

Book Reviews

Fear Eats the Soul*

Cannibalism and the Common Law: The Story of the Tragic Last Voyage of the Mignonette and the Strange Legal Proceedings to Which It Gave Rise. By A.W. Brian Simpson.** Chicago: The University of Chicago Press, 1984. Pp. xiv, 353. \$25.00.

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For most of this century, university-based legal education in America has been dominated, to an extent that drives advocates of clinical and of more analytically oriented legal education to despair, by the close reading of reported cases. It is remarkable, then, to observe how few really exhaustive treatments of particular cases our legal scholarship has generated. Yet in each of the best of these analyses,¹ the author is able to reveal how a particular case—that single unit of law and society—may betray “a glimpse . . . of a universe in which discontinuous realities are nonetheless somehow implicated with each other and intertwined, no matter how remote they may at first have seemed.”²

Most readers of this review will have their own list of remarkable individual case accounts, to which I think should be added A.W. Brian Simpson's *Cannibalism and the Common Law*,³ a fresh look at *Regina v.*

* Title borrowed from Rainer Werner Fassbinder. See FEAR EATS THE SOUL (R. Fassbinder dir. 1973).

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1. See, e.g., J. HALL, THEFT, LAW AND SOCIETY 315-46 (1935) (on Carrier's Case, Y.B. 13 Edw. 4, f. 9, pl. 5 (1473)); R. KLUGER, SIMPLE JUSTICE (1975) (on Brown v. Board of Educ., 347 U.S. 483 (1954), 349 U.S. 294 (1955)); J. NOONAN, PERSONS AND MASKS OF THE LAW 65-110 (on American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909)); *id.*, at 111-51 (1976) (on Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928)).

2. F. JAMESON, T.W. Adorno; or *Historical Tropes*, in MARXISM AND FORM 3, 8 (1971).

3. A. SIMPSON, CANNIBALISM AND THE COMMON LAW: THE STORY OF THE TRAGIC LAST VOYAGE OF THE *Mignonette* AND THE STRANGE LEGAL PROCEEDINGS TO WHICH IT GAVE RISE (1984) [hereinafter cited by page number only].

Dudley and Stephens.⁴ Simpson has researched this famous case of murder and cannibalism at sea expertly and in depth, and has come to the conclusion that the State's method of conviction might be described, like a painting of doubtful attribution, as "not quite right."

I.

This book is different from some of Simpson's previous work:⁵ more readable, more concerned with historical context, and painted with a broader brush. The author obviously cares about the world of ships and sailing⁶ and about the nasty mishandling of Dudley and Stephens, sailors who were accepting of the sea and its ways but out of their depth in the grasp of devious judges on dry land.

Simpson chooses to structure his story in an almost cinematic way. Opening his tale in September of 1884, he describes the arrival of three sailors, Dudley, Stephens, and Brooks, at the Falmouth harbor in Cornwall.⁷ Landed there by a ship that had picked them up at sea, the three men were relieved to be alive and safely home, and were more than ready to tell anyone interested, including the local authorities, about their recent harrowing experience. While delivering the yacht *Mignonette* from the south of England to Sydney, Australia, the men had been caught in a storm that destroyed the yacht and left them stranded without food or water in a small dinghy at sea. After nineteen or twenty days of terrible thirst and hunger and desperately clinging to life, Dudley and Stephens killed the youngest member of the crew, Richard Parker, and ate him. Captain Dudley stabbed the seventeen-year-old Parker in the neck, thus ending the lad's first voyage at sea, and the three remaining crew members shared in drinking Parker's still warm blood. Over the next four days, the sailors ate Parker's flesh and organs in the hope of maintaining their own lives until they might be found.

This initial sequence introduces the reader to the gruesome details of survival cannibalism, assesses the effect upon Falmouth locals, and especially upon the authorities, of "the horrid deed,"⁸ and raises in the

4. 14 Q.B.D. 273, [1881-5] All E.R. Rep. 61, 1 T.L.R. 118 (1884), *aff'd* 1 T.L.R. 29 (1884), *amended* 14 Q.B.D. 560 (1885).

5. See, e.g., A. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT (1975); Simpson, *The Horwitz Thesis and the History of Contracts*, 46 U. CHI. L. REV. 533 (1979).

