The Judicial Bookshelf

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The last day of January 2017 was judicially notable as President Donald Trump introduced Judge Neil M. Gorsuch of the United States Court of Appeals for the Tenth Circuit as his choice to fill the vacancy on the Supreme Court occasioned by the death of Justice Antonin Scalia on February 13, 2016. In his response minutes later to the President's announcement, Judge Gorsuch informed the nation that he began his "legal career working for Byron White, the last Coloradan to serve on the Supreme Court, and the only Justice to lead the NFL in rushing."[1] Yet it was also true that upon confirmation Judge Gorsuch would become only the second Justice ever appointed from the Centennial State.[2] Quoted in a news article the following day, U.S. Senator Gory Gardner of Colorado echoed a similar point, referring to the nominee as a "man of the West."[3]

Voting 11–9 along party lines, the Senate's Committee on the Judiciary cleared the nomination on April 3. After a filibuster by Democrats initially blocked consideration by the full Senate, the Republican leadership responded by deploying what has come to be called the "nuclear option." Effectively a change in the rules of the chamber, this move allowed the process to proceed by simple majority vote, rather than the sixty votes that otherwise would have been required to end debate. The Senate confirmed the nominee 54–45 on April 7, and he was sworn in on April 10 at ceremonies first at the Court and then the White House. Affirmative votes on the nomination were the fewest for a Supreme Court seat since Justice Clarence Thomas was confirmed in 1991 on a 52–48 vote. Reflecting increased congressional polarization, the Gorsuch tally also contained the smallest number of votes (three) from the opposition party since Justice Samuel A. Alito Jr.'s confirmation in 2006, with four.[4] [The new Justice's first opinion was issued on June 12 in *Henson v. Santander USA Consumer*,[5] in which he wrote for a unanimous Court.]

Ironically, the earlier comments by both Gorsuch and Gardner indirectly aligned with a concern that Justice Scalia had articulated when he dissented in the Court's ruling thirty months earlier on same sex marriage: "Judges are selected precisely for their skill as lawyers," he wrote. "[W]hether they reflect the policy views of a particular constituency is not (or should not be) relevant. Not surprisingly then, the Federal Judiciary is

hardly a cross-section of America. Take, for example, this Court, which consists of only nine men and women, all of them successful lawyers who studied at Harvard or Yale Law School. Four of the nine are natives of New York City. Eight of them grew up in east- and west-coast States. Only one hails from the vast expanse in-between. Not a single Southwesterner or even, to tell the truth, a genuine Westerner (California does not count)."[6] While region may have played no part in the President's decision, the observations by both Judge Gorsuch and Senator Gardner brought to mind a consideration that at times has been highly influential in Supreme Court nominations: geography.

It is sometimes forgotten that the federal judicial system, including the Supreme Court, that was first made a reality by the Judiciary Act of 1789 and President George Washington's subsequent appointments, had no parallel under the Articles of Confederation. That early attempt at a governing charter for the United States offered no model of pre-existing national courts for the First Congress to follow. Therefore, "no Light of Experience nor Facilities of usage and Habit were to be derived," explained Chief Justice John Jay in a charge to a grand jury while sitting on circuit court in 1790. "The Expediency of carrying Justice to every Man's Door, was obvious; but how to do it in an expedient Manner was far from being apparent."[7]

In creating the first national courts for the United States in September 1789, Congress divided the eleven member states of the Union—North Carolina would not ratify the Constitution until November 1789, and Rhode Island not until May 1790—into three circuits: eastern (New York, Connecticut, Massachusetts, and New Hampshire); middle (Pennsylvania, New Jersey, Maryland, Delaware, and Virginia; and southern (South Carolina, and Georgia). Oddly perhaps from the perspective of someone today, the resulting system of three kinds of courts (district, circuit, and supreme) were to be staffed by only two categories of judicial personnel (district judges and Supreme Court Justices), an organizational arrangement that—except for the addition of circuits as settlement progressed westward—largely persisted for roughly a century.

In making nominations for the six High Court seats that Congress initially authorized, President George Washington methodically took region and the circuit system into account. Appointed as Chief Justice, John Jay was from New York, Associate Justice William Cushing from Massachusetts, James Wilson from Pennsylvania, Robert Harrison from Maryland, John Blair from Virginia, and John Rutledge from South Carolina. When Harrison, preferring service on his home state bench, declined to serve, Washington turned to James Iredell of North Carolina, who joined the Court in time for its second session. Thus, with Iredell's arrival, there were two Justices from the eastern, two from the middle, and two from the southern circuits. Plainly, along with merit and a record of discernible support for the Constitution, geography dictated selection at the outset.

While the circuit system understandably created the norm that, when a vacancy arose, Presidents would typically nominate from within the circuit, abolition of the circuit system with creation of the courts of appeals and elimination of circuit riding in 1891 accordingly freed Presidents to search more nationally. Henceforth, the importance of region diminished, even though regional "representation" would still occasionally be mentioned in the context of nominee selection and confirmation proceedings.

For example, Judge Willis Van Devanter's Wyoming residency, among other factors, made him the choice of President William Howard Taft in 1910 to fill the vacancy created when Taft named Associate Justice Edward Douglass White Chief Justice following Melville W. Fuller's death.[8] When Justice Louis D. Brandeis retired in 1939, President Franklin D. Roosevelt reportedly wanted a

"Westerner" on the Court and was quickly drawn to William O. Douglas, who, although born in Minnesota, had been reared in Washington State. Douglas, however, had spent the better part of his professional life in the East. Thus, it was the endorsement of Senator William Borah of Idaho, ranking member of the Senate's Judiciary Committee, that made the President's choice easier when Borah hailed Douglas as "one of the West's finest and brightest sons."[9] Region again influenced Roosevelt when Justice James F. Byrnes—utility player from South Carolina in the FDR and later Truman administrations—resigned after barely a year on the Bench. For this seat, FDR got full credit for making a trans-Mississippi appointment in his choice of Judge (and former law school dean) Wiley Rutledge of Missouri, over alternate contender Judge Learned Hand of New York.[10] Similarly reflecting a regional focus, the cover page of the printed hearings on a Supreme Court nominee distributed by the Judiciary Committee, at least through the hearings for Judge John Paul Stevens in 1975, specified the nominee's home state, and even today nominees are often accompanied and introduced at the committee's hearings by a home-state Senator.

Moreover, there have been notable examples of the reemergence of geography as a principal concern in appointments since the Roosevelt era. One was driven by a pertinacious localism bordering on extortion, Washington-style, and the other by political strategy. Neither experience is probably familiar today to anyone whose judicial awareness begins only with the late Burger Court years.

