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Book Review: The Documentary History of the Supreme Court of the United States, 1789-1800, Vol. I, Parts 1 and 2. Edited by Maeva Marcus and James R. Perry.

John P. Roche

judgment—of personal responsibility for one's own choices and behavior—is lacking.

In short, Hewlett and others now writing in a comparable vein never consider that the "double-bind" on women Hewlett describes—the multiple burdens, the tensions and conflicts—may not be the result of society's failures, or the clashing demands of feminists and conservatives, but an inescapable dilemma, part of the human condition generally, and the female condition particularly. None of this, I hasten to add, means that parental leaves and other measures are necessarily bad. Women do marry and have children; they also work. Various proposals may be sound. But they must be evaluated realistically, in terms of probable economic and social benefits and costs, for specific groups and for the society as a whole; and they must not be made to seem the answer to inner problems or conflicts, unanalyzed and even unexpressed, which they will not solve. Hewlett's book provides neither an economic or policy analysis of specific proposals, nor an illumination of the dilemmas of the woman who wants a career and a family. These dilemmas have little to do with parental leaves and day-care centers. True, the book is an advance over much feminist writing, which ignores family altogether, or sees it as something from which women should be freed; but it is a very small advance. Feminism has barely begun to ask the deeper questions that need to be asked.

THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, VOL. I, PARTS 1 AND 2. Edited by Maeva Marcus[1] and James R. Perry.[2] New York: Columbia University Press. 1985. Pp. lxxii, 599; xvi, 400 (consecutively paginated). $95.

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This is the first of seven projected volumes of original sources on the Supreme Court's first decade. It focuses on appointments to the Court and the more technical aspects of its procedures. Two more preparatory volumes are anticipated—one on the background of article III, and the third on the circuit court activities of the Justices—and then four dealing *in extenso* with the Court's decisions.

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At a time when theologians seem to have cornered the market on constitutional commentary, converting the framers into Platonic "Guardians" of various esoteric persuasions, this enterprise should help those of us concerned with "mere facts" in our task (in Walton Hamilton's phrase) of "promoting the Framers from immortality to mortality." These two books are invaluable, but alas they skirt most substantive questions.[4]

A detailed review is impossible, but certain key themes stand out. Admittedly these works bear some resemblance to an annotated telephone directory—the editors have tracked down basic biographical material on everyone cited—but this sort of research is a God-send to scholars like myself who have been arguing for years—roughly forty in my case—that the Constitution was written by a consummate group of practicing politicians, not by a seminar of political philosophers.

As one reads the biographical footnotes, particularly as lawyers line up for admission to the Supreme Court bar, two impressions emerge: first, the personal interrelationships (everyone appears to have been someone else's cousin, nephew, or brother-in-law); and second, the breadth of political experience in what was the world's most democratic political ambience. Once in a moment of masochism I set out to total the years of legislative, executive, and judicial experience possessed by the men who gathered in Philadelphia to draft the Constitution; I quit when I reached 1300!

Indeed, what emerged in the American provinces, later states, between 1765 and 1795, when the party system began to undermine it, was the most cohesive and talented political class in our history. Some members (e.g., James Otis) died; others joined (e.g., Alexander Hamilton and Albert Gallatin, to pick two immigrants); but the amazing solidity of this body of so-called "revolutionaries"[5] was demonstrated by the absence of defectors to the Crown when the heat was turned on in the early 1770's. Only one leading American spokesman, Joseph Galloway of Pennsylvania, opted for the Crown after the defeat of his proposal for an Anglo-American union by the Continental Congress on October 22, 1774.

There were internal disagreements. Patrick Henry automatically opposed anything, including the handiwork of the Constitutional Convention, if he suspected Thomas Jefferson, (via his clone

4. E.g., was there no correspondence on the cases, culminating with Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), which rejected the states' sovereign immunity and led to the virtually instant passage of the eleventh amendment?

5. *See* Roche, *The Strange Case of the "Revolutionary" Establishment*, in SENTENCED TO LIFE (1974).

James Madison), had inspired it. Governor George Clinton of New York had parallel views of an enterprise promoted by Alexander Hamilton. The symbolic status of George Washington, an authentic "father-figure," and Benjamin Franklin rallied the bulk of this group to the new Constitution. How could it be a monarchist plot if the American "Cincinnatus," who returned to Mount Vernon and excoriated admirers who wished him to become a military dictator, had presided over its accomplishments?