6. As another reviewer has pointed out:

Mr. Simpson presents just enough of the flavor (dare one use [sic] a gustatory allusion) of the contemporary seafaring culture, and gives one enough indications of the state of technical knowledge and of the beliefs, lore and experience of sailors to provide a great sense of immediacy in the story he spins. One can fairly smell the docks and feel the wind off the water.

Moore, *Sacrificing the Boy*, N.Y. Times, Aug. 12, 1984, § 7 (Book Review), at 11.

7. Pp. 1-11.

8. P. 55 (title of Chapter 3).

reader's mind the pivotal question of whether or not the surviving sailors had committed a crime.

Simpson then shifts the action from the quite tentative arrest of Dudley and Stephens by local authorities in Falmouth⁹ to a panoramic flashback into the "strange lost world of Victorian yachting."¹⁰ This permits Simpson to discuss the relation between yachting and social class,¹¹ to draw a meticulous portrait of boats and men, and to describe the background of the *Mignonette* and her crew.¹² The suspense builds as the author recounts the "stress of storm"¹³ that demolished the *Mignonette*, the enveloping agony of hunger, the moment when a certain line was crossed, and the final rescue and ambiguous return to civilization. Thus while our "real time" sailors are cooling their heels in the Falmouth police station, our "flashback" crew is back out on the horrible sea, chased by man-eating sharks,¹⁴ terrified of drinking seawater, and compelled to drink their own urine,¹⁵ while the nearest land was South America, "more than 2,000 miles to the west."¹⁶

Simpson's book, with its narcotic repetition of episodes of cannibalism and with its clinical objectivity in describing not only boat rigging and navigational locations but also half-eaten and emaciated corpses, may be quite disturbing to some readers. But perhaps most will respond to these details as did Captain Dudley, who wished that the police would return to him as a memento the penknife he used to cut open Parker's throat;¹⁷ or like most of the popular audience of the day, who joined in ballads and drinking songs celebrating the tragic heroes of the *Mignonette*¹⁸ while waiting expectantly for the waxwork model of Captain Dudley to open at Madame Tussaud's exhibition.¹⁹

To return to Simpson's narrative: Parker had lost control over his ability to resist drinking seawater, and he began to experience violent illness—in addition to maddening thirst and hunger. On July 24th at dawn, there being no sail in sight, Dudley, with the consent of Stephens, though

9. Pp. 10–11.

10. P. 13.

11. Pp. 16–17.

12. Pp. 38–40.

13. Pp. 46–48.

14. P. 49.

15. P. 58.

16. P. 49.

17. P. 7. But even Dudley seemed about to unravel at times. See, e.g., p. 76 ("Daniel (Richard Parker's brother) traveled at once to Falmouth, arriving on Tuesday evening at the police station. There Dudley heard him talking to Superintendent Bourne and called out, 'Why, that's little Dick's voice!'").

18. Pp. 84–86, 253–55, 313–22.

19. P. 248.

probably not of Brooks,²⁰ killed Richard Parker. Although there had been some discussion of drawing lots to see who should be killed, in the end it appears that Parker was chosen without lottery because he was not married and because he seemed closest to death already.²¹

After the perilously weak and dehydrated sailors had lived for four days off the carcass, the German sailing barque *Moctezuma* appeared on the horizon, picked them up, and returned them to the predicament in which the harbor police and Simpson had previously left them: waiting in frustration and complete disbelief to find out if they would actually be charged with murder for doing what they surely had to do.²²

II.

At this point, many readers will want to know the "bottom line"—guilty, not guilty, or no prosecution—and will be impatient to compare notes with the jury that tried Dudley and Stephens. But the reader has yet to find out that Dudley and Stephens' jury never actually passed judgment. Key facts leading to the ambiguous death sentences have yet to be established. It is in this central section of the book that Simpson makes a genuinely original contribution to the debate over one of the leading cases in the history of the British criminal law.

What are the important facts which Simpson brings out of the woodwork of these nineteenth-century vessels that traversed such great expanses of empty water? Simpson demonstrates with example after example that: (1) cannibalism with respect to passengers or crew who died of natural causes on seemingly doomed voyages was common,²³ (2) cannibalism with respect to passengers or crew not yet dead but killed to be eaten

20. Pp. 63-65.

21. Pp. 6, 62, 65-66.

22. Pp. 10, 70-72.

23. Pp. 114-22. Summarizing the detailed research upon which his conclusion is founded, Simpson observes, "So normal was cannibalism that on some occasions survivors found it appropriate to take pains to *volunteer* denial that cannibalism had occurred; suspicion of this practice among starving castaways was a routine reaction." P. 121.

