

Book Review

The Constitution, the Supreme Court, and History

THE SUPREME COURT AND THE AMERICAN ELITE, 1789–2008. By Lucas A. Powe, Jr. Cambridge, Massachusetts: Harvard University Press, 2009. 421 Pages. \$29.95.

THE SUPREME COURT: AN ESSENTIAL HISTORY. By Peter Charles Hoffer, William James Hull Hoffer & N.E.H. Hull. Lawrence, Kansas: University Press of Kansas, 2007. 494 Pages. \$34.95.

Reviewed by Paul Finkelman*

During the recent confirmation of Justice Sonia Sotomayor, we watched, once again, the ritual discussion of what ought to be the standards for a Supreme Court Justice. Republicans, fearful of a third moderate on what is the most conservative Court in three-quarters of a century,¹ trotted out the assertions of John Roberts during his confirmation hearing that judges are like umpires.² They feared Justice Sotomayor would not be an “umpire.”

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1. Probably the last time the Court was this conservative was under Chief Justice William Howard Taft. For scholarship on that Court, see PETER CHARLES HOFFER, WILLIAM JAMES HULL HOFFER & N.E.H. HULL, *THE SUPREME COURT: AN ESSENTIAL HISTORY* 217–38 (2007); LUCAS A. POWE, JR., *THE SUPREME COURT AND THE AMERICAN ELITE, 1789–2008*, at 192–201 (2009); 2 MELVIN I. UROFSKY & PAUL FINKELMAN, *A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES* 624–62 (2d ed. 2002) and WILLIAM M. WIECEK, *THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886–1937*, at 162–64 (1998).

2. *E.g.*, *The Nomination of Sonia Sotomayor to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (2009) (statement of Sen. Jeff Sessions, Member, S. Comm. on the Judiciary), available at http://judiciary.senate.gov/hearings/testimony.cfm?id=3959&wit_id=515. During his confirmation hearing, then-Judge Roberts advocated the virtues of nonactivist jurisprudence, claiming:

Judges are like umpires. Umpires don't make the rules; they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role. Nobody ever went to a ball game to see the umpire. Judges have to have the humility to recognize that they operate within a system of precedent, shaped by other judges equally striving to live up to the judicial oath. And judges have to have the modesty to be open in the decisional process to the considered views of their colleagues on the bench.

Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 182 (2005) [hereinafter *Roberts Confirmation Hearing*] (statement of John G. Roberts, Jr., Supreme Court C.J. Nominee).

Of course, anyone who understands baseball knows that the comments by Judge Roberts, now Chief Justice Roberts, are at best silly. These comments may indicate that, unlike Justice Sotomayor,³ Chief Justice Roberts knows little about baseball. Or they may have been made so that the nominee could be seen as macho or just a “regular guy” before the cameras at a confirmation hearing. For those of us who understand baseball, it is clear that there is no such thing as just an umpire or merely applying the rules. Plate umpires never call balls and strikes according to the rule book because the game would not work.⁴ Baseball shows that umpires must often make “judgment” calls. The strike zone, like a constitutional text, is never clear, precise, or inflexible. Chief Justice Roberts may actually have been correct that a judge is like an umpire, but he and his conservative supporters clearly do not understand why that is so.

When not urging the idea of the jurist as umpire, opponents of Judge Sotomayor’s confirmation argued that Justices should stick to the “original intent” of the framers of the Constitution.⁵ Judge Sotomayor’s injunction in the baseball strike⁶ is of course precisely the kind of equity decision that is not based on original intent or original meaning; it is rooted in the idea that judges “judge.” When Chief Justice Roberts was being confirmed, he also argued for at least a limited use of originalism, where “the framers’ intent is

3. Sotomayor saved the game of baseball in *Silverman v. Major League Baseball Player Relations Committee, Inc.*, 880 F. Supp. 246 (S.D.N.Y. 1995), *aff’d*, 67 F.3d 1054 (2d Cir. 1995), when she refused to allow the major-league owners to unilaterally abrogate their contract with the Major League Baseball Players Association, *id.* at 257. As President Obama noted when he nominated her,

During her tenure on the District Court, she presided over roughly 450 cases. One case in particular involved a matter of enormous concern to many Americans, including me, the baseball strike of 1994–95. . . . In a decision that reportedly took her just 15 minutes to announce, a swiftness much appreciated by baseball fans everywhere[,] she issued an injunction that helped end the strike. Some say that Judge Sotomayor saved baseball.

Remarks on the Nomination of Sonia Sotomayor to Be a Supreme Court Associate Justice, DAILY COMP. PRES. DOC. 200900402, at 2 (May 26, 2009), *available at* <http://www.gpo.gov:80/fdsys/pkg/DCPD-200900402/pdf/DCPD-200900402.pdf>.

4. See Douglas O. Linder, *Strict Constructionism and the Strike Zone*, 56 UMKC L. REV. 117, 117 (1987) (hypothesizing that no umpire in the past twenty years has called the strike zone to be what the rules mandate). In my own work, I draw a comparison between the interpretive approaches of umpires and judges:

Next, consider three umpires discussing their profession and how they call balls and strikes. “I call ‘em as I see ‘em,” the first says. “I call ‘em as they are,” says the second. “They ain’t nothin’ till I call ‘em,” says the third. Their approaches illustrate the nature of judicial interpretation and the way different judicial philosophies can coexist within American law. Watching umpires teaches us, from an early age, that rules—however carefully written down—are flexible and never wholly certain. Each judge, like each umpire, may have a slightly different approach to his or her craft.

Paul Finkelman, *Baseball and the Rule of Law Revisited*, 25 T. JEFFERSON L. REV. 17, 20 (2002).

5. See, e.g., Ramesh Ponnuru, Op-Ed, *When Judicial Activism Suits the Right*, N.Y. TIMES, June 24, 2009, at A29 (“Many conservatives oppose Judge Sotomayor’s nomination because she does not appear to support originalism . . .”).

6. *Silverman*, 880 F. Supp. at 261.

the guiding principle that should apply.”⁷ He told the Senate Judiciary Committee that “[t]he job of a judge is to look at whatever [the] action is and try to analogize it: What would that most be like in 1787? And if you got a jury trial for that, you get one today. And if you didn’t, you don’t. It’s a purely historical approach.”⁸

As a historian, this “purely historical approach” is at first glance quite attractive. To do this job correctly, one would imagine, you might actually need some training in history. Instead of only hiring recent law school graduates for their clerks, we could imagine the Court also hiring Ph.D. historians as their clerks. But, because history is a discipline that tends to take years to perfect, it would be reasonable to see the Court hiring senior scholars, or at least those in midcareer, as clerks. These historian clerks might even be on the staff of the Court for a few years or more, thus giving some continuity in the work of the Court. Here would be the ideal job for senior scholars who no longer want to teach. I can also imagine that if the Court took originalism seriously, every constitutional case would require historical briefs explaining the history to the Justices. The possibility of large fees as an expert is surely attractive.⁹ A jurisprudence of originalism would lead every law school to teach a number of courses in legal history and constitutional history. Historical-methods courses would send law students to the archives and the libraries, and not just to Lexis or Westlaw. These courses would raise the market value of legal and constitutional historians, enabling us to demand higher salaries. Such a change in Supreme Court jurisprudence would also provide a new market for our casebooks¹⁰ and our narrative histories of constitutional developments.¹¹

It is of course highly unlikely that the Court will ever seriously adopt originalism as an interpretive tool.¹² Rather, we can expect that the Court will use history as it has for the last two centuries. Sometimes the Court has used history in a serious way to explain the text of the Constitution. The Court on occasion uses examples from history to explain why a certain

7. *Roberts Confirmation Hearing*, *supra* note 2, at 2.

8. *Id.*

9. In the nature of full disclosure, I was an expert in *Glassroth v. Moore*, 229 F. Supp. 2d 1290 (M.D. Ala. 2002), *aff’d*, 335 F.3d 1282 (11th Cir. 2003), the Alabama Ten Commandments-monument case. I was also an expert in the lawsuit over the ownership of Barry Bonds’s seventy-third home-run ball, *Popov v. Hayashi*, No. 400545, 2002 WL 31833731, at *3 (Cal. Super. Ct. Dec. 18, 2002).

10. *E.g.*, KERMIT L. HALL, PAUL FINKELMAN & JAMES W. ELY, JR., *AMERICAN LEGAL HISTORY: CASES AND MATERIALS* (3d ed. 2004); MELVIN I. UROFSKY & PAUL FINKELMAN, *DOCUMENTS OF AMERICAN CONSTITUTIONAL HISTORY* (3d ed. 2008).

11. *E.g.*, UROFSKY & FINKELMAN, *supra* note 1.

12. For a discussion of conservative activism on the Court that is not based on originalism, see William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217, 1229–36 (2002).

constitutional outcome is appropriate.¹³ More likely, however, Justices will rummage around in history, looking for a factoid or some historical anecdote to support the outcome they want to reach. It is unlikely that on questions that matter to members of the Court they will look to history for an answer. Thus, a jurisprudence of original intent will remain a convenient trope for jurists to justify outcomes they want; it is unlikely the Justices will actually change their mind or alter their ideology because they have discovered that history does support the result that they want.

Two recent books, which I will turn to in a moment, illustrate the complexity of history and the Constitution, and underscore why a serious jurisprudence of original intent is not only unlikely, but deeply problematic. History is often murky, messy, and imprecise. The historical record does not always give judges the answers they want to specific questions. The “intentions of the framers” were not always clear, and even figuring out how to determine these intentions is not a simple matter—it is often not even possible. History can sometimes give us a very precise understanding of what some framers intended, but usually it only can give us general ideas of what the framers may have intended. Sometimes even that is not always possible.

For the Constitution of 1787 and the Bill of Rights of 1789, getting at specific intentions seems particularly problematic. The Constitutional Convention did not keep any formal minutes of the debates, and the records that we do have are sparse and incomplete.¹⁴ In many cases we simply do not know what the intentions were. The Bill of Rights was debated in both houses of Congress, but there is no official record of the debate in the Senate, so we cannot know what the members of that body intended.¹⁵ In the House of Representatives, the record of the debates is sparse. The debate begins with James Madison asserting on the floor of the House that the Bill of Rights was unnecessary, but “that in a certain form, and to a certain extent,” a bill of rights “was neither improper nor altogether useless.”¹⁶ While proposing amendments that were neither “improper” nor “useless,” Madison

13. See, e.g., *Saenz v. Roe*, 526 U.S. 489, 498, 500–04 (1999) (“The word ‘travel’ is not found in the text of the Constitution. Yet the ‘constitutional right to travel from one State to another’ is firmly embedded in our jurisprudence.” (quoting *United States v. Guest*, 383 U.S. 745, 757 (1966))); *Hustler Magazine v. Falwell*, 485 U.S. 46, 54–55 (1988) (illustrating the importance of protecting intentionally injurious speech through the example of political cartoons).

14. See Paul Finkelman, *The Constitution and the Intention of the Framers: The Limits of Historical Analysis*, 50 U. PITT. L. REV. 349, 353–54 (1989) (describing how few documents were preserved from the proceedings of the Constitutional Convention and how some participants actually favored destroying all records).

15. See Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 SUP. CT. REV. 301, 303–04 (reporting revisions made by the Senate to James Madison’s draft of the Bill of Rights and offering revisions specifically produced through House debate). The minutes of the Senate for this period give a bare-bones record of titles of bills and how members voted but do not give the substance of the debates.

16. 1 ANNALS OF CONG. 453 (Joseph Gales & William Seaton eds., 1789).

was careful, as he noted in a private letter to Edmund Randolph, to make sure that “[t]he structure & stamina of the Govt. [were] as little touched as possible.”¹⁷ How does an originalist deal with such evidence as to the meaning of the Bill of Rights?

History is a useful tool for lawyers and judges. History helps judges see the bigger picture of the Constitution and the larger meaning of law and society. History can give jurists a sense of perspective and provide examples of why a particular result might be worthwhile or not worthwhile. Judges can learn much from history, even if it is probably not the ultimate tool for guiding their decisions. Attorneys and expert witnesses can help judges learn the background to cases and to inform them about legal and constitutional developments. This surely makes for better judging and lawyering. Sometimes, history may even provide the answer to a specific legal issue. History can also help us better understand how the Court has affected the political, social, legal, and economic development of the nation. Historical reflection and understanding can often help jurists understand the modern legal issues they confront. With this in mind, we can turn to two recent books about the history of the Court and its relationship to politics and the Constitution.

In Part I of this Review, I will briefly survey these books, discussing their general strengths and weaknesses. In Part II of this Review, I will examine how the authors deal with the way slavery affected the Constitution and the Supreme Court. Slavery was the greatest constitutional problem the nation has ever faced. The Court, like other branches of the government, struggled with slavery and what to do with it. The resolution of the problem ultimately took place outside the courtroom, but the aftermath of ending slavery led to a constitutional revolution that arguably altered almost every aspect of American constitutionalism. Slavery led to a civil war, massive carnage, and three new constitutional amendments, which in turn have led to an enormous amount of constitutional jurisprudence. Thus, in Part II, I examine how these authors have dealt with slavery, the Constitution, and the Supreme Court.

I.

The two books under discussion¹⁸ are both designed for general readers, and no doubt the authors hope they will be used in classrooms. The first, Professors Hoffer, Hoffer, and Hull’s book, could be used in a constitutional law class or an advanced law-school course. The other, Professor Powe’s book, might be enormously stimulating for a seminar on the Court, but it would be as much a foil for argument as it would be a book that would

17. Letter from James Madison to Edmund Randolph (June 15, 1789), in 12 THE PAPERS OF JAMES MADISON 219, 219 (Charles F. Hobson & Robert A. Rutland eds., 1979).

