the Capitol. But no provision whatever had been made for housing the Supreme Court. At the last minute, a room in the basement of the Capitol was set aside for the third branch, and in that rather undistinguished environment it would sit for eight years.

When it upgraded, it the Court returned met from 1819 to 1860 in a chamber now restored as the "Old Supreme Court Chamber." Then from 1860 until 1935, the Court sat in what is now known as the "Old Senate Chamber."

JOHN ROBERTS

In contrast to the early days, when it was a live possibility that Thomas Jefferson might gut the power of the Court, today, the Court is a coequal branch of the federal government.

And now, our Chief Justice—currently, John Roberts—is widely regarded as immensely influential head of a very powerful institution.

Roberts was appointed when he was 50, which makes him the second youngest Chief Justice. The youngest is John Marshall, who was appointed at 45. Because Roberts took the bench so young, it is likely that he will be one of the longest serving chiefs.

Here is a picture of Roberts swearing President Obama into office. He is the first Chief to swear in a President who voted against his nomination. (President Obama was in the Senate when Roberts was confirmed.)

* * *

As the Court has evolved, its standing in our political system is not the only thing that has changed. The profile of the justices, including the Chief Justices, has changed.

Currently, we have a Supreme Court comprised entirely of justices who attended Harvard and Yale. (I'm happy to report, however, that they have been good to Notre Dame. Justices Scalia, Alito, Roberts, Thomas, and Sotomayor have all been to campus, and Justice Ginsburg is scheduled to visit us this fall.)

That was not always the case. Indeed, it was not always the case that justices had a law degree.

MELVILLE FULLER

Melville Fuller, who assumed the office of Chief Justice, was the first U.S. Supreme Court Chief Justice to have had any significant formal legal training. And it wasn't even a degree: he read law, briefly attended the Harvard University School of Law, and was admitted to the Maine bar.

ROBERT JACKSON

The lack of formal training is something that was not beyond the pale well into the twentieth century. While he was not a chief justice, Robert Jackson (1941-54) was one of the greats. I always tell my students that he is one of the Court's greatest writers. And what a career: he was the Solicitor General of the United States, the Attorney General of the United States, a justice on the Court, the prosecutor at the Nuremburg trials. And he did not have a law degree. He briefly attended the Albany Law School, but completed his study through a legal apprenticeship.

EXTRA-JUDICIAL ACTIVITIES

Norms regarding what justices can do off the bench have also changed. Now, we would be surprised to see the Chief Justice undertaking other jobs, particularly political jobs, in the a high-profile way.

IMPEACHMENT

To be sure, the Constitution itself gives the Chief Justice the responsibility of presiding over a Senate impeachment trial of the President, and two chiefs have done that: Salmon Chase presided over the impeachment trial of Andrew Johnson, and William Rehnquist, during the year I clerked on the Court, presided over the impeachment trial of Bill Clinton.

But that is a constitutionally given responsibility. Consider some of the other things Chiefs have done.

JOHN JAY, while Chief Justice, left for France and negotiated the Jay Treaty.

JOHN MARSHALL. For the first month he was in office, he served simultaneously as Secretary of State and Chief Justice of the United States.

SALMON CHASE, while chief justice, he sought to be the Democratic presidential candidate in 1868 and the Republican candidate in 1872.

EARL WARREN headed the Warren Commission that investigated the circumstances surrounding JFK's death.

* * *

What makes a good Chief Justice?

On the one hand, the Chief Justice is the first among equals. His vote doesn't count any more than the others.

REHNQUIST

Former Chief Justice William H. Rehnquist, described it this way: The Chief Justice presides 'over a conference not of eight subordinates, whom he may direct or instruct, but of eight associates who, like him, have tenure during good behavior, and who are as independent as hogs on ice.'

HARLAN FISKE STONE

STONE once likened being Chief Justice to being a law-school dean, a position he had also held, because both have 'to do the things that the janitor will not do.'"

That said, the Chief Justice can set a tone and exercise influence, and the best Chief Justices have done both. Interpersonal skills are a plus for the job.

JOHN MARSHALL

Back to the great John Marshall: one of his innovations was to have all the justices stay at the same boardinghouse and had their meals together during their few weeks in Washington. If it was raining, they would have a glass of wine with dinner. They looked forward to this ritual, and one day were expressing regret that the weather outside was fair and sunny. But Marshall said "somewhere in our broad jurisdiction it must surely be raining," and from then on they had a glass of wine with dinner every day.

TAFT

Taft won favor with his colleagues generally by generous and sensitive gestures toward them, ranging from Christmas cards, rides, and gift salmons, to arranging for the funeral of Mrs. Holmes at Arlington. Taft's conduct in assigning opinions also no doubt endeared him to his colleagues. He wrote more than his share of the Court's opinions, in part because he assigned himself cases in areas like patent law, which others preferred to avoid, and he took on extra work when a colleague was ill or fell behind. Brandeis credited Taft with 'admirable' personal qualities, with smoothing out problems, and with conducting a harmonious conference.

EARL WARREN

- Warren also excelled as a social leader, and his popularity with his colleagues presumably enhanced his influence. He invited Black, as senior Justice, to continue to preside at conference initially. Warren greeted Potter Stewart and his wife at the train station at 6:30 a.m. when they first arrived in Washington, D.C. Warren routinely met other Justices, even those most junior, in their chambers rather than summoning them to his, persisting in the practice even when they protested that protocol demanded that they visit him. This show of humility--institutional and personal--helped endear Warren to his associates. Warren personally hand-delivered his draft of the opinion in Brown to each of his colleagues, even taking it to Jackson in the hospital, a gesture that signaled deference of a new Chief Justice for a senior colleague and afforded an opportunity for conversation, in addition to addressing the underlying confidentiality concerns associated with transporting the opinion outside of the Court.

Warren also cultivated his colleagues socially--an enterprise that must have come naturally for someone Brennan recalled as being 'marvelous with people.' Warren and his family spent holidays with the Blacks; he hunted and walked with Clark; and he attended sporting events and otherwise regularly socialized with Brennan. He persuaded all of his colleagues (except Black and Frankfurter) to join him at the Army-Navy football game most years; the Justices traveled to the game by rail during which time they socialized with one another and their families over breakfast and dinner.

HARLAN FISKE STONE

Stone faced the difficult task of mediating the bitter differences that arose among [the justices] as they faced the challenging issues that arose during World War II (1941–

1945). The five years he served as chief justice are often regarded as the most openly combative in Court history.

FRED VINSON

Chief Justice Vinson was "almost universally rated a failure as Chief Justice"[1] (at least in part) because he was ineffective at limiting concurrences and dissents and preserving a majority.

IS THAT VALUABLE?

I think one can have a hearty debate about whether it is desirable for a Chief Justice to try to limit separate opinions. Certainly it is good to try to have everyone get along. But it might be futile to try to limit separate opinions.

BREYER-SCALIA CLIP

* * *

Opinion-Assigning Power

There is no doubt that the power to decide who writes an opinion is one of the most significant a chief justice has.

John Marshall was the first to exercise control in this respect. Before Marshall, there was no official "opinion for the Court." The judges wrote seriatim opinions—they each wrote their own. Thus they may have all agreed on the result, but there reasoning may have been very different, and the opinion wouldn't provide binding legal authority to lower courts deciding the same issue. Marshall changed that by shifting to a process in which there was one opinion for the Court. This enabled the Court to set precedent rather than simply decide the case in front of it.

US REPORTS

Even then, took time for a reliable case reporting system to emerge. Court had no official reporter, so the decisions that got out when enterprising freelance workers, not paid by the court, got justices notes or sat in the courtroom and listened to what they said. The Court began appointing official reporters during John Marshall's tenure, but the accuracy of their reporters was sometimes questioned. One reporter was reputed to be a drunk.

The norms of the opinion-writing process have also changed over time.

HOW IT WORKS TODAY

---

[1] Paul J. Weber, *Vinson, Fred M.*, *in* ENCYCLOPEDIA OF THE SUPREME COURT 498 (David Schultz ed., 2005).

Conference. (Rehnquist style versus Roberts style)

Opinion Assignment.

HOW IT WORKED IN THE PAST

Into the twentieth century, opinions were not necessarily circulated to all the justices before they were published. The justices met at conference, voted, assigned the opinion, and then they all just trusted the opinion's author to get the reasoning right. They didn't necessarily see it before it went on the books, much less consent to its language.

And sometimes the Chief Justice assigned the majority opinion even when he was in the dissent. That would not go over well today.

OPINION ASSIGNMENTS HAVE ALWAYS BEEN STRATEGIC

The authority to assign the opinion is one of the most significant powers of the chief justice, and it has always been used strategically. For example, to leave their mark, chief justices have almost always retained the most important cases for themselves. Thus Chief Justice Roberts wrote the majority opinion in both Affordable Care Act cases.

Assign opinions in a way that will permit the CJ to keep a majority.

CJ won't assign to the justice likely to have the most extreme views or strident language; to keep everyone else on board, he'll assign the majority opinion to someone more in the middle.

Also manages opinions with an eye toward the public's acceptance of them

Chief Justice Stone's decision to reassign a major civil rights ruling from Justice Frankfurter to Justice Stanley Reed after other members of the Court expressed concern about a pro-civil rights ruling being authored by a Justice from the Northeast rather than a Justice from the South.

Earl Warren separated the merits from the remedy in order to have a unanimous opinion in Brown v. Board, which he thought was crucial to the nation's acceptance of it. He left the questions of remedy—busing, etc.—on which there was a lot of dispute, for later cases.

Chief Justices win friends when they keep some of the "dogs" for themselves. The other justices loved Taft for his willingness to write the patent opinions no one wanted.

Chief Justices are responsible for keeping the trains running on time, and their opinion-assigning power plays into that. Rehnquist was famous for running a tight, efficient ship,

and he simply refused to sign new opinions to any justices who were not timely completing the opinions they had been assigned.

* * *

Above all, the Court is a place of tradition. Chief Justices have played an important role in building those traditions, but once they're built, they're hard to change.

The Obstacle in Your Path Is Your Path

A few months ago, I saw a friend who had suffered a brain injury. Recovery was slow, and he still faced significant challenges. When I asked how he was holding up, he said, "The obstacle in the path becomes the path." That's a paraphrase of a quotation attributed to the Roman stoic Marcus Aurelius: "What stands in the way becomes the way."

Those words really struck me. I suspect they mean something different to me than they did to a Stoic like Aurelius, but I think they have a lot to teach us about our lives as Christians. That said, I would modify them slightly. I would say: the obstacle in the path *is* the path. Let me explain.

I'll begin with my attitude toward obstacles: I dislike them. And when I think about the connection between obstacles and paths, I think of an obstacle course: Obstacles litter the path between your starting point and the finish line. You know where you want to go, and obstacles are things that stand in your way. Thus, you slide under them, jump over them, or swerve around them.

On this point of view, life is like a road trip. When I am on a road trip, I use the Waze app to guide me. I like Waze because it does more than give me directions—it alerts me to obstacles so that I can avoid them. It tells me if there are potholes or vehicles stopped on the road ahead. It warns me if police are out so that I can check my speed. It reroutes me around traffic jams and road closures.

If there was a Waze app that helped me avoid obstacles along the road of life, I would be an early adopter. Can you imagine? A program giving you advance notice of troubles ahead so that you could adjust your course to avoid them if possible? When we encounter difficulty, how many times do we think "If only." If only I had done this or that instead, I wouldn't be in position. If there were a way to avoid unwanted hardship, I think most of us would gladly take it. We know what we want our lives to look like, and we don't want anything to mar that vision.

Yet what if that's the wrong way to see it? What if the obstacle—the pain or other difficulty—*is* more important than the route I have planned?

What if we are supposed to pay more attention to obstacles—the things that slow us down—than to the track on which we're moving?

Scripture and tradition burst with this lesson. The parable of the Good Samaritan is an example. In the familiar story, a man on the road from Jerusalem to Jericho is attacked by robbers, who leave him for dead. He was what Waze would describe as "obstacle on the side of the road ahead."

- A priest is the first to pass him, but, eager to stay on his path, he hurries by him. Had he helped the man, he would not only have lost time but have become ritually unclean. And that would have derailed him from the priestly duties that he was on his way to perform.

- A Levite passes him next. He also wants to stay on his path, so he too plows ahead without stopping. His single-minded focus on the things he had planned for himself—the road he was on—distorted his vision.

- The Samaritan sees things differently. Stopping to care for the man would take the Samaritan off the track he was on. But in contrast to the priest and the Levite, the Samaritan saw that caring for the man was not an obstacle, but rather the path he should take. He recognized that the obstacle was much more important than his planned trip.

How often does my own relentless focus on getting from point A to point B cause me to mistake my planned route for the path Christ wants me to take?

In a sense, however, the Good Samaritan had it easy—he had a *choice* about whether to stop to help the wounded man. In contrast to the Good Samaritan, we don't always get to choose our obstacles; sometimes, they are thrust upon us. Even then—perhaps especially then—the obstacle in our path is the path.

The life of St. Thomas More, in whose honor we have gathered tonight, offers us an excellent example. Consider the path that St. Thomas More

was on. The son of a prominent lawyer and judge, he himself rose within our profession. He was the first layman to serve as Lord High Chancellor of England, a close advisor of the king and head of the judiciary. He wrote prolifically about history and philosophy. He had a close-knit family infused with strong faith.

And then came Henry VIII's demand that Thomas swear an oath accepting the king as the head of the Church of England. This was an obstacle: the penalty for his refusal was imprisonment in the Tower and ultimately, beheading. And there was no way around it: he either had to accept or refuse Henry's demand. If I were in Thomas's position, I would be inclined to see this confrontation with Henry as something that had derailed me from the route on which I had momentum. Thomas was accomplishing so much good, both professionally and personally, and the matter of the oath brought it all to a grinding halt.

But seen with the benefit of hindsight, Thomas made a far greater contribution through his martyrdom than with his career, his scholarly writing, or his family. Had Thomas never faced that challenge that ultimately cost him his life, history would not have remembered him other than as a former Lord High Chancellor of England and author of some learned books. He would have lived a good, commendable life, but he would not be the patron saint of lawyers. I would not have heard the story I did at lunch this week of a judge whose life was changed by visiting Thomas's cell in the Tower of London.

Thomas's death, like the death of every martyr, carries the power of redemption. In that respect, it echoes the life of Jesus, who best illustrates that the obstacle is the path. When Jesus predicted his death to his disciples, they refused to believe it. And with the path Jesus was on, why would they? He was doing so much good in the lives of so many through his preaching and healing of the sick. The cross was an obstacle to that work, a derailment of the route on which he had momentum. But the obstacle in his path was his path: it was through his death and resurrection that he conquered death and sin. What looked like the end was the beginning.

The phrase—the obstacle in my path is the path—has struck me for a very personal reason. Our youngest son, Benjamin, has Down's

Syndrome. We learned of the diagnosis after he was born, and it sent us reeling. Our life was (and remains) very busy. Benjamin has six older siblings, and Jesse and I both work. I very clearly recall driving home with my mom from the NICU one day and telling her "Our life is like a high-speed train, and I really needed a baby who could hop on board." And my mom said: "then God is telling you to slow your train down."

And Benjamin has required us to do that. His therapy appointments have given us more to juggle, and at least now while he is young, family outings are more complicated than they would otherwise be. I have wept more than once watching nephews and neighborhood boys living life as I imagined it for Benjamin. The path of our family has taken a turn that I did not plan, and I have sometimes mourned that we were rerouted.

Yet I have come to realize that a single-minded focus on the path we were on obscured my view. This obstacle *is* my path; caring for Benjamin is perhaps the important work we will do. Sometimes a cross, yes—but evoking a love that is transformative for others. We already see that in the effect on our other children.

Now, when an obstacle appears, some people say—as many did after Benjamin was born—that it is God's plan for you. I don't think that quite captures it. God never intends illness, death, or any kind of pain. Those things are consequences of the fact that we live in a fallen world. He calls us to participate in its redemption; we are part of his rescue plan for the world. Like Christ, we are called to embrace suffering and transform it with love.

I will leave you with a reflection from a dear friend who adopted several children from Ethiopia. I have changed their names for privacy, but otherwise, the words are hers.

* * *

St. Augustine discusses the nature of God and included in that is the significance of Christ being labored by and born of Mary. Michael told me how it struck him that we too, being caught up in the nature of God, labor for the birth of his kingdom. I appreciated Michael's reflection because it

acknowledged the bitterness in this simultaneously sweet situation. Our children had been orphaned—what a tragedy. It was bitter to know that Michael and I would have three children, all brought into this world by people we would never have the chance to know, people we could never tell how wonderful their children are. It was bitter to be taking our children out of their wonderful homeland, even though life would be so much better for them. It was lonely to be forming a family in such a different way and to look so different than most families. We had already also dealt with the bitterness of infertility and I was reminded of how hard that had been. It was just a lot of heavy stuff all of a sudden. HOWEVER, it somehow made me feel more alive to be in that very spot. To know that our Father, seeing all of that bitterness, all of that nasty reality of the fallen world, the infertility, disease, death, poverty, and all, had decided to redeem it. To turn it all into joy. That He, 'the Father of Orphans" was making it very clear that he wanted a home for his children and that he wanted it to be ours. How cool that he could move in my heart in such a way that somehow despite the bitterness this was becoming my dream come true. The family I had never imagined, but always longed for.

* * *

May we lawyers, who are a driven lot, embrace obstacles and transform them, with God's grace, into something beautiful. St. Thomas More, pray for us.

Word Limits: How Textualism Constrains Judges

I've taught Statutory Interpretation for many years, and I find that students—even those sympathetic to textualism—come in with a series of misconceptions about textualism. And so I'm going to begin by clearing the ground; I'm going to start by telling you what textualism is *not*.

Myth Number One: It is not strict constructionism.

As Justice Scalia put it, a textualist does not construe text broadly, and she does not construe it narrowly. She construes the text at the level of generality at which it is written.

Sometimes, Congress legislates through a rule; sometimes, it legislates through a standard. When it specifies a rule, a court must respect that.

- For example, if Congress requires certain paperwork to be turned in before December 31st, a court must treat paperwork turned in after December 30th as late. A deadline is inherently arbitrary; the phrase doesn't mean "before the end of the year."

- Conversely, if Congress lays down a standard, a court must respect that too. The Sherman Act is a classic example. It forbids "contracts, combinations, and conspiracies in restraint of trade." That language is broad, and it leaves judges to flesh it out in common law fashion. Similarly, Rule 501 of the FRE instructs that he common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege . . ." That language essentially delegates to courts the responsibility for fashioning a federal common law of privilege. Thus, that is what courts must do.

- People sometimes think that textualists have a problem with judicial discretion. They don't: they have a problem with discretion not granted by Congress. It is about respecting the level of generality at which a text is written.

Myth Number Two: Textualism is wooden or literalistic.

- This misconception is well illustrated by something one of my statutory interpretation students said to me this semester. He had seen a funny picture online of a green pickup truck parked in a space marked for "green vehicles only." He said that coming into the semester, he would have thought that a textualist would endorse that parking job: a green truck is a green vehicle; therefore, legal parking.
- But that's not right. Textualism isn't wooden or literalistic. It takes a sophisticated approach to language, recognizing that language is a matter of social convention and context.

- Everyone in this room knows that in current parlance, a "green vehicle" is a low-emission vehicle, not a car with green paint.

- As my colleague Judge Easterbrook put it, "courts should listen to the ring the words of the statute would have had to a skilled user of the language, thinking about the same problem." Or, as Justice Scalia put it more colorfully: "the acid test of a word's meaning is whether you could use it that way at a cocktail party without people looking at your funny."

- Justice Scalia uses the example of a statute increasing the penalty for "using a firearm during and in relation to a drug-trafficking offense." In United States v. Smith, the question was whether a defendant who had traded a gun for drugs had used it. The majority said he had. The dissent, written by Justice Scalia, said he hadn't. Justice Scalia said that it was wooden to say that the defendant had "used" the gun just because one could say he had "used" it within the dictionary definition. [explain used it for what it was for - - "use a cane" not asking whether have grandfather's cane hung decoratively on wall.]

Myth Number Three: Textualism make statutory interpretation easy.

The fact of the matter is that statutory interpretation can be hard. Sometimes language is an imperfect medium. Congress doesn't have perfect foresight. And the messy legislative process, including the compromises it requires, can yield awkward language.

The "using a gun" case is hard. Or here's one I give my students based on an Oregon case: has a man who operated his motorized wheelchair in a crosswalk while intoxicated violated Oregon's prohibition on operating a "vehicle" while intoxicated?

Textualism doesn't maintain that you can punch text through dictionaries and canons and yield a rote answer. Statutory interpretation can be hard, and textualists don't deny that. That is evidenced by the fact that they don't always agree with one another about what the right interpretation should be.

Thus, you shouldn't dismiss textualism because you think it makes the simplistic claim that statutory interpretation is simplistic. It doesn't.

Myth Number Four: Only judges who take a so-called "conservative" approach to statutory interpretation are textualists.

Justice Kagan observed a few years ago in a talk at Harvard Law School that "we are all textualists now." Certainly, all judges have not united in a chorus behind Justice Scalia saying that they subscribe to his version of textualism in every respect.

But one tremendous impact he had was in refocusing the judiciary—and lawyers generally—on the centrality of text. In the 70s, cases sometimes started with the legislative history and treated the text as an afterthought. That doesn't happen anymore—judges of all methodological stripes acknowledge that the text is the place to start. Disagreements are

often about the best interpretation of the text rather than whether some extra-textual consideration (like legislative history) trumps.

So what differences remain?

Some scholars have said that textualism and its alternatives—like purposivism—have grown so close that the debate is almost not worth having. I think there are real differences between textualism and more pragmatic approaches, but the ground has certainly shifted from a debate about the importance of text or the utility of legislative history.

I'd identify the primary difference as this: Textualists won't depart from the most natural meaning of text to make it fit more naturally with the statute's purpose.

Why? All legislation is compromise. No statute pursues its purposes at all costs. (Example of ADA). Line drawing happens, and sometimes that's awkward. Lines are inevitably under or overinclusive. They can seem arbitrary. That's in the nature of lines: this much and no more. (Homely examples: if I say my kid must be 13 to get a phone. A curfew. The amount of allowance.) Courts must respect the lines drawn, even if there seem compelling reasons to depart from them in particular cases.

- **Advantages of rules versus standards** (rules clear, predictable, administrable; standards allow for case-by-case accommodation). And as I said, textualists maintain that it is important to respect the difference between the two.

Departing from the most natural meaning of text to judicially improve its fit with the statutory purpose risks undoing the very compromises that made the passage of legislation possible.

- Bicameralism and presentment. Equal representation in Senate. Vetogates of committees etc.

Final word about the limits of textualism. People occasionally characterize textualism as a magical pair of handcuffs that constrain runaway judges. That would be way over-promising, because no methodology—textualism included—can turn judges into automatons.

Judges constrain themselves by making a choice to follow the law where it leads, trying to check their own preference at every turn. I'll share what I do to try to double-check the way I resolve a question of statutory interpretation (or any other): I review my analysis through the eyes of the litigant advocating the opposite view. I take on that viewpoint and ask myself whether I see analytical holes that reveal any impulse in me to resist going where the law leads. In the end, a judge's internal compass—her commitment to the rule of law rather—is the most important constraint upon any sort of judicial willfulness.

That said, I do think that textualism, insofar as it commits to sticking with the text, promotes constraint. It gives the judge a firmer guide to follow in resolving the question before her.

Happy to take questions.

WHAT WOULD JAMES MADISON DO?

Thank you to hosts, especially to Mark Rolfes, who has done a wonderful job organizing this event.

Originalism has been in the news lately. It has been a theme in the confirmation hearings of Brett Kavanaugh, the president's nominee to Supreme Court. And it was a theme last year during the confirmation hearings of now-Justice Neil Gorsuch. But while the term "originalism" has been thrown around in the news a lot, it may not necessarily be clear to everyone what it actually means. In this talk, I'm going to try to give you an overview of the topic. Whether you find the theory appealing or unappealing, my hope is that you will all leave tonight with at least a sense of what people are talking about when they use the word "originalism."

SLIDE: JAMES MADISON

As you all know, James Madison played a critical role in the drafting of the Constitution. Known as "the Father of the Constitution." He attended the Constitutional Convention and was the primary author of the Bill of Rights, the first 10 Amendments to the Constitution.

He is also the source of most of what we know about the behind-the-scenes debates at the Convention. Just a few days after the Convention assembled, the delegates adopted a rule of secrecy. The proceedings were not public, and they were not officially transcribed. James Madison, however, kept a private journal of the proceedings, and it was published more than 50 years later. They are now the basis of the most reliable record we have of the deliberations at the Constitutional Convention.

I gave this talk the catchy title "What Would James Madison Do?" because some people might think that originalism means we ought to interpret the Constitution through James Madison's eyes—that maybe, we should try to answer constitutional questions the way we think James Madison would have. That is certainly what snippets from the news might lead you to believe insofar as they equate originalism with an emphasis on the "original intent of the Framers."

Spoiler Alert: While we should all have the utmost respect for James Madison's role in giving us the Constitution, the rest of my talk will make clear why James Madison's personal views shouldn't dictate the answer to any interpretive question.

Before we dig into originalism, however, I'm going to back up and say a few words about the judicial role in interpreting the Constitution. That will place the debate about originalism in context.

SLIDE: CONSTITUTIONAL COMMITMENTS

What is the Constitution? I like to describe it to my students with an analogy to Odysseus resisting the call of the Sirens. The Sirens appear as beautiful women with enchanting voices who lure sailors to their death. To resist the Sirens, Odysseus has his men tie him to the mast of his ship and instructs his men not to untie him, no matter how much he begs. Sure enough, when they pass the Sirens, Odysseus strains against the ropes, urging his men to free him. But true to their commitment, the men refuse to do it.

In the Constitution, we have made a series of fundamental, non-negotiable commitments. Legislation represents the will of a majority, but the Constitution represents the will of a super-majority: ratification on the assent of ¾ of the states. Supermajority rules tie our hands so that we can resist the temptations of the moment.

We, the people, are Odysseus. There will be times when a democratic majority will be tempted to take actions that violate our fundamental commitments. For example, in a national security crisis, a democratic majority might be willing to take actions that violate our civil liberties. We've tied our hands, like Odysseus to the mast, so that we can resist that temptation in the moment.

Another way to put it is that the Constitution is an appeal from the people sober to the people drunk: don't, in the expediency of the moment, waver from your fundamental commitments.

SLIDE: JUDICIAL REVIEW

Judicial review is a mechanism for adhering to those commitments. When someone believes that legislation or executive action violates the Constitution, they can often go to a court to try to remedy that error.

That error might be structural (e.g., separation of powers) or related to an individual right (e.g., the First Amendment).

Insofar as the courts enforce constitutional limits, we might say that they are a little like Odysseus' crew—they refuse to permit current democratic majorities from violating our fundamental commitments.

SLIDE: COUNTERMAJORITARIAN DIFFICULTY

This is a good thing. It is also a big deal. (Explain countermajoritarian difficulty.)

SLIDE: SOURCE OF POWER

Where do federal courts get this significant power? Not express in the Constitution, but in a famous case entitled Marbury v. Madison, the Supreme Court recognized it.

SLIDE: EMPHATICALLY THE PROVINCE

It is a foundational principle of our constitutional order. But again, it's a big deal. We want judges to stop the state and federal governments from violating the Constitution. But if the state and federal governments take measures that the Constitution permits, we don't want them superimposing their will.

And this brings us to originalism: The debate about originalism is intertwined with the debate about when judges should set aside legislative or executive action as exceeding the limits of the Constitution and when their doing so is illegitimate.

Originalism as a practice had been around since the founding era. (Explain.) But its emergence as a theory is more recent.

Originalism emerged in the early 1980s, largely in reaction to controversial decisions of the Warren and Burger Courts. To set the backdrop against which the theory of originalism initially emerged, think of just two of the more politically controversial decisions produced by the Warren and Burger Courts:

SLIDE

- **Miranda v. Arizona**. The Fifth Amendment provides that "no person . . . shall be compelled in any criminal case to be a witness against himself." In *Miranda*, the Warren Court went farther than the text to adopt a prophylactic rule protecting the right against self-incrimination. As anyone who watches any crime tv knows, the Constitution now requires a state actor taking someone into custody to inform him that "anything you say may be held against you in a court of law." The failure to administer that warning means that any confession, no matter how voluntarily given, will be excluded from evidence in a criminal trial.

SLIDE

- **Roe v. Wade**. The Fourteenth Amendment guarantees that no person will be deprived of life, liberty, or property without due process of law. In *Roe*, the Burger Court interpreted these words to guarantee women the right to obtain an abortion.

SLIDE

Living Constitutionalism

At the time these cases were decided, pretty much everyone in the legal academy agreed that these decisions were not required by the constitutional text.

- Those who defended the decisions argued that that was a good thing; that the Constitution, as a living document should evolve, and that the Supreme Court should interpret the Constitution to push the country forward in accordance with an

evolving sense of morality. The theory of the "living Constitution" was developed as a way of justifying these decisions, which could not be justified by reference to text alone.

- Those who criticized the decisions said "whose morality?" The moral views of the 9 elite justices were not necessarily consistent with those of most citizens, and so to impose those views on the country was anti-democratic. The Constitution is law, these critics said, its text means something, and it's the job of the Supreme Court to interpret it, not invent it.

SLIDE

Conservative Reaction

Enter Robert Bork, who famously criticized the Court.

- This quote is representative: "We are increasingly governed not by law or elected representatives but by an unelected, unrepresentative, unaccountable committee of lawyers applying no will but their own."

- Bork argued that the proper way to interpret the Constitution was to adhere to the original intentions of those who wrote it. The meaning of a law did not evolve with the times according to the opinions of unelected judges. The meaning of a law, including the Constitution, is fixed at the time of its enactment. Only then can it have a claim to democratic legitimacy because it is at the time of enactment that a majority (for legislation) or a supermajority (for the Constitution) approves it. And the way to determine what this fixed meaning is, Bork argued, was to look to the original intentions of the men who drafted it.

This theory was called originalism, and in modern parlance, it is called "original intentions originalism" because of its emphasis on the original intentions of the framers. It gained immediate political traction because the political backlash against the Supreme Court of the 60s and 70s was so strong.

- In a famous speech at Tulane University in 1986 Edwin Meese, then Ronald Reagan's Attorney General, called for a "jurisprudence of original intent."

SLIDE

Original Intent Originalism

- What did the Framers intend for this language to mean?
- How would they have expected it to apply to the current circumstance? (Add thought bubble to something like a computer or an iPad).
- And in this version of originalism, we would ask "What Would James Madison Do?"

SLIDE

- The theory was openly motivated by a desire for judicial restraint.

Throughout the 1980s and 90s, forests of trees were felled in law review articles defending and critiquing originalism.

SLIDE

Criticisms of Original Intentions Originalism

Many minds (CLICK)

- If we in this room drafted the 4th Am prohibition against "unreasonable searches and seizures," my guess is that we may well have many competing views about what particular searches are unreasonable.

How can we know? Mind readers? (CLICK)

- How can I channel James Madison?

Why bound by thoughts instead of words? (CLICK)

Dead hand (CLICK)

"Original intentions originalism" is the form of originalism that dominates the popular consciousness. It might even be what you think of when you think of originalism—as adhering to the framer's intent. **But it's not actually the form of originalism that most originalists subscribe to today.** This is a really important point that I can't stress to you

enough. The public—even lawyers—routinely associates originalism with the "intent of the framers" and it is really hard to break them out of that way of thinking.

SLIDE

ORIGINAL PUBLIC MEANING ORIGINALISM

Justice Scalia is the justice—indeed, the person—most closely associated with modern originalism.

- He shifted the theory of originalism from a "theory of original intention" to a "theory of original meaning." [At a speech at DOJ on June 1, 1986, 3 months before he took his seat on the Supreme Court, then-Judge Scalia urged a shift from "the Doctrine of Original Intent to the Doctrine of Original Meaning. That speech, juxtaposed with his ascendance to the SCt, is a convenient marker for the shift to original meaning originalism.]

Original *intentions* originalism asks what the writers of the Constitution thought their words meant. Original *public meaning* originalism asks what a skilled user of the language would have understood the words to mean when she read them. What was the accepted public meaning of the language at the time it was used?

Modern originalists are interested in discovering the original public meaning of the Constitution's text.

- Thus, an originalist today doesn't care about what James Madison said because she considers James Madison's intent controlling. Perhaps instructive here is that James Madison himself intended for his own notes to be secret.

- An originalist cares about what James Madison said because he was an informed observer at the time. What he thought isn't conclusive, it is one opinion among many, including those of the state ratifying conventions, those who wrote op-eds in contemporary newspapers, members of the First Congress, and judges, about what informed observers at the time understood the words of the Constitution to mean.

SLIDE

Original Public Meaning Originalism answered *some* of the criticisms made of Borkian originalism—most importantly, that a multimember body cannot be said to have a single "intent," and that in any event, the private intention of any individual lawmaker

about how a law should be applied is not itself "law." In these respects, it became a more intellectually viable theory.

- **The rationale for focusing on meaning rather than intent is this**: **We are a government of laws, not of men.** What an individual legislator, be he a framer of the Constitution or the drafter of a statute, has in mind when he writes does not have the force of law. It is his words that do, because it is by the words that we are governed.

- **The whole notion that there is a single "intent of the framers," moreover, is a fiction.** This is the "many minds" problem. Neither the Constitution nor any statute is drafted by one person; it is drafted by a group. Individuals within the group may have various and conflicting intentions about what a particular phrase means, or about how that phrase may be applied to a particular circumstance. Whose intention controls? And how do you go about reliably finding it?

Let me give you an example of a situation in which original intentions originalism and original public meaning originalism might yield a different result.

- **"Equal protection of the law"** Jim Crow

- When I commit myself to a principle, I'm committed to go wherever that principle might take me, even if it takes me to a place that I didn't plan (or want) to go.

SLIDE

Tools for Discerning the OPM: Federalist Papers, Anti-federalist Papers, ratification debates, contemporary commentary, contemporary judicial decisions, contemporary legislation, contemporary legislative debates. (CLICK after each)

(CLICK)
Important Debate: What is the role of expected applications? Do the ways in which informed observers expected language to apply bear on the original public meaning of the document?

SLIDE

Continuing Critiques of Originalism

SLIDE

Dead Hand

- *One response is Steven Calabresi's witty one: Living constitutionalists do not contend that statutes like the Civil Rights Act or the Social Security laws or the*

16th Amendment giving congress the power to impose an income tax should be ignored because those laws were made by dead people. They do not contend that any SCt opinion ceases to bind once the justices in the majority die. A continuous society presupposes the ongoing validity of laws made by preceding generations. Those laws do not derive their force from the command of the dead mouth, but from our continuing acceptance of a legal system in which we treat the law on the books as retaining effect until we change it through the agreed-upon processes. We're not bound to accept what our ancestors said; we are free to change it. The disagreement between living constitutionalists and originalists is about whether we must change it through the constitutionally prescribed processes.

SLIDE

Law office history

- Judges, not to mention most lawyers, are not trained historians. They are therefore ill equipped to discern the original public meaning of the text.

- *Response: Judicial capability of doing the task that living constitutionalists would require of them is equally shaky. Are they well-suited to identify what values a majority of contemporary society deems fundamental? Or, worse, what values ought to be "fundamental" even if a majority of modern society does not treat them as such? (I.e., if only elites believe them so).*

SLIDE

Stare Decisis

- Many well-entrenched precedents are arguably at odds with the original public meaning of the constitutional provisions they interpret. The constitutionality of paper money is a frequently invoked example. If originalism would require overruling these precedents, it is unworkable. If originalism permits the retention of precedents that are inconsistent with the original public meaning, it is unprincipled.