Washington, it might be noted, has been underrated by posterity. In Part 2 of this volume we see him at work choosing Justices and dealing with disappointed candidates and ticklish situations. On October 8, 1789, John Jay wrote Matthew Ridley, who had pushed Samuel Chase of Maryland for a position on the first Court, "whether if it [the letter] had arrived sooner, it would have produced the desired Effect, I know not—The Presidents (*sic*) personal Knowledge of distinguished Characters throughout the States rendering it unnecessary for him to require or depend upon the Information or Recommendation of others. . . ."

In 1791 we find him dealing with a delicate situation in South Carolina after the resignation of John Rutledge as Chief Justice. That state suffered from a surfeit of federalist magnates. Probably none of them really wanted to serve on the Court because of the low salary, the need to move and abandon a law practice, and, possibly the greatest deterrent, the need to ride circuit, a horrendous physical burden given the poor roads and remote locations of some courts. (Rutledge had resigned as Chief Justice to return to the same post in the South Carolina judiciary.) However, South Carolina magnates were proud men who wanted the privilege of turning down an offer, and perhaps picking up points for being the first to turn it down.

Washington dealt with this in distinctive fashion. On May 24, 1791, he sent Charles Cotesworth Pinckney and his brother-in-law Edward Rutledge a joint confidential letter inquiring whether either of them wanted the job, if so "which of you?" It worked like a charm: on June 12 came the joint reply, an effusive statement of thanks for the "Confidence with which you have treated us" and a polite refusal. He was the master both of a chilling note to persistent job-seekers, and of a warmth in personal relations demonstrated in a semi-apology to James Madison, whose advice he had sought on the Virginia judgeship situation. "I am very troublesome," he wrote, "but you must excuse me.—Ascribe it to friendship and confidence, and you will do Justice to my motives. . . . Yours ever GW."

To return to the main line of discussion, what these volumes document is the delightful challenge of establishing a new system of government, with the focus on the judicial department. There is a wonderful atmosphere of improvisation about the first years: the Court's first Clerk, John Tucker, for example, was moonlighting from his regular post as Clerk of the Massachusetts Supreme Judicial Court.[6] He began the official minutes of the Court, which he persisted in designating the "Supreme Judicial Court" of the United States! John Jay was offered his choice of the Chief Justiceship or of continuing his position as Secretary of Foreign Affairs, held under the Articles of Confederation. The newly appointed Secretary of the Senate, Samuel A. Otis, commented wryly in a letter that "*The Keeper of the Tower* [Jay] is waiting to see which Salary is best, that of Lord Chief Justice or Secretary of State." When Jay opted for the Chief Justiceship, Thomas Jefferson—then our Minister to France—was named Secretary of State so Jay held both positions for six months until Jefferson settled in New York. (John Marshall later displayed an identical respect for the separation of powers, but for only six weeks.)

Our recently invented Doctrine of Judicial Political Virginity would surely have shocked the Founding Fathers. In 1792, for instance, John Jay ran for Governor of New York with no apparent qualms about retaining his status as Chief Justice. If asked he probably would have said, "Why leave a good secure job until you know you have a better?," but interestingly enough there seems to have been no serious criticism. In 1795, he tried again, this time against New York's Chancellor Robert R. Livingston (who also ran from his office, which he retained until President Jefferson named him Minister to France in 1801). It was not until the political class was fractured by differing views of the national interest (Hamilton's commercial mercantilism versus Jefferson's agrarian utopia), a split for which the 1795 Jay Treaty with Britain served as the catalyst, that a Supreme Court Justice, Samuel Chase, was savaged by the Jeffersonian press for his Maryland efforts on behalf of John Adams in the election of 1800.

Jay's Treaty (which he negotiated before he left the bench) brought to the surface a whole set of latent disputes about the nation's future. What developed was ostensibly a brawl between the pro-British and pro-French wings of the political class, but I believe (based on contemporary evidence,[7] but beyond the purview of this

6. The terms did not overlap.

7. See the acute English and French commentators' statements cited in J. SMITH, FREEDOM'S FETTERS 12 (1956).

essay) that domestic questions were at the root of the split. It is sufficient for our purposes to state that with the end of George Washington's tenure in sight, Jay's Treaty triggered a political earthquake that eventually reached about 9.0 on the Richter Scale.