18. HOFFER, HOFFER & HULL, *supra* note 1; POWE, *supra* note 1.

instruct students on the history and development of either the Court or its jurisprudence. But any use of these books would require a law professor to think outside the box of cases and casebooks and require students to see cases in their context. This of course may be too great a leap for most law professors. Teaching cases and doctrine is so much easier and so much more certain than teaching the historical context of jurisprudence. Professor Powe declares that his book “situates the Court and its work within the broad narrative of American history,”¹⁹ and correctly asserts that “doctrine may be driven by events and the intellectual currents of the times.”²⁰ But he also argues that Justices take doctrine “seriously,”²¹ so presumably he does as well. But many historians might demur to this statement and argue that in fact the Court only takes doctrine seriously when the issue is not terribly important. But when the doctrine does not fit the times—or the political predilections of the Justices—the Court almost always finds a way around the existing doctrine to end up where the Justices want to go.²² Powe notes that the Court is influenced “by events and the intellectual currents of the times”²³ but fails to also note that the Court is influenced heavily by the ideological views of the Justices.²⁴ A full history of the Court shows that Justices often resist the intellectual and political currents of the times. Indeed, Justices often assert that they should ignore current events or changes in society in favor of the meaning of the Constitution.²⁵ After the Court decided

19. POWE, *supra* note 1, at viii.

20. *Id.*

21. *Id.*

22. For example, Powe’s own admirable discussion of the *Slaughterhouse Cases*, 83 U.S. 36 (1873), demonstrates that Justice Miller easily ignored doctrine on the meaning of the Fourteenth Amendment’s Due Process Clause, Equal Protection Clause, and Privileges and Immunities Clause because he found it inconvenient to the conclusion he wanted to reach. POWE, *supra* note 1, at 134–37.

23. *Id.* at viii.

24. See, e.g., CHRISTOPHER L. EISGRUBER, *THE NEXT JUSTICE: REPAIRING THE SUPREME COURT APPOINTMENT PROCESS* 19 (2007) (claiming empirical research has found that American judges’ ideological values influence their decisions in many cases); Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 31, 34 (2005) (arguing that the Supreme Court is a “political organ”); Brian Z. Tamanaha, *The Distorting Slant in Quantitative Studies of Judging*, 50 B.C. L. REV. 685, 723–24 (2009) (asserting that few in legal circles deny that the ideological views of Supreme Court Justices influence Court decisions).

25. For example, see Chief Justice Roger B. Taney’s overwhelmingly originalist position in *Dred Scott v. Sandford*:

No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. Such an argument would be altogether inadmissible in any tribunal called on to interpret it. If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption. It is not only the same in words, but the same in meaning, and delegates the same powers to the Government, and reserves and secures the same rights and

the *Insular Cases*,²⁶ the social commentator Peter Finley Dunne, through his fictional Mr. Dooley, observed that “[n]o matter whether th[e] Constitution follows th[e] flag or not, th[e] Supreme Court follows th[e] [e]l[e]ction returns.”²⁷ But, this is surely too simplistic an answer. How else, one might ask, could the Supreme Court have handed the presidency to George W. Bush after Al Gore received a rather powerful mandate in the form of an impressive popular majority?²⁸

A. The Supreme Court: An Essential History

The Supreme Court: An Essential History is a fascinating collaborative effort by Peter Hoffer (who wrote most of the first third of the book), Natalie E. Hoffer Hull (who wrote most the second third of the book), and their son, Williamjames Hull Hoffer (who wrote most of the final third of the book). This may be the first serious work of history ever co-authored by two parents and their child. All three have Ph.D.’s in history, two have law degrees, and the third, Peter Hoffer, did a postdoctoral program in a law school. The book is an overview history of the Supreme Court. It is informative and generally on target. The authors cover a lot of ground in their well-written and generally very solid book. Written by three authors, there are naturally changes in voice. But, the transitions are easy and smooth. The

privileges to the citizen; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day. This court was not created by the Constitution for such purposes. Higher and graver trusts have been confided to it, and it must not falter in the path of duty.

60 U.S. (19 How.) 393, 426 (1856). There are more examples of Supreme Court Justices favoring the language of the Constitution over social or political currents. See, e.g., *Chisom v. Roemer*, 501 U.S. 380, 411 (1991) (Scalia, J., dissenting) (“[T]he judge represents the Law—which often requires him to rule against the People.”); *Am. Fed’n of Labor v. Am. Sash & Door Co.*, 335 U.S. 538, 557 (1948) (Frankfurter, J., concurring) (warning courts against yielding to the popular will); *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 448–53 (1933) (Sutherland, J., dissenting) (citing extensive authority for the view that the Constitution’s interpretation should not fluctuate with popular opinion).

26. *Fourteen Diamond Rings v. United States*, 183 U.S. 176 (1901); *Dooley v. United States*, 183 U.S. 151 (1901); *Huus v. N.Y. & P.R. S.S. Co.*, 182 U.S. 392 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *De Lima v. Bidwell*, 182 U.S. 1 (1901). See generally Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT’L L. 283, 300–12 (2007) (chronicling the events that brought rise to the *Insular Cases* and explaining the resulting Supreme Court decisions). For a short discussion of these cases, see PAUL FINKELMAN & MELVIN I. UROFSKY, *LANDMARK DECISIONS OF THE SUPREME COURT* 162–64 (2d ed. 2008).

27. FINLEY PETER DUNNE, *MR. DOOLEY AT HIS BEST* 77 (1938).

28. See *Bush v. Gore*, 531 U.S. 98, 110 (2000) (reversing the decision of the Supreme Court of Florida ordering the state’s recount to proceed and effectively deciding the 2000 presidential election in George W. Bush’s favor). Gore beat Bush in the popular vote by nearly 550,000 votes. Fed. Election Comm’n, 2000 Presidential Popular Vote Summary, <http://www.fec.gov/pubrec/fe2000/prespop.htm>. For Powe’s superb discussion of this case, see POWE, *supra* note 1, at 336–39.

authors want the Court to speak for itself through them, and thus there is no strong theme running through the book. It is a good survey of the Supreme Court. There are nifty vignettes about the Justices—and clear discussions of some of their opinions. The authors also sometimes do a remarkable job of tying nonconstitutional history to what the Court is doing. They are often able to weave, at least with a mention here and there, a great deal of U.S. history into their volume, which places the Court in a political and social context. Thus, they begin their discussion of the Taft Court with a mention of the Harlem Renaissance and the great influenza epidemic.²⁹ Similar bits of history, scattered throughout the book, illustrate the way good historians— as all three authors are—see the larger scope of their subject.

In the end, however, this is not a constitutional history of the United States or a study of the Court's role in society. Rather, it is narrowly Court focused. This is not so much a criticism as an observation. However, the strategy of achieving this history is, unfortunately, not always successful.

The book is organized by Chief Justiceships, with about thirty pages devoted to each Court. This strategy seems odd unless the authors—or more likely the publisher—imagine their fifteen chapters will be assigned in a standard fifteen-week college course. The problem is that all Chief Justices are not historically equal and all Chief Justiceships are not fungible. Most scholars agree that the Marshall, Taney, and Warren Courts stand out for their historical importance. Two of them also stand out for their length. But the Hoffers do not take this into account. Thus, the thirty-four years of the Marshall Court (1801–1835) are covered in thirty-two pages,³⁰ while the Taft Court, which lasted only nine years (1921–1930), gets greater coverage at thirty-five pages.³¹ Even more dramatically, the five years of the Stone Court (1941–1946) get twenty-five pages,³² which is the same amount devoted to the twenty-eight years of the Taney Court (1836–1864).³³ The six years of the Vinson Court (1946–1952) actually get two more pages than the Taney Court.³⁴ This is not merely about counting pages. Taney's Court dramatically shaped the growth of the American economy and developed important doctrines—such as the police powers of the states,³⁵ the dormant powers of

29. HOFFER, HOFFER & HULL, *supra* note 1, at 217.

30. *Id.* at 51–82.

31. *Id.* at 217–51.

32. *Id.* at 281–305.

33. *Id.* at 83–107.

34. *Id.* at 306–32.

35. *See, e.g.,* Mayor of New York v. Miln, 36 U.S. (11 Pet.) 102, 141–43 (1837) (holding that New York's state legislature, because it was exercising its police power, did not unconstitutionally infringe on Congress's power to regulate interstate commerce); *see also, e.g.,* Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299, 320–21 (1851) (upholding Pennsylvania's state-pilotage law that regulated interstate commerce on the grounds it pertained to local commerce, which does not require nationally uniform regulation).

Congress,³⁶ and the concept of unfunded mandates³⁷—that are still with us. While doing this, the Court grappled with slavery and its jurisprudence, for better or worse, helped push the nation toward the Civil War. It is hard to imagine that anyone would think the accomplishments or failures of the Stone or Vinson Court deserve twice the coverage of the Taney Court, as well as almost twice the coverage of the Marshall Court and the Warren Court.³⁸ Does anyone believe that the thirteen years of the Stone and Vinson Courts are almost twice as important as the thirty-four years of the Marshall Court?

This strategy ultimately weakens the book. Consider the chapter on the Marshall Court, which was certainly the most important Court in our history. Marshall served longer than any other Chief Justice, and he made the Court into an important branch of the government,³⁹ although not perhaps a fully equal branch. Hoffer (who wrote this chapter) asserts that the “key cases” under Marshall “totaled no more than a dozen, spread over . . . thirty-four years.”⁴⁰ It is hard to imagine how Hoffer came up with this number, or what he means by a “key” case. One suspects that because Hoffer was hemmed in by a marketing decision at the press into a single short chapter on the Marshall Court, he felt compelled to justify his lack of in-depth coverage by merely asserting that, despite what every constitutional scholar thinks,⁴¹ the

36. See *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 652 (1842) (finding that Pennsylvania’s personal-liberty law of 1826 had unconstitutionally infringed on an area—the power to regulate the return of fugitive slaves—reserved exclusively to congressional legislation). For a fuller discussion of the Pennsylvania law, see THOMAS D. MORRIS, *FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH, 1780–1860*, at 42–58 (1974) and Paul Finkelman, *Sorting Out Prigg v. Pennsylvania*, 24 RUTGERS L.J. 605, 605–65 (1993).

37. See *id.* at 615–16 (“The states cannot, therefore, be compelled . . . to carry into effect the duties of the national government, nowhere delegated or intrusted to them by the Constitution.”).

38. The *Oliver Wendell Holmes Devise History of the Supreme Court* series devoted two books totaling over 1,675 pages to the Marshall Court, more than any other Court. 2 GEORGE LEE HASKINS & HERBERT A. JOHNSON, *THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: FOUNDATIONS OF POWER: JOHN MARSHALL, 1801–1815*, at 1–687 (1981); 3–4 G. EDWARD WHITE, *THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE MARSHALL COURT AND CULTURAL CHANGE, 1815–1835*, at 1–1009 (1988). On the other hand, the series devoted only one volume and some 730 pages to a combined history of the Stone and Vinson Courts. 12 WILLIAM M. WIECEK, *THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE BIRTH OF THE MODERN CONSTITUTION: THE UNITED STATES SUPREME COURT, 1941–1953*, at 1–715 (2006). This seems to be about right in terms of balance—the Marshall Court was two to three times more important than the Stone and Vinson Courts combined. The Hoffers, however, devote two chapters and fifty-three pages to these two Courts but only one chapter and thirty-two pages to Marshall. See *supra* text accompanying notes 30–34.

39. See POWE, *supra* note 1, at 48–49 (describing Chief Justice John Marshall’s expansion of the role of the Supreme Court through his opinion in *Marbury v. Madison*, which he argues amounted to a “declaration of judicial power”).

40. HOFFER, HOFFER & HULL, *supra* note 1, at 60.

41. See, e.g., William N. Eskridge, Jr. & John Ferejohn, *Constitutional Horticulture: Deliberation-Respecting Judicial Review*, 87 TEXAS L. REV. 1273, 1283 (2009) (describing the Marshall Court as “legendary”); William H. Rehnquist, *The Supreme Court: “The First Hundred*

Marshall Court was not all that important. In this chapter Hoffer mentions fourteen cases,⁴² so presumably two of these were not “key,” but nevertheless he mentions them. By contrast, Hull Hoffer mentions forty-two cases in his chapter on the Vinson Court,⁴³ although most scholars would be hard pressed to find more than a half dozen that were “key.”

By limiting himself to the dozen (or fourteen) “key” cases Hoffer fails to even mention or discuss a series of major jurisprudential milestones. Hoffer notes Chief Justice Marshall’s actions in the *Burr* treason trial⁴⁴ while riding circuit, but fails to mention or discuss his jurisprudentially more important decision in *Ex parte Bollman; Ex parte Swartwout*⁴⁵ that narrowly defined the legal standard for treason and affected how the nation would deal with subversive activities in the Civil War, World War I, World War II, the Cold War, the Vietnam War, and the current War on Terrorism.⁴⁶ There is no mention of the Marshall Court’s decision in *United States v. Hudson*⁴⁷ emphatically rejecting the idea that there could be a federal common law of crimes,⁴⁸ or the hypocrisy of the Jefferson Administration, which prosecuted Federalist newspaper editors that offended the thin-skinned Master of Monticello.⁴⁹ Hoffer makes no mention of *Sturges v. Crowninshield*,⁵⁰ a major case in which the Marshall Court severely limited the power of the states to pass bankruptcy laws at a time when there was no federal bankruptcy law.⁵¹ This decision had an enormous impact on the subsequent economic development of the United States and led to enormous misery for Americans who were unable to have their debts discharged because of the lack of bankruptcy laws.⁵² Similarly, Hoffer does not mention *The Antelope*,⁵³ a slave-trade case that the Court heard three times.⁵⁴ In this case,

Years Were the Hardest,” 42 U. MIAMI L. REV. 475, 480 (1988) (“Doctrinally, the contributions of the Marshall Court were of enormous importance to the subsequent development of the nation.”).

42. HOFFER, HOFFER & HULL, *supra* note 1, at 51–82.

43. *Id.* at 306–32.

44. *United States v. Burr*, 25 F. Cas. 201 (C.C.D. Va. 1807) (No. 14,694a); HOFFER, HOFFER & HULL, *supra* note 1, at 57–58.

45. 8 U.S. (4 Cranch) 75 (1807).

46. HOFFER, HOFFER & HULL, *supra* note 1, at 112–21.

47. 11 U.S. (7 Cranch) 32 (1813).

48. *Id.* at 34.

49. See LEONARD W. LEVY, *JEFFERSON AND CIVIL LIBERTIES: THE DARKER SIDE* 61–62 (1963) (describing the indictments by the Jefferson Administration, and its allies in some of the states, of various writers, publishers, and editors of Federalist newspapers for seditious libel of Jefferson).