SLIDE

Originalism is Inflexible

- Permitting historical meaning to control renders the Constitution unable to handle changed circumstances.

- *There are two answers to this objection. One is that originalists can easily apply timeless constitutional commands to new technologies, like wiretapping or tv broadcasting. The text, history, and structure of the Constitution provide the originalist not with a conclusion, but with a premise. That premise states a core value that the Framers intended to protect. The originalist judge must then supply the minor premise in order to protect the constitutional freedom in circumstances that those who ratified the document could not foresee. We apply the core First Amendment principle to broadcasting and cable tv, and the core Fourth Amendment principle to electronic wiretaps. The framers need not have foreseen every situation to which the principles they adopted would apply.*

- *The other is that the Constitution doesn't purport to answer every question. It leaves legislative majorities a lot of room within which to work, and legislative majorities are the ones charged with responding to new circumstances. To the extent that the Constitution becomes outdated in a way that hinders progress, constitutional amendment is the answer.*

- *And it is worth remembering that in some respects, inflexibility is the very point of the Constitution. The First Amendment protects offensive political speech, period. The point of a Constitution is to tie us to certain principles, like Odysseus tied to the mast of the ship to resist the Sirens. Those inflexible restraints help us resist our worst selves, so that our better nature prevails.*

SLIDE

The Interpretation/Construction Distinction

One very prominent strain of new originalism advances the schema of "interpretation" and "construction" to describe the problem of more open-ended constitutional language.

Sometimes, the Constitution prescribes a rule: Like the President must be at least 35 years old. In that event, there is nothing left to do. Interpreting the language yields your answer.

But sometimes, the Constitution lays down a standard: "Necessary and Proper" "Cruel and Unusual" are often offered as examples. *(See Calabresi & Fine).*

- The Necessary and Proper Clause does not detail the ways in which Congress might choose to effectuate its Article I powers; it leaves that matter to Congress's discretion. Similarly, the Cruel and Unusual Punishments Clause of the 8th Amendment does not offer a laundry list of those punishments considered "cruel

and unusual." It uses an open ended term, which permits its application to punishments not yet employed (or even conceived of) at the time the Clause was adopted, and perhaps also room for punishments then thought acceptable to be rendered unconstitutional as the standards of society evolved.

- Interpreting the words will not yield your answer. Open-ended language delegates some discretion to decision-makers, who must then apply it.

- Interpretation is always the first step—determining what the language of the Constitution meant to the people who ratified it. But if the ambiguous language does not yield a clear answer, we can't describe what the public official—be he judge, president, or congressman—is doing as "interpretation." They say that what the judge is doing is "construction." Construction is bounded by the language of the Constitution; the language sets a frame that construction must stay within. In other words, the process of construction does not permit *departures* from the text.

- **For example, we have a complex doctrine of free speech law measuring when the government has unconstitutionally curtailed speech—distinctions between public and private fora, the requirement that regulations be narrowly tailored.** None of that appears on the face of the constitutional text. Judges have fashioned it because simply saying that "Congress shall not [ ]" doesn't answer most problems that arise in this area. Courts need to come up with some guidelines for judging the government's conduct.

- **Constitutional constructions are build-outs that result from practice—caselaw when we're talking about the judiciary, political practice when we're talking about the elected branches**. The president's power in foreign affairs, the political question doctrine, the case and controversy requirement are all examples of doctrines that we might think of constructions: They are build-outs of the document rather than rules that one can derive simply from interpreting the bare text of the document.

SLIDE

LEVEL OF GENERALITY IS A VERY DIFFICULT ISSUE FOR THE CONSTRUCTION MODEL

- **Judges obviously have more discretion in "filling in the gaps" of standards than they do in enforcing clear rules.** So determining the level of generality at which a constitutional text should be read is a crucial question.

Who constructs? If the Constitution leaves open spaces that must be filled by subsequent interpreters, is that the job of Congress? The President? Or the Court?

SLIDE

"LIVING ORIGINALISM"

Now is a good point at which to describe a very interesting development in originalism—that it has become a very large tent.

In the last several years, a significant number of progressives have embraced originalism, Professor Jack Balkin at Yale being the most prominent.

- In many ways, this is a tribute to originalism. Originalist arguments that the text matters have been persuasive. The Constitution is a written document, and that has to mean something. When parties enter into a contract, we don't ignore the language they chose.

- Originalism began with conservative scholars and judges, but it is no longer just a conservative theory. And that is why Justice Elena Kagan told the Senate Judiciary Committee at her confirmation hearings: "We are all originalists." Originalists will by no means be unanimous in their interpretive results: Justices Scalia and Thomas did not always agree. But they do share a commitment to the importance of the original meaning of our Constitution's text.

SLIDE

THE END

Primer on Textualism and Originalism

Originalism

What's it Not: Intent of the Framers. Trying to think your way into James Madison's mind.

- Criticisms of original intent originalism: Can many minds have a single intent? Even if so, why should we be bound by what lawmakers thought, rather than by what they said?

What it is: Original Public Meaning: How would an informed contemporary have understood this language?

- "The judicial power"
- "Commerce"
- "Unreasonable search or seizure"

This focus on the objective meaning of the text answered some of the forceful criticisms of original intent originalism.

This approach is closely associated with Justice Scalia and is the dominant approach of modern originalists. It is the strain of originalism on which I will focus.

It maintains that the meaning of the Constitution's text was fixed at the time of its ratification and that this original meaning constrains the content of constitutional doctrine. It remains fixed until lawfully changed.

Its emphasis is less upon judicial restraint and more upon constitutional fidelity.

- "Activist" – disagreement about what that means. Is it a tally of how many times a court holds a statute unconstitutional? Or does it mean a court that is unfaithful to the meaning of the enacted text?

Tools for Discerning the Original Public Meaning

- Examples include Federalist Papers, Anti-federalist Papers, ratification debates, contemporary commentary, contemporary judicial decisions, contemporary legislation

Some Critiques of Originalism

A. Dead Hand

- Why should we be governed today by laws adopted by people long dead?

- *One response is Steven Calabresi's witty one: Living constitutionalists do not contend that statutes like the Civil Rights Act or the Social Security laws or the 16th Amendment giving congress the power to impose an income tax should be ignored because those laws were made by dead people. They do not contend that Roe v. Wade or any other SCt opinion ceases to bind once the justices in the majority die. A continuous society presupposes the ongoing validity of laws made by preceding generations. Those laws do not derive their force from the command of the dead mouth, but from our continuing acceptance of a legal system in which we treat the law on the books as retaining effect until we change it through the agreed-upon processes. We're not bound to accept what our ancestors said; we are free to change it. The disagreement between living constitutionalists and originalists is about whether we must change it through the constitutionally prescribed processes.*

B. Law Office History

- Judges, not to mention most lawyers, are not trained historians. They are therefore ill equipped to discern the original public meaning of the text.

- *Response: Judicial capability of doing the task that living constitutionalists would require of them is equally shaky. Are they well-suited to identify what values a majority of contemporary society deems fundamental? Or, worse, what values ought to be "fundamental" even if a majority of modern society does not treat them as such? (I.e., if only elites believe them so).*

C. Precedent

- Many well-entrenched precedents are arguably at odds with the original public meaning of the constitutional provisions they interpret. The constitutionality of paper money is a frequently invoked example. If originalism would require overruling these precedents, it is unworkable. If originalism permits the retention of precedents that are inconsistent with the original public meaning, it is unprincipled.

D. Originalism is Inflexible

- Permitting historical meaning to control renders the Constitution unable to handle changed circumstances.

- *There are two answers to this objection. One is that originalists can easily apply timeless constitutional commands to new technologies, like wiretapping or tv broadcasting. The text, history, and structure of the Constitution provide the originalist not with a conclusion, but with a premise. That premise states a core value that the Framers intended to protect. The originalist judge must then supply the minor premise in order to protect the constitutional freedom in circumstances that those who ratified the document could not foresee. We apply the core First Amendment principle to broadcasting and cable tv, and the core Fourth Amendment principle to electronic wiretaps. The framers need not have foreseen every situation to which the principles they adopted would apply.*

- Kyllo: In a 5-4 opinion delivered by Justice Antonin Scalia, the Court held that "[w]here, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant."

- *The other is that the Constitution doesn't purport to answer every question. It leaves legislative majorities a lot of room within which to work, and legislative majorities are the ones charged with responding to new circumstances. To the extent that the Constitution becomes outdated in a way that hinders progress, constitutional amendment is the answer.*

- *And it is worth remembering that in some respects, inflexibility is the very point of the Constitution. The First Amendment protects offensive political speech, period. The point of a Constitution is to tie us to certain principles, like Odysseus tied to the mast of the ship to resist the Sirens. Those inflexible restraints help us resist our worst selves, so that our better nature prevails.*

Textualism

Like originalism for statutes. Because the time lag isn't as great, and because the language is more detailed, requires less historical study.

Role of compromise

Canons

Both approaches emphasize democratic legitimacy: The law is what democratic majorities (and in the case of the Constitution, a supermajority) have enacted into law. That is legitimate because succeeding generations retain the power to change it.

Class of 2018, I am both proud to see you sitting in these seats and honored to speak to you today. I feel like your three years with us has flown. I can only imagine what it's like for your families, who have been watching you grow for many more years than we have. You have accomplished so much, and you are about to accomplish so much more.

I'm going to talk to you today about words. Using them is a super-power that I hope we've given you, because words are the essential tool of our trade. Accountants work with numbers, doctors with the body, and lawyers work with words. Words bring contracts to life. They transfer property. They give force to statutes and judicial opinions. You know—perhaps better than most—that language has power. Today, I want to encourage you to use that power wisely.

Speak up

What you say reflects who you are and what you believe. And not everyone will love who you are or what you believe. Have the courage of your convictions. Don't be afraid to use your words just because they may earn you contempt. That's tough to do—who doesn't prefer being loved to being hated? Choose your words wisely, but if they reflect

what's true and what's good, don't be afraid to say them. No one can accomplish real good in the world if they calibrate their lives to what other people think about them. Martin Luther King, Jr. was not out to win a popularity contest. Don't speak recklessly, but speak fearlessly.

Case Names

Now, the fact that your words reflect who you are does not mean that your words should be all about you. Quite to the contrary—use your words in the service of others. As you enter the profession, keep in mind what the language of the law has to teach us about that. Diseases are often named after the doctors who identify them—and so we have Down Syndrome and Alzheimer's Disease. The same is true of inventions—we have Braille and Pasteurization. And it is also true of statutes—many of you have studied the Sarbanes-Oxley Act. But cases are named not after the lawyers who litigate them or the judges who decide them, but after the people on whom they had the greatest effect. The connection of the law to the lives of real people is hard-wired into the language lawyers speak. Your constitutional law casebook does not contain a case entitled "John Marshall's Triumph" or even "The Judicial Review Case." It contains Marbury v. Madison. You leave law school remembering Helen Palsgraf's

injury at the train station and the Brown family's fight against the Topeka Board of Education. You also carry with you the reminders of the law's tragedies: Dred Scott stands with us still.

Never forget that the law is developed for the people—flesh-and-blood-people—whom you will now serve. And all of you—whether full time or pro bono—should use the legal language you now know to be a voice for the voiceless. Remember the words that the Book of Proverbs speaks to lawyers: "Open your mouth for the mute, for the rights of all who are destitute."

Transition

Of course, your facility with language—the super-power with which you graduate today—won't affect only life at the office. Your friends and family may have already seen that being a lawyer has become a part of who you are. You've got a super-power now; ***with great power comes great responsibility.*** Choose your words wisely.

Admit when you're wrong

Lawyers get a bad rap for wanting to argue things into the ground. I'm sorry to say that there is some truth in the stereotype. When you've been trained to argue, it can be hard to let that go.

Sometimes you should let it go even when you're right, but you must always let it go when you're wrong. That's true professionally, when you have to correct the record, and that's true personally, when you have to roll back what you've said to a friend.

Hold onto the wisdom of Winston Churchill, who said: "In the course of my life, I have often had to eat my words, and I must confess that I have always found it a wholesome diet." Class of 2018, be prepared to eat up.

Be Kind.

Be careful with your super-power. Watch when you should speak and when you should stay silent. It's just not true that "sticks and stones may break my bones but words will never hurt me." Harsh words stick around. Biting your tongue means hurting yourself before you hurt someone else.

Class of 2018, use your words to build up rather than to tear down. Be kind. Seek forgiveness, and give it too. Lawyers might have a particular

hard time forgiving: we are trained to spot injustice, and that can make it particularly hard to be on the receiving end of it. Mother Teresa gives good advice: “People are often unreasonable, illogical and self-centered; Forgive them anyway.”

Class of 2018, use your super-power for the good.

Conclusion

Your education lies behind you. Your career lies in front of you. Today, be filled with gratitude for everything you have been given so far and for everything that you will receive in the future. Let the celebration begin.

Notre Dame Law School celebrates Class of 2018

Published: May 23, 2018
Author: Kevin Allen [link:/news-events/news/authors/kevin-allen/]

This past weekend, the graduates of Notre Dame Law School's Class of 2018 celebrated their achievements, reflected on friendships built and lessons learned, and gave thanks for their many blessings.

While a commencement ceremony marks the end of an era in students' lives, it also marks the beginning of much more.

At the class prayer service Saturday morning at the Basilica of the Sacred Heart, the Law School's chaplain, Rev. Pat Reidy, C.S.C., confessed that he and his fellow resident assistants wrote their names in Sorin Hall's attic before they graduated from the University in 2008.

Rev. Pat Reidy, C.S.C., speaks to the Law School's Class of 2018 on Saturday, May 19, at the Basilica of the Sacred Heart.

"I'm sure we figured that nobody would ever see it, and I think we were OK with that. We just needed to know that our names were there, that all our memories counted for something, that we left our mark somehow," Reidy said.

"One of my favorite ethnographers – a guy from Nashville named Jason Aldean [link:https://www.youtube.com/watch?reload=9&v=EU-zks4FRlI] – describes the feeling perfectly," Reidy said. Then he entertained the Basilica audience by singing the chorus of Aldean's "Tattoos on This Town."

It sure left its mark on us, we sure left our mark on it
We let the world know we were here, with everything we did
We laid a lot of memories down, like tattoos on this town

"It wasn't until graduation that I realized just how much of my life had been marked by Notre Dame. It marked my life. It tattooed my heart," Reidy said.

"That person you've been and become in this place, share that joy with the world," he said. "You don't need a paintbrush to leave your mark on this world. You need joy – the kind of joy you've known in this place, the kind of joy that leaves its mark on you forever."

SEE MORE PHOTOS

Click on these links to see photo galleries from the Class of 2018's Prayer Service [link:https://www.facebook.com/media/set/?set=a.1654292967941391.1073741845.384526071584760&type=1&l=61d83974251 and Hooding and Diploma Ceremony [link:https://www.facebook.com/media/set/?set=a.1654302964607058.1073741846.384526071584760&type=1&l=ee16c74765].

On Saturday afternoon, the Law School held its 148th Hooding and Diploma Ceremony at the Joyce Center. The Law School conferred 204 J.D. and 41 LL.M. degrees to the Class of 2018.

The class selected the Honorable Amy Coney Barrett of the U.S. Court of Appeals for the Seventh Circuit as the Distinguished Professor of the Year. Judge Barrett, who earned her J.D. from Notre Dame in 1997, has been a member of the Law School's faculty since 2002. The U.S. Senate confirmed her as a judge for the Seventh Circuit in October.

In her address to the graduates, Barrett talked about the power of words – especially in law.

"Words are our essential tool of the trade," she said. "Accountants work with numbers, doctors work with the body, lawyers work with words. Words bring contracts to life, they transfer property, they give force to statutes and judicial opinions."

Barrett encouraged graduates to use their new “superpower” wisely.

“Choose your words wisely. If they reflect what’s good and what’s true, don’t be afraid to say them,” she said. “Don’t speak recklessly, but speak fearlessly.”

Members of the Law School’s Class of 2018 sing the Alma Mater, “Notre Dame, Our Mother,” at the Hooding and Diploma Ceremony on Saturday, May 19, at the Joyce Center.

Barrett added that the words the graduates use will reflect who they are, but that doesn’t mean their words should be all about themselves.

“Diseases are named after the doctors who identified them, so we have Down syndrome and Alzheimer’s disease,” she said. “The same is true of

inventions, so we have Braille and pasteurization.”

But legal cases are different.

“Cases are not named after the lawyers who litigated them or the judges who decided them, but after the people on whom they had the greatest effect,” she said.

“The law was developed for people – for the flesh-and-blood people you will now serve,” she said. “And all of you, whether full time or pro bono, should use the legal language that you now know to be a voice for the voiceless.”

The Law School’s three most prestigious awards were announced during the Hooding and Diploma Ceremony.

Brent Murphy of Biloxi, Mississippi, received the Law School’s highest honor – the Colonel William J. Hoynes Award. The award is named for Notre Dame Law School’s first dean and is presented annually to the member of the graduating class who has the best record in scholarship, application, deportment, and achievement.

From left, Mathew Hoffmann, Brent Murphy, and Mary Katherine Hickey received the Class of 2018’s three most prestigious awards.

Murphy was editor-in-chief of the Notre Dame Law Review during the 2017-2018 academic year. He earned his B.A. in political science with a minor in theology from Notre Dame in 2015.

After graduation, Murphy will clerk for the Honorable Paul J. Kelly Jr. of the U.S. Court of Appeals for the Tenth Circuit and then Judge Barrett in the Seventh Circuit. Judge Kelly earned his B.B.A. at Notre Dame in 1963.

Mary Katherine Hickey of Mechanicsburg, Pennsylvania, received the Dean Joseph O’Meara Award. The honor is presented annually to a member of the graduating class for outstanding academic achievement.

Hickey served as executive managing editor of the Notre Dame Law Review during the 2017-2018 academic year. She was the Class of 2018’s

recipient of the Conrad Kellenberg Award for Community Service and the H. King Williams Award, which is presented each year to a graduating student who has made a significant contribution to building community at the Law School. She earned her B.A. in history from Villanova University

in 2015.

After graduation, Hickey will clerk for the Honorable Charles R. Wilson of the U.S. Court of Appeals for the Eleventh Circuit. Wilson earned his B.A. at Notre Dame in 1976 and his J.D. from the Law School in 1979.

Mathew Hoffmann of Calgary, Alberta, received the Farabaugh Prize for high scholarship in law. The award was established by Gallitzin A. Farabaugh, a South Bend attorney.

Hoffmann was a note and submissions editor for the Notre Dame Law Review during the 2017-2018 academic year. He served as an assistant rector in Keough Hall during his second year at the Law School. He graduated from Georgetown University in 2014 with a double major in chemistry and government. He will return to Washington, D.C., this fall to work at Jones Day.

More coverage of Commencement 2018

With law degree, Class of 2018's Ashley Bowman becomes a Triple Domer [link:https://law.nd.edu/news/with-law-degree-class-of-2018s-ashley-bowman-becomes-a-triple-domer/]

Arianna Cook-Thajudeen and William Tronsor named 2018 Bank of America Foundation Fellows [link:https://law.nd.edu/news/nd-law-names-2018-bank-of-america-fellows/]

Ka'sha Bernard and Robert Lee named 2018 Shaffer Fellows [link:https://law.nd.edu/news/2018-shaffer-fellows/]

Veronica Canton, '18 J.D., receives ABA leadership award [link:https://law.nd.edu/news/veronica-canton-18-j-d-receives-leadership-award-from-american-bar-association/]

Professors Barbara Fick and Douglass Cassel announce retirements [link:https://law.nd.edu/news/professors-barbara-fick-and-douglass-cassel-announce-retirements/]

Professor Nicole Garnett addresses Holy Cross College's Class of 2018 [link:https://law.nd.edu/news/professor-nicole-stelle-garnett-addresses-holy-cross-colleges-class-of-2018/]

Back to list

Seventh Circuit Roundtable Roundup

May 25, 2018 10:42 AM

By Margaret A. Manetti,
Codilis & Associates, P.C.

The Appellate Lawyers Association hosted the judges, administrators, and mediators of the United States Court of Appeals for the Seventh Circuit at its annual roundtable discussion and luncheon at the Union League Club of Chicago on May 15, 2018.

The Court's newest members, Judge Michael Brennan, Judge Michael Scudder, and Judge Amy St. Eve, joined the luncheon. Following tableside discussions with 11 judges from the Court, Deputy Clerk Chris Conway addressed new court rules concerning access to the record and a new timing and lighting system to be used during oral arguments. Next, a panel featuring Judge Michael Kanne, Judge Diane Sykes, and Judge Amy Barrett spoke about appellate practice, with ALA President Evan Siegel moderating the discussion.

The panel of judges described their individual methods on preparing for oral argument and the involvement of their law clerks. Judge Sykes described how she chaired a committee that led the Court to introduce a new policy allowing oral arguments to be video-recorded at the request of counsel or the public. And Judge Kanne, who has served on the Court for 31 years, noted that one of the most important issues facing the Court and appellate community is protecting pro se litigants' rights and obtaining counsel to represent them.

The ALA congratulates Judge Brennan, Judge Scudder, and Judge St. Eve and expresses its appreciation to the entire Court and staff for their participation in the luncheon.

Home » *The Brief* » *Seventh Circuit Roundtable Roundup*

ND Law School hosts investiture of Judge Amy Coney Barrett

Published: February 28, 2018
Author: Notre Dame Law School [link:/news-events/news/authors/notre-dame-law-school/]

Notre Dame Law School was privileged on Friday to celebrate a beloved alumna and professor, Amy Coney Barrett, '97 J.D., by hosting her investiture as a judge [link:https://law.nd.edu/news/us-senate-confirms-professor-amy-barrett-as-federal-judge/] for the U.S. Court of Appeals for the Seventh Circuit.

An audience of colleagues, friends, and family members filled the Patrick F. McCartan Courtroom for the ceremony, which included a touching combination of praise and anecdotes from people who have known Judge Barrett personally and professionally throughout her life.

"I have learned many things over the last year, but truly, the most important is how fortunate I am to have a life brimming with so many wonderful people," Barrett said.

Barrett [link https://law nd edu/directory/amy-barrett/] will continue to teach at Notre Dame Law School as one of two judges on the Law School's faculty. Judge Kenneth Ripple [link:https://law nd edu/directory/kenneth-ripple/], also of the U.S. Court of Appeals for the Seventh Circuit, has taught at the Law School for more than 40 years.

Rev. John Jenkins, C.S.C., president of the University of Notre Dame, delivered the invocation at the investiture. Several other judges from the U.S. Court of Appeals for the Seventh Circuit, seated behind Jenkins in the above photo, attended the investiture. Chief Judge Diane Wood, seated in the center, presided over the ceremony.

U.S. Senator Todd Young of Indiana praised Barrett for her brilliant legal scholarship and integrity. Young, pictured above, noted that Barrett is the first woman from Indiana to serve as a judge on the U.S. Court of Appeals for the Seventh Circuit.

Ara Lovitt, pictured above, served as a law clerk for U.S. Supreme Court Justice Antonin Scalia during the same term as Barrett. Lovitt recalled Scalia saying, “Isn’t Amy terrific?”

“This was high praise coming from Justice Scalia, who used to say all of us law clerks were fungible,” Lovitt said, drawing laughs from the audience. “I’m confident that Justice Scalia is looking down on her today and beaming with pride.”

Notre Dame Law Professors Nicole Stelle Garnett, pictured above, and Bill Kelley both offered remarks about Barrett at the investiture. Garnett talked about how gracefully Barrett faced the Senate confirmation process when she was nominated to serve as a judge.

Barrett's husband Jesse Barrett, '96, '99 J.D., an assistant U.S. attorney in the Northern District of Indiana, earned a standing ovation after he delivered a touching speech about his wife's gift for empathy and personal relationships.

The couple met at Notre Dame Law School, and he talked about the many changes they have experienced together as they have lived in different cities, houses, and apartments, and brought seven children into their lives. "But there is one thing that hasn't changed – it is humbling to be married to Amy Barrett," he said. "You can't outwork Amy. I've also learned you can't outfriend Amy."

White House Counsel and Assistant to the President Donald McGahn, a 1991 graduate of the University of Notre Dame, presented Barrett with the Presidential Commission. McGahn is pictured on the left in the above photo.

The Honorable Laurence H. Silberman, senior judge for the U.S. Court of Appeals for the D.C. Circuit, administered the oath of office. Silberman is pictured on the right in the above photo. Barrett clerked for Judge Silberman after graduating from Notre Dame Law School.

Barrett's parents – Michael and Linda Coney – presented her with her judicial robe.

The investiture closed with the Notre Dame Glee Club singing “This Is My Country.” The song was special to Barrett’s grandfather, a World War II veteran, and the family regularly sings it at gatherings.

Share: [link:https://www.facebook.com/dialog/share?app_id=135465433914446&display=popup&href=https%3A%2F%2Flaw.nd.edu%2Fnews-events%2Fnews%2Fnd-law-school-hosts-investiture-of-judge-amy-coney-barrett%2F&title=ND%20Law%20School%20hosts%20investiture%20of%20Judge%20Amy%20Coney%20Barrett] [link:https://twitter.com/intent/tweet?text=ND%20Law%20School%20hosts%20investiture%20of%20Judge%20Amy%20Coney%20Barrett&url=https%3A%2F%2Flaw.nd.edu%2Fnews-events%2Fnews%2Fnd-law-school-hosts-investiture-of-judge-amy-coney-barrett%2F]

NDLS Program on Constitutional Structure Sponsors London Conference, Continuity and Change in Public Law

Published: February 16, 2017

The Program on Constitutional Structure [link:https://constitutional-structure.nd.edu/] and University of Oxford will co-sponsor a conference, Continuity and Change in Public Law, Feb. 16-17 at the University of Notre Dame in London.

Topics and Participants include:

The Myth of Judicial Supremacy
Aileen Kavanagh, associate professor of law, University of Oxford (St Edmund Hall)
Commentator: Erin Delaney, associate professor of law, Northwestern University

The President and the Detainees
Aziz Huq, Frank and Bernice J. Greenberg professor of law, University of Chicago
Commentator: Rachael Walsh, assistant professor of law, Trinity College Dublin

Rawls and the Perpetual Constitution
Paul Yowell, associate professor of law, University of Oxford (Oriel)
Commentator: Jeff Pojanowski, professor of law, Notre Dame Law School

The Place of Economic Crisis in American Constitutional Law: The Great Depression as a Case Study
Barry Cushman, John P. Murphy Foundation professor of law, Notre Dame Law School
Commentator: Jeff King, professor of law, University College London

A Plantagenet Constitution in the 21st Century
Timothy Endicott, professor of legal philosophy, University of Oxford (Balliol)
Commentator: Amy Barrett, Diane and M.O. Miller, II Research Chair in Law, Notre Dame Law School

Settled Versus Right: A Theory of Precedent
Randy Kozel, professor of law, Notre Dame Law School
Commentator: Richard Ekins, tutorial fellow in law, University of Oxford (St John's)

Sponsored by the NDLS Program on Constitutional Structure [link:https://constitutional-structure.nd.edu/] and the Oxford Programme for the Foundations of Law and Constitutional Government.
[link:https://www.law.ox.ac.uk/foundations-law-and-constitutional-government]

Posted In: **General News** [link:/news/category/general-news/] , **Home Page** [link:/news/category/home-page/] , **and News Page** [link:/news/category/news-page/]

The Law School P.O. Box 780, Notre Dame, IN 46556
Phone 574.631.6627
Fax 574.631.3980
ndlaw@nd.edu
Accessibility Information
Law School Admissions Office
1329 Biolchini Hall, Notre Dame, IN 46556
Phone 574.631.6626
Fax 574.631.5474
lawadmit@nd.edu
Like us on Facebook
Law School Career Development Office
Phone 574.631.7542
Fax 574.631.4789
lawjobs@nd.edu
Like us on Facebook

POLITICS [HTTPS://WWW.NEWS4JAX.COM/POLITICS/LEGISLATURE]

Scalia's former clerk talks implications of election for Supreme Court

Amy Barrett, former law clerk for US Supreme Court justice, speaks at JU

By **News4Jax.com Staff [https://www.news4jax.com/author/news4jax.comstaff]**

Posted: 11:21 PM, November 03, 2016
Updated: 11:25 PM, November 03, 2016

JACKSONVILLE, Fla. - The former law clerk of late United States Supreme Court Justice Antonin Scalia spoke to a crowded room at Jacksonville University Thursday evening about how the upcoming presidential election could impact the high court.

Amy Coney Barrett, J.D., who's now a constitutional law professor at Notre Dame University, said voters should know that the next president will likely nominate a Supreme Court justice, and that's something to consider when they cast their ballots on Tuesday.

"I think it's very important for all voters, because the Supreme Court has tremendous influence. It makes decisions that affect the whole country, so who fills those seats will be very important to our public policy," Barrett said. "People should not look to the Supreme Court as a super Legislature. They should look at the court as an institution that interprets our laws and protects the rule of law, but doesn't try to impose police preferences -- that's the job of Congress and the president."

At the final presidential debate, Republican candidate Donald Trump said he would nominate a justice who is pro-life and would uphold the 2nd Amendment.

Democratic nominee Hillary Clinton said she would look for a justice who supported women's rights and LGBT rights.

Barrett was in town to take part in the Hesburgh Lecture Series, which is hosted by the JU Public Policy Institute in partnership with the Notre Dame Club of Greater Jacksonville.

Evidence Presentation Notes

Invite questions throughout; no need to wait until end.

Also appropriate if you want to use the forum for engaging one another; in other words, all questions need not be directed at me. If you would like to solicit the views of other judges in the room about any of these matters, you should feel free to do that too.

The issues that the session's organizing committee asked me to discuss are obviously ones of concern to other circuits as well, because they most appeared on the Advisory Committee to the FRE's Fall 2016 agenda (meeting was just last Friday, 10/21).

Rule 404(b)

United States v. Gomez, 763 F.3d 845 (7th Cir. 2014) (en banc) (replacing the 7th Circuit's prior four-factor test with one that "more closely tracks the FRE."). (Hamilton, Wood, Rovner, and Williams concurred in the new formulation, but disagreed that the error was harmless in this case. Sykes wrote majority.)

Rule 404(a) prohibits what I describe to my students as the "Propensity Chain of Inference," or PCI for short. With some exceptions that we'll put aside here, evidence of other acts or crimes cannot be used to show that a person had a propensity to act in a certain way and that she thus acted in accordance with that propensity on a particular occasion. Sketch: propensity to deal drugs, so dealt drugs on x occasion. Or you can start at antecedent step: dealt drugs on this occasion, shows propensity to deal drugs, therefore likely dealt drugs on x occasion.

404(b) is sometimes described as an "exception" to this rule, but it's really not. 404(b) simply offers an illustrative list of uses that fall outside of the PCI ban. It is a common tactic in the rules of evidence to say that evidence is inadmissible for one purpose even if it is admissible for another. The fact that evidence is inadmissible for making the propensity argument does not render it inadmissible for other purposes.

404(b) lists some of the most common "other purposes" for introducing evidence of other bad acts: intent, absence of mistake, identity, motive, and so on. When introduced, say, to show m.o., the prosecutor is not walking the PCI. If the defendant has committed other crimes all bearing very distinct characteristics, that pattern becomes a "mark of Zorro," so to speak. You're not introducing the prior crimes to show that, say, because the defendant has robbed banks before he is likely to do so again. You're introducing them to argue that this defendant must have committed the bank robbery because the robbery had the distinct "mark" of the defendant. Sketch: Smith's other robberies committed this way, this robbery committed this way; therefore, likely that Smith is the robber. Not relying on the forbidden propensity inference.

FIRST TRAP: ENSURING THAT THE ARTICULATED PERMISSIBLE PURPOSE INDEED AVOIDS THE PROPENSITY INFERENCE. Just invoking something on the 404(b) list isn't enough; you need to be sure that the argument doesn't take a trip through the propensity box.

- From Gomez: The principle that emerges from these recent cases is that the district court should not just ask *whether* the proposed other-act evidence is relevant to a non-propensity purpose but *how* exactly the evidence is relevant to that purpose—or more specifically, how the evidence is relevant without relying on a propensity inference.

- Particularly tricky with intent: intended to deal drugs on a past occasion shows that he is more likely to have intended to deal drugs on the current occasion. Relies on the propensity inference: a predisposition to criminal intent. While this is a very common approach in many circuits, it is one that the Advisory Committee characterizes as a mistake, and it is one that the Seventh Circuit rejected in *Gomez*.

- In *Gomez*, the government wanted to introduce the defendant's prior cocaine possession as evidence of the defendant's identity. The defendant raised a mistaken identity defense: he claimed that he was not "Guero," the name of the person who participated in the drug conspiracy. The government argued that the fact that the defendant had possessed the drugs on a prior occasion made it more likely that he was in fact "Guero." But that was a propensity inference: because he possessed cocaine, he had a propensity to be involved with drugs, and that propensity made it more likely that he was involved in this drug conspiracy.

SECOND TRAP: ATTENTIVENESS TO PROBATIVE VALUE IN 403 BALANCING

Like most evidence, 404(b) evidence is subject to 403 balancing. The fact that it's not categorically barred does not mean that it is automatically admissible. And here's the thing: 404(a) bans character evidence in large part because it is particularly prejudicial. Because "other bad acts" evidence can raise two inferences, and one is substantially prejudicial, surviving the balancing test requires the permissible to be particularly probative.

The probative value of evidence depends upon context. If a defendant admits that he fired the gun that killed the victim, but says that the trigger went off by mistake, then evidence of his identity is not particularly probative because his identity is not contested. Parroting off that evidence is introduced for identity seems a cover for getting evidence in front of a jury in the hopes that it will draw the impermissible inference. Probative value is low and risk of unfair prejudice substantially outweighs it.

I read *Gomez* emphasizing the importance of measuring probative value. In the 404 context, as elsewhere, a 403 challenge requires more than the determination that proposed

evidence is *relevant*. It requires the court to assess the probative value of the evidence, and when evidence is highly prejudicial, the probative value must clear a higher hurdle than the low "relevancy" test.

INTENT: PARTICULARLY TRICKY ON PROBATIVE VALUE.

If the defendant is not actively contesting his mental state, then the probative value of evidence designed to show his mental state is typically very low, and the highly prejudicial value of such evidence will typically outweigh it.

- *Intent point from Gomez*: The specific-intent/general-intent distinction in the Rule 404(b) context is sometimes misunderstood. The critical point is that for general-intent crimes, the defendant's intent can be inferred from the act itself, so intent is not "automatically" at issue. The paradigm case involves a charge of distribution of drugs, see Hicks, 635 F.3d at 1070–71, a general-intent crime for which the government need only show that the defendant physically transferred the drugs; the jury can infer from that act that the defendant's intent was to distribute them. Hence our rule that "[b]ecause unlawful distribution [of drugs] is a general intent crime, in order for the government to introduce prior bad acts to show intent, the defendant must put his intent at issue first."

- Example of specific intent crime: A state's law defines aggravated battery as "intentional and harmful physical contact with another with the intent to maim or disfigure." This is a specific intent crime because it requires that the defendant not only cause harmful contact, but also with the purpose of maiming or disfiguring the victim.

CONDITIONAL RELEVANCE

Huddleston/104(b): The other principle to keep in mind when considering "other bad acts" evidence is the conditional relevancy standard of 104(b). In Huddleston v. U.S., the Court held that 104(b) applied here, and so "bad acts" evidence is admissible only if there is evidence sufficient to permit a reasonably jury to conclude, by a preponderance of the evidence, that the person committed the other act.

