1987

Book Review: The Supreme Court and the American Family. by Eva R. Rubin.

Judith T. Younger

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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has traditionally been the domain of state government," that "[s]tate laws did and still do regulate the structure of family life," and that the "Supreme Court's involvement . . . has been at the outer edges of family law." Why then does she put the Court and the family together in this book? Professor Rubin's explanation is that the Court, "under the guise of constitutional conflicts," has really been deciding family issues on the basis of its own collective preference for the traditional family in which the spouses are married and performing assigned sex-based roles: husband as breadwinner and wife as economic dependent, child-rearer, and provider of emotional support. This is what she sets out to prove, using, among others, the Court's decisions on illegitimacy, abortion, contraceptives, pregnant women in the workplace, and laws curbing the sexual activity of the young. In her own words:

> I hope to show that, although many of the specific decisions appear to based on constitutional principles—equal protection, due process, the right to privacy, freedom of religion—the Court often uses these doctrines to protect a different fundamental value—a traditional ideal of the American family.

Professor Rubin soon encounters problems. First, when she says that the cases she cites involve "family issues" she stretches them unconvincingly out of shape. True, many of the cases show up in the law school curriculum in the Family Law course. Some of them show up, as well, in courses on Criminal Law, Property, and Discrimination in Employment, but few of them involve the American family as such. Their effects on it, if any, are incidental and certainly far from uniform. When Professor Rubin says "[a]bortion is a family issue because reproductive control undermines traditional family structures," she is talking nonsense. One woman's abortion might undermine her traditional family, but another's might shore up hers, for example, by enabling her and her husband to limit their children to the number they can support. A third woman's abortion might have no effect on any traditional family. Abortion is not a "family issue"; it is just what the Court says it is: a matter of individual right for all women—married, unmarried, adult, or minor, regardless of family status or lack of it.

Whatever the underlying motivations, the Court's opinions are coming down more frequently against traditional family values than for them. The cases dealing with contraception and abortion are perfect examples. Rubin herself tells us that the state purpose in passing the laws challenged in these cases was to shore up traditional family values:

> [L]aws restricting contraceptive practices and abortion, like the penalties on illegitimacy, are part of the legal infrastructure designed to ensure that sexual activity

> resulting in reproduction takes place within marriage. Sexual opportunities outside of marriage decrease incentives for individuals of both sexes to take on the responsibilities and burdens of marriage and child-raising.

When the Supreme Court invalidates laws restricting abortion and the use of contraceptives, and penalizing illegitimacy, if it is deciding anything about families at all, as Professor Rubin insists it is, it cannot be deciding to protect traditional family values. If that had been the Court's goal, the decisions would have gone the other way.

Indeed, in four decisions which Professor Rubin unaccountably leaves out of her book but which more nearly involve "family issues" than most of those she includes, the Court's track record is only one for traditional family values and three against them. In 1974, in *Kahn v. Shevin*[3] the Justices upheld a Florida statute granting a property tax exemption to widows but not to widowers. The statute's purpose was to give financial help to surviving widows on the ground that they, as dependents in marriage, were more likely to need it than men. The Court saw the traditional family as the dominant family model and described the problems that the statute addressed in terms which Professor Rubin might have used to support her thesis had she included the case in her book:

> While the widower can usually continue in the occupation which preceded his spouse's death, in many cases the widow will find herself suddenly forced into a job market with which she is unfamiliar, and in which, because of her former economic dependency, she will have fewer skills to offer.[4]

The other three cases, *Stanton v. Stanton*[5] (1975), *Orr v. Orr*[6] (1979), and *Kirchberg v. Feenstra*[7] (1981), all cut the other way—against traditional family values, specifically against the sex-based marital roles of husband as dominant breadwinner and wife as child-rearing economic dependent. In *Stanton* the issue was whether a divorced father was entitled to stop contributing to his daughter's support when she reached eighteen on the basis of a Utah statute which set the age of majority at twenty-one for boys and eighteen for girls. The Court, in holding that the father was not entitled to stop paying support and that the state's preference for the traditional family could not justify the statute treating boys and girls differently, said:

> A child, male or female, is still a child. No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and