The first involved the recess appointment for Chief Justice that President Dwight Eisenhower—not ten months into his first term—tendered to California Governor Earl Warren on October 2, 1953, following Chief Justice Frederick Vinson's death on September 8. According to one chronicler of the incident, Eisenhower and Attorney General Herbert Brownell apparently anticipated routine confirmation after Congress reconvened in January 1954, at which time the President made the formal nomination on January 11. However, neither the President nor the Attorney General had "reckoned with the die-hard, perverse opposition of Republican Senator Robert Langer of North Dakota," who, as a member of the Judiciary Committee, "had then begun his prolonged six-year campaign of opposing any and all nominees to the Court until someone from his home state (which had never been so honored) received an appointment."[11] Senator Langer's "hold" on the nomination, combined with delaying tactics by some conservative Democrats held up a confirmation vote until March 1, 1954, when it proceeded successfully on a viva voce.

Senator Langer also delayed the Senate's consideration of President Eisenhower's nomination on November 8 of Judge John Marshall Harlan for the vacancy created by the death of Justice Robert H. Jackson in October 1954. The delay in this instance, however, was not over the absence of someone from Langer's home state but, as Professor John Q. Barrett has explained, was apparently done to accommodate Senator James Eastland, Democrat of Mississippi, who was wary of Harlan's views on racial discrimination at a time when the implementation of *Brown v. Board of Education*,[12] the landmark school segregation decision, decided the preceding May, was on the Court's docket.[13] (Harlan was confirmed 71–11 on March 16, 1955. Senator Langer died in 1959, and the roster of Justices has yet to include a North Dakotan.)

The second episode was more complex but merits review here in the context of continuing nomination contentiousness in the Senate. It followed in the wake of Justice Abe Fortas's resignation on May 16, 1969, the first such departure from the Court because of public criticism. For his seat, President Richard M. Nixon, who had been inaugurated only four months earlier, selected

Judge Clement Haynsworth of South Carolina, who sat on the Court of Appeals for the Fourth Circuit. Resistance mounted as civil rights organizations claimed the nominee was racially biased and pointed to cases in which he had taken a restrictive view of school desegregation. Similarly, organized labor argued that Haynsworth was unfit because of anti-union rulings. Yet ideological objections alone or even combined with hard feelings among liberal Democrats stemming from the Fortas resignation would probably have been insufficient to defeat Haynsworth. Looking for another way to scuttle the nomination, Birch Bayh of Indiana, leader of the anti-Haynsworth Senators, seized upon his insensitivity to judicial proprieties—specifically two cases in which Haynsworth arguably should have disqualified himself. Because ethics had been central to calls for Fortas's resignation, Bayh's strategy of combining ethics and ideology worked, as fifty-seven Senators, including some northern Republicans but no southern Democrats, voted against confirmation. (Some years later, John P. Frank, an expert on judicial ethics and a scholar not disposed to Haynsworth's jurisprudence, concluded that the ethical charges were vastly overblown and served only as a cover for Senators not willing openly to oppose Haynsworth on ideological grounds.[14]

Nixon countered with the nomination of Judge G. Harrold Carswell of the Fifth Circuit Court of Appeals, a Floridian with a tough law-and-order record. Described by Attorney General John Mitchell as "too good to be true,"[15] the nominee combined avowed racism (which he now disavowed) with minimal professional qualifications. Verifying the latter criticism, Senate supporter Roman Hruska of Nebraska gallantly attempted to convert the liability into an asset. "Even if he is mediocre, there are a lot of mediocre judges and people and lawyers. They're entitled to a little representation aren't they, and a little chance? We can't have all Brandeises and Frankfurters and Cardozos and stuff like that there."[16] The 51–45 vote against Carswell marked the first time since the second Cleveland Presidency in 1893 and 1894 that the Senate refused to accept two nominees for the same Supreme Court vacancy.

In a televised address on April 9, 1970, Nixon accused the Senate of regional discrimination, concluding "with the Senate as presently constituted—I cannot successfully nominate to the Supreme Court any federal appellate judge from the South who believes as I do in the strict construction of the Constitution."[17] The administration's failures may well have reinforced the Republican strategy of gaining support in the South, where the Democratic Party had been dominant for decades. Nixon could blame the defeats on an ensconced anti-Southern liberal elite determined to maintain the Court as its own reserve.[18]

Appearing to have at least temporarily abandoned his regional preference for the Fortas seat, the President then turned to Chief Justice Warren Burger's longtime Minnesota friend, Harry Blackmun of the Eighth Circuit Court of Appeals. Arousing little concern, "old number three" (as Blackmun would later occasionally refer to himself) passed the Senate 94–0. When he joined the Court on June 9, nearly thirteen months had elapsed since Fortas's departure.

In the fall, however, the President indicated again a preference for a nominee from the South. Some observers thought the most likely spot to be vacated was the one occupied by eighty-four-year-old Justice Hugo Black. Asked for his reaction, the Alabamian replied, "I think it would be nice to have *another* Southerner up here."[19] A double opportunity was then handed the President in September 1971 when Justices Black and John Marshall Harlan, both ailing, resigned within days of each other. For Black's seat, Nixon named Lewis F. Powell, Jr., an attorney from Richmond, Virginia, and a Democrat, who received an easy approval

In his new work, *The Coming of the Nixon Court*, Earl M. Maltz argues that *Frontiero v. Richardson* illustrates the decisional pattern that typified the Bench in the 1972 Term. Above is Lt. Sharron Frontiero, who was denied a married housing allowance by the Air Force because her husband was not dependent on her for more than half his support.

vote of 89–1 in the Senate on December 6. For Black, the President chose Arizonan William H. Rehnquist, then serving as assistant attorney general in charge of the Office of Legal Counsel in the Department of Justice. The Rehnquist nomination ran into rough waters, but survived in a vote of 68–26 on December 10.

The Nixon episode—more consequential than Langer's—remains especially notable in that a President seemed to equate region at least partly with an assumed constitutional perspective, even as he pursued partisan advantage. The Nixon maneuverings were testimony to the widely shared conviction that those who sit on the Supreme Court matter significantly in terms of what the law of the land becomes, as recent books about the Justices and their work amply demonstrate. Moreover, the Nixon nominations helped to shape the subject of **The Coming of the Nixon Court** by Earl M. Maltz of the Rutgers University School of Law.[20]

As the author observes in the preface, historical studies of the jurisprudence of the Supreme Court typically "take one of a number of standard forms."[21] Among the most familiar is the doctrinally or topically focused project on a single decision or, more commonly, a range of decisions. Another might encompass many areas of law by way

of the work of a single Justice or perhaps a group of Justices during the tenure of a particular Chief Justice. Maltz has undertaken something entirely different: an in-depth study of the Court's performance during a single term—1972. His intent is "to situate that performance within the political and jurisprudential context of that period as well as to describe the approaches taken by the different members of the Court and to highlight the interactions that ultimately produced the pattern of decisions"[22] during that term. Maltz's approach is reminiscent of that taken by Gerald T. Dunne midway in his biography of Justice Joseph Story,[23] where part four is entitled "The Great Term," with its emphasis on the Dartmouth College case.[24]

Just as Dunne highlighted a particular term in Story's career for good reason, Maltz explains that several considerations guided his selection of the 1972 Term. That year marked the first complete term with the participation of all four Justices appointed by President Nixon, whose campaign for President in 1968 had included promises "to choose justices who would stem the tide of what he characterized as excessive liberal activism by the Warren Court."[25] Of the four, the author believes that the latter two—Lewis F. Powell, Jr., and William H. Rehnquist—had a significant impact on the evolution of constitutional doctrine, even though each came to the Court with no judicial experience, a background fact not repeated successfully[26] until Elena Kagan's appointment by President Obama in 2010.