REVERSE 404(b)

Reverse 404(b): So-called "reverse 404(b)" evidence is evidence introduced by the defendant to show that someone else committed the crime with which he is charged. It exonerates, rather than incriminates, the defendant. It also illustrates how Rule 403 operates in the Rule 404(b) context. 404(a) doesn't distinguish between litigants; it prevents the defendant, like the prosecutor, from walking the PCI. Thus the defendant can't argue that another suspect's bad character makes it more likely that that suspect committed the crime. But the defendant can introduce that evidence for a non-PCI purpose like providing identity or motive.

- Good Wife example: Deft charged with a robbery in which the perp yelled "Kiss the Floor." After deft was jailed, another robbery was committed by someone who yelled "Kiss the Floor." Deft wants to introduce the evidence of that person's crime to argue that that person likely committed the robbery for which he is charged. The police got the wrong man. 404(a)'s ban does not apply because this is a m.o. argument rather than a PCI argument.

- The reasoning is the same: Once the deft identifies a "non PCI" purpose for the evidence, the prosecutor can object based on Rule 403, and the court must perform a prejudice/probative value balancing test.

- But things shake out differently in the 403 balancing test. Risk of prejudice far less severe. In most cases, it is unlikely that jury is going to punish government. To be sure, confusion of issues, waste of time in mini-trial, etc. all remain considerations. But because such evidence doesn't typically carry a high risk of unfair prejudice, the probative value doesn't have to be as significant to survive a 403 objection.

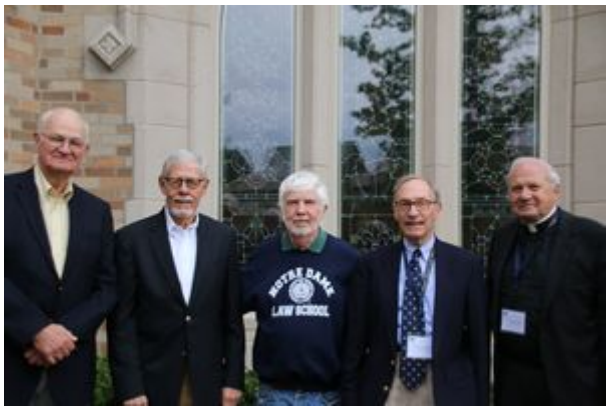
Reunion

Reunion 2017

If your graduation year ends in a 2 or 7, join us on campus for Reunion 2017 from June 1-4. More information, including registration, packages, and accommodations, visit myNotreDame [link:http://reunion.nd.edu/s/1210/myND/landing-2col-wide.aspx?sid=1210&gid=1&pgid=314]. If you register by April 30, you can save up to $50 on registration.

Notre Dame Law School Welcomed Alumni to First Fall Reunion

Law School classmates returned to Notre Dame Law School in October to enjoy a beautiful fall weekend on campus. Alumni had the opportunity to reminisce and reconnect with their classmates at events throughout the weekend. The reunion began with a panel presentation in the McCartan Courtroom by three faculty members — Amy Barrett, A.J. Bellia, and Bill Kelley — who shared their experiences while "Clerking for Justice Scalia." Both alumni and students enjoyed the presentation and the faculty took many questions from the crowd.



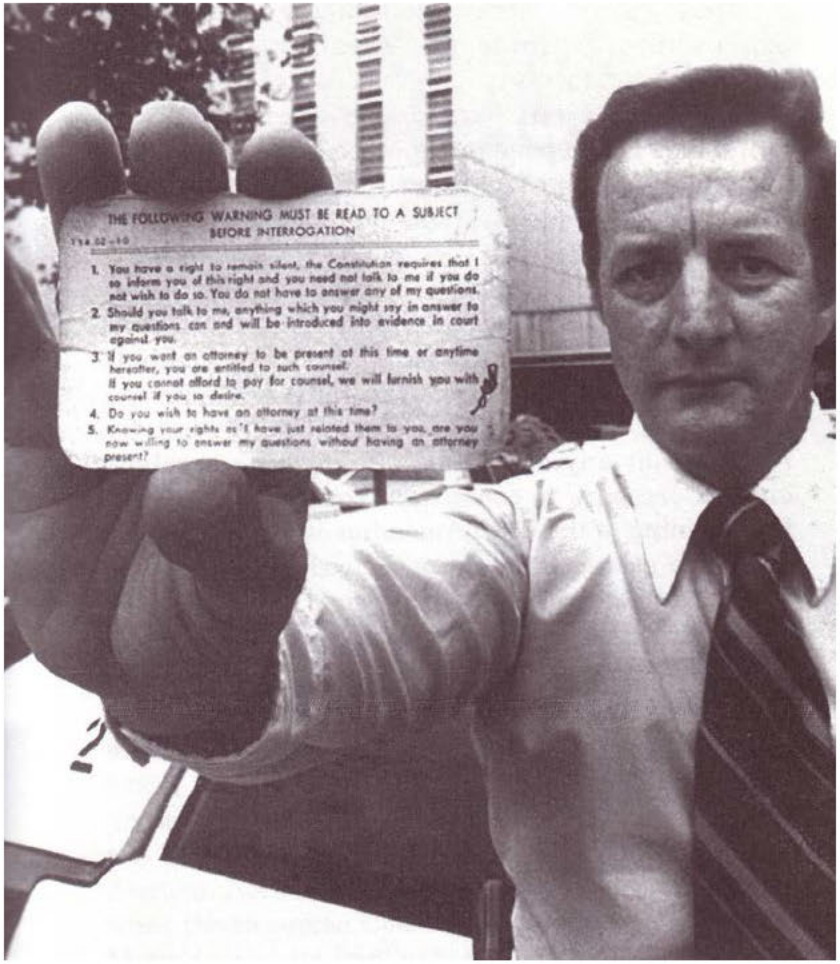
An Intellectual History of Originalism

Professor Amy Coney Barrett
Notre Dame Law School

Three Phases of Originalism

- Original Intentions Originalism
- Original Meaning Originalism
- Interpretation and Construction

Historical Backdrop of the Originalism Debate



Miranda v. Arizona (1966)

Historical Backdrop of the Originalism Debate

Roe v. Wade (1973)

Historical Backdrop of the Originalism Debate

Living Constitution: Sophisticated Justification

Historical Backdrop of the Originalism Debate

Conservative Backlash

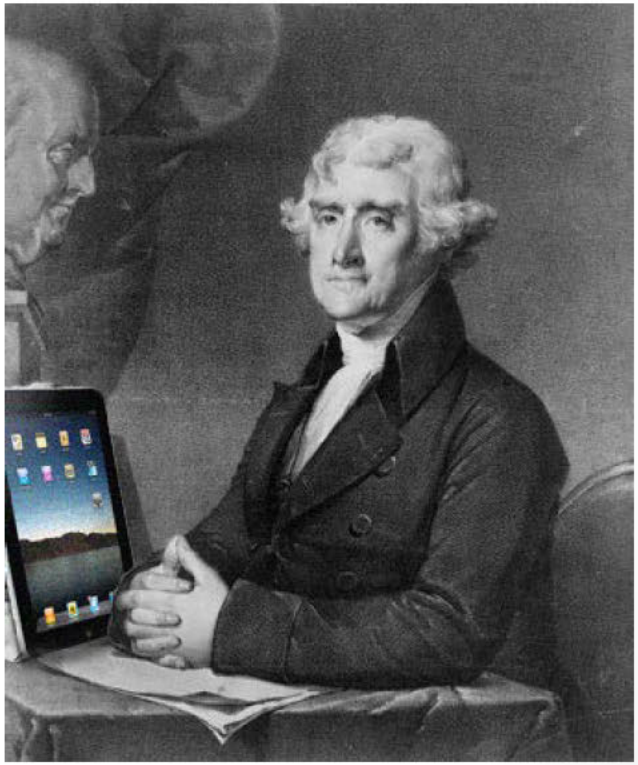
The Honorable Robert Bork

"We are increasingly governed not by law or elected representatives, but by an unelected, unrepresentative, unaccountable committee of lawyers applying no will but their own."

Original Intent Originalism: Focus on the Framers' Intent

What did the Framers intend for this language to mean?

How would they have expected it to apply to the current circumstances?



Original Intent Originalism: Focus on the Framer's Intent

Desire for judicial restraint fueled the theory

Criticisms of Original Intent Originalism

- How many minds have a single intent?
- How can we know what was in their minds?
- Why should we be bound by what lawmakers thought, rather than what they said?
- Why should the dead hand of the past bind us?

Original Public Meaning Originalism

- What was the public meaning of this text at the time of its ratification?

- Answered some of the criticisms of original intentions originalism.

In particular, it dealt with the objections that a multimember body can't have a single intent, and that the private intention of any individual lawmaker about how a law should be applied is not "law."

TEXT CONTROLS

- The meaning of the words at the time they were ratified is the meaning that we apply today.

- The original PUBLIC meaning of the text, not the PRIVATE understanding of any individual.

Tools for Discerning the Original Public Meaning

- Federalist Papers
- Antifederalist Papers
- Ratification debates
- Contemporary dictionaries
- Contemporary commentary
- Contemporary judicial decisions
- Contemporary legislation

Important Debate: Role of Expected Applications

Criticisms of Original Public Meaning Originalism

- Dead hand control
- Law office history
- Stare decisis
- Inflexibility

DEAD HAND OF THE PAST

LAW OFFICE HISTORY

Lawyers are advocates, not historians.

STARE DECISIS

Is paper money unconstitutional?

INFLEXIBLE

The Interpretation / Construction Distinction

Rules vs. Standards

The Construction Model

Difficult Issue:

Level of generality at which a provision is read

Who Constructs? Congress?

The President?

The Supreme Court?

Living Originalism

Most closely associated with Jack Balkin

Read text at a *high level of generality*.

Courts are active in constitutional construction.

THE END

ORIGINALISM AND THE
INTERPRETATION/CONSTRUCTION DISTINCTION

I. Intellectual History of Originalism

A. Original Intent Originalism

- What did the Framers intend for this language to mean? Relatedly, how would the Framers have expected this language to apply to the circumstance at hand?

- This approach was closely associated with Robert Bork, and it emerged largely in reaction to the decisions of the Warren and Burger Courts. It was animated by a desire for judicial restraint.

- Criticisms of original intent originalism: Can many minds have a single intent? Even if so, why should we be bound by what lawmakers thought, rather than by what they said?

B. Original Public Meaning Originalism

- What is the original public meaning of the enacted text? How would this text have been understood by an informed observer at the time of its ratification?

- This focus on the objective meaning of the text answered some of the forceful criticisms of original intent originalism.

- This approach is closely associated with Justice Scalia and is the dominant approach of modern originalists. It is the strain of originalism on which I will focus.

- It maintains that the meaning of the Constitution's text was fixed at the time of its ratification and that this original meaning constrains the content of constitutional doctrine.

- Its emphasis is less upon judicial restraint and more upon constitutional fidelity.

II. Tools for Discerning the Original Public Meaning

A. Examples include Federalist Papers, Anti-federalist Papers, ratification debates, contemporary commentary, contemporary judicial decisions, contemporary legislation

B. The Debate about Expected Applications

- Should expected applications play any role in originalist interpretation? Should we take account of how those who ratified a constitutional provision expected it to be applied? Or does that, like original intent originalism, permit intentions rather than enacted language to control?

III. Some Critiques of Originalism

A. Dead Hand

- Why should we be governed today by laws adopted by people long dead?

B. Law Office History

- Judges, not to mention most lawyers, are not trained historians. They are therefore ill equipped to discern the original public meaning of the text.

C. Precedent

- Many well-entrenched precedents are arguably at odds with the original public meaning of the constitutional provisions they interpret. The constitutionality of paper money is a frequently invoked example. If originalism would require overruling these precedents, it is unworkable. If originalism permits the retention of precedents that are inconsistent with the original public meaning, it is unprincipled.

D. Originalism is Inflexible

- Permitting historical meaning to control renders the Constitution unable to handle changed circumstances.

IV. The Interpretation/Construction Distinction

A. New Originalists

- Those who focus on original public meaning rather than original intentions often call themselves "new originalists." Many prominent new originalists in the academy have drawn a distinction between interpreting and constructing the Constitution. They say that construction begins when interpretation runs out. It is a creative process, and one driven by discretionary choices.

- Some of the Constitution's language is open-ended. The language bounds the discretion of public officials; it provides a frame within which they must stay. But it does not dictate a single right answer within that range of discretion. Construction takes place in these open constitutional spaces.

- Constructions fill in gaps of constitutional meaning and provide guidance for how political actors should behave when original constitutional meaning is indeterminate.

- Interpretation is inflexible insofar as the original public meaning of language does not change with time. But construction gives flexibility.

B. Who Constructs?

- It is difficult to contest the proposition that construction—or something like it—occurs. It is implausible to believe that constitutional text is always determinate.

- But who should do it? Should construction largely be left to the political branches? Should judges largely confine themselves to interpretation, as opposed to construction?

C. Drawing the Line between Interpretation and Construction

- Interpreting the original public meaning of the Constitution at a high level of generality increases the discretion to engage in constitutional construction. Conversely, interpreting the language to be more specific curbs discretion. One's approach to interpretation greatly affects outcomes, particularly if one understands judges to play a large role in construction.

V. Living Originalism

A. The Progressive Embrace of Originalism

- The concept of constitutional construction gives an originalist approach to the Constitution flexibility that it was traditionally thought to lack.

- Some progressive theorists—most famously, Jack Balkin—have used the interpretation/construction distinction to meld "originalism" and "living constitutionalism" into "living originalism."

B. Level of Generality

- By reading the text at a high level of generality, originalist arguments have been advanced to support abortion rights, among other controversial doctrines.

VI. Conclusion

SELECTED BIBLIOGRAPHY

Jack M. Balkin — *Framework Originalism and the Living Constitution*, 103 Northwestern L. Rev. 549, 566-92 (2009).

Jack M. Balkin — *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 311-40 (2007).

JACK M. BALKIN — LIVING ORIGINALISM (2011).

Randy Barnett — *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999).

John O. McGinnis & Michael Rappaport — *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 10 NORTHWESTERN L. REV. 751, 772-80 (2009).

John O. McGinnis & Michael Rappaport — *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENT. 371, 378-81 (2007).

Antonin Scalia — *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 852-65 (1989).

ANTONIN SCALIA — A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1998)

ANTONIN SCALIA & BRIAN GARNER — READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012).

Lawrence B. Solum — *The Interpretation-Construction Distinction*, 27 CON. COMM. 95, 100-08 (2010).

Keith Whittington — *The New Originalism*, 2 Geo. J. L. & Pub. Pol'y 599, 599-613 (2004).

Keith Whittington — *Constructing a New American Constitution*, 27 CON. COMM. 119, 120-29 (2010).

Keith Whittington — *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375 (2013).

5-14-2016

Professor Amy Coney Barrett, Diploma Ceremony Address

Amy Coney Barrett
Notre Dame Law School, abarrett@nd.edu

Thank you, Class of 2016, for this honor. I have had the privilege of teaching the majority of you, and I am simultaneously proud to watch you graduate and sad to see you go. Your time at Notre Dame has truly flown by, and we will miss you.

The words I want to share with you today are borrowed from Teddy Roosevelt: *Comparison is the thief of joy*. I stumbled across this quote a few years ago, and it struck such a chord that I had it framed and displayed in our home. It reminds the members of our family to guard against comparing ourselves to others. That is my advice to you.

Class of 2016, so much life lies before you. There will be many, many good things, as well as some unexpected challenges. Throughout all of it, your joys will be so much sweeter and your burdens so much lighter if you embrace them as your own, without comparing your lot in life to anyone else's.

I can attest from experience that this requires self-discipline. Human nature being what it is, we all experience the impulse to judge our own merits and circumstances by comparing them to others. I fear that this temptation may be particularly pronounced for lawyers, because having self-selected into an adversarial profession, we tend to be a competitive lot. Resist the temptation and you will be happier for it. The destination of comparison is dissatisfaction, because the grass is always greener somewhere.

Fast-forward a few years. You love your job, and you're doing well. You've gotten good evaluations, and you've been given your first oral argument. Then, you find out that a classmate has been written up as a "rising star to watch" in your state's bar magazine. You have a choice. You can push aside comparison, be happy for your friend, and move on. Or, you can view your job through the lens of your friend's success, and let your contentment vanish. *Comparison is the thief of joy.*

Comparison is even more destructive when you weigh your disappointments against someone else's happiness. There is no surer way to permit a cross to crush you: just as comparison deflates your happiness, it magnifies your sorrow. The pain of losing a loved one is amplified, not lessened, by the time you spend resenting those who have not experienced such loss.

But it doesn't have to be that way. I have a dear friend who has never been able to have children, and this has been a great sorrow for her. Yet when a pregnancy is announced, she is the first to offer congratulations; when a baby is born, she is the first visitor at the hospital. I expressed admiration for this, which I assumed was a natural outgrowth of her generous character. Her response surprised me. She said, "You do understand I've had to work hard at this. When a baby is born, my emotions slide toward self-pity. But I can choose to feel sorry for myself or I can choose to share in my friend's happiness. It takes self-discipline, but I choose happiness."

Class of 2016, choose happiness. Counterpunch the temptation to envy by choosing to be the first to rejoice in the good of others. This will not always come naturally; sometimes, it will require self-discipline. Refuse to let comparison steal your joy.

The trick of comparison is that it rarely shows you reality. We think it does: after all, it is better to get an award than not, and your friend's house may in fact be much nicer than yours. But when we compare ourselves to someone else, we zero in on the one thing we envy; we don't look at—and in fact can't even see—the whole picture. We forget about the many good things that are uniquely ours, and there is no way we can know about the spots where the other person suffers. Comparison is like looking in a funhouse mirror: it distorts the picture.

Each of us is a unique, unrepeatable combination of strengths and weaknesses, joys and sorrows. I'm going to describe comparison the way that Justice Scalia described balancing tests in constitutional law: measuring the quality of your life against someone else's is "like judging whether a particular line is longer than a particular rock is heavy." It can't be done. We're all apples to oranges.

I'll conclude with the image of a runner. I ran in my first track meet when I was 10, and I had a rather disappointing finish. My uncle met me on the field afterward and said "Honey, do you know how many times you looked to see where the other runners were? Every time you look to the right or the left, you lose a half step. Next time, look straight ahead and run your best."

Class of 2016, look straight ahead and run your best. Don't lose time or happiness by comparing yourself to those on your right or your left. And as you run forward, carry the torch of faith with you.

The ancient Greeks were fond of torch races, where the object was not simply to finish, but to finish with your torch still lit. Even the fastest runner was disqualified if his torch went out before he crossed the finish line.

As you leave Notre Dame, guard the torch of your faith. Hold it in front and let it guide your way. Rejoice in your blessings and bear your sorrows with your eyes fixed on that light. Run fast, but keep your torch lit so that you are not running for nothing.

Class of 2016, great things lie ahead. Fight the good fight; finish the race; keep the faith.

Law School Diploma Ceremony, May 14, 2016
Amy Barrett

THE SUPREME COURT: FROM JOHN JAY TO JOHN ROBERTS

AMY CONEY BARRETT

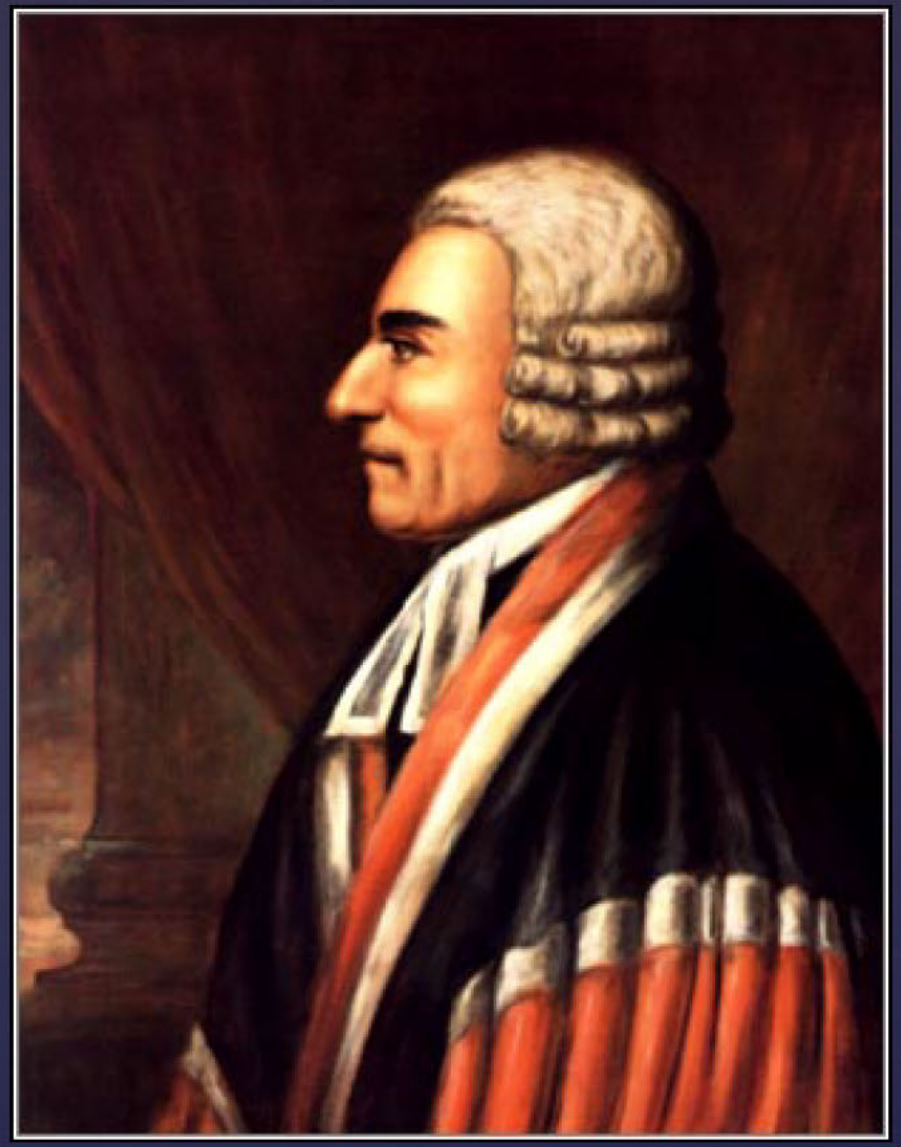
UNIVERSITY OF NOTRE DAME

John Jay

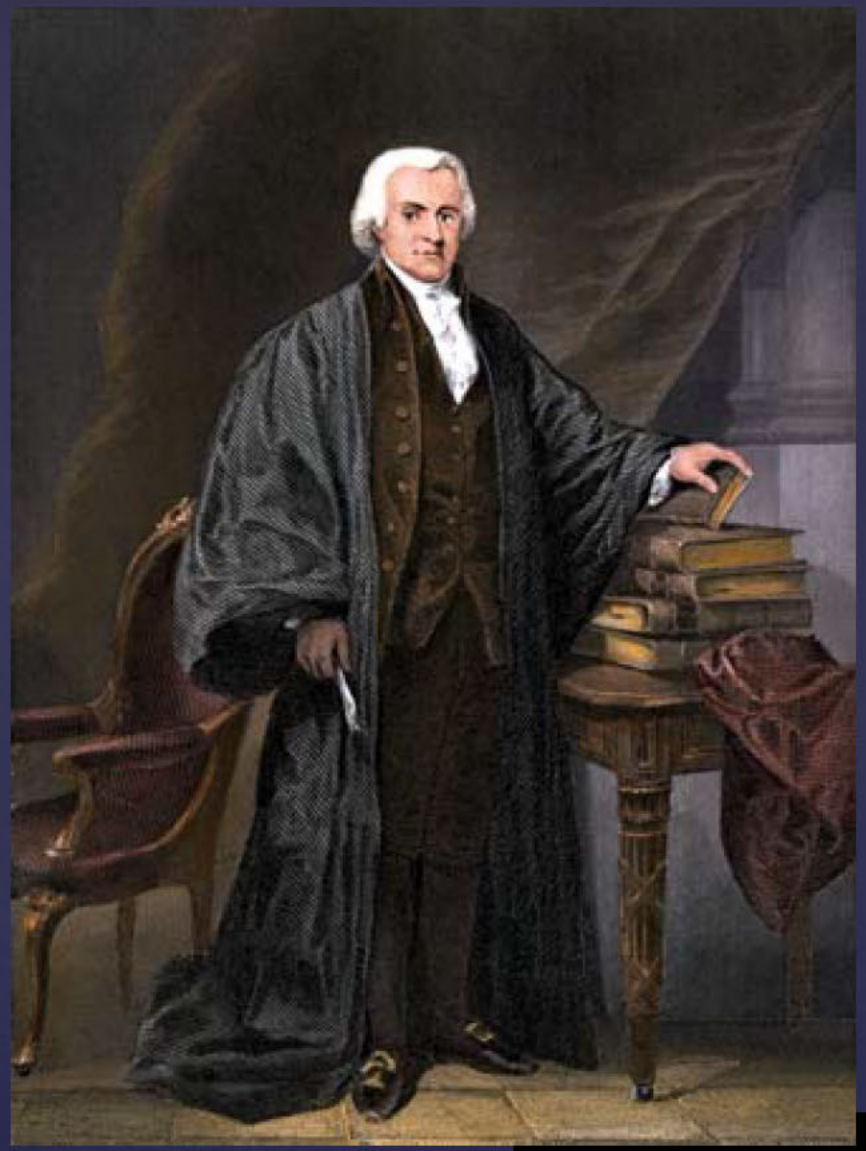
{

John Rutledge

{



William Cushing



Oliver Ellsworth

MONDAY, NOVEMBER 5, 1787. THE NUMBER 1189.

Connecticut Courant,

AND

WEEKLY INTELLIGENCER.

HARTFORD: PRINTED BY HUDSON AND GOODWIN, NEAR THE BRIDGE.

To the Holders and Tillers of Land.

NUMBER I.

THE writer of the following paſſed the firſt part of his life in mercantile employments, and by induſtry and œconomy acquired a ſufficient ſum on retiring from trade to purchaſe and ſtock a decent plantation, on which he now lives in the ſtate of a farmer. By his preſent employment he is intereſted in the proſperity of Agriculture, and thoſe who derive a ſupport from cultivating the earth. An acquaintance with buſineſs has freed him from many prejudices and jealouſies, which he ſees in his neighbours, who have not intermingled with mankind, nor learned by experience the method of managing an extenſive circulating property. Conſcious of an honeſt intention he wiſhes to addreſs his brethren on ſome political ſubjects which now engage the public attention, and will in the ſequel greatly influence the value of landed property. The new conſtitution for the United States is now before the public, the people are to determine, and the people at large generally determine right, when they have had means of information.

It proves the honeſty and patriotiſm of the gentlemen who compoſed the general Convention, that they choſe to ſubmit their ſyſtem to the people rather than the legiſlatures, whoſe deciſions are often influenced by men in the higher departments of government, who have provided well for themſelves and dread any change leaſt they ſhould be injured by its operation. I would not wiſh to exclude from a State Convention thoſe gentlemen who compoſe the higher branches of the aſſemblies in the ſeveral ſtates, but chooſe to ſee them ſtand on an even floor with their brethren, where the artifice of a ſmall number cannot negative a vaſt majority of the people.

This danger was foreſeen by the Fœderal Convention, and they have wiſely avoided it by appealing directly to the people. The landholders and farmers are more than any other men concerned in the preſent deciſion, whe-

Blame not our merchants, the fault is not in them but in the public. A fœderal government of energy is the only means which will deliver us, and now or never is your opportunity to eſtabliſh it, on ſuch a baſis as will preſerve your liberty and riches. Think not that time without your own exertions will remedy the diſorders. Other nations will be pleaſed with your poverty; they know the advantage of commanding trade, and carrying in their own bottoms. By theſe means they can govern prices and breed up a hardy race of ſeamen, to man their ſhips of war when they wiſh again to conquer you by arms. It is ſtrange the holders and tillers of the land have had patience ſo long. They are men of reſolution as well as patience, and will I preſume be no longer deluded by Britiſh emiſſaries, and thoſe men who think their own offices will be hazarded by any change in the conſtitution. Having opportunity, they will coolly demand a government which can protect what they have bravely defended in war.

A LANDHOLDER.

New-London, 26th Sept. 1787.

SIR,

WE have the honour to tranſmit to your Excellency a printed copy of the conſtitution ſubmitted by the Fœderal Convention, to be laid before the legiſlature of the ſtate.

The general principles which governed the Convention in their deliberations on the ſubject are ſtated in their letter addreſſed to Congreſs.

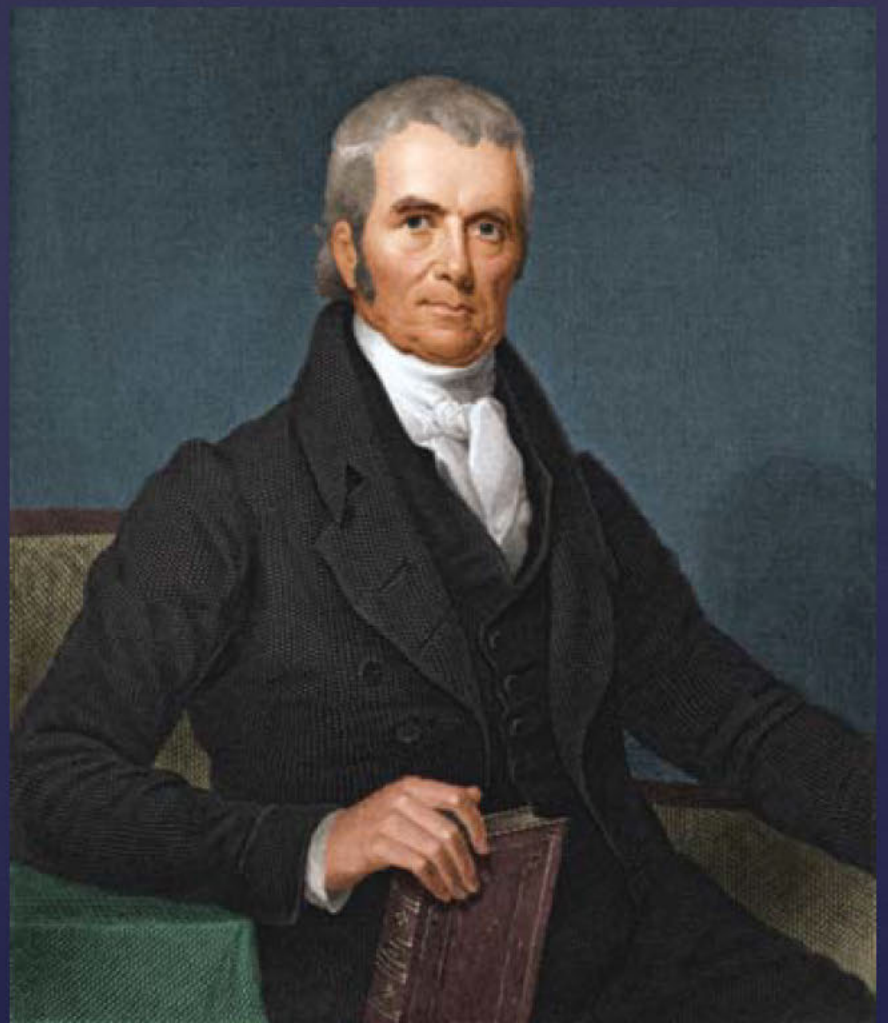
We think it may be of uſe to make ſome further obſervations on particular parts of the conſtitution.

The Congreſs is differently organized, yet the whole number of members and this ſtate's proportion of ſuffrage, remain the ſame as before.

The equal repreſentation of the ſtates in the ſenate, and the voice of that branch in the appointment to offices, will ſecure the rights of the leſſer as well as the greater ſtates.