50. 17 U.S. (4 Wheat.) 122 (1819).

51. *Id.* at 124.

52. See 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 492–93 (photo. reprint 1987) (1926) (describing *Sturges* as a case that had a major influence on the “course of commercial conditions”); see also *id.* at 497 (noting that after *Sturges* many called for a national bankruptcy law since many debtors had relied on the state laws during the financial disaster).

53. 23 U.S. (10 Wheat.) 66 (1825).

54. 25 U.S. (12 Wheat.) 546 (1827); 24 U.S. (11 Wheat.) 413 (1826); 23 U.S. (10 Wheat.) 66 (1825).

Marshall refused to free Africans who were victims of the illegal African slave trade.⁵⁵ Significantly, while condemning slavery in theory, he asserted that the African slave trade was “consistent with the law of nations” and “cannot in itself be piracy.”⁵⁶ Marshall reached this conclusion even though both the United States and Great Britain had banned the African slave trade⁵⁷ and the United States had passed laws that in fact declared slave trading to be piracy punishable by death.⁵⁸ One might defend or attack Marshall for this result, but at least it should be on the table. In *American Insurance Co. v. Canter*,⁵⁹ Marshall significantly defined the power of Congress over the territories,⁶⁰ until it was effectively reversed by *Dred Scott v. Sandford*.⁶¹ Some discussion of this case would have been very useful for setting the stage for understanding what the Court did in *Dred Scott* in 1857 and then what the Court later did in the *Insular Cases* after the Spanish–American War.⁶² Finally, Hoffer ignores *Barron v. Baltimore*,⁶³ where Marshall held that the Bill of Rights did not apply to the states.⁶⁴ Perhaps this was a correct reading of the Bill of Rights, although many nineteenth-century lawyers and politicians thought it was not.⁶⁵ Most notably, John Bingham, the author of the Fourteenth Amendment, believed that *Barron* was wrong.⁶⁶ Whether Bingham is correct or not, it is hard to understand how a history of the Court could utterly ignore this issue. Subsequent discussion of the Fourteenth Amendment and the *Slaughterhouse Cases*, and indeed much of the Reconstruction Era federal law, only makes sense in light of *Barron*. Many scholars also argue that *Barron* was Marshall’s retreat, at the end of his

55. *The Antelope*, 23 U.S. at 121–22.

56. *Id.* at 122.

57. Act of Mar. 2, 1807, ch. 22, 2 Stat. 426; An Act for the Abolition of the Slave Trade, 1807, 47 Geo 3, c. 36 (Eng.).

58. “An Act to continue in force ‘An act to protect the commerce of the United States, and to punish the crime of piracy,’ and also to make further provisions for punishing the crime of piracy.” Act of May 15, 1820, ch. 113, 3 Stat. 600. For a larger discussion of these laws, see Paul Finkelman, *The American Suppression of the African Slave Trade: Lessons on Legal Change, Social Policy, and Legislation*, 42 AKRON L. REV. 431, 465–67 (2009).

59. 26 U.S. (1 Pet.) 511 (1828).

60. *Id.* at 541–46.

61. 60 U.S. (19 How.) 393, 432–49 (1856).

62. For a discussion of these cases, see HOFFER, HOFFER & HULL, *supra* note 1, at 181–82.

63. 32 U.S. (7 Pet.) 243 (1833).

64. *Id.* at 250.

65. MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 24–25 (1990).

66. *See id.* at 61 (explaining that Bingham thought the Bill of Rights applied to the states despite his awareness of the contrary decision in *Barron*); *see also* Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 95 (1993) (“Bingham . . . believed that the Bill of Rights already applied to the states and that local officials who enforced local laws in conflict with the Bill of Rights were violating their oaths of office.”). Thus, Bingham intended the Fourteenth Amendment to make most of the Bill of Rights applicable to the states. Aynes, *supra*, at 95.

career, from judicial nationalism.⁶⁷ A discussion of this would help explain how the Court works and illustrate the limits of politics on jurisprudence.

Beyond the “key” cases, the truncated discussion of the Marshall Court prevents any analysis of the embargo cases,⁶⁸ the African slave-trade cases,⁶⁹ the admiralty cases during the War of 1812⁷⁰ (which is utterly absent from this book), or cases dealing with the complexity of western land ownership.⁷¹ Cases like these occupied a great deal of the Marshall Court’s docket.⁷² Marshall and his colleagues helped shape the law of war, the law of international commerce, and American land law.⁷³ None of this important business of the Court is found here. In addition to discussing key cases, a history of the Court must discuss the business of the Court and explain what else is going on. Indeed, it is arguable that some key cases, such as *Marbury v. Madison*,⁷⁴ *Dartmouth College v. Woodward*,⁷⁵ and *Cohens v. Virginia*,⁷⁶ had relatively little impact on most Americans, but large numbers of Americans felt the impact of cases like *Green v. Biddle*,⁷⁷ *Van Ness v.*

67. See, e.g., Charles F. Hobson, *Defining the Office: John Marshall as Chief Justice*, 154 U. PA. L. REV. 1421, 1437 (2006) (referring to *Barron* and other cases from the same time period as “unanimous concessions to state sovereignty”); Paul D. Moreno, “So Long as Our System Shall Exist”: *Myth, History, and the New Federalism*, 14 WM. & MARY BILL RTS. J. 711, 723 (2005) (citing *Barron* for the proposition that the Marshall Court expanded states’ rights in its later decisions).

68. E.g., *Otis v. Watkins*, 13 U.S. (9 Cranch) 339 (1815); *Durousseau v. United States*, 10 U.S. (6 Cranch) 307 (1810).

69. E.g., *The Plattsburgh*, 23 U.S. (10 Wheat.) 133 (1825); *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825).

70. E.g., *The Amiable Nancy*, 16 U.S. (3 Wheat.) 546 (1818); *L’Invincible*, 14 U.S. (1 Wheat.) 238 (1816).

71. See, e.g., *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 758–61 (1835) (finding valid an Indian sale of land when pursuant to a treaty to which the United States was a party); *Van Ness v. Pacard*, 27 U.S. (2 Pet.) 137, 147–48 (1829) (holding that a tenant could remove a dwelling, but not a building used for business purposes, which he erected during his term); *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 8 (1823) (finding a Kentucky law that granted squatters compensation rights upon ejection unconstitutional).

72. See James W. Ely, Jr., *The Marshall Court and Property Rights: A Reappraisal*, 33 J. MARSHALL L. REV. 1023, 1023 (2000) (asserting that property-rights cases “figured prominently” in the Marshall Court’s docket); Ariel N. Lavinbuk, *Rethinking Early Judicial Involvement in Foreign Affairs: An Empirical Study of the Supreme Court’s Docket*, 114 YALE L.J. 855, 873 (2005) (noting that more than 40% of the Marshall Court’s docket consisted of foreign-affairs cases, with 34% of those concerning the application of U.S. law extraterritorially).

73. See, e.g., *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 604–05 (1823) (holding that Native Americans could only sell their land directly to the United States and not to private citizens); *Brown v. United States*, 12 U.S. (8 Cranch) 110, 125–26 (1814) (holding that a congressional declaration of war does not automatically authorize confiscation of property owned by enemy aliens); *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 177–79 (1804) (affirming a finding of liability against a federally authorized American privateer who seized property from a Danish ship and asserting that the authorization exceeded the executive’s scope of statutory authority).

74. 5 U.S. (1 Cranch) 137 (1803).

75. 17 U.S. (4 Wheat.) 518 (1819).

76. 19 U.S. (6 Wheat.) 264 (1821).

77. 21 U.S. (8 Wheat.) 1 (1823).

Pacard,⁷⁸ and *Mitchel v. United States*,⁷⁹ all of which dealt with the issue of land ownership,⁸⁰ or *Craig v. Missouri*,⁸¹ *Providence Bank v. Billings*,⁸² and *Sturges v. Crowninshield*,⁸³ dealing with currency, banking, and personal bankruptcy.⁸⁴

Hoffer's discussion of the Indian cases underscores how the self-imposed limitations of short chapters on every Chief Justiceship limits the importance of this book. Hoffer devotes nearly five pages to the Cherokee cases,⁸⁵ tying them to the politics of the era, including the nullification crisis in South Carolina.⁸⁶ Importantly, Hoffer correctly points out that after *Worcester v. Georgia*,⁸⁷ President Andrew Jackson *did not* say, "John Marshall has made his decision, now let him enforce it."⁸⁸ But except for a bare mention, Hoffer's self-imposed space limitations forces him to ignore the third, and, in some ways, most important case of the Indian trilogy, *Johnson v. M'Intosh*.⁸⁹ In *M'Intosh*, the Court adopted the "discovery doctrine" to assert that European governments—and later the American government—were the owners of *all* Indian lands.⁹⁰ Marshall's point was not merely, as Hoffer asserts, that Indians "did not hold absolute title" to their lands,⁹¹ but rather that Indians held *no* title to the land on which they lived, and had "only an 'occupancy' right."⁹² This meant that for the next seventy or so years the United States could take Indian land with impunity.⁹³

78. 27 U.S. (2 Pet.) 137 (1829).

79. 34 U.S. (9 Pet.) 711 (1835).

80. *Mitchel*, 34 U.S. at 760–63 (holding that the purchasers of Seminole land had gained a superior title to that of the United States); *Van Ness*, 27 U.S. at 147–48 (holding that the tenant defendant was not liable for tearing down a building he had erected on the landlord plaintiff's lot); *Green*, 21 U.S. at 85–87 (analyzing whether Kentucky's land-claim statutes violated the Contracts Clause).

81. 29 U.S. (4 Pet.) 410 (1830).

82. 29 U.S. (4 Pet.) 514 (1830).

83. 17 U.S. (4 Wheat.) 122 (1819).

84. See *Providence Bank*, 29 U.S. at 559–65 (denying a state-chartered bank's claim that it was exempt from state taxation); *Craig*, 29 U.S. at 437–38 (holding that the loan-office certificates issued by Missouri violated Article I, Section 10 of the Constitution); *Sturges*, 17 U.S. at 196–208 (addressing the constitutionality of New York's bankruptcy laws).

85. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

86. HOFFER, HOFFER & HULL, *supra* note 1, at 76–81.

87. 31 U.S. (6 Pet.) 515 (1832).

88. HOFFER, HOFFER & HULL, *supra* note 1, at 80.

89. 21 U.S. (8 Wheat.) 543 (1823).

90. LINDSAY G. ROBERTSON, *CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS* 4 (2005).

91. HOFFER, HOFFER & HULL, *supra* note 1, at 77.

92. ROBERTSON, *supra* note 90, at 4.

93. STUART BANNER, *HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER* 191–290 (2005) (mentioning the government's various arguments based on the *M'Intosh* holding to justify the programs of removal, reservations, and allotment, in which Indian land was gradually taken by the government without significant resistance until the early 1900s).

The doctrine was deeply pernicious and probably more harmful to Indians than any other Indian law case. Moreover, employing unnecessarily racist language, Marshall's use of the doctrine of discovery led him to assert that Indians were "savages," who did not own their land:

[T]he tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.⁹⁴

The failure to offer a deeper analysis of the Indian cases, like the failure to provide a deeper understanding of other cases (or even a mention of them) undermines the importance of this book and limits our understanding of the role of the Supreme Court under Marshall. This same problem arises for the other significant Courts, under Taney and Warren.

My point is not that Hoffer should have discussed every one of these cases in detail, but that the structure of the book prevents adequate coverage of very important cases and topics. This surely limits the usefulness of the book. Hoffer offers five pages about the various individuals who served on the Taney Court. This discussion is interesting, and even fun to read, but it comes at the expense of not discussing how the Taney Court created the police powers, developed the concept of the dormant powers of Congress, or applied the concept of unfunded mandates to limit the obligations of the states to enforce federal law. Space limitations similarly prevent any discussion of how slavery led to the dramatic assertion of federal supremacy in *Ableman v. Booth*,⁹⁵ and the equally dramatic denial of the power of the federal courts and Executive Branch two years later in *Kentucky v. Dennison*.⁹⁶

In addition to spending the same amount of time on each Court, there is sometimes a disconnect between one part of the book and another. This may be the function of a book by "committee"—even when everyone on the committee is from the same family. The book's illustrations reveal this problem. Under a photograph of the Vinson Court the caption declares that the Chief Justice was "not a distinguished justice or effective manager" but then asks, "[W]ho could keep the feuds that had so long divided the justices from spilling over into their opinions?"⁹⁷ The implication here is not that

94. *M'Intosh*, 21 U.S. at 590.

95. 62 U.S. (21 How.) 506, 515–17 (1859) (holding that the Wisconsin Supreme Court had no power to declare the Fugitive Slave Act of 1850 unconstitutional). The Court would ironically apply this precedent to support the integration of the Little Rock, Arkansas schools in *Cooper v. Aaron*, 358 U.S. 1 (1958).

96. 65 U.S. (24 How.) 66, 107–10 (1861) (restricting the federal government's scope of power to compel state action based on a narrow reading of the enumerated powers and jurisdictional grant in the Constitution).

97. HOFFER, HOFFER & HULL, *supra* note 1, at 247.

Vinson was unable to control the Court (which in fact he was unable to do) but rather that no one could have done so. But directly below this picture is a photograph of Chief Justice Warren, where the caption notes that “his moral authority kept the Court together even when individual justices disagreed with his views.”⁹⁸ In effect, the second caption answers the question of “who” could control the giant egos of Frankfurter, Black, Douglas, and Jackson. The answer was Earl Warren or some other strong leader in the center chair of the Court. Chief Justice Warren could do what Chief Justice Vinson could not do. Vinson failed not because no one could succeed but because Vinson was an utter failure as Chief Justice. Indeed, later in the book the authors impressively explain how Warren “found a way to manage” the two feuding Justices, Black and Frankfurter.⁹⁹

By criticizing here, I reflect a disappointment. This book is solid and well written. It is a good book and a useful book. It might have been a great book.