Second, the Nixon quartet "substantially changed" the Court's "ideological balance." In the author's view, the Court during the late Warren era was "something of a historical anomaly—an institution dominated by progressives that also lacked any representation from true conservatives. Added to that Bench, the Nixon appointees "created a far more politically diverse Court, including not only committed progressives and conservatives but also justices with a wide variety of more moderate views. Thus, one could reasonably expect the behavior of such a Court to be fairly representative of the Court generally over time."[27]

Third, "one would be hard-pressed," writes Maltz, "to find another term in the late twentieth century in which the Court dealt with so many issues with major implications for the future of constitutional law." The 1972 Term, after all, included the court's groundbreaking and ground-shaking decision on abortion rights in *Roe v. Wade*,[28] the effects of which on culture and politics continue today. Alongside that ruling, moreover, were others on a range of salient issues: criminal justice, school desegregation, school finance, obscenity, poverty, gender bias, and government aid to religious schools.

Measuring the impact of Supreme Court decisions or ranking the importance of various terms raises a set of challenging empirical, normative, and methodological questions, and one suspects that it is intellectually less risky to follow the course Maltz has chosen here by identifying a term dense with decisions that seemed important nationally not only when they came down but that remain so with the benefit of distant hindsight. The list of rulings from1972 amounts to a vivid and continuing validation of Alexis de Tocqueville's characterization of America in the Jacksonian era that "[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."[29]

In reviewing the Court's work on a range of topics, Maltz finds that a consistent pattern emerged. Progressives "could generally count on the votes of Justices . . . Douglas, . . . Brennan, and Thurgood Marshall. By contrast, Justice . . . Rehnquist was an equally reliable conservative vote and was usually joined by Chief Justice . . . Burger. Thus the balance of power rested with holdover Justices Potter Stewart and Byron R. White and Nixon appointees . . . Blackmun and . . . Powell, none of whom had views on constitutional law that could be described as either

consistently progressive or consistently conservative. Instead, the political orientation of each of these Justices depended on the particular issue being considered. Conservatives prevailed whenever they could attract the votes of three of the four centrist judges. Otherwise, the progressives emerged victorious."[30]

Given that dynamic, Maltz believes a general political or jurisprudential overview about the term would be misleading. "Instead, the overall pattern of the decisions is nothing more or less than the sum of a number of individual decisions, each of which was produced by interactions among nine men with widely disparate world views"[31] that flowed from a blend of individual judgments and compromises as opinions were drafted and shaped.

Methodologically the author arrives at this conclusion on the basis of a series of eight "independent stories,"[32] each of which focuses on a particular area of constitutional law as illustrated by the term's decisions and those related to them. Together these accounts comprise the bulk of the book's eleven chapters. Instructively, the chapters are much more than basic legal analysis, as important as that remains. Rather, Maltz enriches discussion of outcomes with a detailed look at the process within the Court through which various results were reached. These stories then come to life thanks to the author's extensive use of various manuscript sources, including the papers of Justices Blackmun, Brennan, Douglas, Marshall, Powell, Stewart, and White, with their memoranda and drafts of opinions that were circulated among the chambers.[33]

For example, chapter eight deals with gender discrimination, principally the Court's ruling in *Frontiero v. Richardson*,[34] a decision that illustrates the decisional pattern that Maltz believes typifies the Bench in the 1972 Term. But to appreciate *Frontiero*, one should keep in mind *Reed v. Reed*,[35] a seminal and unanimous Supreme Court decision that in many casebooks has strangely been all but relegated to brief mention in a footnote. The litigation began after Richard Reed, the sixteen-year-old son of Cecil and Sally Reed committed suicide. Both Cecil and Sally Reed, by then divorced, applied to the probate court individually to administer the small estate. Under Idaho law, when a person died intestate, as had Richard Reed, the court appointed an administrator. In choosing among equally qualified persons for that responsibility, however, state law directed the court to prefer a male to a female. Applying a traditional rational basis analysis, a unanimous bench held that to "give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment."[36]

Because the Constitution had been the battleground for many decades in the struggle for racial equality, the casual observer might have supposed that gender equality had occupied the attention of Congress and the courts for just as long. It had not. While there had been opponents of gender-based discrimination since the earliest years of the Republic, for a long time Justices of the Supreme Court did not seem to be among them. Future Justice Ruth Bader Ginsburg herself had been turned down for a Supreme Court clerkship in 1960 by Justice Felix Frankfurter, who is supposed to have explained to her professor at Harvard Law School that he just wasn't ready to hire a woman.[37]

Nonetheless, the decision in *Reed* was noteworthy in that it marked the first time that the Supreme Court invalidated a gender distinction. *Reed*'s resolution under the traditionally relaxed standard of rational basis, however, raised the question whether other gender-based classifications would be similarly adjudicated and therefore possibly

deemed permissible, or whether they would be labeled "suspect" and therefore made subject to the more demanding test of strict scrutiny that the Court employed with respect to race. As Maltz recounts, the Court confronted that option squarely in *Frontiero*. At issue was a federal law that treated male and female personnel in the armed forces differently in allocating support for dependent spouses. The wife of a male service member was presumed to be a dependent, while husbands of female members of the military were not accepted as dependents unless they could establish that they were reliant on their wives for over one-half of their support.

In contrast to *Reed*, however, *Frontiero* was brought not under the Fourteenth but instead had to rely on the due process clause of the *Fifth* Amendment. The Fourteenth Amendment by its own wording applies only to states and their subdivisions, while the Fifth Amendment has always limited actions by the national government, as Chief Justice John Marshall made clear in *Barron v. Baltimore*.[38] Yet, at least since *Bolling v. Sharpe*,[39] in which the Court invalidated racially segregated schools in the District of Columbia, the Justices have also recognized what amounts to an equal protection component within the Fifth Amendment's due process clause.