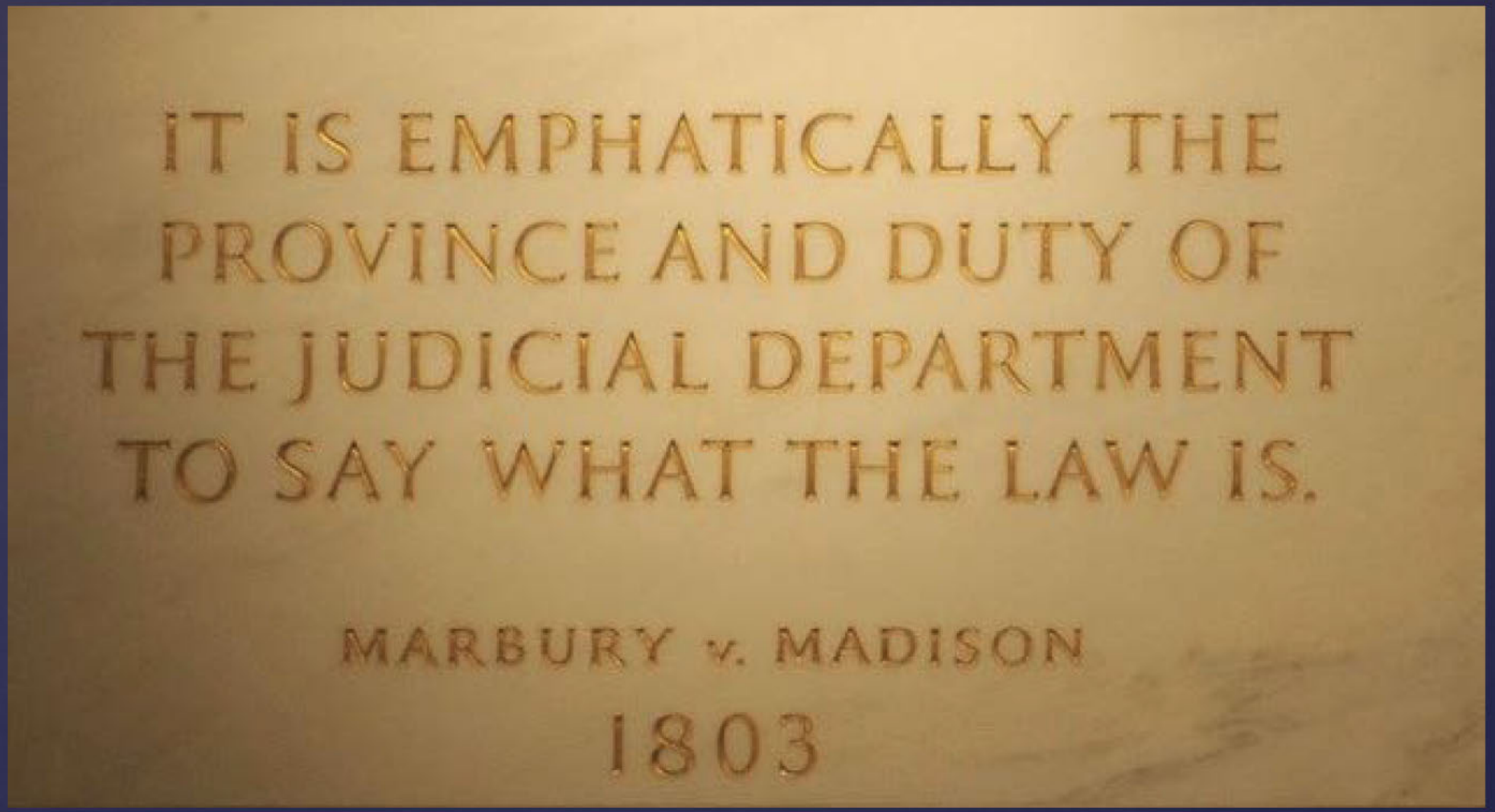
John Marshall

{



Marbury v. Madison

Thomas Jefferson



Inscription of Wall of SCOTUS

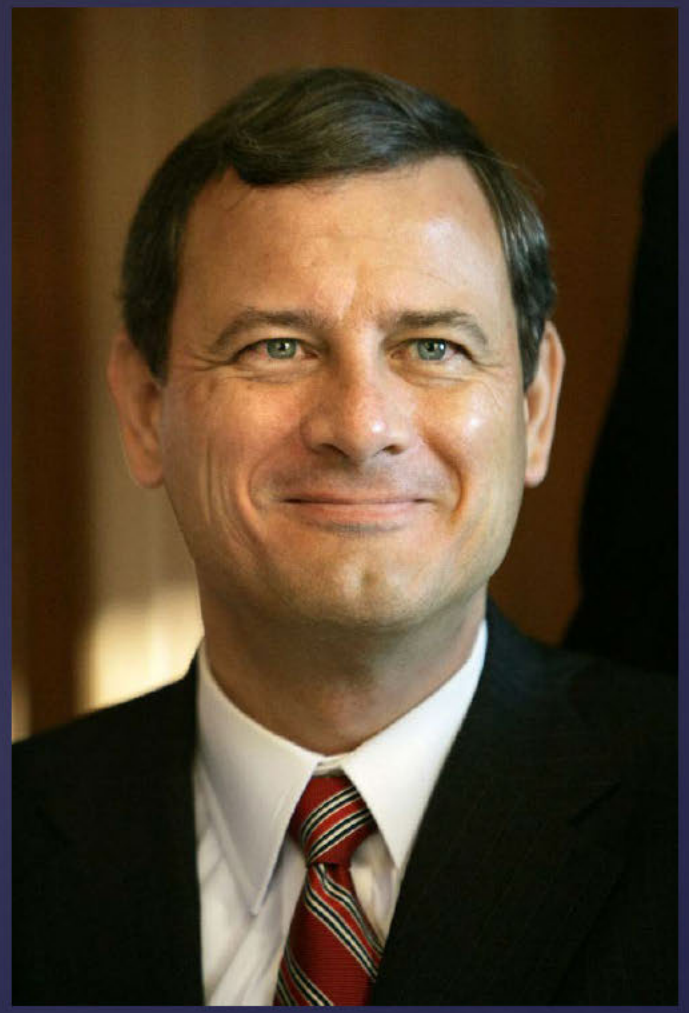
William Howard Taft

Old Supreme Court Chamber

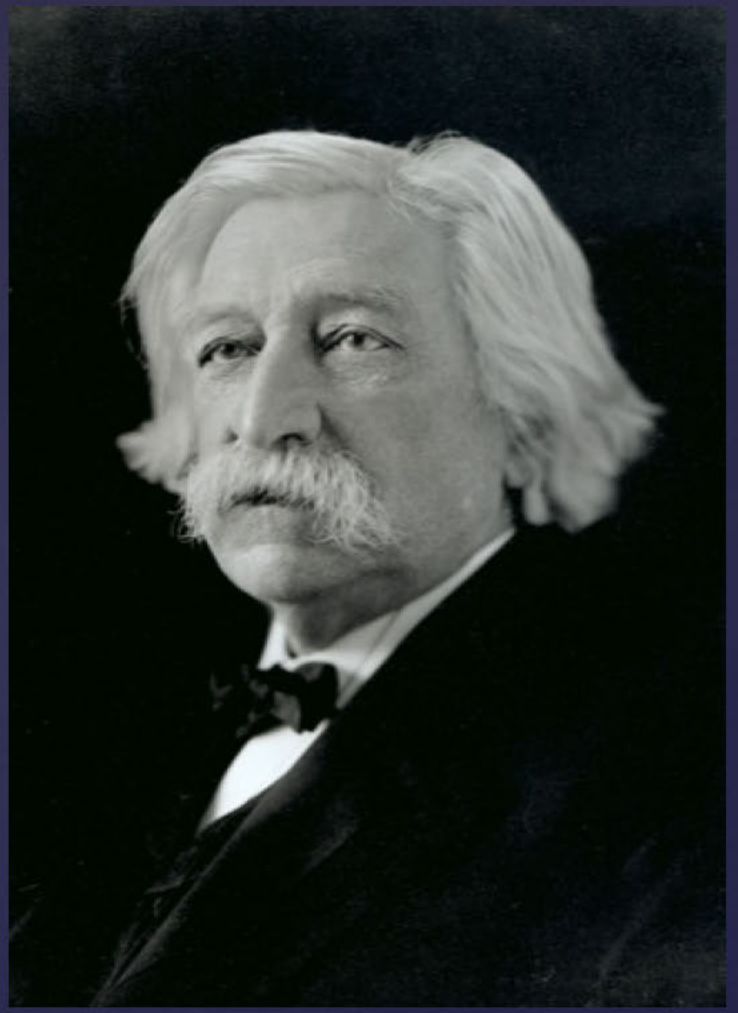
Old Senate Chamber


EQUAL JUSTICE UNDER LAW

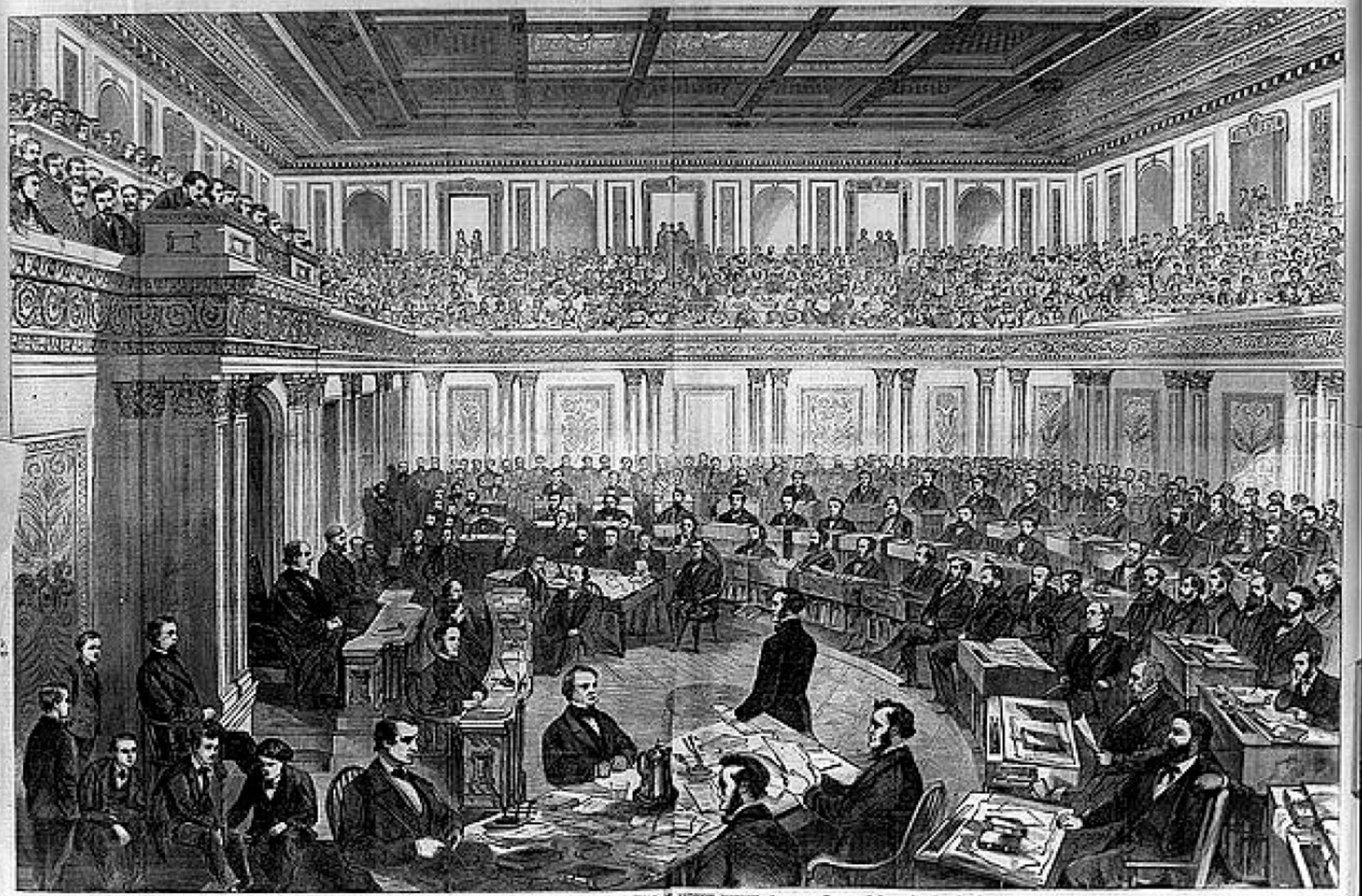
John G. Roberts, Jr.



Melville Weston Fuller



Robert Jackson



THE SENATE AS A COURT OF IMPEACHMENT FOR THE TRIAL OF ANDREW JOHNSON.—[SKETCHED BY THOMAS R. DAVIS.—[SEE FIRST PAGE.]

106TH CONGRESS—FIRST SESSION

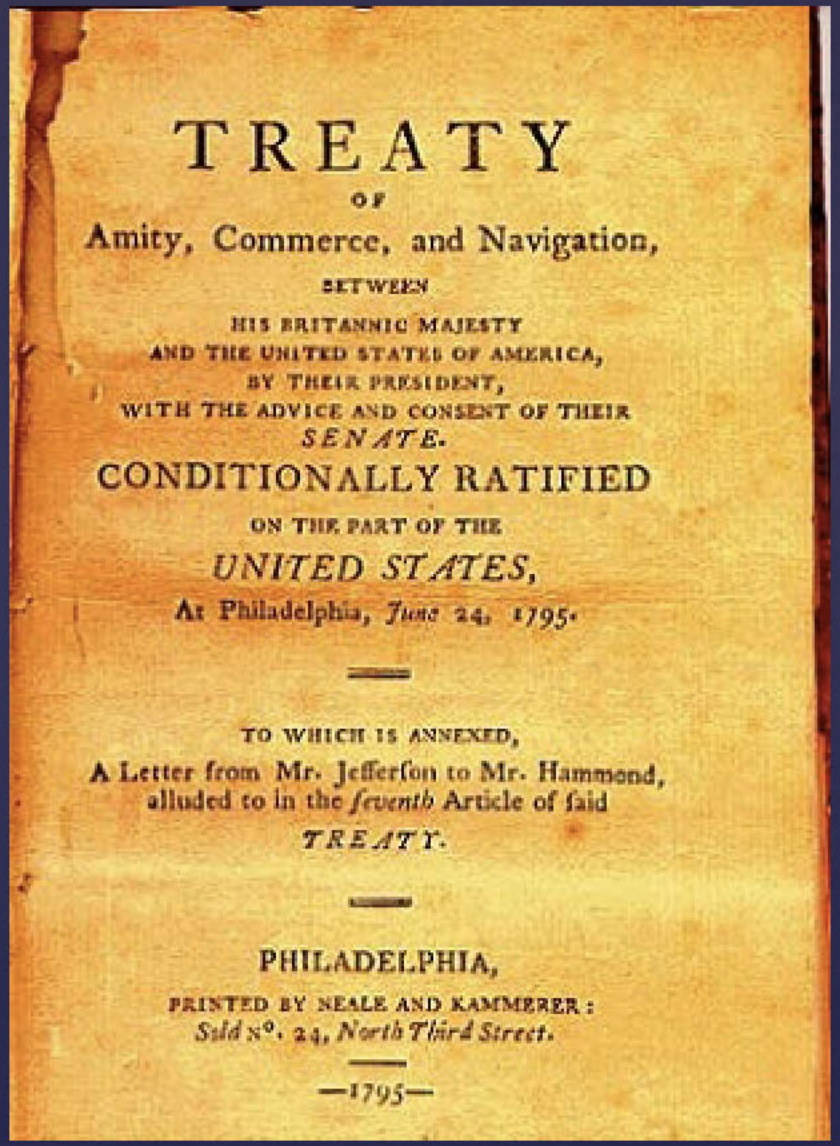
United States Senate

Impeachment Trial of the
PRESIDENT OF THE UNITED STATES

DATE
FEB 06 1999

ADMIT BEARER TO THE SENATE GALLERY

Sergeant at Arms United States Senate



TREATY

OF

Amity, Commerce, and Navigation,

BETWEEN

HIS BRITANNIC MAJESTY
AND THE UNITED STATES OF AMERICA,
BY THEIR PRESIDENT,
WITH THE ADVICE AND CONSENT OF THEIR
SENATE.

CONDITIONALLY RATIFIED

ON THE PART OF THE

UNITED STATES,

At Philadelphia, *June* 24, 1795.

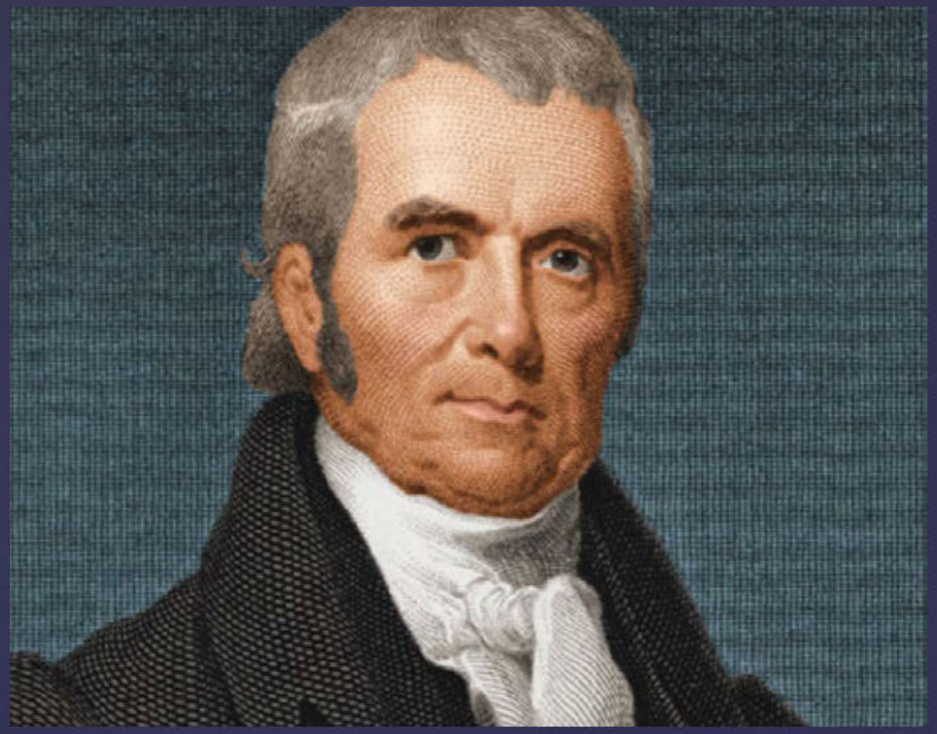
TO WHICH IS ANNEXED,

A Letter from Mr. Jefferson to Mr. Hammond,
alluded to in the *seventh* Article of said
TREATY.

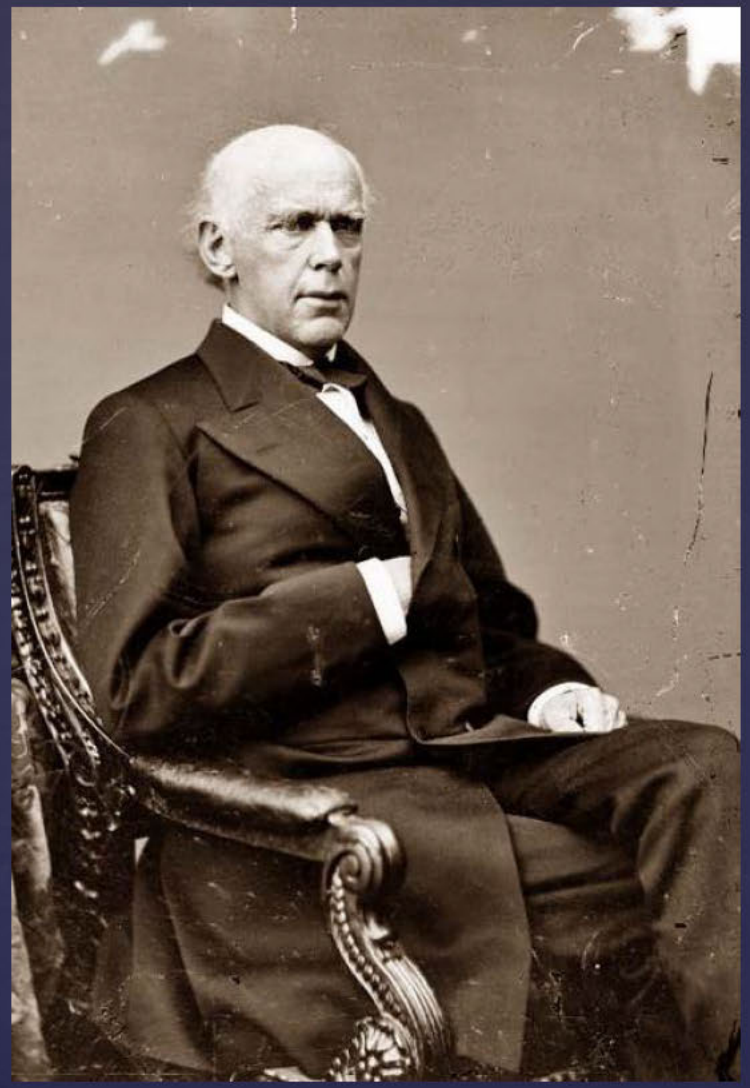
PHILADELPHIA,

PRINTED BY NEALE AND KAMMERER:
Sold N°. 24, *North Third Street.*

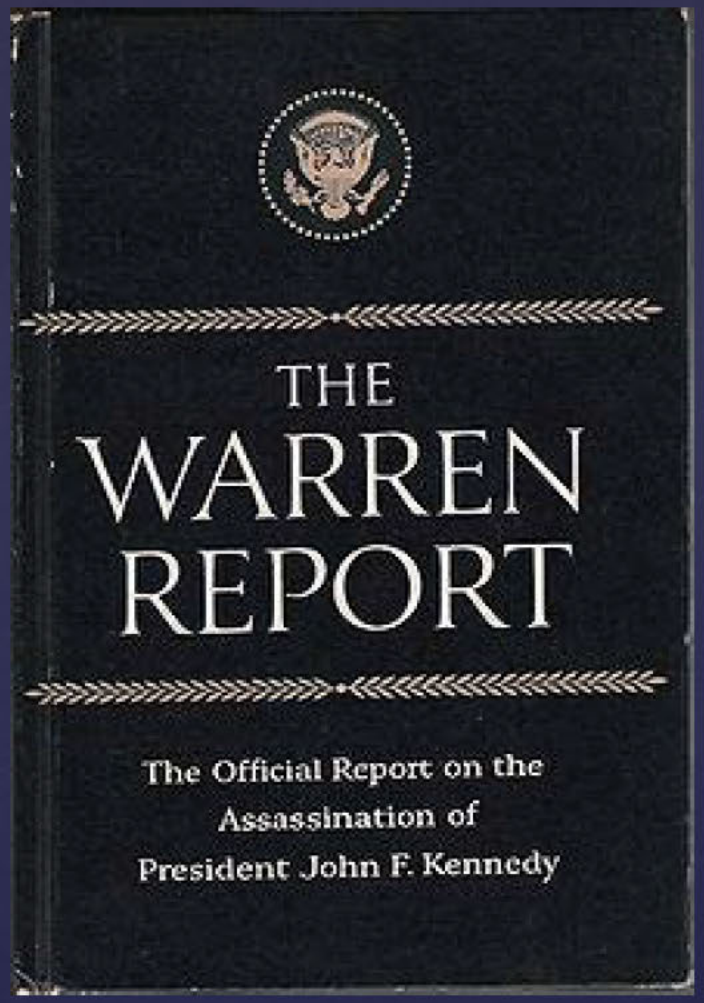
—1795—



John Marshall John Adams

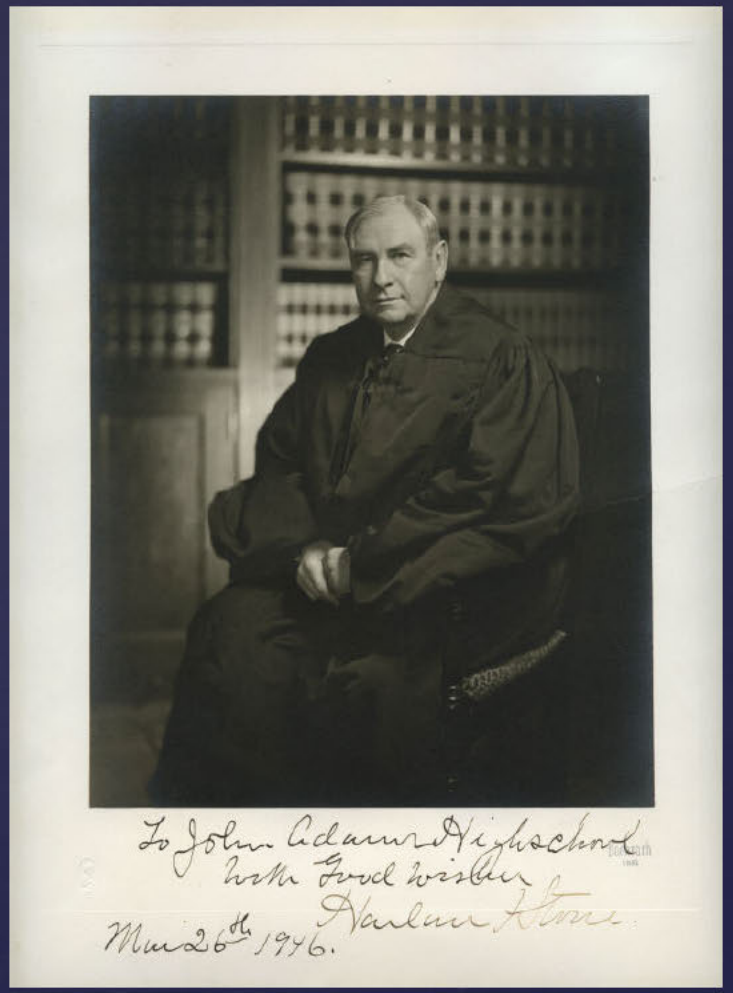


Salmon Chase

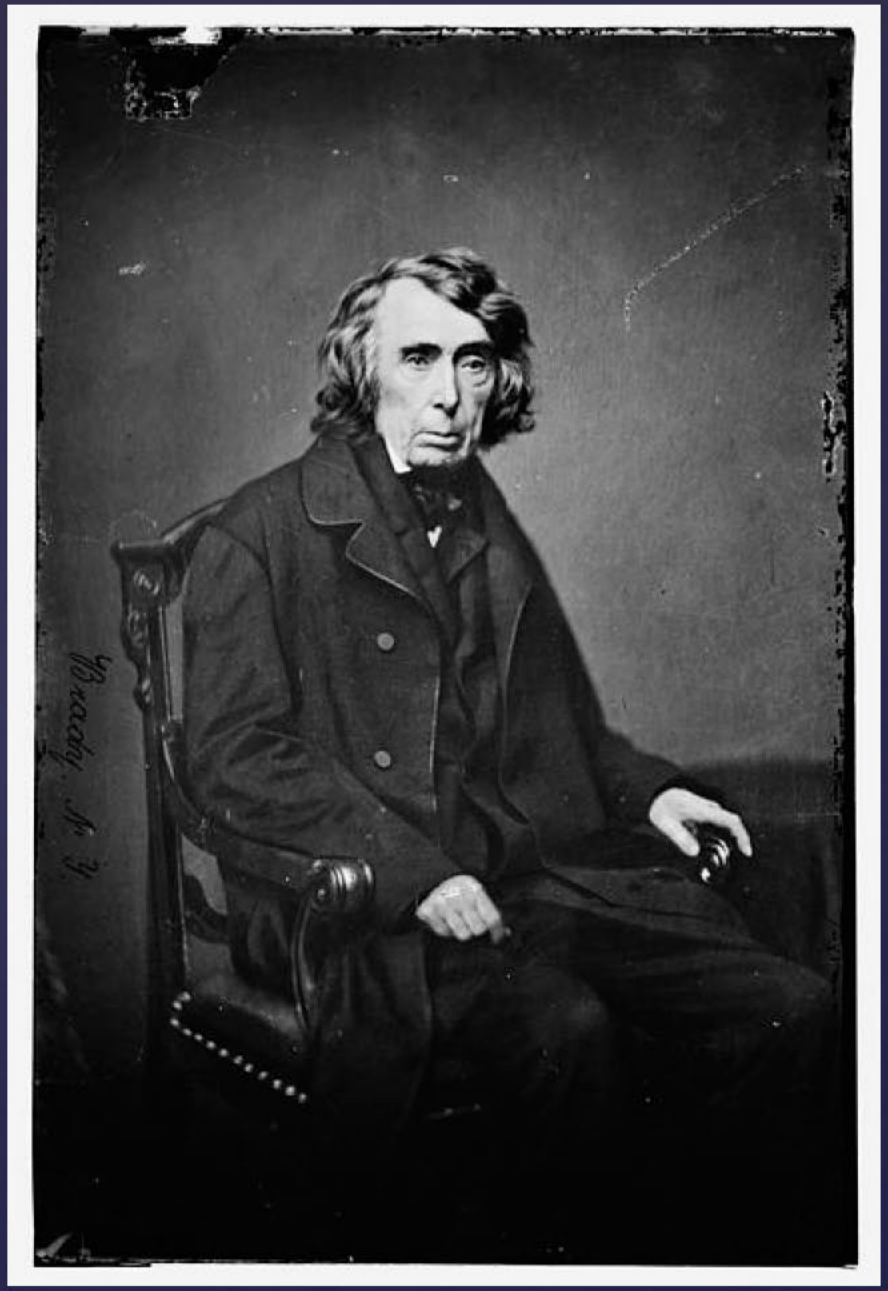

THE
WARREN
REPORT
The Official Report on the
Assassination of
President John F. Kennedy