B. The Supreme Court and the American Elite

Lucas Powe’s *The Supreme Court and the American Elite, 1789–2008*, is the more challenging volume here. It is intellectually a big book, written by a distinguished and prize-winning constitutional scholar who has previously written impressively on the regulation of free speech. In some ways Powe’s book is like the Hoffers’ book. He wants to provide us with a history of the Court, but in the end, he does not. Oddly, for a book about the “American Elite,” Powe never states clearly what he means by this phrase. Nor does he try to explain who the elite is. Is it the Justices? Is he arguing the Court always or usually sides with some unnamed, undefined “elite”—the rich and powerful perhaps? The book title promises far more than the book delivers. In his last—and best—chapter, Powe explains how the modern Court is imperial and partisan. His discussion of *Bush v. Gore*¹⁰⁰ is one of the best I have seen. In this chapter, Powe demonstrates not only how much the Court in recent years has ignored the mandate of the electorate but also how it has followed the election returns and reflected Republican presidential electoral victories. Thus, there remains the confusion: Is the Court elitist because it follows politics or because it does not follow politics? Is the Court elitist because it ignores the will of the electorate or because it reflects it, even if the electorate (or, at least, those elected to office) seems to be the creature of special interests? In other words, Powe’s theme of “the Supreme Court and the American Elite” is never clearly articulated.

A brief look at one aspect of free speech and the Court illustrates the problem of the elite in this book. The Supreme Court barely considered the

98. *Id.*

99. *Id.* at 337.

100. 531 U.S. 98 (2000).

First Amendment before World War I,¹⁰¹ but since 1919 freedom of expression has been a major aspect of the Court's history and the Court's role in shaping American politics. Has the Court been elitist in allowing unpopular radicals to speak, as it has in the modern era?¹⁰² Or was it elitist for the Court to jump on the popular political bandwagon and suppress radicals during, and more importantly, after World War I?¹⁰³ Was it elitist in *Herndon v. Lowry*¹⁰⁴ to overturn the conviction of the black Communist sent to the Georgia chain gang?¹⁰⁵ Or was it elitist to allow California to persecute and prosecute the wealthy heiress Anita Whitney for distributing Communist party leaflets,¹⁰⁶ or to allow the federal government to jail the pathetically powerless leaders of the Communist Party in the 1950s,¹⁰⁷ or to execute the Rosenbergs, who, if not innocent, were at least not guilty of causing any real harms?¹⁰⁸ Powe clearly shows his disgust at the Court's haste in denying the Rosenbergs a stay of execution and the Court's refusal

101. See DAVID RABBAN, *FREE SPEECH IN THE FORGOTTEN YEARS 19* (1997) (“[P]rewar courts did not use constitutional analysis in deciding cases that would present clear First Amendment issues to modern judges.”); Paul Finkelman, *Cultural Speech and Political Speech in Historical Perspective*, 79 B.U. L. REV. 717, 737–40 (1999) (book review) (highlighting the lack of impact that discussions of free speech had on the courts before World War I).

102. See *Brandenburg v. Ohio*, 395 U.S. 444, 448–49 (1969) (overturning the conviction of a Klu Klux Klan member, who was prosecuted under a statute that made advocacy of political violence illegal, on the grounds that the member's speech did not call for “imminent lawless action”).

103. See *Schenck v. United States*, 249 U.S. 47, 51 (1919) (“When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.”); *Debs v. United States*, 249 U.S. 211, 215 (1919) (upholding Debs's conviction based on the precedent established in *Schenck*).

104. 301 U.S. 242 (1937).

105. *Id.* at 261 (invalidating the application of Georgia's anti-insurrection statute to Herndon, who was charged with recruiting members to the Communist Party, on the grounds that the statute did not require actual incitement to violence, and thus was unconstitutionally vague and an invasion of the right to free speech); see also ANGELO HERNDON, *LET ME LIVE* 221–41 (1937) (chronicling his own deeply biased trial for being an African-American member of the Communist Party in the South in the 1930s); CHARLES H. MARTIN, *THE ANGELO HERNDON CASE AND SOUTHERN JUSTICE* 181–90 (1976) (suggesting that the Court's decision in *Herndon* came amidst profound national debate about the role of the Court in advancing civil liberties and reflected the Court's move towards a more progressive political stance).

106. See *Whitney v. California*, 274 U.S. 357, 371–72 (1927) (holding that the California statute Anita Whitney was convicted under did not unconstitutionally limit freedom of speech or assembly and that a state can outlaw knowingly joining an organization that advocates political violence).

107. See *Dennis v. United States*, 341 U.S. 494, 497–502 (1951) (upholding the lower court's finding that the Communist petitioners were advocating the violent overthrow of the nation's government, and concluding that a group loses its right to unrestricted free speech when the aim of the targeted group is advocacy, rather than discussion).

108. Sam Roberts, *Figure in Rosenberg Case Admits to Soviet Spying*, N.Y. TIMES, Sept. 12, 2008, at A1 (casting doubt on the Court's harsh decision in *Rosenberg v. United States*, 346 U.S. 273 (1953), in light of evidence that Julius Rosenberg's leaked state secrets were largely without value and that Ethel Rosenberg, while aware of her husband's wrongdoing, was not actively involved).

“to review their espionage convictions . . . until two days after the Court adjourned.”¹⁰⁹ But was this elitism or in fact the Court kowtowing to public opinion? Powe notes that one unnamed congressman wanted to impeach Justice William O. Douglas because he issued a stay of execution that the Court vacated two days later,¹¹⁰ but I am not sure if Douglas’s stay reflects his well-known elitism or his well-known support for the oppressed and his keen sense of the danger of the misuse of governmental power to harm minorities (in this case a political minority). Powe then notes that in December 1954, after the Army–McCarthy hearings, “the virtual *carte blanche* to hunt communists ended”¹¹¹ and that in the 1956 term the government lost every case involving communists—twelve in all—as the Court took to “lecturing Congress and HUAC that ‘there is no congressional power to expose for the sake of exposure’ (which was all HUAC did in the 1950s).”¹¹² Powe’s discussion of these cases is terrific, pithy, and to the point. It is not detailed scholarship but wonderful, sharp, and at times brilliantly targeted prose that eviscerates the gutless Vinson Court and the horrible miscarriages of justice perpetrated by the Truman Administration, the early Eisenhower Administration, and Congress. But however fascinating and informative his discussions, I cannot figure out who are the elitists and who are the democrats. It reminds me of Judge Skelly Wright’s discussion of broadcast regulation:

[In] some areas of the law it is easy to tell the good guys from the bad guys In the current debate over the broadcast media and the First Amendment . . . each debator claims to be the real protector of the First Amendment, and the analytical problems are much more difficult than in ordinary constitutional adjudication . . . the answers are not easy.¹¹³

For Powe there are clearly bad guys—Joe McCarthy, HUAC, segregationists, the Vinson Court—but it is not at all clear if they are also the elitists.

This oddly idiosyncratic book offers neither a history of the Court nor a history of its jurisprudence. Nor does Powe successfully tie much of the Court’s work to politics and the political times, as the Hoffers do so well. Powe’s discussion (or lack of it) of early free speech doctrine illustrates this.

109. POWE, *supra* note 1, at 235; *see also* HOFFER, HOFFER & HULL, *supra* note 1, at 311 (suggesting the Court’s decision to vacate an initial stay in the execution was unnecessarily delayed and appeared to discount subsequently revealed evidence of perjury and collusion at trial).

110. POWE, *supra* note 1, at 236.

111. *Id.*

112. POWE, *supra* note 1, at 237 (quoting *Watkins v. United States*, 354 U.S. 178, 200 (1957)). HUAC is the acronym for the House Committee on Un-American Activities, popularly called the House Un-American Activities Committee, hence HUAC. DON S. KIRSCHNER, *COLD WAR EXILE: THE UNDISCLOSED CASE OF MAURICE HALPERIN* 7 n.4 (1995).

113. Judge J. Skelly Wright, U.S. Court of Appeals (D.C. Circuit), Speech Before the National Law Center, George Washington University (June 3, 1973), *in* FRED W. FRIENDLY, *THE GOOD GUYS, THE BAD GUYS AND THE FIRST AMENDMENT: FREE SPEECH VS. FAIRNESS IN BROADCASTING*, at ix (1975).

Although Powe claims this is a book that ties politics to the Court, he barely discusses the war on free speech during and immediately after World War I, which is one of the most important eras for seeing how politics affected the Court.¹¹⁴ Powe mentions the prosecution of Eugene V. Debs for obstructing the draft,¹¹⁵ but he does not tie it to the Court's previous articulation of the clear-and-present-danger doctrine. Indeed, Powe does not even mention *Schenck v. United States*¹¹⁶ or the clear-and-present-danger doctrine that Justice Oliver Wendell Holmes Jr. created in that case, even though *Schenck* was the very first case in which the Court inquired into the nature of the Free Speech Clause in the First Amendment.¹¹⁷

The outcome and timing of the *Schenck* case, decided shortly before the more politically sensitive *Debs* case, surely must say something about elitism, politics, and the Court. During World War I, the federal government successfully prosecuted Charles Schenck, a virtually unknown official in the Philadelphia Socialist Party, under the Espionage Act for his attacks on the draft and for urging men to resist the draft.¹¹⁸ The Court upheld the conviction on March 3, 1919 (well after World War I was over).¹¹⁹ On March 10, the Court upheld the prosecution of Jacob Frohwerk, the publisher of a small German-language newspaper in Missouri.¹²⁰ Jacob Frohwerk was even more insignificant and obscure than Charles Schenck. In *Schenck*'s case, Justice Oliver Wendell Holmes Jr. articulated the clear-and-present-danger doctrine by analogizing to someone falsely shouting fire in a theater.¹²¹ This is arguably the most famous analogy in American constitutional history and a phrase known by many Americans, who otherwise know little about constitutional law. But oddly, Powe does not even mention the clear-and-present-danger doctrine. After *Schenck* Holmes applied his new doctrine in *Frohwerk*.¹²² After deciding *Frohwerk*, the Court, again speaking through Holmes,

114. See generally PAUL MURPHY, *WORLD WAR I AND THE ORIGIN OF CIVIL LIBERTIES IN THE UNITED STATES* 179–247 (1979) (arguing that the first wave of substantive civil-liberty jurisprudence arose out of the World War I Era); RICHARD POLENBERG, *FIGHTING FAITHS: THE ABRAMS CASE, THE SUPREME COURT, AND FREE SPEECH* 207–42 (1987) (tying the origins of the clear-and-present-danger doctrine to the social and political landscape of World War I America); SAMUEL WALKER, *IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU* 11–39 (1990) (discussing how the increasing focus on civil liberties during World War I served as a precursor to the formation of the ACLU). For a general piece on the War, see ROBERT H. FERRELL, *WOODROW WILSON AND WORLD WAR I, 1917–1921*, at 13–29 (1985).

115. *Debs v. United States*, 249 U.S. 211, 212 (1919).

116. *Schenck v. United States*, 249 U.S. 47 (1919).

117. *Id.* at 49; WALKER, *supra* note 114, at 26.

118. *Schenck*, 249 U.S. at 47.

119. *Id.* at 53. Actual combat ended with the November 11, 1918 Armistice. FERRELL, *supra* note 114, at 132–33. World War I ended officially for the United States with the signing of various treaties between 1919 and 1920, most notably the Treaty of Versailles on June 28, 1919. *Id.* at 142.

120. *Frohwerk v. United States*, 249 U.S. 204, 210 (1919).

121. *Schenck*, 249 U.S. at 52.

122. *Frohwerk*, 249 U.S. at 206–07.

announced the decision in *Debs*.¹²³ As Powe correctly notes, Debs was a very important political figure “who had won a million votes as the Socialist Party candidate for president in 1912.”¹²⁴ In upholding Debs’s conviction, Holmes dismissed his constitutional arguments by noting, “The chief defences upon which the defendant seemed willing to rely were the denial that we have dealt with and that based upon the First Amendment to the Constitution, disposed of in *Schenck v. United States* His counsel questioned the sufficiency of the indictment. It is sufficient in form.”¹²⁵ Thus, the Court used the convictions of two non-entities (*Schenck* and *Frohwerk*) to set the stage for the jailing—for ten years—of a major political figure who opposed the War. Here is a deeply important example of how politics, elitism, and the Court interact, but unfortunately, Powe does not even mention *Schenck*, even though it set the stage for *Debs*, which he does discuss. Nor does he discuss the clear-and-present-danger doctrine, even though it would be at the center of speech issues for at least half a century.

Shortly after World War I the Court began the process of applying the Bill of Rights to the states. This process began with *Meyer v. Nebraska*¹²⁶ and *Pierce v. Society of Sisters*,¹²⁷ as the Court applied what was essentially a substantive due process analysis to laws banning the teaching of foreign languages and prohibiting private-school education.¹²⁸ These decisions

123. *Debs v. United States*, 249 U.S. 211, 216 (1919).

124. POWE, *supra* note 1, at 190. Actually, Debs only won 900,370 votes, which was impressively 6% of the popular vote. John Woolley & Gerhard Peters, The American Presidency Project: Election of 1912, <http://www.presidency.ucsb.edu/showelection.php?year=1912>. It might seem churlish to fault Harvard University Press (or Powe) for being off by a mere 100,000 votes, but an 11% error in a popular vote is hardly insignificant. Significantly, while in jail in 1920 Debs would actually carry slightly more votes (913,664), which leads Powe to conclude “he won almost a million votes while in jail.” J. DAVID GILLESPIE, *POLITICS AT THE PERIPHERY* 181 (1993); POWE, *supra* note 1, at 190.

125. *Debs*, 249 U.S. at 215 (citing *Frohwerk*, 249 U.S. at 209).

126. 262 U.S. 390 (1923).

127. 268 U.S. 510 (1925).