In *Frontiero*, however, even though a large majority of the Court was prepared to strike down this gender distinction in military pay—only Rehnquist was willing to accept its constitutionality—there was not majority agreement on the basis for such a conclusion. While Douglas, Marshall, and White were willing to follow Brennan's lead in elevating gender to the category of suspect classifications, the necessary fifth vote for that step failed to come forward. Instead, Blackmun, Powell, and the Chief Justice "relied on *Reed* and focused on the pendency of the ERA."[40] In other words, this trio believed that the Court should not intervene just as the Constitution's Article V amendment process seemed on the verge of making the same change. [Proposed by Congress in 1972, section 1 of the Equal Rights Amendment read: "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex." The original seven-year time limit set by Congress for ratification was later extended to June 30, 1982, but even by then only thirty-five states—three short of the requisite thirty-eight—had ratified.] As Maltz explains, Brennan nonetheless attempted to persuade his hesitant colleagues by noting that the early momentum for ratification had slackened. He also urged them to keep in mind that Congress had legislated against gender discrimination in the Equal Pay Act of 1963 and in the Civil Right Act of 1964, arguing from those measures that a coequal branch of government had previously made the same determination he was urging on the Court. Yet, as Maltz injects, Brennan may have simultaneously undercut the persuasiveness of his own claim in that the same legislative record could also be viewed to demonstrate that the political process already factored the needs of women into legislation, thus making the need for bold action by the Justices at that time seem less compelling.[41] As for Justice Stewart, he concurred separately in the result, referenced *Reed*, and insisted that the statute "worked an invidious discrimination."[42]

Brennan's defeat in *Frontiero* was far from total, however. To be sure, the rational basis test had not been expressly abandoned by the Court for gender cases, but "eight of the nine justices plainly signaled that they would view discrimination with considerable suspicion."[43] Moreover, within three years, *Craig v. Boren*[44] made clear that gender cases would now be judged by a heightened scrutiny that came to be called near strict scrutiny whereby "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[45] In this

instance Justice Brennan may have lost the battle, but in large measure he won the war.

What the Court did and refrained from doing in *Frontiero* fits the overall pattern Maltz develops that was followed by the Court Nixon helped to fashion. While the progressives who dominated the Warren era at times "sought to fundamentally restructure the governmental decision-making process and US society generally, the centrists who controlled the Burger Court believed that the Court should focus almost exclusively on the injustice of individual decisions made by the government and generally resisted efforts to involve the Court in major structural reforms. More than any specific doctrinal innovation, this change in emphasis—clearly evident by the end of the 1972 term—was the most important jurisprudential development of the Burger era."[46]

Maltz's focus on the 1972 Term rested not only on a belief that those decisions mattered but also on an unarticulated assumption regarding the Court's ability to accomplish change. Effecting change undergirds **U.S. Supreme Court Opinions and Their Audiences**, a compact and instructive monograph by Ryan C. Black, Ryan J. Owens, Justin Wedeking, and Patrick C. Wohlfarth, who teach political science at Michigan State University, the University of Wisconsin–Madison, the University of Kentucky, and the University of Maryland, College Park, respectively.[47]

Interest in the Court's impact was the central concern of **The Nature of Supreme Court Power** by Matthew E. K. Hall, published several years ago.[48] As Hall noted in that volume, at least in the years since the Court's 1954 landmark ruling in *Brown v. Board of Education*, scholars have differed over what many in the general public probably accept without question about the Court—that the Justices collectively have real power in the political system. In one view the Supreme Court occupies a commanding position, capable of promoting justice and protecting minority rights by enforcing its interpretation of the Constitution or in other contexts at least being heavily influential during specific periods of American history. Yet, an alternate view has depicted the Court as a much less influential institution that may issue high-minded rulings but lacks the power to ensure that those rulings are actually implemented.

In Hall's view neither of these perspectives accurately depicts the Supreme Court's true influence. Were the Court entirely ineffective, one would wonder why individuals, corporations, and interest groups invest so much time, energy, and money in litigation. Neither would one realistically expect the Court to be all-powerful in a political system characterized by separation of powers and federalism that, combined, create multiple centers of political influence. Instead, Hall's conclusion was what one might have expected—that the true nature of the Court's power falls somewhere between these extremes. More specifically, the task his book set out to accomplish was to determine the circumstances and conditions that facilitated judicial influence and the conditions and circumstances that hindered or weakened such influence.

Hall found that the Court tended to be most influential in what he called vertical situations, where implementation of the Court's ruling was in the hands of judges. Somewhat more problematical for implementation were what he called lateral situations, where application of a ruling lay outside the judicial hierarchy, as occurs when application of a ruling is in the hands of and requires the cooperation and support of governors, state legislatures, municipalities, school boards, and or administrative agencies. A link between both books is that each is concerned with the impact of Supreme Court decisions, in both a general and specific sense. To one degree or another that subject has been on the minds of Justices for most of American national history and of students of the Court for at least several decades, as the work of

Jack Peltason, Stephen Wasby, and others illustrates.[49]

The focus by Black, Owens, Wedeking, and Wohlfarth on "audiences," as their title promises, connects with Hall's book in that the audiences—those who receive, read, and ponder decisions by the Supreme Court also include those who in many instances bear the responsibility for carrying them out. Moreover, as will be explained in detail below, it is significant that the authors speak in the plural. That is, the Court has not a single audience, but several. Significantly, to illustrate this point the authors' book opens with discussion of *Swann v. Charlotte-Mecklenburg Board of Education*,[50] a case decided in the spring of the 1970 term but nonetheless also discussed at some length in Maltz's book on the 1972 term.[51]

In this ruling the Court upheld an integration plan involving widespread busing within a single metropolitan school district in North Carolina. Among the larger districts in the United States, it encompassed some 550 square miles and enrolled 84,000 students. A previous desegregation plan had left in place large numbers of predominantly one-race schools. Not surprisingly, this residual segregation in the schools was caused partly by racially segregated neighborhoods, themselves shaped over the years by a system of legally enforced school segregation prior to 1954, as whites tended to live near schools legally mandated for white children and black families near those designated as black schools. The extensive remedial plan under review in *Swann* had been imposed by Judge James McMillan of the Western District of North Carolina and involved transporting large numbers of black children to Charlotte's suburbs and reverse busing of some white children from outlying neighborhoods into the city proper. Judge McMillan's order had been wildly unpopular with some residents who burned the judged in effigy. "The objective today," declared Chief Justice Burger in upholding the plan "remains to eliminate from the public schools all vestiges of state-imposed segregation."[52] The key point of *Swann* was that results, not merely the design of the plan itself, would determine whether constitutional standards had been met.

Swann came down sixteen years after the second Brown decision, often referenced as *Brown II*,[53] and had laid out the guiding principal for implementation of *Brown I*. Chief Justice Earl Warren, speaking for the Court in *Brown II* as he had in *Brown I*, expressed the conclusion that desegregation in public education would necessarily take place at varying speeds and in different ways, depending on local conditions. Federal judges, he wrote, employing the flexible principles of equity, now had the task of determining when and how desegregation should take place. Then in a historic pronouncement he concluded, "The judgments below . . . are remanded to the district courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis *with all deliberate speed* the parties to these cases."[54]

Even in areas like North Carolina where implementation of *Brown* had not been met by the kinds of massive resistance seen in other Southern states, cases like *Swann* were themselves evidence that considerable uncertainty still prevailed among school boards and in courtrooms as to what compliance with *Brown* actually entailed. Part of the uncertainty lay in *Brown I* itself, where Chief Justice Warren had written that "[s]eparate educational facilities are inherently unequal."[55] That statement raised the question whether the constitutional violation stemmed from the fact of separateness itself or from the state's role in making and keeping facilities separate. Moreover, what kind of timetable was suggested by "all deliberate speed"? Except at the extremes, how would one distinguish compliance from non-compliance?