William H. Rehnquist

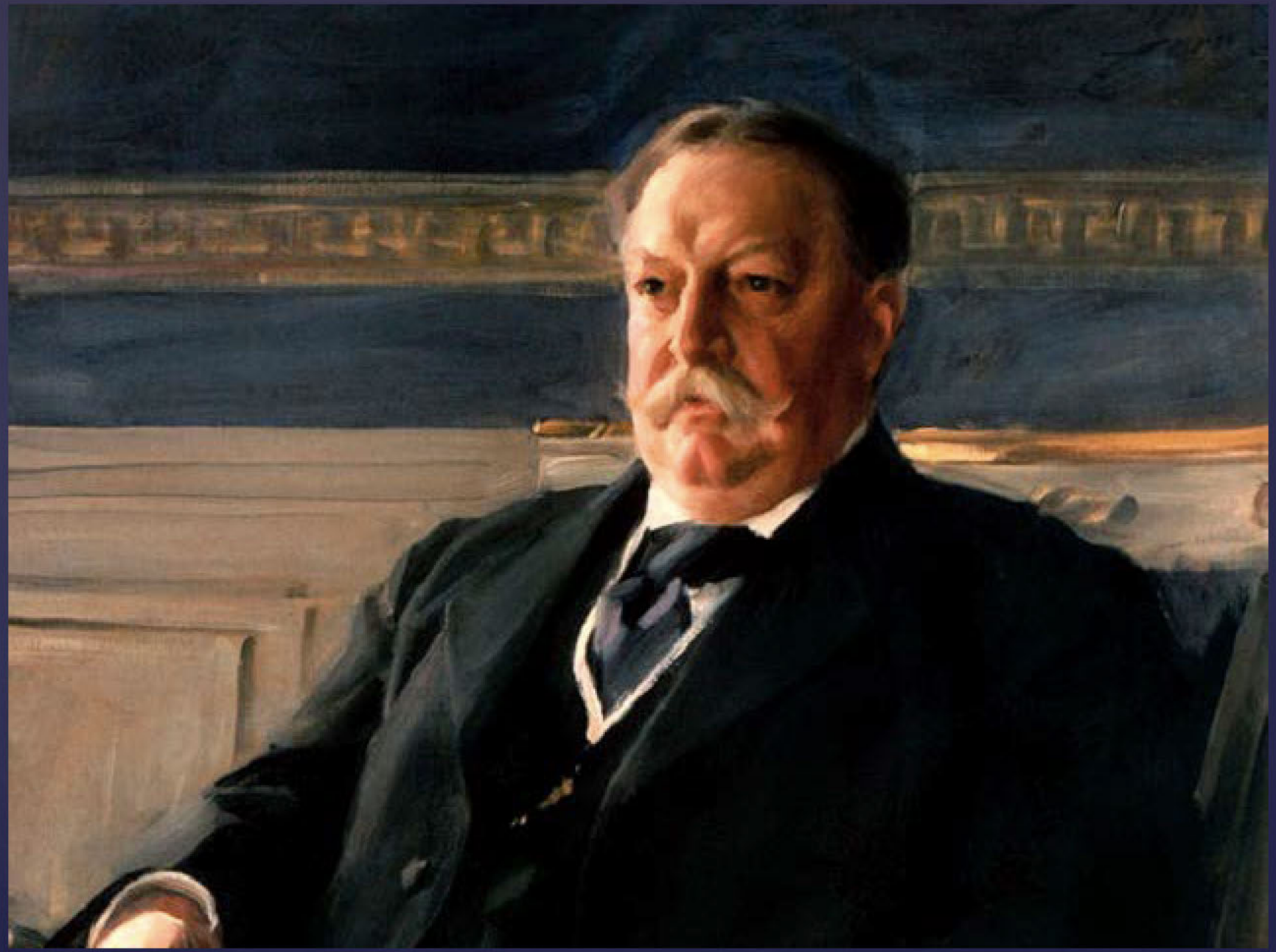
Harlan Fiske Stone



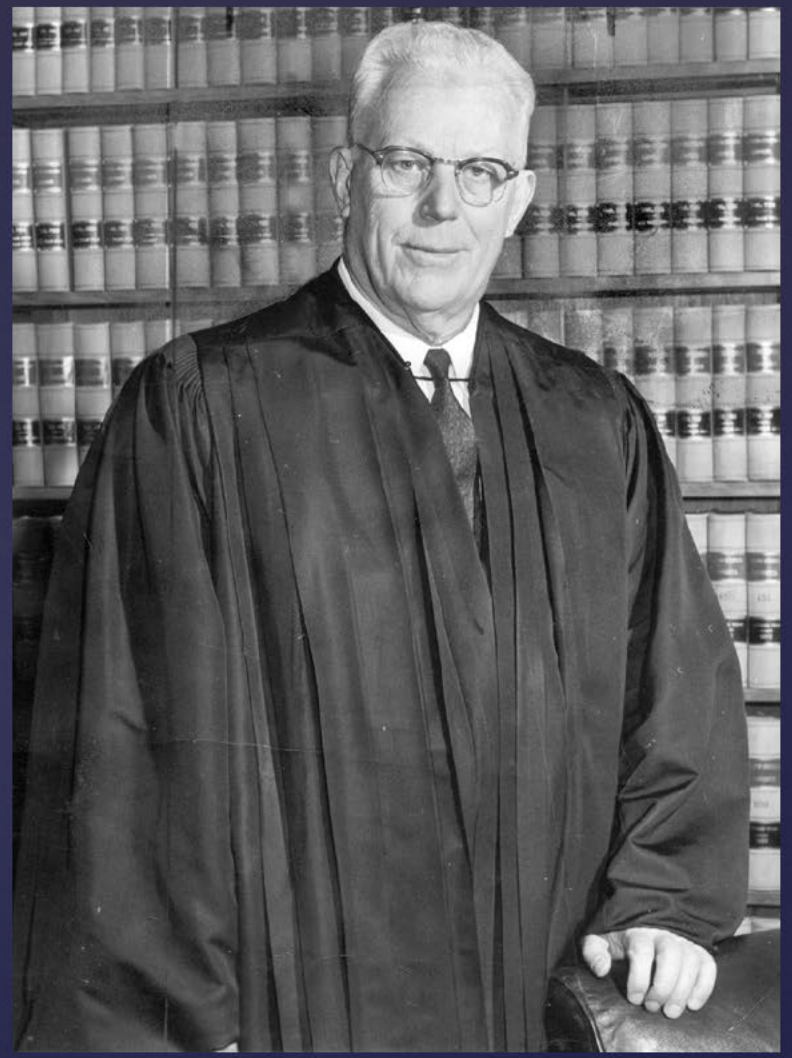
Roger Brooke Taney

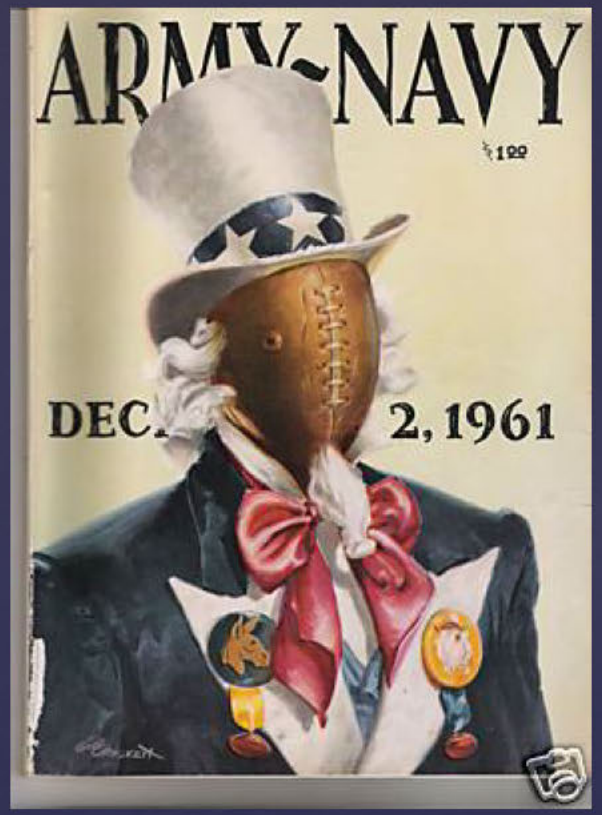


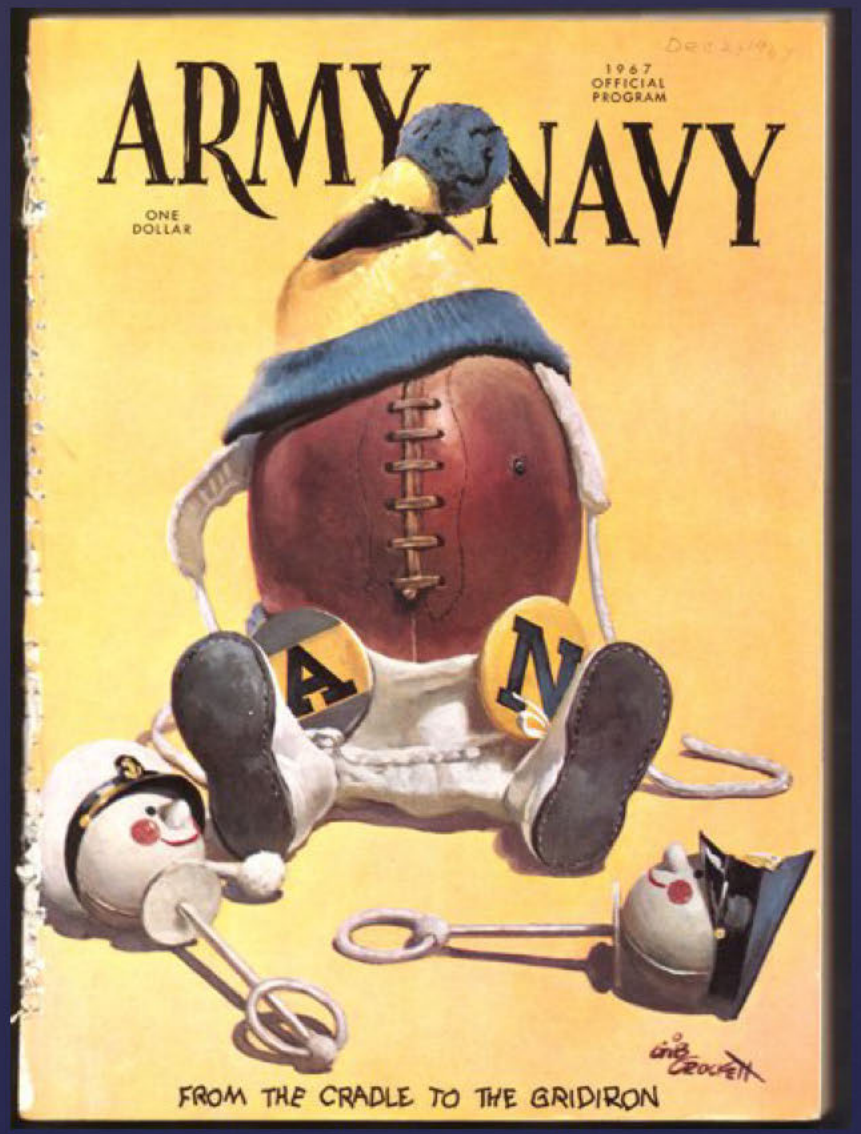

19



Earl Warren

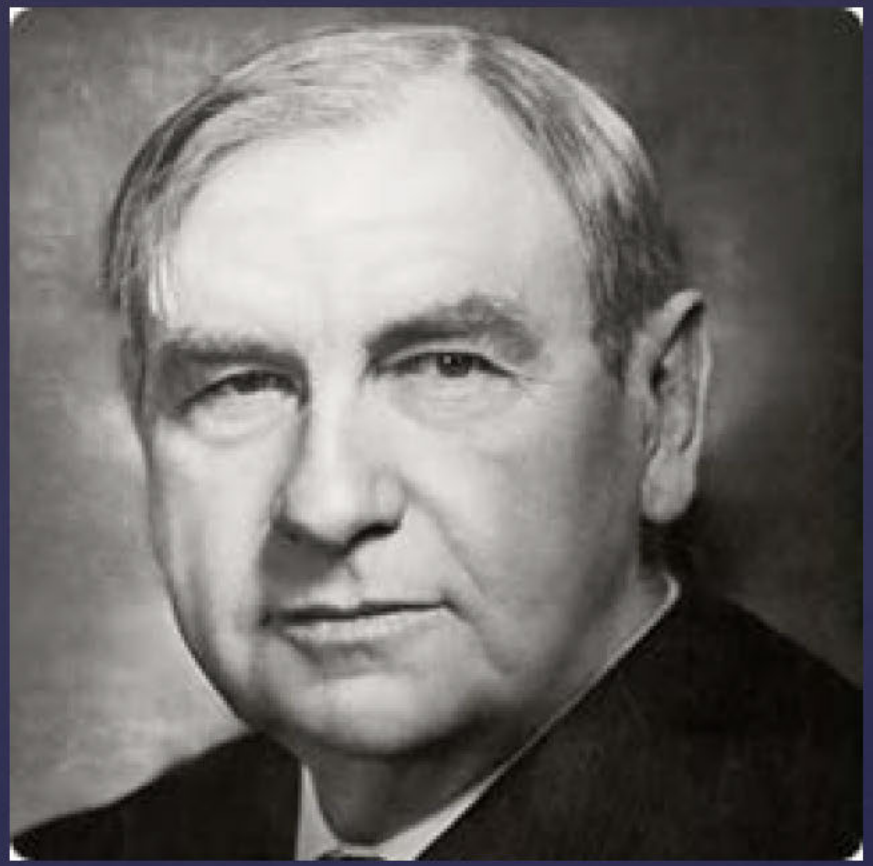



ARMY-NAVY
DEC. 2, 1961


1967
OFFICIAL
PROGRAM
ARMY NAVY
ONE
DOLLAR
FROM THE CRADLE TO THE GRIDIRON

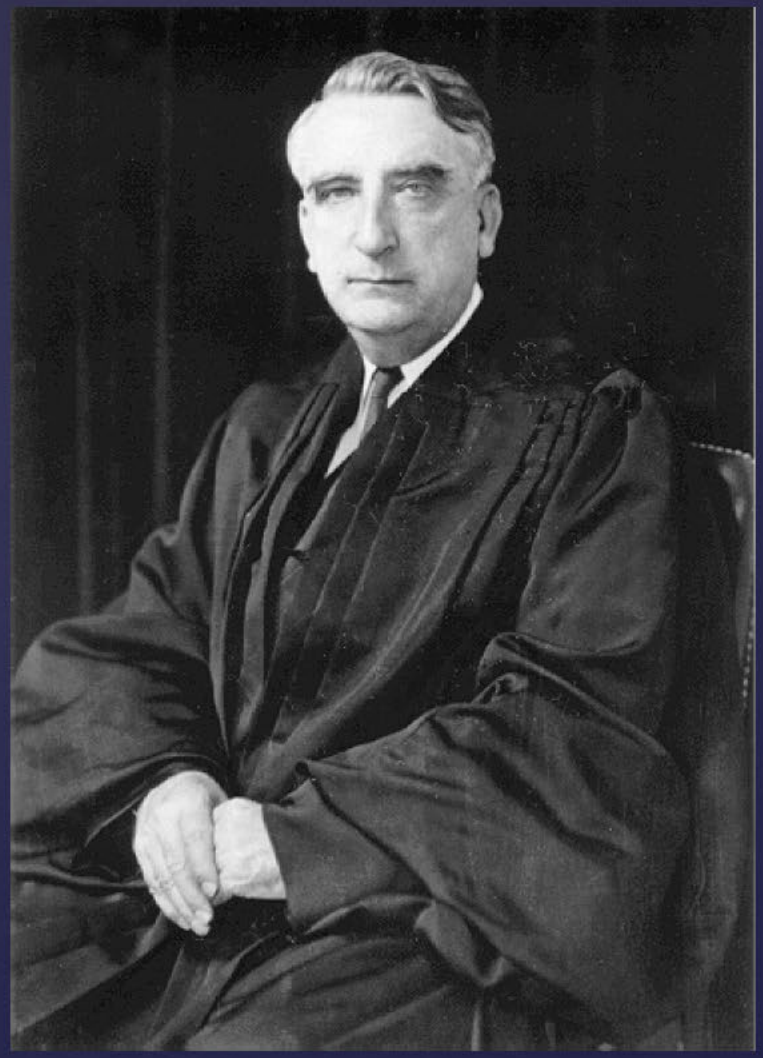

ARMY-NAVY
ARMY
NAVY

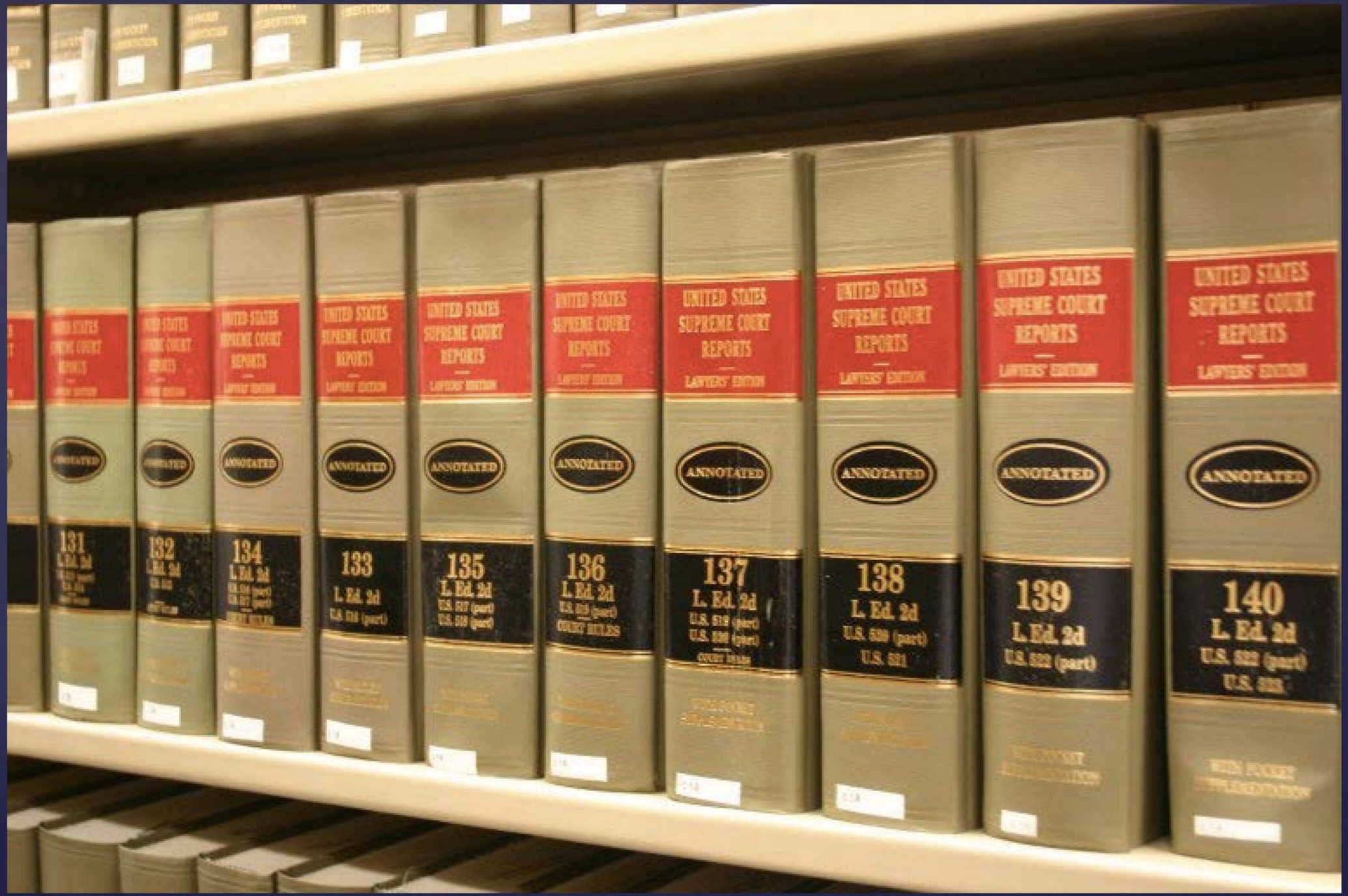

ARMY
NAVY



Harlan Fiske Stone

Fred Moore Vinson




UNITED STATES SUPREME COURT REPORTS
LAWYERS' EDITION
ANNOTATED
131 L. Ed. 2d
132 L. Ed. 2d
134 L. Ed. 2d
133 L. Ed. 2d
135 L. Ed. 2d
136 L. Ed. 2d
137 L. Ed. 2d
138 L. Ed. 2d
139 L. Ed. 2d
140 L. Ed. 2d

Justices' Conference Room

It is a pleasure to be here! Thank you so much for inviting me to speak to you, and special thanks to Ryan Newell, who could not be a more attentive host.

When I received this invitation in December, Justice Scalia was alive and well, and I did not anticipate that there would be a vacancy on the Court when I came to speak to you. While Justice Scalia and the current nomination process are not part of my talk, I will reserve time at the end for questions, and I welcome any questions you have about that, as well as about the topics I cover in my talk.

A few years ago, I had a group of international students in my course on Modern Constitutional Theory. They were interested in taking the course because, among other things, they wanted to understand how our Supreme Court has managed to be stable, powerful, and effective. In their own countries, most of which had much more recent Constitutions, their more recently formed Supreme Courts were not yet at that point.

And at the beginning, neither was the Supreme Court of the United States.

PICTURE OF SCOTUS

While we now see our Supreme Court as powerful, and the role of Supreme Court justice—particularly Chief Justice—as one of the most coveted legal jobs in America, it was not always so.

JOHN JAY

Was the first to hold the job as the Nation's chief justice. He became disillusioned with the Supreme Court, however, concluding that it was impotent, with little real power or authority. Jay was elected governor of New York and he resigned from the Supreme Court to return to New York where he served from 1795 to 1801.

He declined John Adam's offer to return to the Supreme Court as chief justice in 1801 on the ground that the Court lacked "energy, weight, and dignity." He retired to his estate, where he spent the remaining years of his life as a farmer and active abolitionist."

JOHN RUTLEDGE

Next in line, was no more impressed. Bored by the Court's lack of activity, he left to become Chief Justice of South Carolina.

WILLIAM CUSHING

Cushing sat as chief justice for one week in January, 1786, and then declined the appointment and returned to serving as associate justice

OLIVER ELLSWORTH

As a senator, he had been responsible for the Judiciary Act of 1789, which established the basic framework of the federal judiciary still in place today. But he did not find sitting atop that judiciary particularly stimulating. He too left the Court for service in his state government, including as chief justice of the Connecticut Supreme Court. Once off SCOTUS, Ellsworth took up writing a newspaper column dispensing farming advice.

JOHN MARSHALL

The first time he was offered a seat on the Court, he turned it down. But he accepted the next time around, and when he assumed the role of chief, he forever changed the Court. While he was not our first chief justice, he is widely regarded as one of the greatest, if not the greatest. Under John Marshall's leadership, the Court gained strength and prominence.

Perhaps Marshall's greatest achievement was the opinion in Marbury v. Madison, which, for the benefit of the non-lawyers in the room, established the Court's authority to invalidate statutes on the ground that they conflicted with the Constitution. That seems obvious to us today; we take it for granted that deciding whether state and federal laws are consistent with the Constitution is what the Court does. But it was not always self-evident. I will spare you the ins and outs of the case, but it was a masterpiece.

The case essentially charged the Jefferson Administration with behaving unconstitutionally. Marshall and Jefferson were political opponents: Marshall was a Federalist, who favored a strong national government, and . . .

JEFFERSON

Jefferson a Republican, the party favoring states' rights. Jefferson had already made clear that he would ignore any judgment that the Court entered against him. In fact, he was so contemptuous of the Court that he didn't even send a lawyer to argue on the government's behalf. Marshall, therefore, had to play it carefully.

In a brilliant move, Marshall held for technical legal reasons that the Court could not actually decide the case—that saved the Court from having to issue a judgment that Jefferson would ignore. But along the way, the opinion in Marbury v. Madison asserts the authority of the United States Supreme Court to review government action for consistency with the Constitution and hold it unconstitutional when it deviated from it. As Marshall famously put it in that case:

"IT IS EMPHATICALLY THE PROVINCE AND DUTY OF THE JUDICIARY TO SAY WHAT THE LAW IS."

Having dodged the bullet of an unfavorable judgment in Marbury v. Madison, Jefferson may have won the battle. But John Marshall indisputably won the war.

JUSTICE'S PRIVATE DINING ROOMS

The case—and Marshall himself—is so important to having laid the groundwork for the Court's power that portraits of James Madison and William Marbury hang in the "Marshall Dining Room," where the justices eat privately together.

The Court has been on a steady upswing in prestige since Marshall's day.

TAFT

Our early Supreme Court justices may have perceived positions in state government to be preferable to service on SCOTUS, but by the time we got to William Howard Taft, who served as BOTH president of the United States and Chief Justice, we had a man who famously preferred being Chief Justice to being President.

- "Mr. Taft's lifelong ambition to become a Supreme Court Justice, realized by his appointment as Chief Justice by President Harding, was indicated by an incident long before he was mentioned as a candidate for President. The incident occurred at one of the receptions in the White House during the Roosevelt Administration, in the course of a talk in which Mr. and Mrs. Roosevelt and Mr. and Mrs. Taft took part. Colonel Roosevelt, in predicting what the future held for Mr. Taft, declared that eventually he would be called to one of the two highest positions in the country.

  'Make it Chief Justice,' said Mr. Taft.
  'Make it President,' said Mrs. Taft.

PICTURES OF COURT MEETING ROOMS

Taft is responsible for the building that stands as a marker of the Supreme Court today.

To illustrate the low estate of the Supreme Court at this time, the federal government was in the process of moving from Philadelphia, which had been the capital for ten years, to the new capital of Washington in the District of Columbia. The White House - then called the President's House, was finished, and John Adams was the first President to occupy it. The Capitol building had been constructed on Capitol Hill, and was ready for Congress, though it was not nearly the building we know today as the Capitol. But no provision whatever had been made for housing the Supreme Court. At the last minute, a room in the basement of the Capitol was set aside for the third branch, and in that rather undistinguished environment it would sit for eight years.

When it upgraded, it the Court returned met from 1819 to 1860 in a chamber now restored as the "Old Supreme Court Chamber." Then from 1860 until 1935, the Court sat in what is now known as the "Old Senate Chamber."

JOHN ROBERTS

In contrast to the early days, when it was a live possibility that Thomas Jefferson might gut the power of the Court, today, the Court is a coequal branch of the federal government.

And now, our Chief Justice—currently, John Roberts—is widely regarded as immensely influential head of a very powerful institution.

Roberts was appointed when he was 50, which makes him the second youngest Chief Justice. The youngest is John Marshall, who was appointed at 45. Because Roberts took the bench so young, it is likely that he will be one of the longest serving chiefs.

Here is a picture of Roberts swearing President Obama into office. He is the first Chief to swear in a President who voted against his nomination. (President Obama was in the Senate when Roberts was confirmed.)

* * *

As the Court has evolved, its standing in our political system is not the only thing that has changed. The profile of the justices, including the Chief Justices, has changed.

Currently, we have a Supreme Court comprised entirely of justices who attended Harvard and Yale. (I'm happy to report, however, that they have been good to Notre Dame. Justices Scalia, Alito, Roberts, Thomas, and Sotomayor have all been to campus, and Justice Ginsburg is scheduled to visit us this fall.)

That was not always the case. Indeed, it was not always the case that justices had a law degree.

MELVILLE FULLER

Melville Fuller, who assumed the office of Chief Justice, was the first U.S. Supreme Court Chief Justice to have had any significant formal legal training. And it wasn't even a degree: he read law, briefly attended the Harvard University School of Law, and was admitted to the Maine bar.

ROBERT JACKSON

The lack of formal training is something that was not beyond the pale well into the twentieth century. While he was not a chief justice, Robert Jackson (1941-54) was one of the greats. I always tell my students that he is one of the Court's greatest writers. And what a career: he was the Solicitor General of the United States, the Attorney General of the United States, a justice on the Court, the prosecutor at the Nuremburg trials. And he did not have a law degree. He briefly attended the Albany Law School, but completed his study through a legal apprenticeship.

EXTRA-JUDICIAL ACTIVITIES

Norms regarding what justices can do off the bench have also changed. Now, we would be surprised to see the Chief Justice undertaking other jobs, particularly political jobs, in the a high-profile way.

IMPEACHMENT

To be sure, the Constitution itself gives the Chief Justice the responsibility of presiding over a Senate impeachment trial of the President, and two chiefs have done that: Salmon Chase presided over the impeachment trial of Andrew Johnson, and William Rehnquist, during the year I clerked on the Court, presided over the impeachment trial of Bill Clinton.

But that is a constitutionally given responsibility. Consider some of the other things Chiefs have done.

JOHN JAY, while Chief Justice, left for France and negotiated the Jay Treaty.

JOHN MARSHALL. For the first month he was in office, he served simultaneously as Secretary of State and Chief Justice of the United States.

SALMON CHASE, while chief justice, he sought to be the Democratic presidential candidate in 1868 and the Republican candidate in 1872.

EARL WARREN headed the Warren Commission that investigated the circumstances surrounding JFK's death.

* * *

What makes a good Chief Justice?

On the one hand, the Chief Justice is the first among equals. His vote doesn't count any more than the others.

REHNQUIST

Former Chief Justice William H. Rehnquist, described it this way: The Chief Justice presides 'over a conference not of eight subordinates, whom he may direct or instruct, but of eight associates who, like him, have tenure during good behavior, and who are as independent as hogs on ice.'

HARLAN FISKE STONE

STONE once likened being Chief Justice to being a law-school dean, a position he had also held, because both have ‘to do the things that the janitor will not do.’”

That said, the Chief Justice can set a tone and exercise influence, and the best Chief Justices have done both. Interpersonal skills are a plus for the job.

JOHN MARSHALL

Back to the great John Marshall: one of his innovations was to have all the justices stay at the same boardinghouse and had their meals together during their few weeks in Washington. If it was raining, they would have a glass of wine with dinner. They looked forward to this ritual, and one day were expressing regret that the weather outside was fair and sunny. But Marshall said "somewhere in our broad jurisdiction it must surely be raining," and from then on they had a glass of wine with dinner every day.

TAFT

Taft won favor with his colleagues generally by generous and sensitive gestures toward them, ranging from Christmas cards, rides, and gift salmons, to arranging for the funeral of Mrs. Holmes at Arlington. Taft's conduct in assigning opinions also no doubt endeared him to his colleagues. He wrote more than his share of the Court's opinions, in part because he assigned himself cases in areas like patent law, which others preferred to avoid, and he took on extra work when a colleague was ill or fell behind. Brandeis credited Taft with ‘admirable’ personal qualities, with smoothing out problems, and with conducting a harmonious conference.

EARL WARREN

- Warren also excelled as a social leader, and his popularity with his colleagues presumably enhanced his influence. He invited Black, as senior Justice, to continue to preside at conference initially. Warren greeted Potter Stewart and his wife at the train station at 6:30 a.m. when they first arrived in Washington, D.C. Warren routinely met other Justices, even those most junior, in their chambers rather than summoning them to his, persisting in the practice even when they protested that protocol demanded that they visit him. This show of humility--institutional and personal--helped endear Warren to his associates. Warren personally hand-delivered his draft of the opinion in Brown to each of his colleagues, even taking it to Jackson in the hospital, a gesture that signaled deference of a new Chief Justice for a senior colleague and afforded an opportunity for conversation, in addition to addressing the underlying confidentiality concerns associated with transporting the opinion outside of the Court.

Warren also cultivated his colleagues socially--an enterprise that must have come naturally for someone Brennan recalled as being ‘marvelous with people.’ Warren and his family spent holidays with the Blacks; he hunted and walked with Clark; and he attended sporting events and otherwise regularly socialized with Brennan. He persuaded all of his colleagues (except Black and Frankfurter) to join him at the Army-Navy

football game most years; the Justices traveled to the game by rail during which time they socialized with one another and their families over breakfast and dinner.

HARLAN FISKE STONE

Stone faced the difficult task of mediating the bitter differences that arose among [the justices] as they faced the challenging issues that arose during World War II (1941–1945). The five years he served as chief justice are often regarded as the most openly combative in Court history.

FRED VINSON

Chief Justice Vinson was "almost universally rated a failure as Chief Justice"[1] (at least in part) because he was ineffective at limiting concurrences and dissents and preserving a majority.

IS THAT VALUABLE?

I think one can have a hearty debate about whether it is desirable for a Chief Justice to try to limit separate opinions. Certainly it is good to try to have everyone get along. But it might be futile to try to limit separate opinions.

BREYER-SCALIA CLIP

* * *

Opinion-Assigning Power

There is no doubt that the power to decide who writes an opinion is one of the most significant a chief justice has.

John Marshall was the first to exercise control in this respect. Before Marshall, there was no official "opinion for the Court." The judges wrote seriatim opinions—they each wrote their own. Thus they may have all agreed on the result, but there reasoning may have been very different, and the opinion wouldn't provide binding legal authority to lower courts deciding the same issue. Marshall changed that by shifting to a process in which there was one opinion for the Court. This enabled the Court to set precedent rather than simply decide the case in front of it.

US REPORTS

Even then, took time for a reliable case reporting system to emerge. Court had no official reporter, so the decisions that got out when enterprising freelance workers, not paid by the court, got justices notes or sat in the courtroom and listened to what they said.

---

[1] Paul J. Weber, *Vinson, Fred M., in* ENCYCLOPEDIA OF THE SUPREME COURT 498 (David Schultz ed., 2005).

The Court began appointing official reporters during John Marshall's tenure, but the accuracy of their reporters was sometimes questioned. One reporter was reputed to be a drunk.

The norms of the opinion-writing process have also changed over time.

HOW IT WORKS TODAY

Conference. (Rehnquist style versus Roberts style)

Opinion Assignment.

HOW IT WORKED IN THE PAST

Into the twentieth century, opinions were not necessarily circulated to all the justices before they were published. The justices met at conference, voted, assigned the opinion, and then they all just trusted the opinion's author to get the reasoning right. They didn't necessarily see it before it went on the books, much less consent to its language.

And sometimes the Chief Justice assigned the majority opinion even when he was in the dissent. That would not go over well today.

OPINION ASSIGNMENTS HAVE ALWAYS BEEN STRATEGIC

The authority to assign the opinion is one of the most significant powers of the chief justice, and it has always been used strategically. For example, to leave their mark, chief justices have almost always retained the most important cases for themselves. Thus Chief Justice Roberts wrote the majority opinion in both Affordable Care Act cases.

Assign opinions in a way that will permit the CJ to keep a majority.

CJ won't assign to the justice likely to have the most extreme views or strident language; to keep everyone else on board, he'll assign the majority opinion to someone more in the middle.

Also manages opinions with an eye toward the public's acceptance of them

Chief Justice Stone's decision to reassign a major civil rights ruling from Justice Frankfurter to Justice Stanley Reed after other members of the Court expressed concern about a pro-civil rights ruling being authored by a Justice from the Northeast rather than a Justice from the South.

Earl Warren separated the merits from the remedy in order to have a unanimous opinion in Brown v. Board, which he thought was crucial to the nation's acceptance of it. He left

the questions of remedy—busing, etc.—on which there was a lot of dispute, for later cases.

Chief Justices win friends when they keep some of the "dogs" for themselves. The other justices loved Taft for his willingness to write the patent opinions no one wanted.

Chief Justices are responsible for keeping the trains running on time, and their opinion-assigning power plays into that. Rehnquist was famous for running a tight, efficient ship, and he simply refused to sign new opinions to any justices who were not timely completing the opinions they had been assigned.

* * *

Above all, the Court is a place of tradition. Chief Justices have played an important role in building those traditions, but once they're built, they're hard to change.

IS THE FILIBUSTER CONSTITUTIONAL?

PROFESSOR AMY BARRETT
NOTRE DAME LAW SCHOOL

MR. SMITH GOES TO WASHINGTON

Arrrrrggh!!! The term filibuster actually comes from a Dutch word meaning "pirate." It became popular in the United States during the 1850s when the term captured the sense of frustration when efforts were made to hold the Senate floor and prevent action on a bill.

SENATE RULE XXII

Takes 3/5 (60) of the Senators duly chosen and sworn to end debate and bring a measure to a vote.

"NUCLEAR OPTION"

November 2013: Democrats changed the cloture rule so that only a simple majority needed to end a filibuster of executive and judicial nominees, except Supreme Court nominees. The 3/5 rule still applies otherwise.

ART. I, § 5, CL. 2

The Constitution grants each House the authority to "determine the Rules of its Proceedings."

ART. I, § 3, CL. 6

2/3 of the Senate to impeach

ART. I, § 4, CL. 2

2/3 of a chamber to expel a member

ART. I, § 7, CL. 2

2/3 of both houses to override a presidential veto

ART. II, § 2, CL 2

2/3 of the Senate to consent to a treaty

ART. V

2/3 of both houses to propose a constitutional amendment

AMEND. XIV, § 3

2/3 of both houses to remove the disability rendering a federal or state officer who supported the rebellion ineligible to hold federal or state office.

AMEND. XXV

2/3 of both houses to determine that the President is unable to discharge the powers and duties of office.

VETO OVERRIDE

The fact that it takes a supermajority of each

chamber to override a veto suggests that it should be a simple majority the first time around.

ARTICLE I, § 7

"Every bill which shall have *passed* the House of Representatives and the Senate" may become a law upon signature by the president.

VICE PRESIDENT AS TIE BREAKER

The textual commitment to majority rule is also expressed by the grant of a vote to the Vice President in those cases in which the senators are "equally divided."

TREATIES VERSUS APPOINTMENTS

Article II requires the consent of 2/3 of the Senate for treaties. The very next clause requires simply the Senate's "advice and consent" for nominations.

CONSTITUTIONAL PATTERN

The Constitution's supermajority requirements apply in either (1) lawmaking situations of heightened sensitivity and (2) removal of officers (and lifting the punishment for those on the wrong side of the Civil War).

ARTICLES OF CONFEDERATION

The Articles required a 2/3 supermajority to pass many laws. This made it difficult to get things done, and the Constitution sought to remedy this defect.

FEDERALIST NO. 22

Hamilton defended the decision to break with the supermajority system of the Articles, insisting that it would be inadvisable to "give a minority a negative on the majority" in situations involving ordinary legislation.

THE FEDERALIST NO. 58

Madison rejects proposition that more than a majority should be necessary for decision in the House because, *inter alia*, "It would no longer be the majority that would rule; the power would be transferred to the minority."

JEFFERSON'S MANUAL

"No one is to speak impertinently or beside the question, superfluously, or tediously."

MOVING THE PREVIOUS QUESTION

Governed debate in early years. There is disagreement about its function, but agreement that it was rarely used before its abolition in 1806.

RISE OF DELAY TACTIC

Unlimited debate as a delay tactic appears to have emerged in the 1840s.

CLOTURE RULE

Rule XXII was adopted in 1917 as a means of curbing increasingly abusive filibusters.

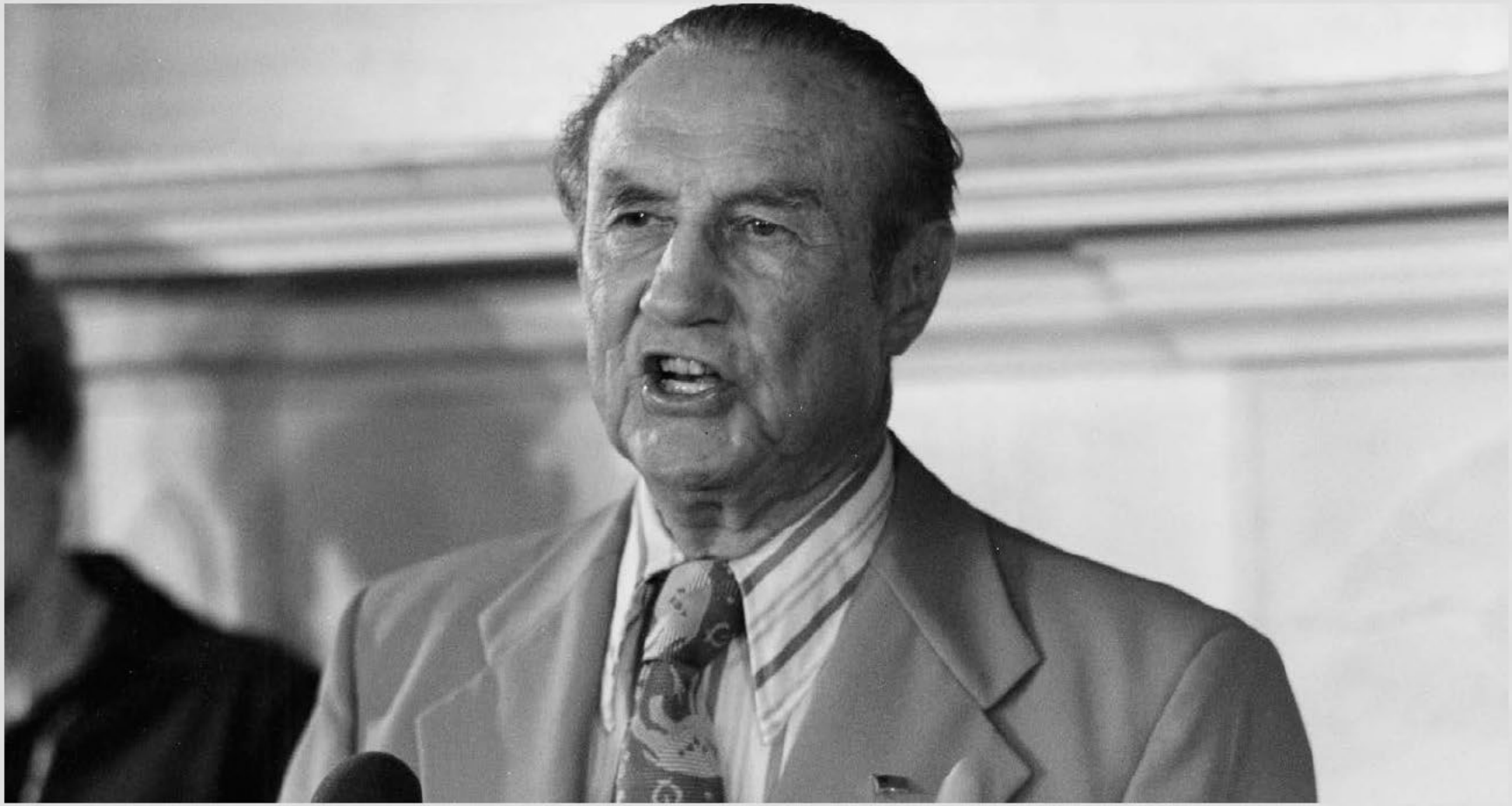
1930-1970

Filibuster almost entirely associated with the battle over civil rights.

SENATOR ROBERT LAFOLLETTE

SENATOR HUEY P. LONG

STROM THURMOND



EXPLOSION SINCE

There has been explosion since then. The filibuster is used to tank a range of legislation and the President's nominations to office.

WEIGHT OF THESE PRECEDENTS?

There is little founding-era evidence, but there is indisputably a longstanding practice, and the cloture rule itself is nearly 100 years old. But is the practice worthy of deference?

TWO-TRACK SYSTEM

Traditional filibuster held up all Senate business; thus it came at a cost. The two-track system—or stealth filibuster—comes at a lower cost because other Senate business can continue.

COUNTERARGUMENTS

How is the filibuster different from other delay tactics that may defeat proposals a majority favors? How would we draw a line?

POLICY

Of course, these arguments are all about the constitutionality of the filibuster. Whatever you conclude about that, you still need to confront the question whether it is good policy.

THE END

UNIVERSITY *of* NOTRE DAME

Notre Dame International

Program on Constitutional Structure Hosts Conference, "The Common Law in an Age of Regulation"

Published: February 13, 2015 **Author:** Denise Wager [link:/about/news/authors/denise-wager/]

The Program on Constitutional Structure recently hosted a conference in London, “The Common Law in an Age of Regulation.” The conference brought together several international scholars for a thought-provoking discussion about the role that the common law can play in an age of modern governance, as well as the inherent challenges that come with regulation.

Professor Jeff Pojanowski organized the conference and considered it a success. “In an era of increasing academic specialization, it was refreshing and exciting to see scholars from such varied backgrounds and research interests convene and learn from each other. The fascinating conversations we had are a great testament to our participants’ depth of learning and intellectual curiosity.”

“The relationship between common law and enacted law has long raised foundational questions of constitutional law,” said Professor A.J. Bellia, who directs the Program on Constitutional Structure and participated in the conference. “It was a privilege to exchange ideas about these questions with leading scholars from a range of nations that face them.”

NDLS Participants: Barry Cushman, A.J. Bellia, Jeff Pojanowski, Amy Coney Barrett, and Randy Kozel

Conference Papers and Participants included:

The Process Acts and the Alien Tort Statute

A.J. Bellia
University of Notre Dame
Commentator: James Lee
Kings College London

Administrativism and the Conceptualisation of Private Law

Allan Beever
AUT Law School
Commentator: Barry Cushman
Notre Dame Law School

Regulation and the Rule of Law

Paul Yowell
University of Oxford (Oriel College)
Commentator: Erin Delaney
Northwestern University

Habeas Corpus and the American Revolution

Amanda Tyler
University of California Berkeley
Commentator: Mark Walters
Queens University

Apportionment of Damages for Contributory Negligence: A Fixed or Discretionary Approach?