Ironically in the light of recent cant about excluding ideological criticism from the evaluation of Supreme Court nominees, the first victim of this "faction" fight was poor old John Rutledge, whom Washington had named in a recess appointment to succeed John Jay as Chief Justice. Rutledge, a 1760 "graduate" of London's Middle Temple and provincial attorney-general, in 1775 became a leader of the patriots in South Carolina, was first President of that State and the framer who with Oliver Ellsworth of Connecticut helped devise the Great (or "Connecticut") Compromise, and had served on the first Supreme Court. If ever a candidate seemed like a sure bet, it was Rutledge.

But a funny thing happened on the way from this recess appointment to Senate confirmation: the word was spread by Alexander Hamilton's myrmidons that Rutledge was *non compos mentis*! The proof? A speech he had delivered at St. Michael's Church in Charleston (undoubtedly before he knew of his nomination) on July 16, 1795, in which he had vigorously denounced Jay's Treaty as contrary to American interests. This touched off a political firestorm. Secretary of Treasury Oliver Wolcott, Jr. was gentle when he wrote Hamilton that, "A driveller & fool [has been] appointed Chief Justice," but William Bradford, Jr., compensated for this moderation a few days later when he told Hamilton, "The crazy speech of Mr. Rutledge joined to certain information that he is daily sinking into debility of mind & body, will probably prevent him to (*sic*) receiving the appointment. . . ."[8] On August 5, 1795, Hamilton himself took up the cudgel. Writing as "Camillus" in the New York Argus, he noted "The ravagings of anger and pride are mistaken for the suggestions of honor. Thus we are told in a delirium of rage by a gentleman of South Caroline [that Jay's Treaty sold out American interests.]" He did throw in a footnote suggesting the pain he suffered in criticizing Rutledge and added "I regret the occasion and the necessity of animadversion."

President Washington, obviously baffled and embarrassed by the whole embroglio, kept trying to find out from Secretary of State Edmund Randolph what the precise facts were, but the latter was not very helpful. Ironically in the light of the fact that two weeks later he was to resign when accused by Washington (at Hamilton's

8. *Id.* at 775.

instigation)[9] of accepting French bribes, Randolph's only contribution was to twist Hamilton's dagger: "No answer," he reported to the President on August 5, "has been received from Mr. Rutledge; but the reports of his attachment to his bottle, his puerility, and extravagances together with a variety of indecorums and imprudencies multiply daily. . . ." The drive was on to prevent Senate confirmation. Rutledge was not without defenders in the anti-Treaty (shortly to be known as Jeffersonian) press, so the battle raged from August through early December.

Let Vice President John Adams, writing Abigail, summarize the finale of this classic exercise of non-ideological evaluation: "The Senate have refused their Consent to the Nomination of Mr. Rutledge. I hope that Chief Justices at least will learn from this to be cautious how they go to popular Meetings especially unlawful assemblies to *Spout* Reflections and excite opposition to the legal Acts of Constitutional Authority." Thomas Jefferson provided another perspective when he wrote William Giles "the rejection of Mr. Rutledge by the Senate is a bold thing, because they cannot pretend any objection to him but his disapprobation of the treaty. It is of course a declaration that they will receive none but tories hereafter into any department of the government."

So much for the Doctrine of Judicial Political Virginity. As indicated earlier, the Rutledge episode was the harbinger of the emergence of a bi-polar party system in the Adams administration, a division so bitter that at one time or another both President Adams, the titular leader of the federalists, and Vice President Jefferson, the head of the anti-federalists, (neither an apocalyptic) feared the outbreak of civil war.[10] Curiously, very few items in this work touch on the acute constitutional crisis of 1798-1800. Perhaps the Sedition Act cases (in which the Jeffersonians argued interestingly that the Sedition Act of 1798 violated states' rights with no mention of the first amendment) have been reserved for the volume of Circuit Court activities as none reached the Supreme Court. Still it is surprising that, with one exception, no correspondence on the internecine conflict merited inclusion here. Justice Chase's notorious partisan addresses to federal grand juries on Circuit—which led to

9. In my judgment, the evidence is overwhelming that Randolph was framed by the Hamilton Cabinet clique (Wolcott and Pickering—respectively Secretaries of the Treasury and of War) because the Secretary of State was considered a Francophile. The best recent summation is Tachau, *George Washington and the Reputation of Edmund Randolph*, 73 J.A.H. 15 (1986).