3. 416 U.S. 351 (1974).
4. *Id.* at 354.
5. 421 U.S. 7 (1975).
6. 440 U.S. 268 (1979).
7. 450 U.S. 455 (1981).

the world of ideas.[8]

In *Orr* the challenge was to the validity of an Alabama statute making alimony available to divorced wives but not husbands. In invalidating it, the Court repeated what it said in *Stanton*. The state's preference for "an allocation of family responsibilities under which the wife plays a dependent role" and its "objective" of trying to reinforce such a model for its citizens was not a governmental purpose which could justify different treatment of the sexes.[9] In *Kirchberg* the Court invalidated a Louisiana statute which imposed the husband's traditional dominant role on Louisiana families; the statute designated husband as the "head and master" of the community assets and gave him the unilateral right to dispose of them. It is interesting to note that the Court could easily have avoided the family issues in both *Orr* and *Kirchberg*. In *Orr* there were serious preliminary questions of plaintiff-husband's standing, the timeliness of his challenge, and his obligation under state law to pay alimony regardless of the constitutionality of the statute. In *Kirchberg*, the legislature had already repealed the challenged law, substituting one providing that each spouse, acting alone, could manage, control, or dispose of community property. The Supreme Court, nevertheless took the cases and decided them squarely against "traditional family values."

Predictably, Professor Rubin does not prove her thesis. She does give us her reactions to those Supreme Court decisions she chooses to review. Her comments contain nothing new. For constitutional interpretation she is indebted to Lawrence Tribe, Arthur Selwyn Miller, Leo Kanowitz, and Sylvia Law, among others. For the sociology and history of the family and its functions, she relies on Edward Shorter, Arlene and Jerome Skolnick, Christopher Lasch, and Harry D. Krause, among others. What Rubin has produced is the kind of manuscript that a teacher prepares for herself when getting ready to teach a class for the first time in a new subject. It is plain that in writing it she learned a lot. For example, take her view of the Supreme Court. At the beginning of the book (pp. 8, 12, and 20) she tells us that the Court is deciding cases on the basis of its own bias in favor of traditional family values. By

8. 421 U.S. at 14-15.

9. 440 U.S. at 279-80. The Court did not reject the other legislative objectives advanced to support the statute—to provide help for needy spouses, using sex as a proxy for need, and to compensate women for past discrimination during marriage which left them unprepared to fend for themselves after divorce. It merely held that such generalizations were improper in light of Alabama's individual hearings on the finances of divorcing spouses, during which the actual facts of need and past discrimination can be determined. *Id.* at 281-82.

page 183, however, her view has changed: she informs us that the Court, "like other governmental institutions has been uncertain about the direction family policy should take." So as a project in self-education Professor Rubin's book is a great success. As an exercise in coherent scholarship it is not.

THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888. By David P. Currie.[1] Chicago: University of Chicago Press. 1985. Pp. xiii, 504. $55.00.

Charles A. Lofgren[2]

Constitutional specialists who are not lawyers sometimes apply the term "law office history" to the selective and distorted probing of the past that occasionally passes as legal argument. The late Alfred Kelly once chose the apt title *Clio and the Court: An Illicit Love Affair* for a dissection of some notable examples of this kind of endeavor;[3] and many of us have had fun straightening the historical excursions of judges.

There is, however, a more laudable kind of lawyers' history, which Professor David Currie's large book exemplifies. Professor Currie has written what he calls a "critical history." "My search," he explains, "is for methods of constitutional analysis, for techniques of opinion writing, for the quality of the performances of the Court and of its members." The result, according to the dust jacket, is a study that "analyz[es] the Court's constitutional work from a modern lawyer's point of view." This latter claim, I suspect, is only partly true, and as history the book has faults; but no one can deny that Currie has given us a thorough, systematic, and careful assessment of the constitutional work of the Supreme Court during the period 1789-1888.

Currie's subject matter is the thousand or so cases of constitutional significance during the Court's first century. The organization is conventional, by each Chief Justice's "Court," except that the tenures of John Jay and Oliver Ellsworth (1789-1801) are grouped together. This first period receives fifty-five pages of cover-

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3. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119. *See generally* C. MILLER, THE SUPREME COURT AND THE USES OF HISTORY (1969).