James Goudkamp
University of Oxford (Keble College)
Commentator: Amy Coney Barrett
Notre Dame Law School

Our Common Law Court?

Randy Kozel and Jeff Pojanowski
Notre Dame Law School
Commentator: Rachael Walsh
Trinity College Dublin

Originally published by Denise Wager at constitutional-structure.nd.edu [link:http://constitutional-structure.nd.edu/news/55810-program-on-constitutional-structure-hosts-conference-the-common-law-in-an-age-of-regulation/] on February 12, 2015.

Notre Dame International105 Main Building, Notre Dame, IN 46556
Phone 574.631.1138
ndintl@nd.edu EmergencyAccessibility Information

CANONS OF STATUTORY INTERPRETATION

LINGUISTIC CANONS

- The rules of syntax applied to statutes.
- These are not hard-and-fast rules. The context may make clear that they do not apply.

ORDINARY MEANING

- Words should be given their ordinary meaning unless the context indicates that Congress used the word or phrase as a term of art.

NOSCITUR A SOCIIS

- A word is known by its companions—i.e., the words that appear around it.

EJUSDEM GENERIS

- Where general words follow a list of more specific terms, the general words apply only to persons or things of the same general kind or class as the more specific ones.

PRESUMPTION OF CONSISTENT USAGE

- Presume that a word has the same meaning throughout the statute.

PRESUMPTION AGAINST SUPERFLUITY

- Avoid an interpretation that would render part of a statute superfluous.

EXPRESSIO UNIUS

- The expression of one thing implies the exclusion of others.

SPECIFIC TRUMPS GENERAL

- When there is a conflict between a general provision and a more specific one, the specific provision controls.

SUBSTANTIVE CANONS

PROMOTE POLICIES EXTERNAL TO THE STATUTE

AVOIDANCE CANON

- Where one interpretation of a statute raises a serious constitutional question, the court should adopt any other plausible interpretation.

PRESUMPTION AGAINST PREEMPTION

- Presume that a federal statute does not preempt state law.

PRESUMPTION AGAINST EXTRATERRITORIALITY

- Presume that a statute applies only within the territorial jurisdiction of the United States.

SOVEREIGN IMMUNITY

- Absent a clear statement, a statute does not waive the federal government's immunity from suit.
- Absent a clear statement, a statute does not abrogate a state's sovereign immunity from suit in federal court.

CORE STATE FUNCTIONS

- Absent a clear statement, a state does not regulate "core state functions."

ABSURDITY DOCTRINE

- Construe a statute to avoid an absurd result.

THE END

Introduction

Thanks.

Stress that I am offering a description of the American experience, but certainly not presuming to advise you on the best way to resolve the disputes you face under your own Constitution. My expertise lies in American constitution law. My goal is to offer to you an account of some of our own constitutional struggles in the event that our own debates are of interest to you.

I encourage you to interrupt me whenever you have questions or would like to hear more about a certain topic. My aim is to be as useful to you as I can, so I will rely upon you to let me know what you are most interested in discussing.

In this very first session, my goal is to give you a brief background on our Constitution and the Supreme Court. I think our discussion of the specific issues our Court faces will make more sense if I can put it in the context.

Background of U.S. Constitution

AGE

One thing that distinguishes the United States Constitution from the constitutions of many other countries is its age: our Constitution is relatively old. It was adopted in 1789. The original Constitution dealt primarily with the structure of our government and said very little about the protection of individual rights. This was a matter of concern to several of the American states who ratified the original Constitution. They consented to it but at the same time insisted that a Bill of Rights be added. Lawmakers responded to that request, and what we call our "Bill of Rights" was ratified by the states only two years later, in 1791. This Bill of Rights contains various guarantees like freedom or religion, freedom of speech, and certain protections in the criminal process. These constitutional guarantees of rights remain central to the American experience and are frequently litigated in our courts even today.

FEW AMENDMENTS

In the two centuries since then, our Constitution has been amended only 17 more times. The infrequency of amendment is due to the fact that the United States Constitution is very difficult to amend. It cannot be amended by the United States

Congress or president acting alone; nor can it be amended by a simple referendum of the people. It can only be amended by a supermajority. An amendment can only be proposed by 2/3 of both the Houses of the legislature or by 2/3 of the 50 States. Once a proposal is made, it only becomes law if 3/4 of our fifty states ratify it. Thus, an amendment must jump over very high hurdles to become law.

- 6 amendments approved by Congress that the states failed to ratify.

- 11,539 measures proposed by members of Congress that didn't make it through the step of supermajority legislative approval.

There is occasional debate in America about whether it is a good thing that our Constitution is so difficult to amend. This debate is not very serious, however, because on the whole, people are content with the situation. The infrequency of amendment gives our constitutional law stability. The Constitution sets things in stone. If we set only the most fundamental things in stone, that leaves more room for us to experiment through ordinary legislation.

Purpose of the Constitution

ULYSSES

So what does it mean for the US Constitution to set some things in stone and leave others to the process of ordinary legislation? The US Constitution takes some matters off the table by placing them beyond the reach of ordinary legislation.

We leave most things to be worked out through by a majority vote in the democratic process, but that there are some things that a simple majority can't change. Our Constitution identifies some matters as so fundamental that they cannot be changed through the ordinary political process; our most fundamental values can be changed only supermajorities.

Scholars have described this relationship between the Constitution and ordinary legislation in different ways.

- One analogy is to describe the Constitution like Ulysses tying himself to the mast of his boat to resist the charms of the Sirens. In his sane moment, Ulysses knows that he does not want to leap over the side of the boat and

swim to the Sirens. But he also knows that he might be sorely tempted to do so in the heat of the moment.

- Similarly, we as an American people do not want to legislate in ways that violate the fundamental rights of any of our citizens. The Constitution is the way we restrain ourselves from giving into that temptation. For example, the First Amendment to the Constitution protects the right of every American to engage in free speech, even when the speech is unpopular, because we view the ability to speak freely as a cornerstone of democratic government. But in the heat of the moment, we have sometimes tried to pass legislation that violates that principle—for example, by making it illegal to burn the American flag to symbolically critique the government. The Supreme Court enforcing the First Amendment by holding such legislation to be an unconstitutional violation of Frist Amendment rights. Even though democratic majorities wanted that legislation in the heat of the moment, the commitment we made during our saner moment restrains us.

- Tushnet: the Constitution is an appeal from the people drunk (the people acting under the influence of short-term considerations) to the people sober (the people acting on their understanding of their deeper long-term interests).

The Role of the Supreme Court

This is where the United States courts come in. Litigants can ask the federal courts to decide whether a statute or executive action violates the principles enshrined in the Constitution. The courts, through this ability to review the constitutionality of state action, enforce the limits of the Constitution.

Because I will spend much of my time discussing the work of the United States Supreme Court, I thought it would be helpful to give you a sense of how our Court operates.

NOT JUST A CONSTITUTIONAL COURT

The United States Supreme Court is not only a constitutional court: It addresses many different questions arising under federal law. In any given year, a significant percentage of the Court's docket involves the interpretation of federal statutes rather than the interpretation of our Constitution.

NUMBER

Congress gets to decide how many justices sit on the Court. That number has varied over time; currently, we have nine justices.

NOMINATION AND CONFIRMATION

Our justices are appointed by the President, but they cannot take office unless they are confirmed by the Senate. For most of history—indeed, until the 1980s—the confirmation of Supreme Court justices did not tend to be a politically controversial matter.

The more the Court became involved in morally contentious issues like abortion, however, the more heated confirmation battles have become. It is now rare for a Supreme Court justice to be confirmed unanimously; the vote tends to break down along party lines, with the politicians of the President's party supporting the nomination and those of the opposite party opposing it. In the old days, nominees were confirmed based on their credentials. Now, it's not just a matter of credentials, but as the Court has involved itself more in hot-button issues, people oppose or support justices based on the positions those nominees take on abortion, etc.

The ability to appoint Supreme Court justices is a very significant power, and because people know that Supreme Court justices have tremendous power to interpret the Constitution in ways they may not like, Supreme Court nominations are a huge issue in every presidential election.

LIFE TENURE

Once they are confirmed, however, a Supreme Court justice has a secure job for life. The Constitution gives all federal judges, including those who sit on the Supreme Court, life tenure and protection from reduction in salary while they are in office. This is designed to give them independence: Neither the President nor Congress can fire a justice if the justice writes an opinion they don't like. Congress cannot reduce a justice's salary to punish him or her for an unpopular decision.

The only way to forcibly remove a federal judge from office is to impeach her for committing a "high crime or misdemeanor." Congress only tried once to impeach a Supreme Court justice, and he was ultimately acquitted. A handful of lower

court judges have been impeached. Impeachment has been used against federal judges only to battle corruption rather than as a political tool.

JURISDICTION

MANDATORY VERSUS DISCRETIONARY

There are many restrictions on the jurisdiction of the Supreme Court. .For the most part, Congress gets to decide by statute how many and what kinds of cases the Court will hear. The jurisdictional statutes have varied over time.

- For much of the 19th Century, the Supreme Court's jurisdiction was mandatory: in a specified class of cases, the Court had to hear every case that came to it. It had no discretion to refuse to hear cases.

- That changed in the 20th Century, when Congress chose to give the Supreme Court much more discretion. Now its jurisdiction is almost entirely discretionary. Every year, the Court receives approximately 10,000 petitions asking it to review disputes; it only decides between 80 and 100 of those cases.

CERT POOL

- The law clerks at the Court have the enormous job of reviewing all of the petitions, summarizing them in memos, and advising the justices which ones warrant the attention of the Court. Generally speaking, the Court takes a case only if it is a matter on which lower courts are divided. It does not take a case only to correct an error in the decision below. It takes cases to clarify, once and for all, what a federal statute or constitutional provision means when the lower courts disagree. It sees its job as clarifying the law rather than rectifying errors. It picks and chooses as a means of allocating its resources to the issues that it thinks most important.

- After reading the advice of the law clerks about which cases to take, the justices have a conference to vote. It takes the vote of four justices to get a case onto the Court's calendar.

OPINIONS

With rare exceptions, the Court issues an opinion in every one of the 80-100 cases that it hears each year. Many times, separate opinions, either concurring or dissenting, are published along with the majority opinion. These opinions are published and have precedential value, which is a matter that we will talk about more in tomorrow's session. The Supreme Court will follow the holdings of these opinions in its own future cases, and lower courts are absolutely bound to follow the opinions that the Supreme Court issues.

The question whether elected officials from the executive or legislative branch have to treat these opinions as having the status of law is a controversial one. As a practical matter, they largely do, but every so often, the President or Congress will reject what the Supreme Court has said and assert the right to interpret the Constitution differently than the Court.

Kellogg Institute Director Trains Justices of Ecuador's Constitutional Court

Published: December 09, 2013

Author: Elizabeth Rankin and Kevin Fye [link:/about/news/authors/elizabeth-rankin-and-kevin-fye/]

Under the terms of a new agreement between the University of Notre Dame and Ecuador's Constitutional Court, Kellogg Institute Director Paolo Carozza [link:http://kellogg.nd.edu/faculty/fellows/carozza.shtml] is in Quito this week providing Ecuadorian justices with a foundation in procedural and theoretical aspects of precedent-based law.

Following the enactment of a new national constitution in 2008, the Ecuadorian Court has been developing new methods of adjudication. As it does so, justices are interested in learning more about practices in other countries, including the United States.

"It is a really dynamic time for constitutionality in Latin America," says Carozza. "There is a great deal of ferment and experimentation. This is a wonderful opportunity to contribute to what is going on as well as an opportunity to learn from the Ecuadorian process."

The intensive week-long seminar, cotaught by Professor of Law Amy Barrett, touches upon a broad range of issues, from the organization of the court's docket and drafting of judgments to theories of constitutional interpretation and the handling of precedents. In addition, Carozza is offering a comparative analysis of other foreign courts, examining the rationale and procedures for citing these courts in judgments, as well as a lecture on issues of human dignity.

Of particular value to Ecuador's Court, the seminar is also examining the ways that other jurisdictions handle freedom of expression cases.

The first stage of an anticipated long-term relationship between the Notre Dame Law School and the Ecuadorian Court, the seminar is cosponsored by the Center for Civil and Human Rights and the Program on Constitutional Structure. It is being held at CIESPAL, the Center for Advanced Studies in Communication for Latin America.

Notre Dame International 105 Main Building, Notre Dame, IN 46556
Phone 574.631.1138
ndintl@nd.edu EmergencyAccessibility Information

UNIVERSITY *of* NOTRE DAME

The Law School

Judge Kavanaugh Comes to NDLS

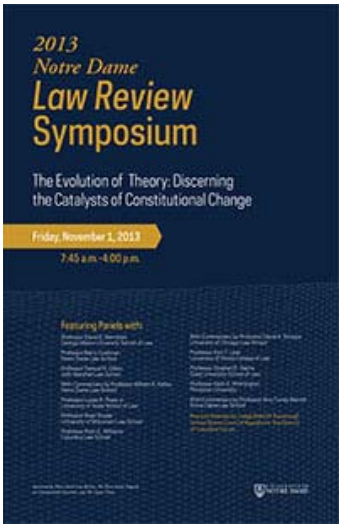
Published: October 30, 2013

Afterward, the Federalist Society hosted Judge Kavanaugh for a question and answer session moderated by NDLS Professor William K. Kelley [link:/directory/william-kelley/].

The *Law Review Symposium*, entitled "The Evolution of Theory: Discerning the Catalysts of Constitutional Change" opened with remarks by NDLS Professor A.J. Bellia [link:http://law.nd.edu/directory/anthony-bellia-jr/]. Three panels of leading scholars, including NDLS Professor Barry Cushman [link:/directory/barry-cushman/], then delveed into some of the major doctrinal shifts in constitutional law: the Lochner/New Deal "switch in time"; the rights revolution of the Warren and Burger Courts; and the conservative revival of the Rehnquist and Roberts Courts. Offering commentary on the panel discussions was University of Chicago Law Professor David A. Strauss and NDLS Professors Kelley and Amy Coney Barrett [link:http://law.nd.edu/directory/amy-barrett/].

Photo from left to right: Krista Pikus, Francesca Genova, Judge Kavanaugh, Patrick Cassidy

D.C. Circuit
Judge Brett M. Kavanaugh
[link:http://www.cadc.uscourts.gov/internet/home.nsf/Content
gave the keynote address for the 2013 Notre Dame Law Review Symposium November 1 in the Patrick F. McCartan Courtroom. The presentation was sponsored by the Notre Dame Law Review, the Notre Dame Program on Constitutional Structure [link:http://constitutional-structure.nd.edu/], and the Clynes Chair in Judicial Ethics.



[link:/assets/116875/law_review_symposium_brochure_fall2013.pdf]

Posted In: **General News** [link:/news/category/general-news/] , **Home Page** [link:/news/category/home-page/] , **and** **News Page** [link:/news/category/news-page/]

Why ND Law?
Apply Now
Faculty & Staff
Library
Support the Law School
ABA Required Disclosures

The Law SchoolP.O. Box 780, Notre Dame, IN 46556
Phone 574.631.6627
Fax 574.631.3980
ndlaw@nd.edu
Accessibility Information
Law School Admissions Office
1329 Biolchini Hall, Notre Dame, IN 46556
Phone 574.631.6626
Fax 574.631.5474
lawadmit@nd.edu
Like us on Facebook
Law School Career Development Office
Phone 574.631.7542
Fax 574.631.4789
lawjobs@nd.edu
Like us on Facebook
, Facebook
fl Twitter
. Instagram
· LinkedIn

Today@NDLS

Professors for Lunch

Thanks so much to Professor Munoz for inviting me to talk to you today, and thanks to you for joining this lunch conversation. As you know, this month marks the fortieth anniversary of Roe v. Wade. Given that mile marker in our nation's history, Prof. Munoz asked me to talk to you today about the Supreme Court's jurisprudence. But my hope, actually, is that I will not do all the talking. I'm going to describe the Court's abortion cases for those who are unfamiliar with them, and I'm going to identify some of the issues surrounding those cases. In particular, I want to focus on two questions:

(1) The Supreme Court's capacity to decide conclusively moral questions on which the country is deeply divided.

(2) What might happen if the Supreme Court reversed Roe.

Roe v. Wade (1973)

The fight about abortion had already begun before 1973, but it was focused at the state level. A majority of states had criminal statutes prohibiting abortion except where necessary to preserve the life of the mother. Some states, however, had begun liberalizing their abortion laws, permitting abortion in cases of rape and incest, and where the doctor judges that carrying the pregnancy to term would impair the physical or mental health of the mother—a more vaguely defined standard. Even these laws, however, required doctors to jump through hoops before an abortion could be ordered. There needed to be consultation with other doctors or even approval by a hospital committee for that purpose.

The statute challenged in Roe was a Texas statute that criminalized abortion unless necessary to protect the life of the mother. The plaintiff—Norma McCorvey, who sued under the pseudonym Jane Roe—was single and poor. She alleged that the TX statute violated her constitutional right to privacy. The Supreme Court agreed, although most people in the United States at the time did not.

Now, the Constitution does not expressly protect a right to privacy. The Court rooted its decision in the Fourteenth Amendment to the Constitution, which prohibits a State from depriving any person of life, liberty, or property without due process of law. That sounds like a procedural guarantee—a guarantee that the State will observe fair procedures before depriving you of those things. But well before Roe, the Court had held that the Fourteenth Am's guarantee was substantive as well: in guaranteeing "liberty" it implicitly guaranteed a "fundamental right of privacy." Before Roe, it had held that this right included, among other things, the right to use contraceptives. The question was whether the right should extend to include a woman's right to decide whether to terminate her pregnancy.

As you know, the Court held that it did. In an opinion by Justice Blackmun, the Court set out a framework that, as a practical matter, permitted abortion on demand. It guaranteed women an unqualified right to abortion in the first trimester. It permitted the state to regulate abortion in the second and third trimesters, but only in ways that promoted the health of the mother. Even when the state regulated to protect the health of the other, the standard for such regulation was the highest the Constitution imposes: The state could only regulate if its interest was "compelling" and it had to protect its interest by the least restrictive means possible.

Roe ignited a national controversy. It took an issue that had been fought in the states to the national level. I want to focus on two questions that have been raised in legal scholarship about Roe: (1) Is the Supreme Court well suited to resolve moral questions on which the nation is divided, or should it leave such issues to legislatures, and (2) if the Supreme Court should resolve such issues, should it get out ahead of public opinion when it does so?

(1) Institutional Capacity

Pro: The open-ended language of the Constitution permits the recognition of rights that are not express. If the right to terminate a pregnancy is one of those rights, the Court has to intervene to protect that right even if the overwhelming majority of American citizens think differently. The whole point of the Constitution is to tell democratic majorities that there are some things they cannot do.

Con: Overruling the will of a democratic majority is a big deal. When the Constitution doesn't expressly prohibit something, and when our history and tradition has not treated it as a fundamental right, the Court should not step in but rather leave the democratic process free to work. This is how Justice White put it in Roe:

- **Roe v. Wade, 410 U.S. 179, 222 (1973) (White, J., dissenting):**

  As an exercise of raw judicial power, the Court perhaps has authority to do what it does today; but in my view its judgment is an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court. The Court apparently values the convenience of the pregnant woman more than the continued existence and development of the life or potential life that she carries. Whether or not I might agree with that marshaling of values, I can in no event join the Court's judgment because I find no constitutional warrant for imposing such an order of priorities on the people and legislatures of the States.

(2) Backlash

It is well known that those in the pro-life movement think Roe was a mistake. Perhaps less well known is that some committed to abortion rights are also critical

of the decision. There are legal scholars who think that the Court should be cautious about getting too far ahead of public opinion. When it goes farther than the majority of people are ready to, it can provoke backlash that does both the country and the Court's institutional reputation harm. In legal scholarship, some have dubbed this phenomenon "Roe Rage."

- **Cass Sunstein:**

  Progressives dread *Roe* rage. *Roe*'s "enduring harmful effects on American life": By 1973 . . . state legislatures were moving firmly to expand legal access to abortion, and it is likely that a broad guarantee of access would have been available even without *Roe* . . . . [T]he decision may well have created the Moral Majority, helped defeat the equal rights amendment, and undermined the women's movement by spurring opposition and demobilizing potential adherents. At the same time, *Roe* may have taken national policy too abruptly to a point toward which it was groping more slowly, and in the process may have prevented state legislatures from working out longlasting solutions based upon broad public consensus.

- **William Eskridge,** a law professor and leader in the gay rights movement, condemns *Roe* because it recognized a right that caused traditional Americans who oppose abortion to feel "as though they had been disowned by this country":
  Roe essentially declared a winner in one of the most difficult and divisive public law debates of American history. Don't bother going to state legislatures to reverse that decision. Don't bother trying to persuade your neighbors. *Roe* was a threat to our democracy because it raised the stakes of an issue where primordial loyalties ran deep. Not only did *Roe* energize the pro-life movement and accelerate the infusion of sectarian religion into American politics, but it also radicalized many traditionalists.

There is no doubt that Roe provoked a tremendous backlash in American politics, or that it had a tremendous effect on the Court itself. Consider the nomination process. If Americans believe that the Court is going to resolve moral issues of consequence, of course they are going to want to ensure that the justices on that Court are likely to resolve them in ways with which they agree. And so a justice's inclination to overturn Roe (for Republicans) or adhere to Roe (for Democrats) became a huge factor in the process of nominating and confirming Supreme Court justices.

Casey: In 1992, the composition of the Court had changed, and many hoped that the Court was poised to overturn Roe. A case called Casey v. Planned Parenthood of PA was

on the Court's docket. Casey overturned some aspects of Roe, but it affirmed Roe's central commitment to a woman's right to choose.

Casey leaves more room than did Roe for state regulation of abortion. It gives more room than did Roe to the state's interest in protecting fetal life. But it leaves intact the core of the case, the woman's constitutional right to end a pregnancy.

Casey holds that before viability, the state may not prohibit or impose substantial obstacles to the right of a woman to obtain an abortion. But both before and after viability, the state can regulate abortion in ways that further the state's interest in the life of the fetus. Post-viability, the state can restrict abortion, so long as it includes an exception for the mother's health. This is a robust exception insofar as health includes emotional health.

Under the Roe regime, the Court never met an abortion regulation that it found acceptable. In Casey, the Court upheld a parental consent requirement (with a bypass), a 24 hour waiting period, a requirement that the doctor inform the patient of gestational age and make available materials describing abortion and alternatives, and record-keeping requirements. The only regulation it struck was a spousal notification requirement.

After Casey, the next significant abortion cases are the partial birth abortion cases. There are two, and I will call them Carhart I and Carhart II, because the same doctor was a named party in each.

In 2000, the Court decided Carhart I. In that case, it held unconstitutional a NE statute banning partial birth abortion. A partial birth abortion is one in which the doctor partially delivers the fetus before killing it. The NE statute contained no health exception. The Court held it unconstitutional under Casey as an undue burden on the mother's abortion right.

- This, like Roe, is a case in which the SCT was out of step with then-current opinion. Polls show that 70% of Americans support bans on partial birth abortion, and statutes prohibiting it were a compromise between those supporting an unqualified abortion right and those wanting some exceptions to it.

In 2007, the Court decided Carhart II, which tested the constitutionality of the Federal Partial Birth Abortion Act, which had been passed after Carhart I. The most significant change between 2000 and 2007 was that Justice Alito had replaced SOC, who had voted with the majority in Carhart I.

In Carhart II, the Court upheld the statute. It held that Congress had been more careful than the NE legislature in tailoring the statute so that it did not impose an undue burden. In particular, Congress had made clear that the ban applied only to the "Dilation and Extraction" procedure when the infant had come partway through the birth canal partially intact. It left in place the D & E method most commonly

employed in late term abortions, which dismembers the fetus in utero and removes the body piece by piece.

Importantly, the state interest identified as not the prevention of fetal killing. Instead, it was preventing the coarsening of society by implicit approval of an inhuman technique. As Congress said in its statement of purpose: "Implicitly approving such a brutal and inhumane procedure by choosing not to prohibit it will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life."

These are valid state interests under Casey: the state may use its voice and its regulatory authority to show its profound respect for the life within the woman. D & E procedure is laden with the power to devalue human life. But it was open to Congress to regulate this specific iteration of it because it implicates additional ethical and moral concerns that justify a special prohibition. Disturbing similarity to infanticide.

Dissent pointed out, correctly in my view, that the standard d & e, which dismembers a fetus, can be thought equally brutal, and methods of abortion that kill the fetus in utero and deliver the stillborn baby resemble infanticide. There is no rational line, they argued, between this situation and those, which puts the right to abortion at risk. Moreover, they viewed the Act as an effort by the pro-life movement to chip away at the abortion right, at least in the second and third trimesters.

Let me return to the two questions I posed at the outset:

(1) The Court's institutional capacity to resolve political conflicts like disagreement about abortion;

(2) What might happen if Roe were overturned?

I'll take the second one first:

I think it unlikely that the Court would overturn Roe. Our current situation is that states are trying to live within it. Some states continue to consider regulations designed, as Casey put it, to express the profound respect for the life or potential life within the mother, while avoiding at the same time putting a substantial obstacle in the way of a woman's right to obtain an abortion, particularly in the first trimester.

- Example of recent state proposals - - heartbeat laws requiring pre-abortion u/s.

It seems to me that the battle now is less about whether Roe will be overruled than about funding: whether state legislatures and governors, or the president and Congress, will choose to use public funds to pay for abortions—which the

Constitution permits them to do. And whether the government can require private parties to fund abortions, as some say the government has done through the Obamacare mandate.

But let's imagine a world in which the Court overturned Roe. What would happen?

The day after Roe fell, of course, abortion would be neither legal nor illegal throughout the United States. Instead, the states and Congress would be free to ban, protect, or regulate abortion as they saw fit.

- It is unlikely that Congress or any state would outlaw abortion altogether. Polls consistently show support for, at a minimum, exceptions for rape, incest, fetal defect, and the life and health of the mother. And as we've seen to this point "health" can be interpreted quite broadly.
- But even beyond that, many polls show support for first trimester abortions and the use of abortion-inducing drugs very early in pregnancy. It may well be that abortions might be prohibited in the second and third trimesters, but at least in the majority of states, it seems doubtful that they would be altogether prohibited in the first three months of pregnancy.

It's also possible that whatever the Supreme Court holds about the federal constitution, state supreme courts would hold that their state constitutions protect a constitutional right to abortion. We might see many blue states do that.

Now for that first question: Does the Supreme Court have the institutional capacity to decide questions like Roe? Any decisionmaker who makes a choice about whether abortion should be permitted must resolve competing moral claims. Institutionally, are legislatures or courts better suited to that task?

Questions.

ARCHIVE

Law professor reflects on landmark case

Christian Myers | Monday, January 21, 2013

The first installment of the semester in the Professors for Lunch series, “Roe at 40: The Supreme Court, Abortion and the Culture War that Followed,” drew an audience that filled the Oak Room of South Dining Hall on Jan. 18.

During the lunch event, law professor Amy Barrett discussed the legacy of the landmark Supreme Court case Roe v. Wade that was decided on Jan. 22, 1973.

Barrett, a 1997 graduate of Notre Dame Law School and a former clerk for associate justice Antonin Scalia of the Supreme Court of the United States, said it was important to look at the case and its legacy in light of its coming 40th anniversary.

Barrett said an important question surrounding the issue of abortion is what part of the government should ultimately decide abortion policy. It makes a difference whether the issue is addressed at a state or national level, and whether it is addressed by popularly elected legislators or appointed judges, she said.

“It brings up an issue of judicial review: Does the Court have the capacity to decide that women have the right to obtain an abortion or should it be a matter for state legislatures?” she said. “Would it be better to have this battle in the state legislatures and Congress rather than the Supreme Court?”

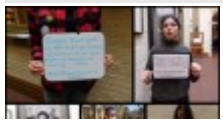
Barrett said one problem with the Supreme Court having ruled on the issue is the effect Roe v. Wade has had on the confirmation process of newly appointed Supreme Court justices.

“Republicans are heavily invested in getting judges who will overturn Roe [v. Wade], and Democrats are heavily invested in getting judges who will preserve the central holding of Roe [v. Wade],” Barrett said. “As a result, there have been divisive confirmation battles of a sort not seen before.”

The 1992 case of Planned Parenthood v. Casey modified Roe but upheld its central ruling, she said.

“Planned Parenthood v. Casey is a case that alters Roe but preserves the core of Roe,” she said. “As of the [Planned Parenthood v.] Casey ruling, before viability the state policy may not pose a substantial obstacle to a woman’s obtaining an abortion, but the state can regulate in the

‘She’s a Hall of Fame person. Period.’: Former players reflect on McGraw’s Hall of Fame career, legacy after her 30th season at Notre Dame (http://ndsmcobserver.com/2017/04/muf mcgraw-former-players-reflect-hall-fame-legacy-30-season/)



Students launch whiteboard campaign in response to Commencement speaker (http://ndsmcobserver.com/2017/04/stud spark-hashtag-campaign-to-resist-commencement-speaker/)

THE OBSERVER

Hall of the Year (http://ndsmcobserver.com/2017/04/hall presidents-council-hall-year/)

THE OBSERVER

A North Dining Hall review (http://ndsmcobserver.com/2017/04/nor dining-hall-review/)

TWITTER FEED

interest of the life of the fetus. [Planned Parenthood v.] Casey also stated that after viability the state can regulate with an exception for health of the mother."

After 40 years, the Court is unlikely to overturn Roe v. Wade, she said. The political opposition to the case has for the most part changed tactics from fighting to overturn it to preventing public funding of abortions.

"I think it is very unlikely at this point that the court is going to overturn Roe [v. Wade], or Roe [v. Wade] as curbed by [Planned Parenthood v.] Casey. The fundamental element, that the woman has a right to choose abortion, will probably stand," she said. "The controversy right now is about funding. It's a question of whether abortions will be publicly or privately funded."

Barrett said it is important to recognize the emotional and physical difficulty of carrying an unwanted pregnancy to term.

"Motherhood is a privilege, but it comes at a price," she said. "A woman who wants to become pregnant accepts this price, but in an unplanned pregnancy the woman faces the difficulties of pregnancy unwillingly."

Many women who choose to abort an unwanted pregnancy are both poor and single, Barrett said, and therefore do not have the means to raise a child properly. She said this ought to be an area of focus for addressing the abortion issue.

"I think supporting poor, single mothers would be the best way to reduce the number of abortions in the U.S.," Barrett said.

Barrett also outlined the history of the Roe v. Wade decision and associated cases in the Supreme Court.

At the time of the case, most states prohibited abortion, except in cases wherein it protected the life of the mother, she said. But there was a trend of states liberalizing their abortion laws to permit exceptions for incest, rape and the mother's health.

Roe v. Wade came before the Supreme Court after a woman filed suit against a Texas statute, one of the states with stricter abortion laws, Barrett said. The decision took the abortion issue to the "national stage" and that it marked a dramatic change in public policy about abortion.

"Roe [v. Wade] was a dramatic shift," she said. "The framework of Roe [v. Wade] essentially permitted abortion on demand, and Roe [v. Wade] recognizes no state interest in the life of a fetus."

The decision led to a political backlash that legal scholars have termed "Roe rage."

Barrett said some individuals on the "pro-choice" side of the abortion issue believe the Court overstepped in Roe v. Wade and should have instead allowed more time for states will trend toward more permissive laws. She said these people point to "Roe rage" and its political consequences as evidence.

The 1973 case Doe v. Bolton upheld Roe v. Wade and struck down a Georgia law's restrictions on abortion, Barrett said, including the requirement that a hospital committee approve abortion procedures. A few states maintain restrictions that the Supreme Court has yet to rule on, Barrett said, including the requirement that the mother view an ultrasound that shows the fetus' heartbeat.

SHARE THIS STORY

RELATED STORIES

Law Profs Anticipate Supreme Court Case (Http://Ndsmcobserver.Com/2006/04/Law-Profs-Anticipate-Supreme-Court-Case/)

With the U.S. Supreme Court poised to hear a case challenging a federal partial...

The right to life, liberty, happiness and access to Abortion (http://ndsmcobserver.com/2008/10/the-right-to-life-liberty-happiness-and-access-to-abortion/)

Film explores lasting implications of Roe v. Wade (http://ndsmcobserver.com/2016/03/40-film/)

Notre Dame law professor reflects on legacy of Justice Scalia (http://ndsmcobserver.com/2016/03/nd-professor-reflects-on-legacy-of-justice-scalia/)

ALSO ON THE OBSERVER

Conservative pundit speaks on University's identity,

5 comments • 6 days ago•

Avat Benjamin Skwirut — I think it's not by coincidence that the passage of scripture we

Students launch whiteboard campaign in

7 comments • 2 days ago•

Avat Insanity — They really should go back to Mommy's basement.

The problem with idealizing the past

1 comment • 6 days ago•

Avat Punta Venyage — So is everything always getting better by necessity? Is it

The science of the Syrian chemical attack

1 comment • 14 hours ago•

Avat peter brooker — Ray McGovern has said on RT International that the

To uncover the truth and report it accurately.

Site Links

About Us (http://ndsmcobserver.com/about/)

Contact (http://ndsmcobserver.com/contact/)

Letters to the Editor (http://ndsmcobserver.com/letters-to-the-editor/)

Suggest a Story Idea (http://ndsmcobserver.com/tips/)

Advertise With Us (http://ndsmcobserver.com/advertise/)

Print Editions (http://ndsmcobserver.com/print/)

Subscriptions (http://ndsmcobserver.com/subscribe/)

Terms of Service (http://ndsmcobserver.com/terms-service/)

Privacy Policy (http://ndsmcobserver.com/privacy-policy/)

Email Edition (http://ndsmcobserver.com/email-edition/)

Like what you see? Help support student-run publications. (http://ndsmcobserver.com/donate/)

(/)

Phone: (574) 631-7471 / **Fax:** (574) 631-6927 / **Address:** The Observer / P.O. Box 779 / Notre Dame, IN 46556
Email: editor@ndsmcobserver.com (mailto:editor@ndsmcobserver.com)

40 Years of Roe: The legal background

By Erin Stoyell-Mulholland (https://irishrover.net/author/erin-stoyell-mulholland/) :: January 26, 2013

Erin Stoyell-Muholland, Staff Writer

Professor Amy Barrett, Professor of Law at the Notre Dame Law School, gave a talk entitled "Roe at 40: The Supreme Court, Abortion, and the Culture War that Followed" on January 18, 2013 in the Oak Room of South Dining Hall. This was a part of the "Professors for Lunch" series and this particular talk was hosted by Notre Dame's Tocqueville Program for Inquiry Into Religion and the Constitutional Studies minor.

Over the course of the lunch, Barrett gave an overall background of the legal aspects of *Roe* v. *Wade* and how this has affected both the pro-life and pro-choice approaches toward the issue of abortion.

She started by giving the background under which *Roe* was decided. In 1973, the year that *Roe* was decided, states had already begun to liberalize abortion laws. Many states had begun to allow abortion in the cases of rape, incest, and health of the mother.

Roe challenged a Texas statute that only allowed abortions if the life of the mother was in danger. This is important to distinguish from the health of the mother which includes both physical and emotional health.

The Supreme Court overturned this statute on the basis of a right to privacy. The Constitution is not explicit on the right to privacy and this idea is drawn from the Fourteenth Amendment which says that "nor shall any State deprive any person of life, liberty, or property, without due process of law." The Supreme Court has interpreted this right to liberty as including the fundamental right to privacy.
Barrett said that one of the reasons that this decision was controversial was that in the

past all cases dealing with the right to privacy drew from consensual situations such as marriage or the use of contraception. Abortion deals with the life of a child so it differs from the earlier case relating to privacy.