Thus, as the co-authors make clear, much was on the line as Chief Justice Burger crafted his opinion in *Swann*, the hope being that enhanced clarity would generate enhanced compliance. In particular, Justice William J. Brennan, Jr., was concerned that without careful wording the opinion might encourage resistance, not cooperation. "We deal here with boards that were antagonistic to *Brown* from the outset and have been noteworthy for their ingenuity in finding ways to circumvent *Brown*'s command, not to comply with it. I think any tone of sympathy with local boards having to grapple with problems of their own making can only encourage more intransigence . . . We might court a revival of opposition if we provide slogans around which die-hards might rally." Recognizing the importance of clear and direct language, Brennan continued. "For me the matter of approach has assumed major significance in light of signs that opposition to *Brown* may at long last be crumbling in the South . . . I nevertheless suggest that our opinion should avoid saying anything that might be seized upon as an excuse to arrest this trend. Some things said in your third circulation seem to me to present that hazard."[56]

Much more recently, Justice Clarence Thomas made a similar point in response to a question about his own opinion-writing, outside the context of any specific legal issue. "There are simple ways to put important things in language that's accessible . . . [and] the editing we do is for clarity and simplicity without losing meaning . . . We're not there to win a literary award. We're there to write opinions that some busy person or somebody at the kitchen table can read and say, I don't agree with a word he said, but I understand what he said."[57]

The Brennan and Thomas statements illustrate the link that may exist between language and compliance and suggest that an opinion should be tailored to its intended audience. This is a tenet that would seem obvious to any manager, teacher, or military officer who has ever given instructions with the hope of encouraging actions and achieving particular results from employees, students, or soldiers. Indeed, Black and the other authors suggest that clearly written opinions have four distinct advantages in that they remove or narrow leeway for discretion. Second, at least in an organizational setting, "opinion clarity can help whistle-blowers monitor and report on the behavior of actors who defy the Court." Third, clear opinions "can serve as instructions that help guide actors who are inclined to follow the Court's decisions but might not have the resources to do so." Finally, writing clear opinions helps the Court "manage its legitimacy . . . Those who read Court opinions expect them to be coherent and understandable, and when they are not, the Court might suffer. The rule of law supposes clarity. So when Justices write unclear opinions, they fail to fulfill one of their key obligations. By writing clear opinions, they can maintain—and perhaps even—improve the Court's reputation."[58] That is, increased clarity not only makes explicit what is expected and what is supposed to be achieved but thereby reduces opportunities for deviation or variation by those who might otherwise be hesitant, unenthusiastic, uncooperative, or downright obstreperous.

These managerial and leadership verities are applicable in a judicial context because, as the authors explain, Supreme Court decisions typically "do not mark the beginning or the end for most legal controversies but, rather, the end of the beginning. Rarely does the Court have the last say or take the last action in a case. Instead, others must implement or apply its policies." As the authors phrase the question at the level of the individual Justice, "do I seek out my own goals without regard to the response of my audiences, or do I try to anticipate and manage audience-based obstacles?"[59]

Thus the central objective of the book "is to examine whether justices modify the

clarity of opinions to enhance compliance with their decisions and to manage support for the Court." Recognizing that they are not the first to suggest that a particular audience may influence how judges behave, the authors do claim to be the first "to examine systematically how justices change the clarity of their opinions because of those audiences."[60]

The authors adhere to a familiar division of the Court's audiences. The *interpreting audience* consists almost exclusively of judges who read, construe, and apply Supreme Court decisions. In their study, statistically structured as it is, the authors focus nearly entirely on those who sit on the federal benches although, practically speaking, the interpreting audience necessarily must include the far more numerous judges on the state and local benches too. Second is the *implementing audience*, consisting of those who execute or put the Court's decisions into practice. This group is numerically enormous, surely outnumbering the first audience in that it consists of law enforcement and penal personnel, public school employees, and regulatory agencies and their staffs. Any tally jumps from hundreds into thousands. Moreover, the combination of the first and second audience groups, as the authors remind the reader, presents ample opportunities at different decision points for obstruction of the High Court's rulings for anyone so inclined. Third is the *consuming audience*—those who will receive benefits or suffer penalties because of what the Court does, and who therefore may dodge the Court's ruling by altering their behavior or situations. The last group is the *secondary audienc*e, or in common parlance, the general public. Because "the Court relies on public support to maintain its legitimacy" the public "stands in a position to assist the Court by supporting its decisions or, alternatively, opposing them and the Court."[61] One significant part of this secondary public would presumably be what Gabriel Almond many years ago called "the attentive public"[62]—that part of the population that follows and cares about what happens to an issue or issues.

While the need for clarity may seem apparent, can clarity be measured? Or is clarity mainly a subjective reaction or judgment by the reader in the way that beauty is sometimes said to lie within the eye of the beholder? The question in this instance is important because the core of the book is an examination of the variations in clarity across Supreme Court opinions as the Court addresses different audiences. Given that the authors' book relies heavily on comparative data, some standard and consistent way of determining clarity is imperative.

The authors explain that for them clarity is "textual readability," and they define readability as "the ease with which a layperson can read and understand the language of the Court's opinions." They then generate readability scores, which are quantified estimates of the difficulty of reading the selected prose. Developed originally by reading experts to define reading levels for school textbooks, these tools are today used in other settings by government agencies and insurance companies. Applied in this book, the resulting scores "measure the difficulty a general reader is likely to encounter when reading a court opinion"[63] where a larger score indicates more readable text, and a smaller score points to less readable text.[64] The authors discover an encouraging result. Among the many opinions they "graded," and with the exception "of a handful of very unreadable opinions, the distribution is a symmetric, bell-shaped distribution."[65]

The authors then test several hypotheses and report their findings. First, "when circuits are ideologically disparate from one another—and therefore more likely to conflict with each other over the proper interpretation of law—justices writer [*sic*] clearer opinions."[66] In these situations, the judicial motivation is probably two-fold: to reduce future conflicts *among* the circuits as

well as to reduce variation *between* lower court rulings and the Court's view of the law. In short, readability and anticipated compliance are positively linked.