128. *See Meyer*, 262 U.S. at 399, 403 (holding that the Fourteenth Amendment protects a broad range of individual rights, including the right “to acquire useful knowledge,” and noting that “[n]o emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed”); *Pierce*, 268 U.S. at 534–35 (striking down an Oregon statute mandating public school attendance because it “unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. . . . [R]ights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state”); WILLIAM G. ROSS, *FORGING NEW FREEDOMS: NATIVISM, EDUCATION, AND THE CONSTITUTION, 1917–1927*, at 186 (1994) (“In addition to inaugurating a new era of civil liberties, *Meyer* and *Pierce* started a profound revolution in federalism by anticipating the long process by which the Court gradually incorporated most of the guarantees in the Bill of Rights into state law.”); Paul Finkelman, *The War on German Language and Culture, 1917–1925*, in *CONFRONTATION AND COOPERATION: GERMANY AND THE UNITED STATES IN THE ERA OF WORLD WAR I, 1900–1914*, at 177, 191–94 (Hans-Jürgen Schröder ed., 1993) (explaining that in the *Meyer* and *Pierce* decisions, the Court’s holdings illustrated the fear “that in fighting against German ‘tyranny,’ Americans were creating their own, home-grown system of tyranny and oppression, which violated the guarantees of the Constitution”).

struck down state laws that discriminated against immigrants and their children—especially those of German, Japanese, and Catholic descent.¹²⁹ These cases, which Powe does discuss, set the stage for the incorporation of the Bill of Rights to the states through the Fourteenth Amendment in *Gitlow v. New York*.¹³⁰ This was a major revolution in constitutional law and a significant change in the way the Supreme Court examined the Constitution.¹³¹ Incorporation remains one of the great issues in constitutional law. Understanding the Court’s twisted road to incorporation—and its failure to fully come to terms with it—is central to our understanding of the Court and the Constitution. This is a deeply political issue that demonstrates the intersection between the Court, the Constitution, and politics. Astonishingly, Powe does not mention *Gitlow* and barely considers incorporation. I would have liked to read Powe’s analysis of incorporation and learn whether it was elitist to force the states to accept the federal Bill of Rights, or non-elitist and democratic (with a small “d”) to make the states respect the fundamental liberties of the people.

Powe’s book is narrowly focused on the Court, even as he tells us that his book is designed to place the Court in the context of American politics. Powe notes he came to this project after a career as a teacher of constitutional law.¹³² The dust jacket quotes another constitutional law professor, Jack Balkin of Yale, declaring that this book is “great fun to read” and is “lively” and “opinionated.”¹³³ All of this is true. Unfortunately, it is also quite problematic. As a constitutional law scholar, reading Powe’s work is intriguing and thought provoking. He has wonderful insights into why judges might act as they do. Like the Hoffers, he would want to situate the Court in the politics of the times and within American history. Unlike the Hoffers, however, Powe is not really a historian. Thus, in many places his history is confused, wrong, or only tells part of the story. This is not merely disciplinary competition. He builds his argument on history, but if the history is not correct, then the arguments fall.

For example, in introducing his discussion of *Sturges v. Crowninshield*,¹³⁴ which involved a state bankruptcy law,¹³⁵ he argues that “[b]ecause of the depression at the end of the 1810s, states had to decide

129. See *Pierce*, 268 U.S. at 532 (noting that the Catholic school, as part of its educational program, provided religious and moral instruction); *Meyer*, 262 U.S. at 401 (observing that under the ban, dead languages such as “Latin, Greek, [and] Hebrew are not proscribed; but German, French, Spanish, Italian and every other alien speech are within the ban”); Finkelman, *supra* note 128, at 191–96 (discussing *Meyer*’s effect on German-Americans).

130. 268 U.S. 652 (1925).

131. 2 UROFSKY & FINKELMAN, *supra* note 1, at 651–52.

132. Unmemorable Opinions, a Memorable Man, Posting of Lucas A. Powe Jr., to Room for Debate, <http://roomfordebate.blogs.nytimes.com/2009/05/01/the-judgment-on-justice-souter/#powe> (May 1, 2009).

133. POWE, *supra* note 1, at dust jacket.

134. 17 U.S. (4 Wheat.) 122 (1819).

135. *Id.*

what to do about insolvent debtors.”¹³⁶ I assume this is a reference to the Panic of 1819.¹³⁷ However, because *Sturges* was decided in 1819—the year of the Panic—it would have been impossible for the act at issue in the case to have been passed in response to that Panic and then to have been brought before the Court in the year of the Panic. In fact, as Powe notes on the next page, in *Sturges* the Court was asked to determine the constitutionality of a law passed in 1811—eight years before the Panic and at the beginning of the 1810s, not the end.¹³⁸ The outcome in *Sturges* may very well have been tied to the Panic, but the case began before the Panic and was about a statute passed well before the Panic. The case may also have been about the Court and the American Elite, but unfortunately, the author makes no attempt to tie the parties to their elite (or non-elite) economic and social status. Nor does he explain how and why insolvency laws, which the Court undermined in this case,¹³⁹ worked to the disadvantage of some economic classes and the advantage of others.

Powe’s “opinionated” analysis is equally misleading, in part because Powe seems intent on reinterpreting constitutional history, sometimes without much fidelity to the history itself. His discussion of *McCulloch v. Maryland*¹⁴⁰ illustrates the problem of his approach. As Powe correctly notes, Chief Justice Marshall’s opinion in *McCulloch* was his “most important”¹⁴¹ because he used the case “to write as strongly nationalist an opinion as possible.”¹⁴² Few constitutional scholars would disagree with this assessment. As others have noted, “His ‘state paper,’ as it has been properly called, expounded theories of national supremacy and federal power that over the next century and a half would be used to justify the growth of the central government and its involvement in nearly every aspect of national life.”¹⁴³ Powe concludes that all this was unnecessary to the case and that Marshall’s opinion “went far beyond the facts of the case into the realm of supposedly forbidden (because unconstitutional) advisory opinions.”¹⁴⁴ Clearly Marshall wrote a broad opinion, setting out where congressional power begins and ends and setting out a theory of the Constitution.¹⁴⁵ But, if this makes it an

136. POWE, *supra* note 1, at 63.

137. See MURRAY N. ROTHBARD, *THE PANIC OF 1819: REACTIONS AND POLICIES*, at vii (Ludwig von Mises Inst. 2007) (1962) (labeling the Panic of 1819 as America’s first great economic crisis not caused by a singular event).

138. *Sturges*, 17 U.S. at 212; POWE, *supra* note 1, at 64.

139. *Sturges*, 17 U.S. at 200–08.

140. 17 U.S. (4 Wheat.) 316 (1819).

141. POWE, *supra* note 1, at 68.

142. *Id.*

143. 1 UROFSKY & FINKELMAN, *supra* note 1, at 219–20.

144. POWE, *supra* note 1, at 69.

145. See *McCulloch*, 17 U.S. at 421 (“[W]e think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within

unconstitutional advisory opinion, then almost all important opinions which explain the result of a holding are advisory.¹⁴⁶

More problematic than his assertion that *McCulloch* was unnecessary is his odd summary of the case. He starts his discussion of *McCulloch v. Maryland* by noting that Maryland had passed “a nondiscriminatory revenue measure, commensurate with the bank’s booming business in the state” that would have led the federally chartered Bank of the United States to pay \$15,000 in state taxes.¹⁴⁷ What Professor Powe does not tell the reader is that \$15,000 in 1818, when the law was passed, would be worth about \$462,000 today.¹⁴⁸ Nor is it at all clear what the “bank’s booming business in the state” was at this time. The main branch of the bank was in Philadelphia and the Baltimore branch was not opened until 1817.¹⁴⁹ Thus, the 1818 Maryland law could not have been based on a booming business when it was passed. Nor was the Bank of the United States as a whole making great profits. In 1818 the bank had about \$22.4 million in liabilities (mostly in the form of state banknotes) but had only about \$2.4 million in specie (gold and silver).¹⁵⁰ Because the bank had a national policy of redeeming all notes in specie when requested to do so, the bank in 1818 was on verge of collapse.¹⁵¹ This leads one to wonder what sort of “booming business” the bank had in 1818 when the law was passed. Since Powe does not provide any secondary sources for this claim, we can only wonder if in fact he has any evidence to support it. Certainly none of the economic or historical data I have found would support it.

The real issue here, however, is Powe’s claim that the law was “nondiscriminatory.” The title of the law creating the tax illustrates the problem with Powe’s analysis. “An act to impose a Tax on all Banks or Branches thereof in the State of Maryland not chartered by the Legislature,”¹⁵² by definition, applied *only* to banks operating in Maryland that were chartered outside of the state. This provision alone might be considered discriminatory. But the kicker here, which Powe leaves out, is

the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”).

146. For example, in *Miranda v. Arizona*, 384 U.S. 436 (1966), the Court not only threw out Miranda’s coerced confession and thus his conviction but also explained in great detail what was necessary for a constitutionally permissible interrogation, *id.* at 444–60. This too must have been an advisory opinion, although Powe never really discusses the case except to complain when the Court reaffirmed it. POWE, *supra* note 1, at 316.

147. POWE, *supra* note 1, at 68.

148. Tom’s Inflation Calculator, <http://www.halfhill.com/inflation.html>. This calculation is based on the U.S. retail-price annual average.

149. *McCulloch*, 17 U.S. at 318.

150. Leon M. Schur, *The Second Bank of the United States and the Inflation After the War of 1812*, 68 J. POL. ECON. 118, 130 (1960).

151. *Id.* at 121.

152. Act of Feb. 11, 1818, ch. 156, 1817–1818 Md. Laws 174.

that there was only *one* bank in Maryland that fit this description: the branch of the Bank of the United States in Baltimore.¹⁵³ He argues that Marshall struck down the ability of a state to “nondiscriminatorily tax a federally chartered private corporation”¹⁵⁴ without noting that the tax did not apply equally to state chartered banks, and so was in fact a tax that discriminated against the federal bank. It may be that Powe thinks *McCulloch* was wrongly decided. Maybe it was. But, it can hardly be argued that this was a “fair tax,”¹⁵⁵ as Powe asserts. Powe would have been more persuasive if he had explained why a tax that affected only *one* bank in the entire state could be “nondiscriminatory.” Similarly, he would have been on stronger grounds if he had demonstrated the bank’s “booming business” and profits in February 1818 when the law was passed. The bank had been chartered in April 1816¹⁵⁶ and actually began operations on January 1, 1817.¹⁵⁷ Because of poor administration and leadership, in less than a year and a half the bank’s “[o]ffices were drained of their capital.”¹⁵⁸ In February 1818 when Maryland passed the law, the bank was teetering on failure. By the time Marshall heard *McCulloch*, the situation was worse, and fraud and mismanagement had led to the loss of more than \$1.6 million in the Baltimore branch.¹⁵⁹ There was no “booming business” for the bank, especially in Baltimore. On the contrary, the bank as a whole was teetering on collapse, and the Baltimore branch was in worse shape than other branches of the bank.

Powe is correct that the history of the Court must be placed in larger political history. But, quite frankly, that requires a firm grasp of national and constitutional history that Powe fails to demonstrate. His strengths—and there are many—are found in his delightful and sometimes brilliant discussions of the Court in the last half-century. But, even here the book is idiosyncratic. It is not bad that it is “opinionated,” but it would have been better and more useful book if the opinions were better grounded in history and if the thesis—of elitism and politics—was more clearly articulated.

153. See Alfred Cookman Bryan, *History of State Banking in Maryland*, in 17 ECONOMIC HISTORY—MARYLAND AND THE SOUTH 17, 17–24 (Herbert B. Adams ed., 1899) (detailing the history of banking in Maryland, and indicating that the Baltimore branch of the Bank of the United States was the only bank in Maryland not chartered by the state during the early 1800s).

154. POWE, *supra* note 1, at 71.

155. *Id.*

156. See Act of Apr. 10, 1816, ch. 44, 1816 Md. Laws 266 (incorporating the subscribers of the Bank of the United States).

157. Report from Langdon Cheves, President of the Bank of the United States, 1822, in 1 DOCUMENTARY HISTORY OF BANKING AND CURRENCY IN THE UNITED STATES 582, 582 (Herman E. Krooss & Paul A. Samuelson eds., 1977).

158. *Id.* at 583.

159. *Id.* at 586.

II. Slavery, the Constitution, and the Court

In a brilliant essay during the bicentennial of the U.S. Constitution, William M. Wiecek described the problem of slavery at the Constitutional Convention as “[t]he Witch at the Christening.”¹⁶⁰ Wiecek likened slavery to a witch who shows up at a christening, unwanted and uninvited, to curse the child, as in the story of *Sleeping Beauty*.¹⁶¹ At the time he wrote the essay, only a few scholars were interested in thinking about the role of slavery at the Convention.¹⁶² The traditional story, told for generations, was that slavery was unimportant to the founding. The framers, we were told, expected slavery to disappear, and so they felt it was unnecessary to actually worry about it at the Convention. Thus, a decade and a half before the bicentennial of the Constitution, William W. Freehling argued that the framers were inherently antislavery and that “[t]he impact of the Founding Fathers on slavery . . . must be seen in the long run not in terms of what changed in the late eighteenth century but in terms of how the Revolutionary experience changed the whole American antebellum history.”¹⁶³ Twenty years later, the prize-winning scholar Don E. Fehrenbacher argued much the same way, claiming that “the Constitution had some bias toward freedom but was essentially open-ended with respect to slavery.”¹⁶⁴ Similarly, the conservative legal scholar Earl Maltz has argued that “the Constitution of 1787 took no position on the basic institution of slavery.”¹⁶⁵

Scholars of the Revolution have also been reluctant to talk about slavery at the founding. David Waldstreicher, for example, notes in *Slavery’s Constitution: From Revolution to Ratification*, that many of the greatest scholars of the Revolutionary period have ignored slavery.¹⁶⁶ These scholars,

160. William M. Wiecek, *The Witch at the Christening: Slavery and the Constitution’s Origins*, in *THE FRAMING AND RATIFICATION OF THE CONSTITUTION* 167, 167 (Leonard W. Levy & Dennis J. Mahoney eds., 1987).

161. *Id.*

162. At about this time, I published my first article on the issue, Paul Finkelman, *Slavery and the Constitutional Convention: Making a Covenant with Death*, in *BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY* 188 (Richard Beeman et al. eds., 1987) [hereinafter Finkelman, *Slavery and the Constitutional Convention*]. For early works that discussed slavery and the Constitutional Convention, see PAUL FINKELMAN, *AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY* 22–40 (1981) [hereinafter FINKELMAN, *AN IMPERFECT UNION*]; DONALD L. ROBINSON, *SLAVERY IN THE STRUCTURE OF AMERICAN POLITICS, 1765–1820*, at 131–247 (1971) and WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848*, at 62–83 (1977). While focused on larger issues, the role of slavery at the Convention was also dealt with in DAVID BRION DAVIS, *THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION, 1770–1823*, at 122–31 (1975).