The ruling of *Roe* was extremely broad. It stated that there could be no restrictions on abortion in the first trimester and in the second and third trimesters it could be regulated by the states.

Another case that reached the Supreme Court was that of *Doe* v. *Bolton* which challenged the Georgia abortion law that had three restrictions on abortion. In order to obtain an abortion a woman had to have a judgment of a doctor that agreed with her decision to abort. This judgment had to be confirmed by two other physicians. Then the abortion had to be performed in an accredited hospital. This law was also struck down by the Supreme Court for being too restrictive.

The ruling of *Roe* called into question the institutional capacity of the Supreme Court. Those in favor of the court working in this fashion say that it protects the minority. Those who are against it hold that the Court is ill-suited to make these moral judgment calls when the subject matter is not explicitly stated in the Constitution.

Justice Byron White wrote in his dissenting opinion in *Roe*, "I find nothing in the language or history of the Constitution to support the Court's judgment. The Court simply fashions and announces a new constitutional right for pregnant women and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes."

This type of moral decision by the Court created a backlash against *Roe* by both the pro-life and pro-choice sides. Barrett said "In legal scholarship, this is called Roe Rage." Pro-choice proponents believe that without *Roe*, abortion would have continued to become more accessible without the strong backlash that followed in the wake of *Roe*.

Casey v. *Planned Parenthood* was another key case in developing the abortion laws. This case cut back against *Roe* in deciding that the state has an interest in the life of the fetus. The court held true that before viability no restrictions may be imposed, but that regulations on abortion may be imposed as long as these regulations were not substantially infringe on the right to privacy expressed in *Roe*.

Barrett then expressed her opinion that it is very unlikely to overturn *Roe* no matter who sits on the Supreme Court. She then asked the question "If the Court doesn't [overturn *Roe*], where does this leave the state?" In recent years, states have been passing more regulations in the interest of the fetus. This includes ultrasound laws, waiting periods, and parental consent.

The real battleground according to Barrett is over public funding. Currently the Hyde Amendment prohibits most public funding for abortions, but it is possible that this could be overturned.

Ultimately Barrett said, "whether or not *Roe* gets overturned is irrelevant." If *Roe* is overturned, the question of abortion will return to the state level and could still be legal depending on the state.

Erin Stoyell-Mulholland is a sophomore business major who lives in fear of her loft. When she is not sleeping on the couch, she can be found organizing dance parties throughout her dorm. Contact her at estoyell@nd.edu (mailto:estoyell@nd.edu).

ALSO ON IRISH ROVER

Comments On Trump's Victory

1 comment • 4 months ago•

NDaniels — Since it is true that the candidates chosen represent our acceptance of …

Free Read 12/7

2 comments • 4 months ago•

Tom Schmitt — Would like to read.Tom Schmitt

Notre Dame's First New School in 96 Years

2 comments • a month ago•

Guy Garofano — Very interesting. One can only hope that the assurances about …

Vice President Pence to Deliver 2017 Commencement Address

1 comment • a month ago•

NDaniels — "...we will not rest until we restore a culture of life in America for ourselves and …

Notre Dame Magazine

Students, faculty mark 40 years of Roe

Published: January 25, 2013
Author: John Nagy '00M.A. [link:/news/authors/john-nagy/]

2011 March for Life, photo by Matt Cashore

A record number of Notre Dame students traveled to Washington, D.C., this week for the annual March for Life.

The trip to the nation's capital culminates a week of campus observances of the 40th anniversary of the Supreme Court's *Roe v. Wade* decision, which uniformly legalized abortion across the United States when it was handed down on January 22, 1973.

ND marchers received a blessing Tuesday at a sendoff Mass that Campus Ministry organized at the Basilica of the Sacred Heart. Campus ministers have also encouraged students participating in Eucharistic adoration at the Basilica and the Coleman-Morse chapel to pray this week for greater respect for human life.

Jen Gallic, president of ND Right to Life, says 600 students are attending the March today — nearly doubling the previous high mark set in 2012 — along with 100 members of the faculty and staff and their families. Most are traveling aboard a dozen buses departing campus in two waves Wednesday and Thursday.

Meanwhile, March organizers have invited 50 representatives of the Notre Dame Right to Life club to carry the official event banner that traditionally spans Constitution Avenue as the March proceeds from the National Mall toward the Supreme Court.

Forecasts calling for a high of 29 degrees and snow showers do not seem to have daunted plans for the March, which has drawn about a quarter of a million people in recent years, news sources say. Organizers are predicting a turnout as high as 400,000 people.

Such an attendance jump would parallel the number sent from Notre Dame as well. Gallic says several factors have helped boost numbers, including the significance of the anniversary year, an ad campaign, a more robust lineup of club events through the autumn semester and a registration drive that began months earlier than usual.

Gallic, a junior economics major who grew up the third of seven children in a Roman Catholic family in Gillette, New Jersey, says the national organizers' decision to shift the March from the anniversary date this past Tuesday to Friday in order to avoid conflicts with Monday's presidential inauguration also helped by giving students flexibility to schedule their travel around their classes and possibly miss one fewer day.

The biggest difference, she believes, is the student club's expanding emphasis beyond its anti-abortion stance into activities that build a "culture of life" — a phrase commonly associated with the late Pope John Paul II. ND Right to Life members, for instance, volunteer at local organizations that support senior citizens, people with severe disabilities and women facing crisis pregnancies.

"Coming to Notre Dame and working with the club, you really find that the people who are most passionate about being pro-life . . . uphold the dignity of all humans," she says. "That's what's at the core of the pro-life movement — that every life is priceless."

Turnout aside, the number that abortion protesters have most in mind this year is the estimated 55 million abortions performed in the United States since 1973, according to the Alan Guttmacher Institute.

The consequences of American abortion jurisprudence was the subject of "_Roe_ at 40: The Supreme Court, Abortion and the Culture War that Followed," a presentation that ND law Professor Amy Coney Barrett made in South Dining Hall's packed Oak Room January 18.

The talk kicked off the spring "Professors for Lunch" lecture series co-sponsored by the Tocqueville Program for Inquiry into Religion and American Public Life and the Constitutional Studies Minor program.

Barrett reviewed the debate over the Supreme Court's "institutional capacity" to resolve divisive questions like the legality of abortion. A constitutional law authority and mother of seven who clerked for Associate Justice Antonin Scalia, Barrett spoke both to her own conviction that life begins at conception and to the "high price of pregnancy" and "burdens of parenthood" that especially confront women before she asked her audience whether the clash of convictions inherent in the abortion debate is better resolved democratically.

By creating through judicial fiat a framework of abortion on demand in a political environment that was already liberalizing abortion regulations state-by-state, she said, the court's concurrent rulings in *Roe* and *Doe v. Bolton* "ignited a national controversy."

Barrett noted that scholars from both sides of the debate have criticized *Roe* for unnecessarily creating the political backlash known colloquially as "Roe Rage," a dynamic that has since affected everything from federal and state elections to the federal judicial nominations process.

Abortion opponents have found success in recent years passing and defending abortion restrictions such as informed consent laws, ultrasound requirements and the federal partial-birth abortion ban after rulings in *Casey v. Planned Parenthood* (1992), *Carhart v. Stenberg* (2000) and *Gonzales v. Carhart* (2007). But Barrett believes it is "very unlikely" the court will ever overturn Roe's core protection of abortion rights, and sees the political battle shifting toward matters of public and private funding.

For more information on the ND Right to Life club please visit their website [link:https://sites.google.com/a/nd.edu/prolifend/]

John Nagy is an associate editor of Notre Dame Magazine. *Email him at* nagy.11@nd.edu [link:mailto:nagy.11@nd.edu].

Posted In: Editor Blogs [link:/news/category/editor/] and Society & Culture [link:/news/category/society-and-culture/]

The magazine welcomes comments, but we do ask that they be on topic and civil. Read our full comment policy [link:/about/comment-policy].

Scholars Gather for Constitutional Structure Roundtable at NDLS

Published: March 20, 2012

The second annual roundtable conference of the NDLS Program on Constitutional Structure took place March 23.

Organized by Professor Jennifer Mason McAward [link:http://law.nd.edu/people/faculty-and-administration/teaching-and-research-faculty/jennifer-mason-mcaward/], the theme of this year's program is "The Reconstruction Amendments and Constitutional Structure." This Conference brought together leading scholars of Constitutional Law in the United States, including Notre Dame faculty members, to discuss their important work on the Reconstruction Amendments to the Constitution of the United States—a topic of enduring importance in the U.S. federal system.

The Conference began at 9 a.m., when Professor Ellen Katz of the University of Michigan Law School will presented her paper, "The Waning Resistance to Federal Anti-Discrimination Law," with commentary from Professor Darrell Miller of the University of Cincinnati Law School (visiting at Duke Law School).

The conference followed a similar format for the rest of the day, considering several other important papers:

- "Completing the Constitution: The 14th Amendment" (Michael Zuckert, University of Notre Dame Department of Political Science)
- "The Fourteenth Amendment, National Citizenship, and the Unconstitutionality of Secession" (Daniel Farber, University of California, Berkeley School of Law)
- "Two Cheers for a Unitary Enforcement Power" (Calvin Massey, University of California, Hastings College of the Law)
- "The Thirteenth Amendment, the Power of Congress, and the Shifting Sources of Civil Rights Law" (George Rutherglen, University of Virginia Law School)

Professor McAward presented the final paper of the day, "McCulloch and the Thirteenth Amendment," at 3:50 p.m. Professor Kurt Lash [link:http://www.law.illinois.edu/faculty/profile/KurtLash] of the University of Illinois College of Law provided commentary.

Other NDLS professors taking part in the program included Professor Amy Barrett, Professor A.J. Bellia, Professor Rick Garnett, Professor Randy Kozel, Professor John Nagle, Professor Jay Tidmarsh, Professor Stephen Smith, Professor Bill Kelley, Professor Tricia Bellia, and Professor Bruce Huber.

The full program agenda listing all presenters and commentators is available here [link:https://law.nd.edu/about/conferences/the-reconstruction-amendments-and-constitutional-structure] .

The NDLS Program on Constitutional Structure [link:http://law.nd.edu/academic-programs/law-school-programs/nd-program-in-constitutional-structure-and-design/] is an interdisciplinary program directed by Professor Anthony J. Bellia Jr. [link:http://law.nd.edu/people/faculty-and-administration/teaching-and-research-faculty/anthony-j-bellia-jr/]

Posted In: General News [link:/news/category/general-news/]

The Law School P.O. Box 780, Notre Dame, IN 46556
Phone 574.631.6627
Fax 574.631.3980
ndlaw@nd.edu
Accessibility Information
Law School Admissions Office
1329 Biolchini Hall, Notre Dame, IN 46556
Phone 574.631.6626
Fax 574.631.5474
lawadmit@nd.edu
Like us on Facebook
Law School Career Development Office
Phone 574.631.7542
Fax 574.631.4789
lawjobs@nd.edu
Like us on Facebook

LinkedIn

Today@NDLS

Trinity Speech

Congratulations, Class of 2011! And congratulations to your parents and teachers, who have made this day possible for you. I'm honored to join this celebration of you and your accomplishments at Trinity School.

I'm going to talk to you today about ambition. Now the word "ambition" has a mixed reputation. C.S. Lewis put it this way:

> Ambition! We must be careful what we mean by it. If it means the desire to get ahead of other people . . . then it is bad. If it means simply wanting to do a thing well, then it is good. It isn't wrong for an actor to want to act his part as well as it can possibly be acted, but the wish to have his name in bigger type than the other actors is a bad one.

We do have to guard against ambition of the latter sort, and I'll talk about that in a moment. What I want to emphasize today is the positive side of ambition: Identifying goals and vigorously pursuing them. These are both things that Trinity has taught you, and the faculty honorings of you last night make clear that they are lessons you have absorbed well. But because this vision of a purposeful life is a relatively rare one, it is worth emphasizing as you take your leave of Trinity.

Identifying goals

You may have heard the expression "Bloom where you are planted." I'm not a fan of this expression, at least insofar as it reflects a general outlook on life. If you translate it from passive to active voice, I think you'll see why. "Bloom where someone else

plants you." In other words, let circumstances sweep you along, and then make the best of things wherever you land. This is not a recipe for a life well lived, but you would be surprised by how easy it is to slide into this approach. And so many people, by failing to act purposefully, do just that. For example, their closest friends in college may be the other students who live on their hall—not because they have concluded that these people share their ideals, but just because they're there. Whether they go to church might be dictated not by a decision about faith, but rather by whether the people they are hanging out with happen to be going, or whether the time or location of the service is convenient. They may defer their choice of a major and skip around the curriculum, only to discover that they have limited their options by failing to wisely allocate credit hours.

Fight that tendency. Today, you leave Trinity, and in a few months, most of you will leave your parents' homes. You are about to enjoy more freedom than you have had to this point in your life. How you spend your time, who you spend it with, the classes you take, the profession you want to pursue, whether and where you go to church—all of this will lie in your hands rather than in the hands of your teachers or your parents. Don't drift into any of those decisions. Reflect on who you are and who you want to be, and then orient all areas of your life toward that end. Don't bloom where you are planted; plant yourself where you want to be and bloom there.

Because I both study and love American constitutional history, John Adams leaps to my mind as an example of someone who approached life with a sense of purpose and accomplished great things as a result. This is an entry from John Adams' journal, written when he was only 20 years old and one year out of college:

> I am resolved to rise with the sun and to study Scriptures on Thursday, Friday, Saturday, and Sunday mornings, and to study some Latin author the other three mornings. Noons and nights I intend to read English authors. . . . I will rouse up my mind and fix my attention. I will stand collected within myself and think upon what I read and what I see. I will strive with all my soul to be something more than persons who have had less advantages than myself.

Adams had already completed his formal education when he wrote this; thus, his educational plan was entirely self-motivated. We are the beneficiaries of the goals that he set for himself, because, among other things, it was his broad reading of political philosophy that enabled him to play a vital role in the formation of our then-fledgling country.

Vigorously pursuing goals

Of course, identifying goals is only the first step. I said at the outset that there were two components of good ambition: the thoughtful identification of goals and the vigorous pursuit of them. As you have learned at Trinity, you cannot achieve unless you both work hard and conquer a fear of failure. You have fallen into the rhythm of these things in your years at Trinity. But college will bring new challenges, and you will have to steel yourselves to jump in all over again.

I love this quote from Teddy Roosevelt:

> It is not the critic who counts; not the man who points out how the strong man stumbles, or where the doer of deeds could have done them better.

> The credit belongs to the man who is actually in the arena, whose face is marred by dust and sweat and blood, who strives valiantly; who errs and comes short again and again; because there is not effort without error and shortcomings; but who does actually strive to do the deed; who knows the great enthusiasm, the great devotion, who spends himself in a worthy cause, who at the best knows in the end the triumph of high achievement and who at the worst, if he fails, at least he fails while daring greatly. So that his place shall never be with those cold and timid souls who know neither victory nor defeat.

Dare greatly and strive valiantly. Don't let the fear of failure turn you into a sideline-sitter.

Consider here the relationship between Annie Sullivan and Helen Keller. Annie Sullivan was only 20 years old and visually impaired herself when she took on the task of educating Helen Keller, who was both blind and deaf. No method existed for teaching someone both blind and deaf to communicate. It had never been done before, and it was immensely frustrating. In the beginning, Sullivan made little progress. And the task did not require perseverance only from Sullivan; it required tremendous effort from Keller, who was only seven years old. They succeeded. Keller became the first blind and deaf person to receive a bachelor of arts, and the techniques Sullivan developed have reaped tremendous rewards for the education of the blind and deaf.

I can guarantee that like Sullivan and Keller, you will have setbacks in the pursuit of your ambitions. But don't give up. Think of what St. Paul says:

> I do not claim that I have already succeeded or have already become perfect. I keep striving to win the prize for which Christ Jesus has already won me to himself. Of course, my brothers, I really do not think that I have already won it; the thing I do, however, is to forget what is behind me and do my best to reach what is ahead. So I run straight toward the goal in order to win the prize, which is God's all through Christ Jesus to life in Him.

As St. Paul makes clear, your primary ambition should be to follow Christ. Spend yourself in that and in all that you do.

The dark side of ambition

This is a good place to reference the dark side of ambition that C.S. Lewis cautions against in the quote I read at the beginning. If you recall, Lewis says that when ambition means the desire to get ahead of other people, it is bad.

While the word "ambition" has evolved to have a positive connotation as well as a negative one, it was not always thus. It derives from the Latin "ambitio," "a striving for favor, literally "a going around, especially of candidates for office in Rome soliciting votes."

When you are talented, and when you start to gain the momentum that comes with putting in hard work toward a goal, it is so easy to fall prey to this bad sort of ambition. Literature is replete with stories of men and women who were consumed by their ambition. Macbeth and Lady Macbeth are two famous examples. Macbeth so desired power and advancement that he ultimately killed for it, spurred on by Lady Macbeth, whose desire for rank and power was even greater than his own. Macbeth achieved the

crown, but they were both destroyed in the process. That is how ambition works when it is turned inward on oneself rather than on a goal for the sake of the good. Channeled thus, it destroys rather than creates.

Keep in view the men and women who achieved great things without succumbing to self-advancement in the form of money, prestige or power. I will conclude here with an example from science: Jonas Salk, the scientist who developed the vaccine that eradicated polio.

Until 1955, when the Salk vaccine was introduced, polio was considered the most frightening public health problem of the post-war United States. It killed thousands of people a year and left of tens of thousands—like Franklin Roosevelt—with mild to disabling paralysis. Salk spent seven years with the sole professional purpose of developing a safe and effective vaccine for polio as rapidly as possible. When he succeeded, he was hailed as a national hero. According to historian William O'Neill, the day the vaccine was announced became almost "a national holiday: people observed moments of silence, rang bells, honked horns, blew factory whistles, fired salutes, kept their red lights red in brief periods of tribute, took the rest of the day off, closed their schools or convoked fervid assemblies therein, drank toasts, hugged children, attended church, smiled at strangers, and forgave enemies." Salk was showered with awards and honorary degrees. Studios immediately began racing to be the first to make a movie out of his biography. Yet Salk did not relish the limelight. New York City wanted to conduct a ticker tape parade in his honor, but he refused. The New York Times reported that

> Salk is profoundly disturbed by the torrent of fame that has descended upon him.... He talks continually about getting out of the limelight and back to his laboratory... because of his genuine distaste for publicity, which he believes is inappropriate for a scientist.

I think we can all imagine how much money a successful vaccine like this could have earned Salk. But when he was asked who owned the patent for it, Salk replied "There is no patent. Could you patent the sun?"

Conclusion

Class of 2011, today you step forward into independence. Take what you have learned from your parents and teachers and use it to make the most of that independence. Live your life with purpose. Be ambitious, but never self-serving.

UNIVERSITY of NOTRE DAME

The Law School

Separation of Powers: Theory, Development, and Applications Conference

Published: March 25, 2011

A roundtable conference at the law school March 25 considered the latest leading scholarship in the field of Separation of Powers. Conference papers addressed separation of powers theory, executive power, and administrative law. The daylong program was hosted by Professor Anthony J. Bellia Jr. and sponsored by the Notre Dame Program in Constitutional Structure and Design [link:http://law.nd.edu/academic-programs/law-school-programs/nd-program-in-constitutional-structure-and-design/] .

Among the conference highlights:

Democracy in the Balance: Strengthening Accountability in U.S. International Lawmaking
Oona A. Hathaway
Yale Law School

Separation of Powers as Ordinary Interpretation
John F. Manning
Harvard Law School

Administrative Change
Jeffrey A. Pojanowski & Randy J. Kozel
Notre Dame Law School

PCAOB's Principle: Separation of Powers as Separation of Agency Functions
Kevin Stack
Vanderbilt University Law School

The Forgotten Core Meaning of the Suspension Clause
Amanda Tyler
George Washington University Law School

Other participating scholars included:

Amy Coney Barrett, Notre Dame Law School
Patricia L. Bellia, Notre Dame Law School
Rev. William R. Dailey, Notre Dame Law School
Patrick Griffin, Notre Dame Department of History
William K. Kelley, Notre Dame Law School
The Honorable Raymond M. Kethledge, U.S. Court of Appeals, Sixth Circuit
M. Elizabeth Magill, University of Virginia School of Law
Jennifer Mason-McAward, Notre Dame Law School
Trevor W. Morrison, Columbia Law School
John Copeland Nagle, Notre Dame Law School
Vincent Phillip Munoz, Notre Dame Department of Political Science
Stephen Smith, Notre Dame Law School
Jay Tidmarsh, Notre Dame Law School
Michael Zuckert, Notre Dame Department of Political Science

Posted In: **General News** [link:/news/category/general-news/]

Phone 574.631.6627
Fax 574.631.3980
ndlaw@nd.edu
Accessibility Information
Law School Admissions Office
1329 Biolchini Hall, Notre Dame, IN 46556
Phone 574.631.6626
Fax 574.631.5474
lawadmit@nd.edu
Like us on Facebook
Law School Career Development Office
Phone 574.631.7542
Fax 574.631.4789
lawjobs@nd.edu
Like us on Facebook
, Facebook
fl Twitter
. Instagram
· LinkedIn

Today@NDLS

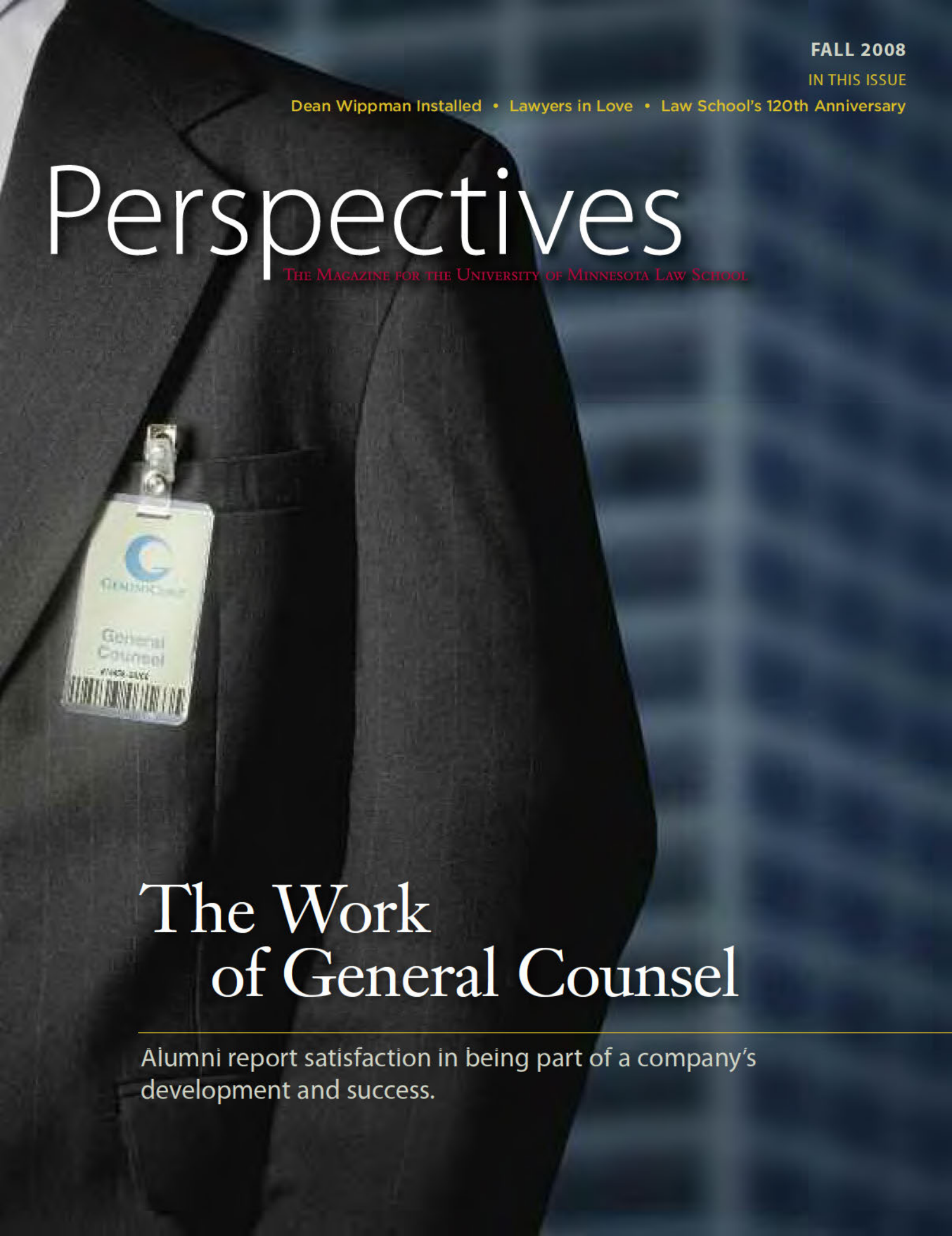
FALL 2008

IN THIS ISSUE

Dean Wippman Installed • Lawyers in Love • Law School's 120th Anniversary

Perspectives

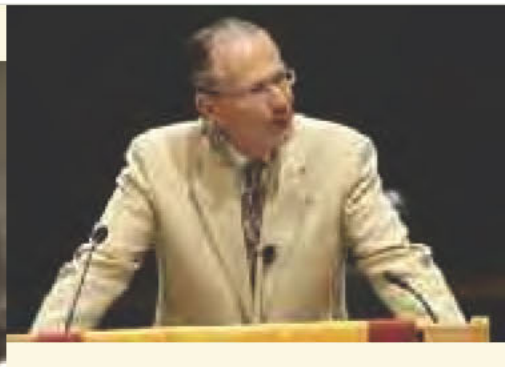
The Magazine for the University of Minnesota Law School



The Work of General Counsel

Alumni report satisfaction in being part of a company's development and success.

Justice Alan Page ('78) and Professor Amy Monahan (in background)



Jesse N. Choper (Berkeley)

Jim and Sharon Hale Excellence in Legal Education Lecture

> On Sept. 3, 2008, Jesse H. Choper, a widely recognized constitutional law scholar and distinguished teacher, returned to the Law School after more than a 40-year absence to deliver the Jim and Sharon Hale Excellence in Legal Education Lecture, entitled "Liberal and Conservative Supreme Court Justices—What Difference Does it Really Make and What Does it Bode for the Future?" Choper, now Earl Warren Professor of Public Law at the University of California Berkeley's Boalt Hall, taught at the Law School from 1961 to 1965.

Professor Choper offered a "quick-and-dirty" definition of the terms "liberal" and "conservative" when applied to Constitutional decision-making. In addition to these differences, he said, each Supreme Court Justice makes decisions based on judicial restraint, ideology, and original understanding, or interpretation of the Constitution according to the text and what the framers intended. He discussed previous, current, and future Supreme Courts in terms of liberal vs. conservative makeup, the impact of a "swing" voter, and struggles over difficult issues.

The lecture was made possible by the Jim ('65) and Sharon Hale Excellence in Legal Education Fund, created through their unrestricted gift to the Law School.

Minnesota Conservative & Libertarian Legal Colloquium Debuts

> The Law School initiated a new annual colloquium on Oct. 3, 2008, with its first event, "Stare Decisis in Constitutional Law." The Law School's Brian Bix, Frederick W. Thomas Professor for the Interdisciplinary Study of Law and Language, and Heidi Kitrosser, associate professor, participated in the event, along with seven distinguished guests from across the nation: Amy Coney Barrett, Associate Professor of Law, University of Notre Dame; Rachel Brand, Counsel in the Regulatory and Government Affairs and Litigation and Controversy Department, WilmerHale; Orin Kerr, Professor of Law, George Washington University Law School; Thomas W. Merril, Professor of Law, Northwestern University Law School; John Oldham McGinnis, Stanford Clinton Sr. Professor of Law, Northwestern; Michael Paulsen, Distinguised University Chair and Professor, University of St. Thomas; and Sai Prakash, Hertog Research Professor of Law, University of San Diego School of Law.

Front row: Amy Coney Barrett (Notre Dame); Associate Professor David Stras; Michael Paulsen (St. Thomas)
Second row: Rachel Brand (WilmerHale); Thomas W. Merrill (Northwestern); Orin Kerr (George Washington University)
Third Row: John Oldham McGinnis (Northwestern); Dale Carpenter
Back row: Sai Prakash (University of San Diego)

The new Minnesota Conservative & Libertarian Legal Colloquium was created to foster discussion of important legal issues among conservatives and libertarians. Co-chairs are Dale Carpenter, Earl R. Larson Professor of Civil Rights and Civil Liberties Law, and David Stras, associate professor of law and co-director of the Institute for Law and Politics. Professors Carpenter and Stras moderated the discussion at the first event.

The Colloquium is sponsored by the Law School, the Federalist Society, and the Law School's Federalist Society student chapter.

5-2006

Associate Professor Amy Coney Barrett, Diploma Ceremony Address

Amy Coney Barrett
Notre Dame Law School, abarrett@nd.edu

AMY BARRETT
Professor of the Year Commencement Speech

Thank you for this honor. Thank you, Class of 2006, for your ideas, your enthusiasm, and for the ways in which you have challenged me in the classroom. You've made it easy for me to call my job one of the best around.

I decided to talk to you today about what it might mean for you to be a different kind of lawyer. Three years ago, you decided to enroll at Notre Dame Law School on the promise that we were educating a different kind of lawyer. Now, as you prepare to leave us, you may well wonder whether that promise has been fulfilled in you. When you drive away from campus tonight or tomorrow to wherever you're headed, will you be a different kind of lawyer? Indeed, what does it even mean to be a different kind of lawyer in the Notre Dame tradition?

There are certainly many respects in which you will not be any different from your peers who have graduated from other law schools. To begin with, being a different kind of a lawyer does not mean that you have mastered a different body of law. There is no Catholic version of the Federal Rules of Civil Procedure, and the movie *My Cousin Vinny* taught you the same evidentiary principles observed by Domers and non-Domers alike. The law is a discipline, and it is one in which you are now well trained. When you begin your jobs, you will be able to hold your own with other graduates of the best law schools.

Sometimes we're tempted to say that a Notre Dame lawyer is a different kind of lawyer because he or she is an ethical lawyer. But that can't be right. Our profession is in pretty deep trouble if the only ethical lawyer is the different one. When you leave here, hold yourselves to the highest ethical standards, and be leaders in that regard. But maintaining high ethical standards ought to be something that characterizes our whole profession—not something that causes Notre Dame lawyers to stand apart.

So if being a different kind of lawyer is not defined by the body of knowledge you have mastered or by the ethical standards you are expected to maintain, might it be defined by the kind of law you choose to practice? The banner hanging in the main reading room says, "If you want peace, work for justice." Surely we can expect that, as a Catholic law school, our commitment to social justice will lead a higher-than-average percentage of you to choose to work on behalf of the disadvantaged and oppressed. We can expect Notre Dame lawyers like my own classmate, Sean Litton, who left a successful and lucrative practice at Kirkland & Ellis to work for a human rights organization with the mission of eliminating sexual trafficking in southeast Asia. Many of you, like my classmate Sean, will work in the public interest sector, and Notre Dame will be proud of you. But many of you will work in the private sector, and Notre Dame will be proud of you too. It cannot be that being a different kind of lawyer is defined by the kind of law one practices, for that would leave too many of our graduates out of the definition.

So what then, does it mean to be a different kind of lawyer? The implications of our Catholic mission for your legal education are many, and don't worry—I'm not going to explore them all in this short speech. I'm just going to identify one way in which I hope that you, as graduates of Notre Dame, will fulfill the promise of being a different kind of lawyer. And that is this: that you will always keep in mind that your legal career is but a means to an end, and as Father Jenkins told you this morning, that end is building the kingdom of God. You know the same law, are charged with maintaining the same ethical standards, and will be entering the same kinds of legal jobs as your peers across the country. But if you can keep in mind that your fundamental purpose in life is not to be a lawyer, but to know, love, and serve God, you truly will be a different kind of lawyer.

I think you will find, when you enter the legal profession, that most of your colleagues, by default or by design, treat the legal profession as an end in and of itself. Apart from family, which occasionally exercises a tempering influence, the law is the preeminent force driving the life of a typical lawyer. Legal opportunity is the primary consideration in choosing where to live. Ambition is the primary influence in choosing a job. The average lawyer gives his or her daily routine largely to work, from waking to sleeping. These things are true, by the way, whether the legal job is high paying or not. You have chosen a profession that engages your mind. While there is certainly some drudgery involved—no one likes document review—the practice of law is fun. Be prepared to love it. As a young lawyer, I was surprised by how much I did. It is easy to see how, for so many lawyers, the practice of law quickly becomes an end in itself, for the satisfaction, prestige, or money it brings.

Don't let that happen to you; set your sights higher than that. No matter how exciting any career is, what is it really worth if you don't make it part of a bigger life project to know, love, and serve the God who made you?

I'd like to offer three concrete suggestions for ways in which you might go about being a different kind of lawyer, one who treats his or her career as a means to the end of serving God rather than an end in itself.

First, before you take any job, particularly one that requires a move, pray about it. St. Ignatius of Loyola observed that when presented with options, most people choose what they want to do first, and it's only after the choice is already made that they go to God and say, "How can I serve You in the situation I'm in?" It's the rare person who consults God before making a choice. It's the rare person who brings his or her options to God and says, "In which situation can I best serve You?" Be the rare person. Pray about your career choices before you make them. If you

do, I think you will be successful at tempering the influence of ambition as the overriding force in your decisionmaking.

My second suggestion is that you give away 10 percent of what you earn to the church, charitable causes, and to friends and acquaintances who need it. Tithing will help you remember that your career and the money you earn shouldn't be directed just toward your own betterment but ought to be directed, in a tangible way, toward the common good. I recommend that you begin this practice with your first paycheck. As soon as I said that, I'm sure that many of you started worrying about your student loans. Don't. It's my experience that God is never outdone in generosity. For those of you who expect your salaries to increase over time, in some cases dramatically, it is also worth noting that in my experience, it is a lot easier to start this practice at the beginning of your career, when your paychecks are relatively small. Perhaps paradoxically, it wasn't really that hard for me to give away 10 percent of my income when I was a law clerk on government wages. It got a lot harder for me to write the checks when I went into private practice and the amount on them increased. But by then, the practice was a habit, so it was easier to stick with it.

Finally, when you arrive at your new jobs in your new cities, seek out friends with whom you can share your faith. For the past three years, you have lived within the Notre Dame Law School community. While we are a community engaged in the enterprise of legal education and scholarship, we are also a community engaged in the enterprise of bringing about the kingdom of God. We are a community characterized by our love and concern for one another. I hope that you have enjoyed living here these last three years. I also hope that living at Notre Dame has given you a thirst for this kind of community. Don't just look back on your time here with nostalgia. When you get where you're going, carry Notre Dame with you. Deliberately choose a parish or church that has an active community life and commit yourself deeply to the relationships you find there. It's only when you're an independent operator that your career takes over. When your life is placed firmly within a web of relationships, it is much easier to keep your career in its proper place.

The advice I've given you today may sound challenging. But if you can rise to the challenge, I think you will find your career more satisfying as a result. The fulfillment at the end of your career will be immeasurably greater if it is a career marked by more than just cases won or deals done.

That's it. It has been a privilege to call you my students, and today, it is a privilege to call you my colleagues in the profession. Congratulations. I expect great things from all of you.

Forum assesses future of Big Easy

Karen Langley | Friday, October 28, 2005

Faculty experts in law, architecture and engineering united to share their views on the need to rebuild New Orleans and to discuss necessary details – regarding design, planning, land use and environmental law – in a forum at the Law School Thursday.

Law School Assistant Professor Amy Barrett noted that while most Americans think of New Orleans as a unique city, it has qualities that are even more important than the music and food for which it is famed.