10. John Adams wrote later that he feared "a civil war," cited in J. CHARLES, THE ORIGINS OF THE AMERICAN PARTY SYSTEM 135 (1956). Thomas Jefferson: "A final dissolution of all bonds, civil & social, appeared imminent." *Id.* at 118.

his later impeachment (the Senate failed to convict)—must have had some ripple effect at the top level. But as the editors patently could not include everything, we shall have to wait.

The one substantive exception was the conspiracy that Alexander Hamilton tried to organize in 1801 to prevent Jefferson or Burr from becoming President. Space prevents full examination except to note that Jefferson and Madison were not suffering from paranoia when they attributed this design to the hard-core federalists. The mechanism was to be a "Grand Commission" consisting of six Senators, six representatives, and chaired by the Chief Justice, which would validate the votes of the electors when the Electoral College assembled. The hardly covert assumption underlying this was that various electors would have their credentials challenged—as occurred in the contested election of 1876.[11] The Ross Bill passed the Senate, died in the House, leaving Jefferson and Burr to fight it out in the federalist dominated House of Representatives. 1801 was a busy year!

In particular it was busy in the waning months of the Adams administration as Congress passed the Judiciary Act establishing a clutch of sixteen new Circuit Judges, shortly to be defenestrated by Jefferson's Judiciary Act of 1802, and relieving the Justices from riding Circuit. Adams's big problem was the vacant Chief Justiceship: Ellsworth, who replaced the rejected Rutledge, was sick in France and resigned. Adams immediately offered it to Jay, but the latter had had enough of politics and retired to spend the remaining twenty-eight years of his life as a gentleman farmer. With the clock running down and the federalist Senate soon to be replaced by a Jeffersonian one, Adams had to act. Act he did. As John Marshall recollected the event in 1827,

> When I waited on the President [in January, 1801] with Mr. Jays letter declining the appointment [sent to Marshall in his capacity as Secretary of State] he said thoughtfully 'Who shall I nominate now?' I replied that I could not tell, as I supposed that his objection to Judge Paterson [based on Paterson's siding with Hamilton to oppose the dispatch of a peace mission to France in 1799] remained. He said in a decided tone 'I shall not nominate him.' After a moments hesitation he said 'I believe I must nominate you.'[12]

Marshall was confirmed by the Senate and a new era in American constitutionalism began.

This essay has digressed, but art reflects life and the volume

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11. The Commission set up to adjudicate contests in 1877 was similar to the one proposed in 1800 by Senator Ross except that it included five Supreme Court Justices. I have been unable to discover any genetic link.

12. Further evidence is supplied in M. DAUER, THE ADAMS FEDERALISTS 244, 251 (1953).

under review necessarily digresses, and marvelously so. From the outset, American constitutional law has been a contact sport, and all fact-mongers can look forward to the early completion of this series.

However, at the risk of seeming churlish, I must point out two errors in the commentary, one *non clericale privilegium*, the other trivial. To write "The Senate ratified the Jay Treaty on June 24, 1795" (p. 781) is really inexcusable, particularly since later in the same footnote Washington's reluctance to ratify was pointed out. The second, which only those who have read the state debates on the ratification of the Constitution would catch, is in the brief biography of Richard Henry Lee of Westmoreland County, Virginia, namely, the assertion that he opposed the ratification in the Virginia Convention. In fact, "Mr. Lee of Westmoreland" was the federalist hatchet-man who specialized in flaying Patrick Henry. He voted for the Constitution; another of the ubiquitous Lees, "H. Lee of Bourbon," voted against.[13]

But all in all an outstanding contribution to scholarship.

THE SUPREME COURT AND THE AMERICAN FAMILY. By Eva R. Rubin.[1] Westport, Conn.: Greenwood Press. 1986. Pp. 251. $35.00.

Judith T. Younger[2]

By calling her book, "The Supreme Court and the American Family," Professor Eva Rubin arouses our curiosity. Her title suggests that the Supreme Court and the American family are somehow related. In fact, they have very little to do with each other. American families are not regulated by the federal government through its courts or Congress. They are regulated by the states through their legislatures. Of course states, in regulating families, may not tread on constitutionally protected rights; and the Supreme Court of the United States is the ultimate arbiter of when the states have overstepped permissible bounds. This is not a close connection, and Professor Rubin knows it. She tells us that "family law

13. *But see* 3 J. ELLIOT, DEBATES IN THE STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 655 (2d ed. 1891), and my discussion of the Virginia Convention in Roche, *The Founding Fathers: A Reform Caucus* in *Action*, 55 AM. POL. SCI. REV. 799 (1961).

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