163. William W. Freehling, *The Founding Fathers and Slavery*, 77 *AM. HIST. REV.* 81, 82 (1972).

164. DON E. FEHRENBACHER, *THE FEDERAL GOVERNMENT AND SLAVERY* 3, 6 (1984).

165. Earl M. Maltz, *Slavery, Federalism, and the Structure of the Constitution*, 36 *AM. J. LEGAL HIST.* 466, 468 (1992).

166. DAVID WALDSTREICHER, *SLAVERY’S CONSTITUTION: FROM REVOLUTION TO RATIFICATION* 10–19 (2009).

most importantly Bernard Bailyn and Gordon Wood, see the Revolution in ideological terms, as a great movement that led to a new nation based on republicanism and self-government. They see the Constitution as “the ideological fulfillment of the American Revolution.”¹⁶⁷ Intellectual historians of the founding, like Bailyn, Wood, and Jack Rakove, according to Waldstreicher, “see slavery as at most a side issue—a distraction that nearly derailed the Constitution.”¹⁶⁸ These scholars, like Fehrenbacher and Maltz, would have us believe that “the Constitution’s silence about slavery . . . suggests the praiseworthy antislavery implications of that silence.”¹⁶⁹ More importantly, it “excuses the framers from having done anything more” about slavery at the founding.¹⁷⁰

The countertrend to this recognizes the importance of slavery at the founding and throughout the antebellum period. This trend also understands that, to a great extent, slavery shaped the writing of the Constitution and its implementation. Donald Robinson’s magisterial *Slavery in the Structure of American Politics* provides an in-depth look at slavery at the founding and during the early national period.¹⁷¹ Other works support this, including David Brion Davis’s volume *The Problem of Slavery in the Age of Revolution*,¹⁷² William M. Wiecek’s work on antislavery constitutional thought,¹⁷³ and my books *An Imperfect Union* and *Slavery and the Founders: Race and Liberty in the Age of Jefferson*.¹⁷⁴ More recently, David Waldstreicher’s *Slavery’s Constitution: From Revolution to Ratification* added to this literature. During the Revolution, the British intellectual Samuel Johnson asked, “How is it that we hear the loudest yelps for liberty among the drivers of negroes?”¹⁷⁵ Scholars who see slavery as central to the American founding provide an answer for Johnson. The American master class, led by Thomas Jefferson, Patrick Henry, Charles Cotesworth Pinckney, and George Mason, fully understood that slavery was vulnerable within the Empire. Thus, many members of the master class revolted. The Constitution

167. *Id.* at 11 (internal quotations omitted) (endorsing Bailyn’s claim that the Constitution is a document showing the reasonableness of the Revolution and that consequently, limits were necessary).

168. *Id.*

169. *Id.* at 12.

170. *Id.*

171. See ROBINSON, *supra* note 162, at 4–6 (highlighting the role of slavery as a political issue at the time of the founding).

172. See DAVIS, *supra* note 162, at 104–07 (citing as an example the founders’ assumption that slavery would be taken into account, at a minimum, for the purposes of taxation and representation).

173. See WIECEK, *supra* note 162, at 62–83 (discussing the role slavery played in the drafting of and debate surrounding the Constitution).

174. See FINKELMAN, AN IMPERFECT UNION, *supra* note 162, at 22–45 (describing how the Constitutional Convention was affected by the issue of slavery); PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON 2 (2d ed. 2001) [hereinafter FINKELMAN, SLAVERY AND THE FOUNDERS] (“A careful reading of the Constitution reveals that the [abolitionists] were correct: the national compact did favor slavery.”).

175. FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 174, at 48.

for them was “the ideological fulfillment of the American Revolution,”¹⁷⁶ but with a catch. For them, guaranteeing the right to property in people and giving them almost unrestricted power to regulate and control race relations were central to their ideology.¹⁷⁷ Thus, the Convention that wrote the Constitution of 1787 was populated by many men with huge investments in slavery who were determined to create a framework of government that would protect their special form of property.

They were enormously successful in this. Five provisions in the Constitution were directly about slavery. The Three-fifths Clause¹⁷⁸ gave the slave states extra representation in Congress by counting the slaves for representation, even though no southern state legislatures even considered counting slaves for the purpose of representation.¹⁷⁹ Thus, masters in those areas of the South with huge slave populations that often outnumbered free people, such as coastal South Carolina and tidewater Virginia,¹⁸⁰ gained extra power in the House of Representatives that they did not even have in their own state legislatures. The Migration and Importation Clause prohibited the national government from ending the international slave trade for *at least* twenty years (until 1808) but did not require a ban on it after that time.¹⁸¹ This was the only substantive limitation on Congress’s plenary power “to Regulate commerce with foreign Nations.”¹⁸² The Capitation Tax Clause required that Congress apply the Three-fifths Clause to any “capitation tax” or other “direct” tax.¹⁸³ Article IV of the Constitution provided that no state could emancipate a fugitive slave and that any fugitive slave escaping into another state had to “be delivered up on Claim of the Party to whom such Service or Labour may be due.”¹⁸⁴ Finally, the amendment provisions of the Constitution prohibited any alteration to the Constitution that would allow the abolition of the slave trade before 1808.¹⁸⁵ It is worth noting that no other form of property, or indeed no other regulation of social status, had any specific constitutional protection. States were free to recognize, or reject, all sorts of social statuses and regulate all kinds of property; so was Congress.

176. WALDSTREICHER, *supra* note 166, at 11.

177. See FINKELMAN, *SLAVERY AND THE FOUNDERS*, *supra* note 174, at 7–18 (summarizing the southern states’ arguments in favor of slavery at the Constitutional Convention).

178. U.S. CONST. art. I, § 2, cl. 3.

179. Finkelman, *Slavery and the Constitutional Convention*, *supra* note 162, at 188, 198 n.26.

180. See CHARLES MANFRED THOMPSON, *HISTORY OF THE UNITED STATES: POLITICAL, INDUSTRIAL, SOCIAL* 293 (1917) (noting the high slave populations in Virginia and South Carolina and that in South Carolina the slaves outnumbered the whites).

181. U.S. CONST. art. I, § 9, cl. 1.

182. *Id.* art. I, § 8, cl. 3.

183. *Id.* art. I, § 9, cl. 4. This was partially redundant since Article I also provided that the Three-fifths Clause would be applied to any “direct tax” that might be “apportioned among the several States.” *Id.* art. I, § 2, cl. 3.

184. *Id.* art. IV, § 2, cl. 3.

185. *Id.* art. V.

Only slave property and the legal status of “slave” received special constitutional recognition and protection.

In addition to these five specific clauses, numerous other clauses of the Constitution directly and indirectly protected slavery. Some provisions that indirectly guarded slavery, such as the prohibition on taxing exports, were included primarily to protect the interests of slaveholders.¹⁸⁶ Others, such as the guarantee of federal support to “suppress Insurrections”¹⁸⁷ and the creation of the Electoral College, were written with slavery in mind, although delegates also supported them for reasons having nothing to do with slavery.¹⁸⁸ The most prominent indirect protections of slavery were in the following clauses:

Article I, Section 8, Clause 15. The Domestic Insurrections Clause empowered Congress to call “forth the Militia” to “suppress Insurrections,” including slave rebellions.¹⁸⁹

Article I, Section 9, Clause 5. This clause prohibited federal taxes on exports and thus prevented an indirect tax on the staple products of slave labor, such as tobacco, rice, and eventually cotton.¹⁹⁰

Article I, Section 10, Clause 2. This clause prohibited the states from taxing exports or imports, thus preventing an indirect tax on the products of slave labor by a nonslaveholding state.¹⁹¹

Article II, Section 1, Clause 2. This clause provided for the indirect election of the President through an electoral college based on congressional representation.¹⁹² It also incorporated the Three-fifths Clause into the electoral college, giving whites in slave states a disproportionate influence in the election of the president.¹⁹³

Article IV, Section 3, Clause 1. This clause allowed for the admission of new states.¹⁹⁴ The delegates to the Convention anticipated the admission of new slave states to the Union.¹⁹⁵

Article IV, Section 4. The Domestic Violence Clause guaranteed the U.S. government would protect states from “domestic Violence,” including slave rebellions.¹⁹⁶

186. Paul Finkelman, *Affirmative Action for the Master Class: The Creation of the Proslavery Constitution*, 32 AKRON L. REV. 423, 429 (1999).

187. U.S. CONST. art. I, § 8, cl. 15.

188. Finkelman, *supra* note 186, at 429.

189. U.S. CONST. art. I, § 8, cl. 15.

190. *Id.* art. I, § 9, cl. 5; Paul Finkelman, *The Root of the Problem: How the Proslavery Constitution Shaped American Race Relations*, 4 BARRY L. REV. 1, 7 (2003).

191. U.S. CONST. art. I, § 10, cl. 2.

192. *Id.* art. II, § 1, cl. 2.

193. *Id.* For a detailed discussion of the relationship between slavery and the electoral college, see generally Paul Finkelman, *The Proslavery Origins of the Electoral College*, 23 CARDOZO L. REV. 1145 (2002).

194. *Id.* art. IV, § 3, cl. 1.

195. Finkelman, *supra* note 190, at 8.

Article V. By requiring a three-fourths majority of the states to ratify any amendment to the Constitution,¹⁹⁷ this Article ensured that the slaveholding states would have a perpetual veto over any constitutional changes.¹⁹⁸

Many other clauses would impact slavery under the Constitution, such as the provision giving Congress power over the national capital,¹⁹⁹ the provision giving Congress, and not the states, the power to regulate naturalization,²⁰⁰ which Congress would limit to whites,²⁰¹ and the provision giving Congress the power to regulate the territories.²⁰²

Given the vast number of constitutional provisions protecting slavery, it is no wonder that the great abolitionist William Lloyd Garrison considered the Constitution to be the result of a terrible bargain between freedom and slavery. The American states were, in Garrison's words, united by a "covenant with death" and "an agreement with Hell."²⁰³ Garrison and his followers refused to participate in American electoral politics because to do so they would have had to support the "pro-slavery, war-sanctioning Constitution of the United States."²⁰⁴ Instead, under the slogan, "No Union with Slaveholders,"²⁰⁵ the Garrisonians repeatedly argued for a dissolution of the Union.²⁰⁶

Starting with the first Congress, issues of slavery bedeviled the Legislative and the Executive Branches. By the early 1800s, cases involving slavery came before the Supreme Court. In the 1790s, Congress regulated—but could not ban—the African slave trade;²⁰⁷ passed laws to allow or ban slavery in the federal territories;²⁰⁸ regulated the capture and return of

196. U.S. CONST. art. IV, § 4.

197. *Id.* art. V.

198. DON E. FEHRENBACHER, *THE SLAVEHOLDING REPUBLIC* 46 (2001).

199. U.S. CONST. art. I, § 8, cl. 17.

200. *Id.*

201. An Act to Establish a Uniform Rule of Naturalization § 1, 1 Stat. 101 (1790).

202. U.S. CONST. art. IV, § 3, cl. 2.

203. William Lloyd Garrison, *Repeal of the Union*, *THE LIBERATOR*, May 6, 1842, at 3.

204. Letter from William Lloyd Garrison to Reverend Samuel J. May, (July 17, 1845), in 3 *THE LETTERS OF WILLIAM LLOYD GARRISON* 303, 303 (Walter M. Merrill ed., 1973).

205. William Lloyd Garrison, *Address to the Friends of Freedom and Emancipation in the United States*, *THE LIBERATOR*, May 31, 1844, at 2.

206. See JAMES BREWER STEWART, *HOLY WARRIORS: THE ABOLITIONISTS AND AMERICAN SLAVERY* 98–99, 158–59 (1976) (comparing the Liberty Party's advocacy of eliminating the slave trade by changing existing laws with the more radical Garrisonians' advocacy of disunion); WIECEK, *supra* note 162, at 228–48 (analyzing the Garrisonian repudiation of the Constitution and support for the disunion of the United States). See generally FINKELMAN, *SLAVERY AND THE FOUNDERS*, *supra* note 174, at 3–36 (summarizing the Garrisonian advocacy of disunion).

207. Act of Mar. 22, 1794, ch. 11, 1 Stat. 347; Act of Feb. 12, 1793, ch. 7, 1 Stat. 302; Finkelman, *supra* note 58, at 458.

208. See Northwest Ordinance of 1789, 1 Stat. 50, 53 (banning slavery in the Northwest Territory); Act of Apr. 7, 1798, ch. 28, § 7, 1 Stat. 549, 550 (prohibiting the introduction of slavery into the territory of Mississippi).

fugitive slaves;²⁰⁹ applied racial categories to laws on the military,²¹⁰ the militias,²¹¹ and naturalization;²¹² and provided for the maintenance of slavery in the new District of Columbia.²¹³ During the War of 1812, New Englanders bitterly complained that the Three-fifths Clause gave the slave states too much power.²¹⁴ They understood that the slave-holding Thomas Jefferson was elected president over John Adams by the electoral votes created through the Three-fifths Clause and its application to the Electoral College.²¹⁵ After the War of 1812, slavery—and the racial controls in the South that came with it—led to the Missouri Compromise debates, which revealed the deep rift in the nation over slavery. Congress and the Executive Branch spent enormous energy on slavery in the territories and the District of Columbia,²¹⁶ the African slave trade,²¹⁷ fugitive slaves,²¹⁸ the distribution of antislavery literature in the mail,²¹⁹ and international relations involving fugitive slaves and free blacks.²²⁰ The Supreme Court heard many cases on these

209. See Ch. 7, 1 Stat. at 302 (making it a crime to assist a fleeing slave, and providing a means for recovering escaped slaves).

210. See BERNARD C. NALTY, *STRENGTH FOR THE FIGHT: A HISTORY OF BLACK AMERICANS IN THE MILITARY 19–20* (1986) (noting that in 1792 Congress restricted enrollment to white men).

211. See CHARLES S. HYNEMAN, *THE AMERICAN FOUNDING EXPERIENCE* 49 (Charles E. Gilbert ed., 1994) (“In 1792 [Congress] limited militia enrollment to able-bodied white male citizens . . .”).

212. See Naturalization Act of 1790, 1 Stat. 103 (repealed 1795) (“That any alien, being a free white person, who shall have resided within the limits and under the jurisdiction of the United States for the term of two years, may be admitted to become a citizen thereof . . .”).