Second, the Justices write clearer opinions when they rule against what the authors describe as a "lower quality agency," by which they mean a unit within the federal bureaucracy that is less professional than others and has a small staff, small budget, poor appellate legal advisors, and unclear goals.[67] Third, a similar finding occurs when the audience for an opinion consists of less professionalized state governments that tend to be characterized by citizen legislatures, as opposed to professionalized legislatures. This effect, they report, is exacerbated when the court faces a politically unified state. Fourth, with the secondary audience (public opinion), the finding is compatible with the others in that the "Court writes increasingly readable opinions when it rules against public opinion." Thus, "when justices have the most reason to expect the least compliance, they write clearer opinions."[68] The point may seem obvious, but it also poses the question how the Justices gage public opinion, and whether such gauging is done collectively or individually.

With their focus on assessing opinion clarity, the authors only tangentially refer to the legal and intellectual integrity of decisions, but were they someday to undertake polling of scholars to determine the ten most questionable decisions by the Supreme Court during the past twenty years, *Kelo v. City of New London*[69] might well make the list. Certainly, based upon **The Grasping Hand**, George Mason University law professor Ilya Somin would think the case belongs in such undistinguished company.[70] In this ruling from the last days of the Rehnquist Court, five Justices held that the homes of Susette Kelo and several neighbors who were long-term residents of the Fort Trumbull neighborhood of New London, Connecticut, could be taken by the municipality in condemnation proceedings under eminent domain for the purpose of economic redevelopment. Somin's title is therefore itself significant. As he explains, just as Adam Smith argued more than two centuries ago in his **Wealth of Nations** that private property together with a decentralized market generated prosperity as if by "an invisible hand," eminent domain relies on *the grasping hand* of government to accomplish its purposes.[71]

The constitutional provision at issue in *Kelo* was the last clause of the Fifth Amendment: "nor shall private property be taken for public use, without just compensation." Applicable to the national government since ratification of the Bill of Rights in 1791, this limitation was the first from the Bill of Rights that the Supreme Court, in 1897, made applicable to state governments and by inference to their municipal subdivisions as well.[72] Specifically, the outcome in *Kelo* turned on the meaning of "public use." Was the term meant to apply only to property seized by government, that would be maintained by government and generally open to or dedicated to the public such as roads, schools, and parks, or could it be something broader? Specifically, did public use also encompass "public purpose" where that purpose was economic revitalization? The Court's own most recent precedents hinted at a flexible approach. For example *Berman v. Parker*[73] allowed redevelopment in Washington D. C. while *Hawaii Housing Authority v. Midkiff*[74] presented a situation in which the state required large landowners to sell their property to others. Against the charge in the latter that the law took private property for private, not public, use, all eight participating Justices decided that Hawaii's plan served a valid public purpose. "Where the legislature's purpose is legitimate and its means are not irrational," declared Justice O'Connor, "our cases make clear that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in

the federal courts."[75] The hands-off approach represented by *Midkiff* may explain the willingness of the majority in *Kelo*—a majority that did not include Justice O'Connor, to approve New London's use of eminent domain.

Kelo was noteworthy not merely because of what it allowed but because it was a property rights case, a category of litigation that until the late 1930s populated the High Court's docket. Indeed, property had long held a central place in American political thought and in the way that people commonly viewed individual liberty. "The right of acquiring and possessing property and having it protected," Justice William Paterson wrote in an early circuit court opinion, "is one of the natural inherent and unalienable rights of man. Men have a sense of property: Property is necessary to their subsistence, and correspondent to their natural wants and desires; its security was one of the objects that induced them to unite in society. No man would become a member of a community in which he could not enjoy the fruits of his honest labor and industry. The preservation of property, then, is a primary object of the social compact."[76]

Paterson's point was echoed more than a generation later by Justice Joseph Story: "That government can scarcely be deemed to be free where the rights of property are left solely dependent upon the will of a legislative body without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be sacred."[77] This link between property and liberty and between property and citizenship lies at the center of *Kelo* and Somin's book.

While publication of a case study on a Supreme Court decision is happily not an unusual event, it is uncommon to have two such books published close together on the same case. Readers may recall the pair of books that appeared concerning *McCulloch v. Maryland*[78] and another pair that was issued on *Gibbons v. Ogden*,[79] both landmark rulings from the Marshall era.[80] With *Kelo*, Lexington Books published Guy Burnett's **The Safeguard of Liberty and Property** in 2015 not long before the University of Chicago Press released Somin's book in 2016. Anyone interested in *Kelo* should read both. Given its substantially shorter length, Burnett's has the advantage of brevity. With endnotes alone extending over about 100 pages, Somin's displays a treasure of scholarship and should be of particular interest to students of constitutional interpretation in the nineteenth and early twentieth centuries. Moreover, in an appendix Somin includes four pages of tables with data on private-to-private condemnations in the states. Perhaps more than with most case studies, both authors emphasize the personal stories of the individuals directly involved in and adversely affected by New London's actions.

Somin's account in particular is powerfully hostile to the trend he observes whereby courts, especially the U.S. Supreme Court, have given constitutional property rights far less protection than that routinely granted to other constitutional rights. The result is a situation where property rights are now at "the mercy of the very government officials that they are supposed to protect us against." Moreover, nowhere "was the low status of constitutional property rights more clear than in the court's [*sic*] and society's toleration of the government's use of eminent domain to take private property and transfer it to other private interests, on the theory that such policies might provide often vague and uncertain benefits to the public."[81] Equally troubling to the author, who filed a brief amicus curiae when *Kelo* was before the U.S. Supreme Court, is the fact that the decision reinforced the view that a "public use" within the meaning of the Fifth Amendment was "almost entirely up to state and local governments,"[82] a result that Justice Thomas found rich with irony.

"Something has gone seriously awry with this Court's interpretation of the Constitution. Though citizens are safe from the government in their homes, the homes themselves are not."[83]

There was a second irony as well. In his opinion for the majority, Justice John Paul Stevens recognized "the hardship that condemnations may entail, notwithstanding the payment of just compensation [and] emphasize[d] that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power."[84] Many jurisdictions have since taken that observation to heart in that dozens have enacted legislation or passed ballot or constitutional measures in response to *Kelo* that disallow a similar use of eminent domain in their particular locales.

For those like Somin who believe the Court's decision in *Kelo* was a grave error and a serious setback for proponents of property rights, he nonetheless finds that the decision represents "an important sign of progress for them in that the question posed in *Kelo* is now a live controversy among scholars, judges, and other experts." Moreover, it has caught the attention of the general public, and among salient issues, is one of the few that "cuts across race and ideological lines."[85]

Moreover, he explains, proponents of property rights have learned some key lessons through defeat. First, "for constitutional reform movements, legal action and political action are not mutually exclusive, but are mutually reinforcing." That is, without the negative publicity generated by the Court's ruling there would not have been the public interest generated in curbing the eminent domain powers in many states. Accordingly, the *Kelo* litigation "would not have gotten as far as it did if not for the careful work of a political movement that sought to make judicial protection for property rights more intellectually and politically defensible."[86] Second, the negative reaction to the decision may in fact make a future Court less hesitant to overrule it, even as the anti-*Kelo* "backlash has begun to wane." Third, a "less hopeful lesson of *Kelo* is that the political process often cannot be relied on to protect even those constitutional rights that enjoy strong support from majority public opinion" and in such instances "judicial intervention may still be a vital backstop to prevent rights violations facilitated by widespread public ignorance." Fourth, Somin points positively as a long-run consequence to "the breakdown of the post-New Deal consensus on judicial review of public use issues . . . "[87]

In his view, the close 5–4 division in the Supreme Court and the negative reaction of the public and elite opinion suggested that the scope of public use is far from settled. However, while the voting division in the case was close, the numbers alone do not necessarily suggest a different outcome in a future case. While only three members of *Kelo*'s majority continue to serve, it is also true that only one of the four dissenting Justices remains.