New Orleans differs from other American cities in that its residents love it and would never entertain the notion of leaving, said Barrett, whose entire family is from the Big Easy.

“New Orleans’ vision for what it means to be a city and its citizens’ commitment to one another and to the place is unique in America,” she said. “And it does offer America something.”

Philip Bess, a professor and the Director of Graduate Studies at the School of Architecture, emphasized the cultural and practical needs for New Orleans to rebuild – despite its hazardous geographical location.

“The deeper reason why New Orleans will be rebuilt has to do with its strategic location,” he said. “The port at New Orleans is as important as at any point in the United States because of its location on the Mississippi River. The U.S. needs a city right there. It’s a terrible place for a city to be located but a place where a city needs to exist.”

New Orleans must consider its natural environment as it moves ahead with rebuilding, Dean Michael Lykoudis of the School of Architecture said.

“We have to live in harmony with nature,” he said. “So much of the paradigm today is to resist and conquer nature instead of behaving like sailors on boats, which is that their legs move a lot to accommodate the changing seas.”

One of most important issues in rebuilding New Orleans is maintaining a long-term ecological perspective, said associate law professor Alex Camacho, who also noted the challenge of ensuring that those people who were most affected by the hurricane also reap the benefits of rebuilding.

“For a long time, scientists predicted that anything greater than a fast-moving Category 3 hurricane could breach levee system,” he said. “The tragedy is not that this hurricane happened but that we expected it to. It’s amazing how many scientists predicted what would occur, yet the same inadequate system remained in place.”

Professor Ahsan Kareem of the department of civil engineering and geological sciences agreed with Camacho.

“New Orleans to me was a beautiful machine that was left to rust,” he said.

Even more complex than the engineering and building issues are the problems of New Orleans’ displaced population, Kareem said.

“Unfortunately, the poor people always have to take the brunt of these issues,” he said.

Associate law professor Nicole Garnett expressed the need for New Orleans to fundamentally rethink land use legislation.

“New Orleans needs to think about alternatives that allow the government to control rebuilding without producing sprawl,” she said.

United States Senate
Committee on the Judiciary

Questionnaire for Judicial Nominees

Attachments to Question 12.e.

Amy Coney Barrett
Nominee to be Associate Justice
of the Supreme Court of the United States

Amy Coney Barrett

Diane and M.O. Miller II Research Professor of Law, Professor of Law

I came to Notre Dame because of its twin commitments to academic excellence and advancing the common good. In the Law School, I work to further these goals through my study of constitutional structure.

Part of the genius of our Constitution is its distribution of power across three branches of government and between federal and state governments. Yet the Constitution does not draw these lines sharply; the boundaries are often unclear.

I draw on the Constitution's text, structure, and history to determine optimal constraints on the power of government entities, particularly in the face of modern governing challenges. My research is animated by the belief that our scheme of divided power exists not for the sake of the government itself but to promote individual liberty and human flourishing.

The Law School's Program on Constitutional Structure has proven indispensable to my work. The program gathers leading legal scholars, political scientists, and historians, from Notre Dame and elsewhere, to study how government structures and foundational documents best advance the common good.

These are themes that I explore with my students, both in the classroom and in their own research. Understanding the importance of such questions and the competing approaches to resolving them enables students to see the role of law in building and sustaining our society.

Learn More About Professor Barrett

More Featured Faculty

View the Football Program Feature on Professor Barrett (434 kb PDF)

---

300 Main Building, Notre Dame, IN 46556 Phone 574.631.3802 provost@nd.edu

Accessibility Information

UNIVERSITY OF NOTRE DAME

Professor Amy Coney Barrett Recognized at Notre Dame Football Game

Published: September 30, 2016

The University honored Notre Dame Law School Professor Amy Coney Barrett [link:http://law.nd.edu/directory/amy-barrett/], Diane and M.O. Miller, II Research Chair in Law, as a 2016 Featured Faculty [link:http://provost.nd.edu/assets/212180/final_barrett_ad.pdf] during a commercial break in the third quarter of the Duke University football game (Sept. 24). She was recognized in an on-field ceremony at Notre Dame Stadium.

"I came to Notre Dame because it is committed to both academic excellence and pursuit of the common good," Barrett said. "I am incredibly lucky to share life with students and colleagues who have chosen it for the same reasons."

Barrett teaches and researches in the areas of federal courts, constitutional law, and statutory interpretation. She was named Teacher of the Year by NDLS graduating classes of 2006 and 2016.

"Amy is an exemplary and enthusiastic professor, influential scholar, and an energetic and respected leader," said Dean Nell Jessup Newton. "We're very proud of her."

Before joining the Notre Dame faculty, Professor Barrett clerked for Judge Laurence H. Silberman of the U.S. Court of Appeals for the D.C. Circuit and for Associate Justice Antonin Scalia of the United States Supreme Court.

Posted In: **General News** [link:/news/category/general-news/], **Home Page** [link:/news/category/home-page/], **and** **News Page** [link:/news/category/news-page/]

Support the Law School
ABA Required Disclosures

The Law School P.O. Box 780, Notre Dame, IN 46556
Phone 574.631.6627
Fax 574.631.3980
ndlaw@nd.edu
Accessibility Information
Law School Admissions Office
1329 Biolchini Hall, Notre Dame, IN 46556
Phone 574.631.6626
Fax 574.631.5474
lawadmit@nd.edu
Like us on Facebook
Law School Career Development Office
Phone 574.631.7542
Fax 574.631.4789
lawjobs@nd.edu
Like us on Facebook

Facebook
Twitter
Instagram
LinkedIn

Today@NDLS

Professor Amy Coney Barrett to Deliver Notre Dame Law School Commencement Address

Published: May 11, 2016

Notre Dame Law Students have selected Amy Coney Barrett, Diane and M.O. Miller, II Research Chair in Law, for the 2016 Law School Distinguished Teaching Award. Barrett will address the graduates at Notre Dame Law School's 2016 Commencement ceremony Saturday.

"I'm incredibly honored to be recognized," said Barrett, who also won the award in 2006. "I've had the privilege of teaching the majority of the graduating class. While I'm sad to see them go, I'm excited to see the great things they will accomplish as Notre Dame Lawyers."

Each year the graduating class selects a professor to receive the Law School Distinguished Teaching Award, which honors a faculty member who exhibits excellence in leadership, friendship, legal knowledge, legal teaching and professional ability.

"Professor Barrett was selected as the distinguished professor of the year because she embodies the Notre Dame spirit," said Tim Dondanville, 3L and NDLS Student Bar Association president. "She really challenged us to think critically about cases and concepts, but it is very clear that she truly cares about us as individuals."

Next week a total of 172 students will receive their Juris Doctor degree and 27 will receive their Legum Magister or Master of Laws degree.

Barrett teaches and researches in the areas of federal courts, constitutional law, and statutory interpretation. Her scholarship in these fields has been published in leading journals, including the Columbia, Virginia, and Texas Law Reviews. She serves by appointment of the U.S. Supreme Court Chief Justice on the Advisory Committee for the Federal Rules of Appellate Procedure.

Before joining the Notre Dame faculty, Barrett clerked for Judge Laurence H. Silberman of the U.S. Court of Appeals for the D.C. Circuit and for Associate Justice Antonin Scalia of the United States Supreme Court. As an associate at Miller, Cassidy, Larroca & Lewin in Washington, D.C., she litigated

constitutional, criminal, and commercial cases in both trial and appellate courts.

Barrett earned her B.A. in English literature, magna cum laude, from Rhodes College, where she was elected to Phi Beta Kappa and, among other honors, was chosen by the faculty as the most outstanding graduate in the college's English department. She earned her J.D., summa cum laude, from Notre Dame, where she was a Kiley Fellow, earned the Hoynes Prize — the Law School's highest honor — and served as executive editor of the Notre Dame Law Review.

"I know that I will be very prepared in my career because of the lessons I have learned from Professor Barrett," Dondanville said. "She taught us all what it means to be a Notre Dame lawyer, and I am very grateful for her guidance both inside and outside of the classroom."

Posted In: General News [link:/news/category/general-news/] , Home Page [link:/news/category/home-page/] , and News Page [link:/news/category/news-page/]

The Law School P.O. Box 780, Notre Dame, IN 46556
Phone 574.631.6627
Fax 574.631.3980
ndlaw@nd.edu
Accessibility Information
Law School Admissions Office
1329 Biolchini Hall, Notre Dame, IN 46556
Phone 574.631.6626
Fax 574.631.5474
lawadmit@nd.edu
Like us on Facebook
Law School Career Development Office
Phone 574.631.7542
Fax 574.631.4789
lawjobs@nd.edu
Like us on Facebook
Facebook

Twitter
Instagram
LinkedIn

Today@NDLS

Faculty mourn the loss of U.S. Supreme Court Justice Scalia

Shannon Roddel [link: /news/authors/shannon-roddel/] February 14, 2016

U.S. Supreme Court Justice Antonin Scalia speaks at the Law School, Oct. 19, 2007

U.S. Supreme Court Justice Antonin Scalia, who was nominated to the Supreme Court in 1986 by President Ronald Reagan and was known for his conservative views, died Saturday (Feb. 13) at the age of 79. He will be missed, said University of Notre Dame Law School [link: http://law.nd.edu] professors.

“It would be difficult to overstate Justice Scalia’s impact on the law. His jurisprudence touched nearly every area of the Constitution, and he has profoundly influenced the way that lawyers think about questions of statutory and constitutional interpretation," said Amy Coney Barrett [link: http://law.nd.edu/directory/amy-barrett/], Diane and M.O. Miller, II Research Chair in Law, who served as a law clerk to Scalia from 1998-99. "However, those of us who knew the Justice mourn the loss of a mentor and friend. His brilliance and wit not only lit up a pen, they lit up a room. He was larger than life, and it is difficult to imagine life without him in it.

“My sadness is tempered only by my gratefulness for having known this truly great man. Both Justice Scalia and the family he so loved are in my prayers.”

“Justice Scalia was an exceptional jurist who, by force of reason and principle, transformed debates over constitutional law and the role of courts in our federal system. He was one of the most influential justices of our day, and he likely will go down as one of the most influential justices in United States history," said Anthony J. Bellia Jr. [link: http://law.nd.edu/directory/anthony-bellia-jr/], O’Toole Professor of Constitutional Law, who served as a law clerk to Scalia in 1997-98.

“Justice Scalia was beloved by those who knew him — for his warmth, his friendship and his example. To work with him was a privilege. His sharp intellect, quick wit and commitment to principle were unfailing. More importantly, his witness to the things in life that matter most — including faith and family — was constant. My thoughts and prayers are with his wife, Maureen, and his entire family,” Bellia said.

William Kelley [link: http://law.nd.edu/directory/william-kelley/], associate professor of law, who served as a law clerk to Scalia in 1988-89, said, “We lost a great and consequential jurist, whose contributions to the law have been immense. During his almost 30 years on the Supreme Court, Justice Scalia set the terms of debate among lawyers, judges and academics. His piercing intellect, his unyielding devotion to principle and his graceful pen produced a body of work that will influence American law for generations to come. History will record him as one of America’s greatest justices.

“But for those who knew and loved him, today is about the loss of a great man — a boss, a mentor, a role model and a friend. Anybody who spent any real time with the Justice came to love him. His wit, his quick mind, his love of laughter and a great story — those are the things that his friends will remember.

“Personally, I will always remember and be grateful for the many conversations we had, and the things he taught me about faith, and the things that really matter. I pray for the repose of Justice Scalia’s soul, and for the comfort of his wife and family.”

***Contact**: Amy Coney Barrett, 574-631-6444, abarrett@nd.edu [link: mailto:abarrett@nd.edu]; Anthony J. Bellia Jr., 574-631-9353, Anthony.J.Bellia.3@nd.edu [link: mailto:Anthony.J.Bellia.3@nd.edu]; William Kelley, 574-631-8646, William.K.Kelley.24@nd.edu [link: mailto:William.K.Kelley.24@nd.edu]*

Posted In: Law [link: /news/category/law/]

News Categories

Science
Social Science

Notre Dame News

University Communications

500 Grace Hall, Notre Dame, IN 46556
Phone (574) 631-7367
Fax (574) 631-6767

Accessibility Information

Faculty Mourn the Loss of a Great U.S. Supreme Court Justice

Published: February 13, 2016
Author: Lauren Love [link:/news-events/news/authors/lauren-love/]

“It would be difficult to overstate Justice Scalia’s impact on the law. His jurisprudence touched nearly every area of the Constitution, and he has profoundly influenced the way that lawyers think about questions of statutory and constitutional interpretation.

Tonight, however, those of us who knew the Justice mourn the loss of a mentor and friend. His brilliance and wit not only lit up a pen; they lit up a room. He was larger than life, and it is difficult to imagine life without him in it.

My sadness is tempered only by my gratefulness for having known this truly great man. Both Justice Scalia and the family he so loved are in my prayers.”

— Amy Coney Barrett [link http://law nd edu/directory/amy-barrett/]
Diane and M.O. Miller, II Research Chair in Law
Barrett served as a law clerk to Associate Justice Scalia (1998-99)

“Justice Scalia was an exceptional jurist who, by force of reason and principle, transformed debates over constitutional law and the role of courts in our federal system. He was one of the most influential justices of our day, and he likely will go down as one of the most influential justices in United States history.

Justice Scalia was beloved by those who knew him — for his warmth, his friendship, and his example. To work with him was a privilege. His sharp intellect, quick wit, and commitment to principle were unfailing. More importantly, his witness to the things in life that matter most — including faith and family — was constant.

My thoughts and prayers are with his wife, Maureen, and his entire family.”

— Anthony J. Bellia Jr. [link:http://law nd edu/directory/anthony-bellia-jr/]
O’Toole Professor of Constitutional Law
Bellia served as a law clerk to Associate Justice Scalia (1997-98)

“We lost today a great and consequential jurist, whose contributions to the law have been immense. During his almost thirty years on the Supreme Court, Justice Scalia set the terms of debate among lawyers, judges, and academics. His piercing intellect, his unyielding devotion to principle, and his graceful pen, produced a body of work that will influence American law for generations to come. History will record him as one of America’s greatest Justices.

But for those who knew and loved him, today is about the loss of a great man — a boss, a mentor, a role model, and a friend. Anybody who spent any real time with the Justice came to love him. His wit, his quick mind, his love of laughter and a great story — those are the things that his friends will remember.

Personally, I will always remember and be grateful for the many conversations we had, and the things he taught me, about faith, and the things that really matter.

I pray for the repose of Justice Scalia’s soul, and for the comfort of his wife and family.”

— William Kelley [link:http://law nd edu/directory/william-kelley/]
Kelley served as a law clerk to Associate Justice Antonin Scalia (1988-89).

More Remembrances
Scalia’s lasting impact on the Supreme Court [link:http://www cnbc com/2016/02/14/scalias-lasting-impact-on-the-supreme-court-commentary html] (William Kelley)
The fight for late Supreme Court Justice Antonin Scalia’s replacement is just getting started [link:http://www.cbsnews.com/videos/fight-over-vacant-scotus-scalia-seat-gets-ugly/]
(Amy Barrett)

http://www.southbendtribune.com/court-clears-way-for-gay-marriage/article_49546040-f235-5c38-8b80-34f8677fc060.html

Court clears way for gay marriage

Indiana AG says county clerks should prepare to issue licenses

By Madeline Buckley South Bend Tribune Oct 7, 2014

The U.S. Supreme Court on Monday declined to hear appeals from same-sex marriage cases in Indiana and four other states, lifting the stay on gay marriages that has been in effect since the state appealed a federal judge's order that struck down Indiana's gay marriage ban.

But it was unclear on Monday how quickly the St. Joseph County clerk's office could begin issuing same-sex marriage licenses.

Indiana Attorney General Greg Zoeller released a statement that says counties will be legally required to issue same-sex marriage licenses after the 7th U.S. Circuit Court of Appeals issues a mandate lifting its previous stay.

St. Joseph County Clerk Teri Rethlake said county attorneys were reviewing the cases as well as the statement from Zoeller to determine whether the county must wait for the mandate or immediately resume issuing licenses.

"Before too long, we will probably be issuing them," Rethlake said Monday.

In a memo to clerks throughout the state, Zoeller's office said a mandate should come from the 7th Circuit "very soon" and advised the offices to begin making preparations.

The memo also said the Indiana State Department of Health is making changes to the online marriage license form, which is written for a marriage between a man and a woman.

Zoeller expressed regret that the Supreme Court did not take up the issue, but he said the nation's high court could still hear cases pending in other federal appeals courts.

"Our nation and all sides involved needed a conclusive Supreme Court ruling to bring finality to the legal question of state authority to adhere to the traditional definition of marriage," Zoeller said in the statement.

But speaking to reporters in South Bend at a news conference for a different matter, Zoeller said the matter is at this point "resolved" in Indiana's statute.

"That ruling is the law of the land so we'll be issuing those instructions to the clerks," Zoeller said.

Indiana Gov. Mike Pence similarly relayed disappointment in the court's decision.

"I will always believe in the importance of traditional marriage and I will always abide by the rule of law," Pence said in a statement. "While it is disappointing to many that the Supreme Court has chosen not to hear arguments on this important issue, under our system of government, people are free to disagree with court decisions but we are not free to disobey them."

Amy Coney Barrett, a law professor at the University of Notre Dame, said the U.S. Supreme Court typically only takes cases when there has been a split in opinion in the circuit courts.

“I think some people are surprised because it’s such a big issue so they were hoping the Supreme Court would weigh in,” Barrett said. “But given that typical standard of intervening, it’s kind of not surprising.”

Locally, advocates and officials celebrated.

On his first day back on the job after serving in Afghanistan, South Bend Mayor Pete Buttigieg said the development puts Indiana “on the right side of history.”

I think it’s a good day for Indiana and a good day for America,” Buttigieg said Monday at a press event. “We’re a stronger country and our families are better when we are equal to everybody.”

Willow Wetherall, a gay rights advocate, said locals will celebrate on Saturday with a gathering at Ciao’s Lounge, starting at 9 p.m.

The bash was already planned as a regular Guerrilla Gay Bar gathering, monthly events that attract crowds to a local establishment.

“Part of me hoped the Supreme Court would take Indiana’s case or all five cases and settle the issue once and for all so we would have marriage equality nationally,” Wetherall said. “Still, this is really exciting.”

Tribune staff writer Lincoln Wright contributed to this report.

mbuckley@sbtinfo.com

@mabuckley88

574-235-6337

College Basketball

Memphis AD Bowen issues statement supporting Smith's program

Cardinals center leaves Rick Pitino to play for son Richard

New Mexico hires NMSU's Paul Weir as new head coach

Xavier's Bluiett arrested on marijuana possession charge

Anderson: NBA draft a 'possibility' for Macon, Barford

MORE HOME

Decision halts opposition for 'foreseeable future'; High court's decision paves way for future, some say.

The Elkhart Truth (Indiana)

October 7, 2014 Tuesday

Section: NEWS; Pg. A1

Length: 706 words

Byline: TIM VANDENACK tvandenack@elkharttruth.com, FOLLOW REPORTER TIM VANDENACK ON TWITTER AT @TIMVANDENACK OR VISIT HIM ON FACEBOOK.

Dateline: ELKHART

Body

ELKHART — That samesex couples will now legally be able to marry in Indiana doesn't come as a complete shock to Brandon Stanley.

Sooner or later it was bound to happen, he said.

"As with any civil rights movement, there's always a step forward and a couple steps back," he said Monday, Oct. 6, after the U.S. Supreme Court rebuffed the appeal of a lower court decision overturning the state's same-sex marriage ban. "We were eventually going to get to this point."

Stanley, operator of New Paradigm Brewing Co. in Downtown Elkhart, conducted 24 same-sex marriage ceremonies at his bar last June after the initial decision overturned the Indiana ban and opened a brief window for such unions. The window completely shattered, apparently, with Monday's U.S. Supreme Court determination not to hear Indiana's appeal, and he cheered the change.

"It's the right thing," he said.

'A SAD DAY'

Of course, same-sex marriage is a hot-button issue that generates strong opinions, and, not surprisingly, the response here to the Supreme Court action, or inaction, was mixed.

Pastor Mike Fisher of Grace Bible Church here expressed dismay, saying no matter what the courts say, no matter how cultural perceptions might shift, same-sex marriage runs contrary to the Bible. He worries the opening to same-sex marriage will hasten the "disintegration" of the traditional family unit.

"It's a sign of culture going against the Bible, culture going against God, culture becoming more atheistic," Fisher said. "It's asad day when it wins."

Still, Fisher also expressed a measure of resignation.

"There is not much you can do when the law is the law," he said. That it's evolved to the point that Indiana's law prohibiting samesex marriage has been overturned "is apublic opinion thing. This is acultural thing."

At the same time, a pair of University of Notre Dame legal experts expressed doubt about the future prospects of banning same-sex marriage in Indiana.

"I think it's dead for the foreseeable future," said Amy Barrett, aNotre Dame law professor.

Indiana lawmakers earlier this year gave first-round approval to House Joint Resolution 3, the proposed constitutional amendment to define marriage as the union of one man and one woman, prohibiting same-sex marriage. But since the Supreme Court let the decision stand that overturns the Indiana law banning same-sex marriage, HJR 3 as an avenue closes, said Barrett and Richard Garnett, another Notre Dame law professor.

The September U.S. 7th Circuit Court of Appeals decision upholding the original June 25 U.S. District Court ruling overturning the Indiana ban is based on the U.S. Constitution. The U.S. Constitution always trumps state constitutions, thus if the Indiana Constitution were altered to prohibit same-sex marriage, per HJR 3, that would run afoul of the federal document, say Barrett and Garnett.

Indiana Reps. Tim Wesco and Wes Culver and Indiana Sen. Joe Zakas, members of Elkhart County's legislative delegation who backed HJR 3, didn't immediately return calls seeking comment.

'LIKE, OH MY GOD'

Legalities aside, the opinions were strong from those here who pay attention to the issue.

"I'm in shock," said Amy DeBeck, reverend at the Unitarian Universalist Fellowship in Elkhart. "I'm clearly not a lawyer here, but I'm like, oh my God."

She's performed same-sex marriage ceremonies before, but never had authority to sign marriage licenses. If the Supreme Court action means she finally can ink such documents, she said, "I'm ecstatic."

Chad Crabtree, who lobbied against HJR 3 during the last legislative session, said now he hopes lawmakers can "move on," to issues like jobs and the economy. In years to come, he predicted, people looking back will view Indiana's ban on samesex marriage with curiosity.

"History will look back, wondering what the hell Indiana was doing," he said.

On the flip side, Fisher maintains the Bible is unequivocal on homosexuality — that it's not to be tolerated and that it is wrong. He has no campaign planned to sway public opinion. As a pastor, he just works with individuals, one at a time, encouraging them "to do right" and read the Bible.

"It's not like we don't like these people," he said, alluding to homosexuals. "It's what God says."

Notes

SUPREME COURT SURPRISES SOME The SCOTUS decision not to hear the appeal of the Indiana same-sex marriage case came as a surprise to some legal experts, said Richard Garnett, a law professor at the University of Notre Dame. The Supreme Court frequently takes up the pertinent appeals so state advocates have a chance to speak out on behalf of state laws. That didn't happen this time, though. The Supreme Court sometimes takes up cases when federal courts offer divergent rulings on similar issues, said Amy Barrett, another Notre Dame law professor. Federal courts have been fairly uniform in turning over laws banning such unions. If a federal court were to uphold a state ban on same-sex marriage, that could spur involvement by SCOTUS, Barrett thinks.

Graphic

Decision halts opposition for ‘foreseeable future’; High court’s decision paves way for future, some say.

The Rev. Amy DeBeck supported the U.S. Supreme Court decision that lets a lower court ruling stand overturning the ban on same-sex marriage in Indiana. She's pictured here at the Unitarian Universalist Fellowship in Elkhart on Dec. 5, 2013. DeBeck worked at a phone bank at the church late last year and earlier this year to lobby against a proposed amendment to change Indiana's constitution to prohibit same-sex marriage. By Jennifer Shephard/The Elkhart Truth, file Pastor Mike Fisher of Grace Bible Church in Elkhart expressed concern about the deterioration of the traditional family unit. He was responding to the U.S. Supreme Court decision not to consider the appeal of a lower court decision overturning the ban on same-sex marriage here. By Jennifer Shephard/The Elkhart Truth, file

Load-Date: October 7, 2014

End of Document

Law students show discontent

Ken Fowler | Tuesday, April 17, 2007

Notre Dame's recent six-spot drop in the US News and World Report Law School rankings has highlighted feelings of discontent among Law School students for reasons ranging from ordinary to overarching.

While many have questioned the leadership of Dean Patricia O'Hara, the dean said she understands why a conversation about the future of the Law School would be taking place after the release of the rankings, which knocked Notre Dame from 22 to 28 – the program's largest drop since 2000.

"I can appreciate that for students it's very unsettling when there's a drop in the rankings," O'Hara said. "And so it's not at all – it's very understandable that students would be upset by that decline and that there be a certain amount of conversation and dialogue going on within the Law School community as a result of that."

In an e-mail to Law School students after the rankings were released, O'Hara said the Law School administration would fully evaluate the reason for the drop. However, she stressed that the schools in places Nos. 20 to 30 finished with unusually close overall rankings, indicating the separation between 20th and 30th is minimal.

One area in which Notre Dame's base score dropped for the rankings was in its selectivity rating. For the 2006 incoming class, the Law School's acceptance rate jumped to over 21 percent. But, O'Hara said, an analysis of other school's numbers showed similar jumps in acceptance rates around the country, minimizing whatever effect it would have had on Notre Dame's final ranking.

"There was some indication that applicants were applying to more schools, so even though the volume of our applicant pool was the same as the prior year, whether or not the head count was exactly the same was more difficult to determine," she said.

She said it was too early to tell if the pattern would last.

For many students, however, the drop is already a sign of lost potential: where Notre Dame should be excelling, instead it is declining, at least in relative terms.

"To me, when there are things that are holding it back from the potential that it has. It's kind of frustrating when you know it could be so much better than it is," said Jake Kiani, a third-year law student. "It's great already, so why shouldn't it be better?"

The complaints are varied, with some wondering about the five-year delay in the opening of the new building for the Law School (now slated for 2009), and others criticizing what they call inadequate upgrading of the current building.

Class selection

The overriding complaint, however, was with class offerings.

Melissa Nunez, a third-year law student, cited problems with property law classes and the cancellation of other classes in the days before semesters were set to begin as serious issues not fully addressed.

“Either Patty O’Hara needs to change … the way she runs the Law School or … they just need a new dean, to be frank,” she said. “There’s a lot of reasons the school, in my opinion … isn’t doing its best to be a [top] university law school.”

Questions from many students center around the number of corporate law classes offered by Notre Dame in relation to the total number of classes offered in other sections of legal teaching.

O’Hara, whose specialty is in business and corporate law, declined to say if she felt the proportion of corporate law classes compared to the total number of offerings was adequate. Instead, she said the size of the Law School restricts both the number of faculty members and available classrooms – a concern that the new building will meet.

“There’s very few areas of the curriculum that we wouldn’t like to be offering more courses,” she said.

But whether the Law School is doing enough with its current resources is an important question, Kiani said.

“When I pick classes, I just feel sometimes there’s not as many classes as should be there in terms of what you really need to practice law,” he said. “They don’t have enough courses dealing with the transactional side of things.”

What’s more, Kiani said, the Law School should try to use more undergraduate classrooms at different times to allow greater flexibility in scheduling. With six main classrooms in the Law School, he said, allowing undergraduate courses to be taught in the Law School and Law School courses to be taught in undergraduate settings would allow law students an ability to register for classes that might otherwise conflict.

That, he said, is one of the major things that could be fixed but hasn’t been.

A more general concern many students said they had was with the amount of Notre Dame professors visiting other law schools this year – something they said seems to have had an effect on the variety and quality of the courses offered.

O’Hara said she did not know if this year marked an unusually high number of visiting faculty members, but rather pointed to the positive trend she said comes from having desired professors.

“We have an outstanding faculty, so it’s not surprising that our faculty would be attracted to other law schools and that they’re receiving offers to visit,” she said. “Within the legal academy, it’s a fairly common culture for law schools to hire visiting professors. … It’s in a sense a compliment to the outstanding caliber of our faculty.”

But on a different point, Kiani and Jim Paulino, a third-year law student, said the school’s ideology and strong Catholic focus – including classes on canon law – only diminish its overall teaching quality.

The requirements of Ethics II and Jurisprudence, Paulino said, amount to watered-down classes with minimal practical use and poor treatment of the subject matter.

“The class was a joke, the course was a joke, the grading was a joke, the whole thing was a joke – and that’s what makes Notre Dame, quote, different. … It’s like a mockery of our intelligence,” Paulino said. “I think it’s embarrassing that they would waste my money as a student and my time as a student to take these things that really make no difference from professors who really don’t teach you anything. Everybody knows it’s a joke.”

On a separate issue, Kiani said he feels the administration hasn’t done enough to adjust to the number of faculty members on leave, creating a problem situation for students looking to take courses in certain subfields.

“That they know that faculty are going on leave … it seems to me you need to plan around that to get the professors here that need to be here to teach the courses that the students need,” he said. “This is supposed to be a law school at one … of the country’s best universities. … I don’t think that they are living up to the potential that they have here.”

Faculty evaluated

That potential includes a slew of young faculty members with Supreme Court clerkships on their rÃ©sumÃ©s.

Many students noted the Law School’s young faculty as a significant boon to the students and the institution as a whole, but wondered if such success wasn’t being promoted fully.

“Notre Dame’s reputation in the legal community, at least among law schools, has not improved, despite a lot of these excellent, outstanding young faculty,” third-year law student Derek Muller said.

Mueller, who said he worried about an overreaction to the US News and World Report rankings, said the administration was not vocalizing support for young faculty members to the extent that it should. Nonetheless, he stressed caution to those criticizing O’Hara.

“When people tie the U.S. News rankings to the current performance of a dean, it only makes the law school look very, very bad in the eyes of the legal community,” he said in a follow-up e-mail to his interview. “The rankings are kind of like the 800 [pound] gorilla in the room, but it’s generally agreed that most law schools detest them, even if they do well.”

From the faculty perspective, the new building couldn't come soon enough.

"I think growing our faculty helps us better serve our students," said Amy Barrett, an associate professor of civil procedure and evidence in the Law School. "That's already in the works as part of our strategic plan."

An increase in the number of faculty members will allow professors to write and publish more scholarly articles, which will enhance peer evaluations of Notre Dame, she said. Barrett said the new building also will improve the opinion other legal scholars have of Notre Dame.

But Paulino and Kiani said a predominance of one ideology among most professors is a serious hindrance to getting a full legal education.

"A lot of professors are bad professors. They just can't teach," Paulino said. "But they're good in terms of the school's Catholic image because they're good, conservative Catholic professors. But they couldn't teach you anything if you begged them. They couldn't teach you what the law is, but they're still advisors.

"There's no practicality to anything that we do here, except for the trial ad[vocacy] program, and it looks like that program is not getting enough of the respect it deserves. There's nothing practical about coming to Notre Dame Law School except that you need your degree to practice law."

Other issues

Paulino said he feels trial advocacy is getting too little attention, especially in terms of mock trial.

"The general feel is that trial advocacy for mock trial is on the way out, and they're focusing more on appellate advocacy," Paulino said. "Something that was tremendously valuable to me, that helped me get a good job, that's going to help me be an excellent litigator, feels like it's getting slowly phased out of the school, feels like it's not as important as it should be."

While some students have been vocal about their disappointment in the direction of certain parts of the Law School, O'Hara said she didn't receive a great rush of students after the rankings came out.

She noted, however, that students typically approach the assistant dean for students, Gail Peshel, with concerns.

Nonetheless, O'Hara said she believed she could do a better job in communicating with students.

"I think there's room for improvement in my relationship with students," said O'Hara, who works in her office at night and often leaves the door open. "Deans wear a lot of different hats, and many of my responsibilities have demanded a lot of time and energy. … I think I can always improve on my access to students."

Several students said a two-year lag time from the time students passed a petition asking for additional power outlets in the Law Library and the time the outlets were installed last year was indicative of the communications problems in

the Law School.

“If any CEO of any company wanted plugs put in, they would put the plugs in the next day,” Paulino said. “This administration and a lot of the faculty members do things because that’s what they want to do … oblivious to what other people think or feel.”

O’Hara said the questions raised in light of the rankings could provide a positive platform for self-assessment and the ability to look for positive improvements.

“I want our students to be proud of the Law School and feel like this is a strong and good community for them,” she said.

A CAREER IN LAW; GRADUATE PULLS STINTS IN D.C. AS LAW CLERK

Times-Picayune (New Orleans, LA)

June 8, 1997 Sunday, KENNER

Section: PICAYUNE; Pg. 1D1

Length: 541 words

Byline: By EVA BARKOFF East Jefferson bureau

Body

Amy Coney had always wanted to be a teacher until discovering her love of the law, especially its goal of protecting the rights of individuals.

In July, Coney, who last month graduated No. 1 in Notre Dame's Law school, will head to Washington, D.C., to be a law clerk for U.S. Court of Appeals Judge Laurence Silberman for one year before taking a 12-month position as clerk for U.S. Supreme Court Justice Anthony Scalia.

"To tell the truth, I feel a little stunned," said Coney, a resident of Old Metairie. "I feel a sense of accomplishment, yet at the same time, it all hasn't really sunk in. I'm a bit overwhelmed."

Coney, 25, applied for both law clerk positions this year after a couple professors encouraged her to do so. The professors, who had clerked for the Supreme Court, wrote letters of recommendation.

"I went for my interview with Justice Scalia last March," Coney said. "We talked for a little while and then I went to another interview; this one was with his four law clerks.

"We sat in Justice Scalia's library and for about an hour, the four of them asked me a series a questions about the law. I knew the answers to most of what they were asking. Whatever case I didn't know, I didn't try to answer it. I just said I didn't know."

Soon after, Coney received a phone call from Justice Scalia.

"I picked up the phone and the voice on the other end said 'please hold for Justice Scalia,' " Coney said. "I was so excited, my heart was racing. He comes on the line and starts asking me how I am and what's new. Then he says he wanted me to clerk for him after I completed my clerking with Judge Silberman. I immediately said 'yes' and began thanking him over and over again."

Coney, who attended Notre Dame on a full academic scholarship, graduated with a 3.9 grade-point average and received the Hoynes Award for highest academic average in the law school class. She earned her undergraduate degree in English at Rhodes College in Memphis, Tenn.

"My first year at Notre Dame was the hardest," said Coney, the oldest of Mike and Linda Coney's seven children. "The transition from college to law school was very difficult. After the first year, it didn't get easier. I just kept working hard and learned how to balance and organize my time better."

Coney said her legal interest is in public law, specifically in governmental issues and the rights of citizens.

"I am drawn to this area because I see it as a way of being able to help a lot of people," Coney said. "I am also interested in seeing how government is doing its job as it relates to protecting the citizens."

Coney feels fortunate for the opportunities that await her.

"There are many law school graduates who did just as well as I did and who know the law just as well as I do," Coney said. "But I've been blessed because I have so many people along the way who have helped me and who have believed in me."

Once Coney completes her work in Washington, she plans to return home and practice law. And she hasn't given up on the idea of becoming a teacher.

"Right now, I plan to practice law for a while, get married, start a family and then maybe teach law," Coney said. "That way, I can combine two careers I really love - the law and teaching."

Graphic

Amy coney, who graduated first in her class from Notre Dame's Law School, will be a law clerk for a federal court of appeals judge for a year before taking on a position as clerk for U.S. Supreme Court Justice Anthony Scalia. STAFF PHOTO BY JOHN McCUSKER

Load-Date: June 9, 1997

End of Document

[redacted]