213. See CLAYTON E. JEWETT & JOHN O. ALLEN, *SLAVERY IN THE SOUTH* 53 (2004) (explaining that the legislation passed at the time of the District of Columbia’s creation imposed on it the laws of Virginia and Maryland that governed and defined the legal status of African-Americans).

214. See MATTHEW MASON, *SLAVERY AND POLITICS IN THE EARLY AMERICAN REPUBLIC* 39, 42 (2006) (explaining that although the Three-fifths Clause was not an especially divisive issue at the turn of the nineteenth century, during the War of 1812, the “New England Federalists demonstrated the full power of slavery as a political tool in their wartime appeal to Northerners’ latent hostility to slaveholders and their power”).

215. Finkelman, *supra* note 193, at 1155.

216. 1 UROFSKY & FINKELMAN, *supra* note 1, at 381.

217. *Id.* at 367.

218. *Id.* at 382–84.

219. See WIECEK, *supra* note 162, at 174–78 (describing the sometimes bitter debates over abolitionist literature during Jackson’s presidency).

220. See, e.g., ROBINSON, *supra* note 162, at 299–301 (chronicling an early debate about slavery when a 1789 bill was proposed imposing a \$10 tax on all slaves imported into the United States); *id.* at 376 (stating that “in the field of foreign affairs, [officials of the federal government] were bound in duty to protect slave owners against assaults on their human property”); *id.* at 347–77 (analyzing two incidents, Jay’s Treaty of 1795 and American relations with Santo Domingo, as illustrative of the great effect slavery and free blacks had on foreign relations); 1 UROFSKY & FINKELMAN, *supra* note 1, at 371 (detailing the multiple Executive recommendations for reparations to Spain in the aftermath of *Amistad*, which were countered by Congress); *id.* at 380 (explaining that the Wilmot Proviso prescribed what to do with land acquired from the Republic of Mexico).

issues, and the Justices, while riding circuit, heard many more.²²¹ In addition, the federal courts dealt with commercial transactions over slavery,²²² freedom claims of slaves who had claimed they had been emancipated or were never actually enslaved,²²³ freedom claims of slaves who had been taken to free jurisdictions by their masters,²²⁴ and private suits against abolitionists who helped slaves escape.²²⁵

Lurking in the background of all these cases was the political tinderbox that slavery created. Even before the Constitution was written, some southerners were ready to end the national union to protect slavery.²²⁶ Eventually, of course, eleven southern states would do just that.²²⁷ The nation's greatest and most costly crisis—the Civil War—was caused by slavery. As William Wiecek noted many years ago, slavery was “The Nemesis of the Constitution.”²²⁸

221. See, e.g., *Jones v. Van Zandt*, 46 U.S. (5 How.) 215, 230–31 (1847) (interpreting the Fugitive Slave Law of 1793 to allow for a private lawsuit for harboring a fugitive slave even though the defendant (*Van Zandt*) encountered the alleged fugitive in the free state of Ohio and had no notice that he was in fact a fugitive slave); *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 625–26 (1842) (striking down as unconstitutional a Pennsylvania statute requiring judicial approval prior to the removal of fugitive slaves); *United States v. The Amistad*, 40 U.S. (15 Pet.) 518, 597 (1841) (finding that illegally enslaved Africans that had landed in America on a foreign vessel should be set free); *Vaughan v. Williams*, 28 F. Cas. 1115, 1116 (McLean, Circuit Justice, C.C.D. Ind. 1845) (No. 16,903) (holding that if a resident of Indiana harbored someone who had escaped from slavery the harbinger would be liable for damages under the Fugitive Slave Law of 1793, though Justice McLean, riding circuit, held that the alleged slave had actually become free and thus the outcome favored the abolitionist). For a discussion of the *Vaughan* case, see Paul Finkelman, *John McLean: Moderate Abolitionist and Supreme Court Politician*, 62 VAND. L. REV. 519, 555–58 (2009).

222. See, e.g., *Groves v. Slaughter*, 40 U.S. (15 Pet.) 449, 497 (1841) (considering the legality and validity of the sale of slaves in Mississippi in light of a provision of the Mississippi Constitution limiting the importation into the state of slaves as merchandise); *Marshall v. Beverley*, 18 U.S. (5 Wheat.) 313, 315 (1820) (hearing, but not ruling on, a claim that a sale of slaves was in violation of a deed of trust); *Cassedy v. Williams*, 5 F. Cas. 272, 272 (C.C.D.C. 1843) (No. 2,501) (concerning the purchase of a slave for \$600 worth of notes from a failed bank).

223. See, e.g., *Williams v. Ash*, 42 U.S. (1 How.) 1, 14 (1843) (holding that bequests of freedom to slaves were valid).

224. See, e.g., *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 399, 454 (1856) (establishing the plaintiff's inability to sue in court due to his lack of citizenship, thereby refusing to hear his claims for freedom); *Strader v. Graham*, 51 U.S. (10 How.) 82, 97 (1850) (holding that the states were free to determine the status of people in their jurisdiction, limited only by the Fugitive Slave Clause of the Constitution); *Rhodes v. Bell*, 43 U.S. (2 How.) 396, 404–05 (1844) (holding that a slave was free under Maryland law when he was brought from Virginia to D.C. for the purpose of sale).

225. See, e.g., *Jones*, 46 U.S. at 231–32 (finding for the plaintiff against the abolitionist, who knowingly harbored the fugitive slave); *Oliver v. Kauffman*, 18 F. Cas. 657, 658–59 (Grier, Circuit Justice, C.C.E.D. Pa. 1850) (No. 10,497) (charging the jury to set aside their personal sentiments regarding slavery, whatever those may be, and fairly apply the law).

226. See, e.g., Finkelman, *supra* note 58, at 445 (describing the threats of a South Carolina delegate to the Constitutional Convention that the Constitution's acceptance was contingent on the slavery question).

227. 1 UROFSKY & FINKELMAN, *supra* note 1, at 427.

228. HAROLD M. HYMAN & WILLIAM M. WIECEK, *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835–1875*, at 86 (1982).

How then, do these new volumes on the history of the Supreme Court deal with slavery? How do they confront this nemesis that so bothered the Courts and nearly destroyed the nation?

In Lucas Powe's world, slavery was not an issue until the Missouri Compromise debates. He argues that "[f]or the Constitution's first three decades slavery was a dormant issue."²²⁹ Then it "burst onto the scene in arguments over whether Missouri would be admitted as a state only with conditions placed on slavery."²³⁰ It is not clear what "scene" slavery had suddenly burst upon or how it was "dormant" before then. The First Congress had debated slavery and the African slave trade. Benjamin Franklin's last public act, on February 12, 1789, was to send a petition to Congress denouncing slavery as a violation of the "political creed of Americans" and urging Congress to end the African Slavery Trade.²³¹ This led to an outburst from the South Carolina and Georgia delegations in Congress attacking this aging patriot, with South Carolina's William L. Smith declaring Franklin's petition to be "an attack on the palladium of the property of our country."²³² Congressman James Jackson offered a more vigorous attack and Franklin responded with a brilliant satirical essay defending slavery from the perspective of the fictitious Sidi Mehemet Ibrahim, a member of the Divan of Algiers.²³³ Slavery had in fact burst upon the national political scene during the Revolution²³⁴ over such issues as black enlistment, the slave trade, taxing the states based on their whole population, and Lord Dunmore's proclamation to free slaves who would fight for the British.²³⁵ At the Constitutional Convention the delegates had angry debates over slavery and in the early Congress slavery was a political issue. Indeed, slavery "burst onto the scene" at the beginning of the American nation, and it would remain on the political and legal agenda, at least until it was abolished in 1865.

In the 1790s, as I noted above, Congress passed legislation regulating fugitive slaves²³⁶ and the African slave trade.²³⁷ Before abolishing the

229. POWE, *supra* note 1, at 91.

230. *Id.* at 71.

231. ROBINSON, *supra* note 162, at 303.

232. *Id.*

233. Letter from Benjamin Franklin to the Editor of the Federal Gazette (Mar. 23, 1790), available at <http://franklinpapers.org/franklin/framedVolumes.jsp>.

234. See DAVIS, *supra* note 162, at 92–94 (discussing the problem of slavery during the Constitutional Convention); FINKELMAN, AN IMPERFECT UNION, *supra* note 162, ch. 1 (explaining how slavery affected many of the Constitutional Convention's most crucial decisions); ROBINSON, *supra* note 162, at 148 (discussing threats by South Carolinians in 1777 to dissolve the emerging Union over slavery); ARTHUR ZILVERSMITH, THE FIRST EMANCIPATION: THE ABOLITION OF SLAVERY IN THE NORTH 137–38 (1967) (discussing how slavery was ending during and immediately after the Revolution).

235. BENJAMIN QUARLES, THE NEGRO IN THE AMERICAN REVOLUTION, at xiii–xxv (1961).

236. See *supra* note 209 and accompanying text.

African trade in 1807,²³⁸ Congress would pass other laws regulating it.²³⁹ The slave-trade laws led to a number of cases that the Justices heard on circuit, while a few reached the full Court.²⁴⁰ During this period the Court also heard a number of cases involving freedom claims, always rejecting them.²⁴¹ Congress also heard numerous petitions from settlers in the Old Northwest to repeal, amend, or suspend the Northwest Ordinance.²⁴² In other words, Congress, the Executive Branch, and the courts were dealing with slavery all along.

Powe's analysis of slave cases, like much of his work, is mixed. His discussions of *Prigg v. Pennsylvania*²⁴³ and *Dred Scott* are excellent. Indeed, this part of the book is clear and sharp. He brings in outside events—the Mexican War, Bleeding Kansas—to show how slavery, politics, and constitutional developments were interconnected.²⁴⁴ Most of the analysis is not new, although Powe rarely cites the secondary sources he seems to have used. But, this section covers a lot of ground and covers it well. If the whole book were like this, it would be a prize winner.

Other aspects of his discussion of slavery seem to lack precision and focus. He ignores the Court's rulings on manumission, which almost always went against slave plaintiffs under Marshall but were sometimes sympathetic to slave plaintiffs under Taney. The Court, and the Justices riding circuit,²⁴⁵ were heavily involved in the African slave-trade cases,²⁴⁶ and numerous

237. Act of Mar. 22, 1794, ch. 11, 1 Stat. 347; Act of Feb. 12, 1793, ch. 7, 1 Stat. 302; see also Finkelman, *supra* note 58, at 458 (offering an overview of the government's actions in regulating the African slave trade).

238. Act of Mar. 2, 1807, ch. 22, 2 Stat. 426.

239. Act of Feb. 28, 1803, ch. 10, 2 Stat. 205; Act of May 10, 1800, ch. 51, 2 Stat. 70.

240. See, e.g., *Brig Caroline v. United States*, 11 U.S. (7 Cranch) 496, 499 (1813) (adjudicating a charge based on the Act of March 22, 1774); *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 342 (1806) (deciding a claim by a slave against his owner, brought under a Virginia law regulating the slave trade).

241. E.g., *Mima Queen v. Hepburn*, 11 U.S. (7 Cranch) 290, 294 (1813); *Scott v. Negro London*, 7 U.S. (3 Cranch) 324, 331 (1806).

242. E.g., Paul Finkelman, *Evading the Ordinance: The Persistence of Bondage in Indiana and Illinois*, 9 J. EARLY REPUBLIC 21, 23–24 (1989); Paul Finkelman, *Slavery and the Northwest Ordinance: A Study in Ambiguity*, 6 J. EARLY REPUBLIC 343, 361 (1986).

243. 41 U.S. 539 (1842).

244. See POWE, *supra* note 1, at 100–02 (discussing the constitutional issues created by the Mexican War, and noting that “[o]ver the course of the Mexican War the Wilmot Proviso was but one of several options articulated to deal with slavery in the territories” and that each of the proposals had a constitutional basis); *id.* at 104 (discussing how Bleeding Kansas illustrated the South's view of the North and impacted the slavery debate).

245. Unfortunately, neither Powe nor Hoffer, Hoffer, and Hull tells us very much if anything about the nature of circuit riding before the reorganization of the Courts in 1891, when circuit riding was abolished. Circuit Courts of Appeals Act, 26 Stat. 826 (1891). This is unfortunate because, at least before the Civil War, the Justices spent more time on circuit than in Washington, and that is where the Court may have had its most important impact. WILLIAM H. REHNQUIST, *THE SUPREME COURT* 236 (Vintage Books 2002) (1987).

246. See *supra* text accompanying note 240.

fugitive-slave cases,²⁴⁷ but none of that is present here. Powe's discussion of South Carolina's Black Seamen's Laws²⁴⁸ is confusing, and that is too bad, because had he applied the same rigor to this section as he did in his discussion of *Dred Scott* and *Prigg*, he might have truly advanced our understanding of these issues.

In 1822, South Carolina passed legislation that required free black sailors landing in South Carolina to be jailed while their ships were in port.²⁴⁹ When the ship left port the captain would pay the local sheriff for feeding and housing his black crewman, and the free black sailor would then be allowed to leave with his ship.²⁵⁰ This law clearly violated the Commerce Clause of the Constitution.²⁵¹ The South Carolina law also threatened international relations, since many foreign ships had black sailors.²⁵² The Black Seamen's Laws led to enormous controversies from the 1820s until the Civil War.²⁵³ In the 1840s, Massachusetts sent commissioners to South Carolina and Louisiana to negotiate over these issues, but the governors of those two states refused to even discuss the matters with the representatives from Massachusetts.²⁵⁴ The treatment of free black sailors by South Carolina, and later other states, especially Louisiana, helped set the stage for the protections found in the Fourteenth Amendment.²⁵⁵

Powe begins his tale by asserting that in 1822 "[m]ost Southern states" had enacted such laws at this time,²⁵⁶ when in fact only South Carolina had. In the 1830s and 1840s, after the courts and Congress had refused to face this issue, other states did pass such laws,²⁵⁷ but in 1822 only South Carolina behaved this way.²⁵⁸ This is not mere nitpicking about a single error of fact. The timing here is important. The South Carolina story helps us understand

247. See *supra* notes 220–21 and accompanying text.

248. See POWE, *supra* note 1, at 92–94 (discussing the Justices' various reactions to the South Carolina law).

249. Act of Dec. 21, 1822, 1822 S.C. Acts 461; HERBERT A. JOHNSON, *THE CHIEF JUSTICESHIP OF JOHN MARSHALL* 131 (1998).

250. *Id.*

251. See *Elkison v. Deliesseline*, 8 F. Cas. 493, 495 (Johnson, Circuit Justice, C.C.D.S.C. 1823) (No. 4366) ("[The] right of the general government to regulate commerce with the sister states and foreign nations is a paramount and exclusive right[, and the] navigation of ships has always been held . . . to appertain to commercial regulations.").