The personal and legal story that Somin tells handily illustrates the observation made in a wholly different context many years ago by William M. Beaney, professor of politics at Princeton University and later law school dean at the University of Denver, that "all members of a civilized society should be concerned with the means whereby any one of their number loses his liberty, for . . . each of us is threatened by an official act of injustice, which requires only acceptance and repetition to become part of our practical jurisprudence."[88]

The focus of each of the books thus far examined in this essay has at least one thing in common aside from the Court itself, and that is the work of attorneys. One states only a basic truth to observe that the federal judicial system could not function without them. However, books about the Court tend for obvious reasons largely to emphasize the Justices and their decisions, with members

of the Supreme Court bar and their work typically remaining in the background. For this reason, publication of **Fair Labor Lawyer** by Marlene Trestman, former special assistant to the attorney general of Maryland and law instructor at Loyola University of Maryland's Sellinger School of Management and Business, is a welcome event.[89] Her volume on Bessie Margolin (1909–1996) is one of the most recent additions to the Southern Biography Series issued by Louisiana State University Press, the contributions of which to the public law field date back at least to its publication of Edward S. Corwin's **Liberty Against Government** in 1948.

Trestman's well researched, meticulously documented, and engagingly written book should have wide appeal—to students of the New Deal era, the landmark Fair Labor Standards Act (FLSA), and the Department of Labor, as well as early twentieth-century Jewish life and culture in Memphis and New Orleans. Most especially her life is important for anyone interested in gender and the legal profession. A graduate of the law school at Tulane University, Margolin launched her legal career in 1930, when only about two percent of American lawyers were women. By the time she retired in 1972, she had argued dozens of cases before the federal courts of appeals plus twenty-four cases at the Supreme Court, where she prevailed in twenty-one. According to Trestman, she was one of only three women in the twentieth century to compile such a record at the High Court. Over those years she literally went from orphan to advocate.

Nonetheless, the actual writing of this book was also itself a remarkable feat, involving challenges well beyond those typically faced by someone trying to complete a manuscript. For a biography on a Justice or an elected official, there is usually a mass of public papers that are readily available and easy to consult. There may even be letters and Court memoranda available that have been carefully organized by a librarian or archivist. Such was not the case with Trestman's subject. Befriended by Margolin in 1974 when they discovered common beginnings, it was only after 2005 that Trestman seriously pursued the idea of a book on this labor lawyer and was given access to and long-term use of her personal papers by Margolin's nephew and his former wife.

It was perhaps only then that Trestman realized the full scope of the challenge she then faced. As she explains, "Margolin preserved only a hodgepodge of her work records, filling a pair of disorganized filing cabinets with correspondence, legal briefs, speeches, and news clippings." Moreover, there was no oral history, journal or scrapbook. "She left behind a few bundles of photos and private letters, many unidentified: in some cases addresses had been ripped from envelopes and postcards, while the most intimate letters she wrote and received had been penned with initials or a pet name, perhaps to confound prying eyes." That situation then compelled Trestman to look in other manuscript collections and repositories to locate "Margolin's needles in other people's haystacks."[90]

The results of the author's labors speak for themselves. Consider her recounting of what on December 19, 1935, must have been felt with a sense of drama and urgency. The occasion was the first day for oral argument in *Ashwander v. T.V.A.*[91] in the recently completed Supreme Court Building. On the motion of Solicitor General (and future Justice) Stanley Reed, Chief Justice Charles Evans Hughes admitted Bessie Margolin to the Supreme Court bar. Moreover, her name appeared on the TVA brief under the names of Attorney General Homer Cummings and General Reed, "making her the first and only woman whose name appeared on the Supreme Court brief of any of the New Deal cases" even though it would be another decade before she would speak for the government in oral argument at the High Court. *Ashwander* came

Marlene Trestman's biography *Fair Labor Lawyer* recounts how Bessie Margolin went from graduating law school at Tulane University in 1930, when only about two percent of American lawyers were women, to an illustrious career at the Labor Department. By the time Margolin retired in 1972, she had argued dozens of cases before the federal courts of appeals plus twenty-four cases at the Supreme Court, where she prevailed in twenty-one. In 1963, President John F. Kennedy honored her (second from left), and other recipients of Federal Women's Awards, at the White House.

down on February 17, 1936, with Justice James McReynolds as the lone dissenter, making the TVA the "first New Deal agency to survive Supreme Court scrutiny."[92] Similar vignettes are scattered throughout the book. The result is a volume rich in detail that not only chronicles a remarkable life but contributes to a fuller appreciation of litigation involving administrative agencies in the Supreme Court.

As with the other titles surveyed here—by Maltz, Black and his coauthors, and Somin—Trestman's contribution not only depicts the judicial process at work but is a reminder that the Court is part of a large and complex political system, with far-reaching impacts on the lives of all Americans.

THE BOOKS SURVEYED IN THIS ARTICLE ARE LISTED ALPHABETICALLY BY AUTHOR BELOW

Black, Ryan C., Ryan J. Owens, Justin Wedeking, and Patricia C. Wohlfarth. **U.S. Supreme Court Opinions and Their Audiences.** (Cambridge, United Kingdom: Cambridge University Press, 2016). Pp. 185. ISBN: 978-1-107-13714-1, cloth.

Maltz, Earl M. **The Coming of the Nixon Court: The 1972 Term and the Transformation of Constitutional Law.** (Lawrence, KS: University Press of Kansas, 2016). Pp. ix, 250. ISBN: 978-0-7006-2278-8, cloth.

Somin, Ilya. **The Grasping Hand: *Kelo v. City of New London* & the Limits of Eminent Domain.** (Chicago: University of Chicago Press, 2015). Pp. xii, 356. ISBN: 978-0-226-25660-3, cloth.

Trestman, Marlene. **Fair Labor Lawyer: The Remarkable Life of New Deal Attorney and Supreme Court Advocate Bessie Margolin.** (Baton Rouge, LA: Louisiana State University Press, 2016). Pp. xvii, 243. ISBN: 978-0-8071-6208-8, cloth.

ENDNOTES

[1] A full transcript of Judge Gorsuch's acceptance remarks appears at: http://www.denverpost.com/2017/01/31/neil-gorsuch-full-remarks-supreme-court-nomination. (Last accessed March 9, 2017.)
[2] Henry J. Abraham, **Justices, Presidents, and Senators** (5th ed., 2008), table 4, p. 50.
[3] Mark K. Matthews, John Frank, and David Migoya, "Going with Gorsuch," *Denver Post*, February 1, 2017, p. 13A.
[4] Republican Senator Johnny Isakson of Georgia did not cast a vote on Gorsuch.
[5] 137 S. Ct. 810 (2017).
[6] *Obergefell v. Hodges*, 135 S. Ct. 2584, 2629 (2015), Scalia, J., dissenting.
[7] Quoted in Maeva Marcus, ed., **Origins of the Federal Judiciary: Essays on the Judiciary Act of 1789** (1992), p. 3.
[8] Abraham**, Justices, Presidents, and Senators**, p. 136.
[9] *Id.*, 177.
[10] John M. Ferren, **Salt of the Earth Conscience of the Court** (2004), pp. 207-221.
[11] Abraham, **Justices, Presidents, and Senators**, p. 202.
[12] 347 U.S. 483 (1954).
[13] Professor Barrett writes the Jackson Blog. http://johnqbarrett.com, last accessed on April 9, 2017.
[14] John P. Frank, **Clement Haynsworth, the Senate, and the Supreme Court** (1991).
[15] Richard Harris, **Decision** (1971), p. 110.
[16] Quoted in Abraham, **Justices, Presidents, and Senators**, p. 11.
[17] The text of the address appears in the *New York Times*, April 10, 1970, p. 1. In the midterm election seven months later Republican opponents defeated Democratic Senators Albert Gore of Tennessee and Joseph Tydings of Maryland; in an earlier Texas primary, Democratic Senator Ralph Yarbrough lost to a conservative challenger. Their votes against Carswell may well have contributed to their defeats.
[18] Mark Silverstein, **Judicious Choices** (1994) p. 109.
[19] Quoted in Alpheus Thomas Mason and Donald Grier Stephenson, Jr., **American Constitutional Law: Introductory Essays and Selected Cases** (16th ed., 2012), p. 8.
[20] Earl M. Maltz, **The Coming of the Nixon Court** (2016), hereafter Maltz.
[21] *Id.*, vii.
[22] *Id.*, viii.
[23] **Justice Joseph Story and the Rise of the Supreme Court** (1970), p. 175.
[24] *Dartmouth College v. Woodward*, 17 U. S. (4 Wheaton) 518 (1819).
[25] Maltz, vii.
[26] President George W. Bush's nomination of White House counsel Harriet Miers in 2005 was withdrawn before the Senate Judiciary Committee held hearings.
[27] Maltz, vii.
[28] 410 U.S. 113 (1973).
[29] Alexis de Tocqueville, **Democracy in America**, Phillips Bradley, ed. (1954), vol. 1, p. 290.
[30] Maltz, viii.
[31] *Id.*
[32] *Id.*, ix.
[33] *Id.*, 227.
[34] 411 U.S. 677 (1973).
[35] 404 U.S. 71 (1971).
[36] *Id.*, 77.
[37] Abraham, **Justices, Presidents and Senators**, 305.
[38] 32 U.S. (7 Peters) 243 (1833).
[39] 347 U.S. 497 (1954).
[40] Maltz, 144.
[41] *Id.*, 146.
[42] 411 U.S. at 691.
[43] Maltz, 144.
[44] 429 U.S. 190 (1976).
[45] *Id.*, 197.
[46] *Id.*, 193.
[47] Ryan C. Black, Ryan J. Owens, Justin Wedeking, and Patrick C. Wohlfarth, **U.S. Supreme Court Opinions and Their Audiences** (2016), hereafter Black.
[48] Hall's book was published by Cambridge University Press in 2011.
[49] Jack W. Peltason, **Fifty-Eight Lonely Men: Southern Federal Judges and School Desegregation** (1971); Stephen L. Wasby, **The Impact of the United States Supreme Court: Some Perspectives** (1970); George Alan Tarr, **Judicial impact and State Supreme Courts** (1977).
[50] 402 U.S. 1 (1971).
[51] Maltz, 84-90.
[52] 402 U.S. at 15.
[53] 349 U.S. 294 (1955).
[54] *Id.*, 301 (emphasis added).
[55] 347 U.S. at 495.
[56] Black, 2.
[57] *Id.*, 4.

[58] *Id*., 10-11.
[59] *Id*., 3.
[60] *Id*.
[61] *Id*., 9.
[62] Gabriel Almond, **The American People and Foreign Policy** (1950), p. 228.
[63] Black, 46.
[64] *Id*., 50.
[65] *Id*., 51.
[66] *Id*., 157.
[67] *Id*., 81.
[68] *Id*., 157-158.
[69] 549 U.S. 469 (2005).
[70] Ilya Somin, **The Grasping Hand** (2015), hereafter Somin.
[71] *Id*., 1.
[72] *Chicago, B. & Q. R. Co. v. Chicago*, (1897).
[73] 348 U.S. 26 (1954).
[74] 467 U.S. 229 (1984).
[75] *Id*., 243.
[76] *Van Horne's Lessee v. Dorrance, Cir. Ct. Pa.*, 2 U. S. 304, 310 (1795).
[77] *Wilkinson v. Leland*, 27 U. S. (2 Peters) 627, 657 (1829).
[78] 17 U.S. (4 Wheaton) 316 (1819).
[79] 22 U.S. (9 Wheaton) 1 (1824).
[80] On *McCulloch*, *see* Mark R. Killenbeck, ***M'Culloch v. Maryland*** (2006), and Richard E. Ellis, **Aggressive Nationalism** (2008). On *Gibbons*, *see* Thomas H. Cox, ***Gibbons v. Ogden*** (2009) and Herbert A. Johnson, ***Gibbons v. Ogden*** (2010).
[81] Somin, 1.
[82] *Id*., 3.
[83] 545 U.S. at 518, Thomas J., dissenting.
[84] 45 U.S. at 469.
[85] Somin, 10.
[86] *Id*., 241-242.
[87] *Id*., 242-243.
[88] William M. Beaney, **The Right to Counsel in American Courts** (1955), p. 3.
[89] Marlene Trestman, **Fair Labor Lawyer** (2016), hereafter Trestman.
[90] *Id*., xv-xvi.
[91] 297 U.S. 288 (1936).
[92] Trestman, 57. The question in *Ashwander* was whether Congress had exceeded its authority in setting up and having the government operate and sell the power generated by the hydroelectric dams of the Tennessee Valley Authority. The case is probably best remembered today for a concurring opinion by Justice Louis Brandeis in which he articulated a set of "rules" to guide the Court's resolution of cases, especially those involving constitutional issues. *See* 297 U.S. at 341.