252. N. JEFFREY BOLSTER, *BLACK JACKS: AFRICAN AMERICAN SEAMEN IN THE AGE OF SAIL* 204–05 (1997).

253. *Id.* at 206.

254. See *id.* at 204 (stating that the Massachusetts commissioners were "thwarted" and one was "almost lynched").

255. See Paul Finkelman, *Race and Domestic International Law in the United States*, 17 NAT'L BLACK L.J. 25, 42 (2003) (recounting that while introducing what would become the Fourteenth Amendment, Congressman John Bingham used the treatment of the Massachusetts commissioners as a reason the proposed amendment was necessary).

256. POWE, *supra* note 1, at 92.

257. See BOLSTER, *supra* note 252, at 198–99 (noting that beginning in the 1830s, Georgia, North Carolina, Alabama, and Louisiana enacted Black Seamen's Laws).

258. *Id.*

the way slavery undermined the Constitution, and it also helps us see how the Court failed to support both the Constitution and fundamental liberty on this issue. Had the Justices responded in a different way, it is possible other southern states might not have followed South Carolina's lead on this issue.

In 1823, in *Elkison v. Deliesseline*,²⁵⁹ Justice William Johnson heard a case on the 1822 South Carolina Black Seamen's Laws while riding circuit.²⁶⁰ Henry Elkison, a free black sailor on an English ship was arrested and sent to jail when the ship docked in Charleston.²⁶¹ His supporters went to Johnson to obtain relief.²⁶² In his long opinion, Johnson vigorously denounced the South Carolina statute,²⁶³ and Powe notes that South Carolina "disregard[ed] Johnson's decision."²⁶⁴ The problem is that Johnson never actually gave South Carolina anything to disregard. Justice Johnson asserted that South Carolina's act was unconstitutional but denied that he had any power to issue a writ of habeas corpus in the case or a writ of *homine replegiando* against the sheriff.²⁶⁵ In other words, he refused to offer any relief to Elkison. Instead, Johnson told the black sailor that he only had "recourse to the state authorities."²⁶⁶ Elkison might have then taken the case to the state courts, but he did not. And there the case ended. Neither Johnson nor the U.S. Supreme Court ever ruled on the issue.

To complicate matters further, Powe then notes that Chief Justice Marshall "faced a similar issue" while riding circuit, but that he "chose to duck the constitutional question."²⁶⁷ The problem here is that Marshall did not in fact face a similar issue. Powe seems to be referring to *The Brig Wilson v. United States*,²⁶⁸ which Marshall heard on circuit in 1820—three years *before* the Elkison case. In that case, the Virginia law only prohibited the actual migration of free blacks into the state, and not the temporary sojourn of black sailors.²⁶⁹ In fact, Section 3 of this law specifically provided, "This act shall not extend to master of vessels bringing into this state any free negro or mulatto employed on board and belonging to such vessel, and who shall therewith depart . . ."²⁷⁰ This was clearly not the same issue as in the South Carolina case. Indeed, the Virginia statute specifically avoided the

259. 8 F. Cas. 493 (Johnson, Circuit Justice, C.C.D.S.C. 1823) (No. 4,366).

260. *Id.* at 493.

261. *Id.*

262. *Id.*

263. *See id.* at 494–95 (rebuking the South Carolina statute's treatment of out-of-state black sailors as "utterly incompatib[le]" with Congress's power to regulate foreign commerce).

264. POWE, *supra* note 1, at 93.

265. *Elkison*, 8 F. Cas. at 498.

266. *Id.*

267. POWE, *supra* note 1, at 93.

268. 30 F. Cas. 239 (Marshall, Circuit Justice, C.C.D. Va. 1820) (No. 17,846).

269. An Act to Prevent the Migration of Free Negroes and Mulattoes into this Commonwealth, ch. 23, § 1, 1793 Va. Acts 28.

270. *Id.* § 3.

Commerce Clause (and perhaps the Privileges and Immunities Clause) issues created by the South Carolina statute. The outcome was also different in that Marshall ordered the release of the ship under simple statutory construction.²⁷¹ Powe notes that Marshall never reached the constitutional issue in this case and told Justice Story he did not reach it because “[he was] not fond of butting against a wall in sport.”²⁷²

The implication here is that Marshall criticized Johnson for going to the constitutional issue when he might have been smarter to act as Marshall had, in just reading the statute in such a way to free Elkison. That might not have been possible. The South Carolina statute was clearly quite different from the Virginia statute.

I wish that Powe had taken the time to truly examine this issue. He could have brought a great deal to analyzing these issues, and perhaps getting at the problem of how slavery truly corrupted justice and jurisprudence. He might also then have told us how these Justices, while riding circuit, were either acting as an “elite,” or not acting as an “elite.”

Powe’s discussion of slavery is over twenty pages long, illustrating his correct understanding that slavery was deeply important to our constitutional history. Hoffer, boxed in by his Chief Justiceship approach, deals with slavery in his chapter on Marshall and later in his chapter on Taney. Like Powe, he recognizes that slavery is very important, but his discussions are often cryptic and unclear. Since there are no footnotes in the Hoffer book, it is often impossible to figure out exactly what he is focusing on.

Hoffer rejects the notion that the Constitution was proslavery, or that it “promot[ed] slavery.”²⁷³ He seems to vacillate between seeing slavery as the profound problem it was—the nemesis of the Constitution—and taking a rather soft view of slavery and the Constitution. Thus, oddly, he says the Three-fifths Clause “permitted states to include” slaves in their apportionment.²⁷⁴ This phrasing seems to imply that the states had a choice in the matter (which they did not under the rules of apportionment and the census) or that some might have rejected counting slaves, which of course none did. A similar confusion of language comes when Hoffer states that “[t]he framers may have hoped that slavery would die out of its own accord.”²⁷⁵ Which framers hoped this? Surely not the southerners who demanded, over and over again, protection for slavery in the Constitution. This kind of analysis implies an odd sort of originalism, in the sense that we can lump all the framers into a single box and know what they hoped for.

271. *The Brig Wilson*, 30 F. Cas. at 245.

272. POWE, *supra* note 1, at 93 (quoting Letter from John Marshall to Joseph Story (Sept. 26, 1823), in 9 THE PAPERS OF JOHN MARSHALL, 1820–1823, at 338, 338 (Charles F. Hobson ed., 1998)).

273. HOFFER, HOFFER & HULL, *supra* note 1, at 74.

274. *Id.*

275. *Id.* at 75.

Hoffer continues this soft approach to slavery by arguing that “[o]pponents of slavery had founded the American Colonization Society in 1817 to remove emancipated slaves and free blacks from the country”²⁷⁶ Some colonizationists did oppose slavery and some opponents of slavery (such as Lincoln) supported colonization because they believed it was a practical way of ending slavery in a society where most whites opposed black equality.²⁷⁷ But the vast majority of colonizationists—and almost all the founders of the American Colonization Society—were emphatically not opponents of slavery.²⁷⁸ Many of the leaders of the Colonization Society were slaveowners, like Henry Clay²⁷⁹ and Justice Bushrod Washington. Hoffer quotes Chief Justice Marshall’s assertions of his personal ambivalence about slavery but does not indicate where the quotation comes from.²⁸⁰ Hoffer then notes that Marshall always had to view slavery “in a legal light.”²⁸¹ What he does not tell us is that for much of his tenure on the bench Marshall consistently denied freedom claims of slaves when the issues might easily have gone the other way, and that he took a technical, almost pettifogging approach to slave-trade cases, which led to slave traders avoiding punishment.²⁸² Most tragically, when given the opportunity to strike a blow at the international slave trade in *The Antelope*—with the full sanction of federal law behind him—Marshall refused to do so.²⁸³

In his chapter on the Taney Court, Hoffer proclaims that Justice Story agonized over his proslavery decision in *Prigg v. Pennsylvania*, but he fails to point out that immediately after the case Story corresponded with Senator John M. Berrien of Georgia to suggest how a more efficient fugitive slave law might be passed.²⁸⁴ Hoffer asserts that Story “knew that the Rendition

276. *Id.*

277. Eric Foner, *Lincoln and Colonization*, in *OUR LINCOLN: NEW PERSPECTIVES ON LINCOLN AND HIS WORLD* 135, 139 (Eric Foner ed., 2008) (explaining that though the American Colonization Society was originally founded to colonize free blacks, nevertheless, “colonizationists frequently spoke of abolishing slavery gradually, peacefully, and without sectional conflict”); *id.* at 136 (distinguishing Lincoln’s belief in inalienable natural rights for blacks from his disinterest in “bring[ing] about social and political equality between the white and black races”). For a different view, see Mark E. Neely, Jr., *Colonization and the Myth that Lincoln Prepared the People for Emancipation*, in *LINCOLN’S PROCLAMATION: EMANCIPATION RECONSIDERED* 45, 45–74 (William A. Blair & Karen Fisher Younger eds., 2009).

278. *See id.* at 139 (“Upper South planters and political leaders whose commitment to slavery appeared suspect dominated the [American Colonization Society].”).

279. *Id.*

280. HOFFER, HOFFER & HULL, *supra* note 1, at 76.

281. *Id.*

282. *See, e.g.*, *Scott v. Negro London*, 7 U.S. (3 Cranch) 324, 331 (1806) (reversing a circuit court’s decision granting a slave freedom under a Virginia statute because the circuit court misapplied the statute); *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 342 (1805) (overturning a fine imposed under a federal law regulating the slave trade by applying the relevant two-year statute of limitation).

283. 23 U.S. (10 Wheat.) 66, 121–22 (1825).

284. Paul Finkelman, *Story Telling on the Supreme Court: Prigg v. Pennsylvania and Justice Joseph Story’s Judicial Nationalism*, 1994 SUP. CT. REV. 247, 286.

Clause [Fugitive Slave Clause] was of utmost importance to South Carolina and Georgia in the drafting and ratification of the federal Constitution.”²⁸⁵ But in fact Story knew no such thing. In his famous *Commentaries on the Constitution*, he noted only that the clause was a boon “for the benefit of the slave-holding states” to indicate northern good will toward the “peculiar interests of the south.”²⁸⁶ He thought the clause was evidence that the South “at all times had its full share of benefits from the Union.”²⁸⁷ Significantly, Story did not argue in *Commentaries* that the clause was part of a bargain or that it was a quid pro quo for something in the Constitution that the North wanted. Nor did he argue in his *Commentaries*, as he would disingenuously assert in *Prigg*, that it was “a fundamental article, without the adoption of which the Union could not have been formed.”²⁸⁸ By the time Story wrote his overwhelmingly proslavery opinion in *Prigg* he had full access to Madison’s notes on the Constitutional Convention, which showed that the Fugitive Slave Clause was not a fundamental part of the constitutional bargain but was an afterthought, proposed late in the Convention, without any serious debate.²⁸⁹

Hoffer thus spends a good deal of time on the issue of slavery but somehow manages to avoid the central questions: How did the Constitution, which protected slavery in so many ways, affect the Court; and how and why did the Court so overwhelmingly protect slavery?

III. Conclusion

Both of these books offer a great deal for the serious student of constitutional history. They are not, however, in the end, what they might have been. The total lack of notes in Hoffer and the sparse notes almost without any secondary sources in Powe make it hard to follow the arguments. For example, Hoffer tells us that Justice McKinley “joined the majority in allowing federal regulation of interstate trade,”²⁹⁰ but he does not name a case or cite one. Since the Congress *never* passed legislation regulating the interstate trade, and there are no cases asserting the federal power to regulate the trade in the entire history of the Court, it is hard to know what case this

285. HOFFER, HOFFER & HULL, *supra* note 1, at 94.

286. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 952 (Carolina Academic Press 1987) (1833).

287. *Id.*

288. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 540 (1842).

289. See JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 545–46, 552 (Adrienne Koch ed., 1966) (relating the brief debate that preceded the insertion of the Fugitive Slave Clause); Louise Weinberg, *Methodological Interventions and the Slavery Cases; or, Night-Thoughts of a Legal Realist*, 56 MD. L. REV. 1316, 1347–48, 1348 n.145 (1997) (arguing that a “fair reading” of the debate over the Fugitive Slave Clause reveals that the clause did not embody a “crucial compromise”).

290. HOFFER, HOFFER & HULL, *supra* note 1, at 85.

might be.²⁹¹ Beyond the documentation, both books have numerous little errors that distract the knowledgeable reader and will unfortunately mislead the novice constitutional scholar.

In the end, these books take us back to where I started this Review: the problem of interpretation and history. History is vital to our understanding of how the Constitution has shaped our society and been shaped by it. Much in these books will help us to better understand the Court and the Constitution. At their best, the authors illustrate the complexity of history and the futility of originalism. They also illustrate why a serious study of constitutional history should be required for all law students and why judges should read and learn from history. The more we understand how we got to where we are, the more tools we will have to avoid the mistakes our predecessors made and to perhaps fix the problems they created. With some caveats, both Powe and Hoffer are a start in that direction.

291. The case Hoffer has in mind may be *Groves v. Slaughter*, 40 U.S. 449 (1841), which turned entirely on a construction of the Mississippi Constitution, *id.* at 503. The case did not consider federal regulation of the trade and did not imply that Congress could regulate the trade. See Michael A. Morrison, Book Review, 54 CIV. WAR HIST. 97, 98 (2008) (reviewing DAVID L. LIGHTNER, *SLAVERY AND THE COMMERCE POWER: HOW THE STRUGGLE AGAINST THE INTERSTATE SLAVE TRADE LED TO THE CIVIL WAR* (2006)) (“The Marshall Court . . . refused to make clear Congress’s authority in a case (*Groves v. Slaughter*) that explicitly involved the interstate slave trade.”).