Simpson's many examples of such survival cannibalism during the nineteenth century include those mentioned in the Commons debate on the Unseaworthy Ships Bill of 1875 by Samuel Plimsoll, such as that of the *Anna Maria* where "part of the leg of a woman was found which evidently served the crew for food." Plimsoll mentioned two other cases, . . . in one of which "four bodies were found under the maintop, all dead, with part of one of their comrades hung up, as if in a butcher's shop."

Pp. 120-21.

After the timber ship *Francis Mary* became disabled off Newfoundland:

the crew began to die. John Wilson died on February 22 and was quartered and hung up for food; the next day, I. Moore died, and his liver and heart were eaten. Matters went from bad to worse, and when the cook, James Friar, died, Ann Saunders, his betrothed and a passenger, cut his throat and claimed prior property rights in his blood.

P. 126.

was also common;²⁴ and (3) it was unusual that stranded and desperate human beings would play the game of death by rules, drawing lots fairly to determine who would be sacrificed.²⁵

All of this places in sharp contrast much that happened to Dudley and Stephens once back on land: the actual decision to prosecute them,²⁶ the

24. One case mentioned by Simpson is that of the *Tiger*:

The *Tiger* was shipwrecked in 1766, and in Peter Viaud's story of it, once matters became critical, "it came into Viaud's recollection that mariners had cast lots who should die to keep their comrades from famine. His eyes lighted on the negro youth . . ." His companion, Mme. la Couture, had the same idea about the same time, and the formality of casting lots was dispensed with, though some time was directed to "bitterly bewailing his fate." The unfortunate man, who appears to have been a slave, was killed and indeed smoked.

P. 125.

Another case, this one from the nineteenth century, when such wrecks were most frequent, was that of the *Brig Caledonia*, "a typical story of a waterlogged timber ship, where the men near to death had their throats cut for blood. They were self-selected . . ." P. 128.

25. There are sufficiently many examples of genuine lot drawing for Simpson to conclude that the practice can be regarded as an element within the "custom of the sea." P. 144. Yet the following example, describing the wreck of the *Peggy*, illustrates that procedural niceties such as a fair lottery were by no means always observed:

Led by the mate, the crew burst in on the captain, and, with "countenances of the most frightful ghastliness" announced that they would have to draw lots. Captain Harrison attempted to buy time, but the crew left him and then returned, saying they had already cast lots and that "the lot had fallen on the negro who was part of the cargo." The unfortunate slave attempted to escape but was dragged on deck and shot by a sailor by the name of Doud. It strains credulity to suppose that lots were fairly cast. After another sailor, James Campbell, ate the liver raw, elaborate culinary activities commenced, including an attempt to pickle the body.

P. 124.

Repeatedly, in Simpson's illustrations, blacks and foreign nationals, boys and apprentices, somehow manage to draw the short straw or else are killed and eaten outright. See, e.g., pp. 131-32 (describing events aboard derelict *Francis Spaight*); *supra* note 24.

For a fictional account of a bungled attempt to cheat in such a lottery, see E. POE, THE NARRATIVE OF ARTHUR GORDON PYM 108 (New York 1838). This story, discussed by Simpson at p. 144, includes events astonishingly similar to those which actually occurred in the case of Dudley and Stephens half a century after Poe wrote his story. For example, the sailor killed and eaten in Poe's account is named *Richard Parker*.

26. Pp. 73-94. On the contrast with prior episodes, see p. 212 (quoting defense summation in *Regina v. Dudley and Stephens*) ("Although they all knew that unfortunate men had in many instances been driven by stress of hunger and thirst to feed upon their fellow creatures, no government of any civilized country had in any case prosecuted the unhappy survivors on a charge of murder."). Consider also the incident of the *Francis Spaight*:

[A]lthough [the owner] Francis Spaight was himself a justice of the peace, no legal proceedings against captain or crew were apparently even contemplated. Press reports emphasized the sufferings of the survivors . . . Particularly distressed by the whole affair was [eaten apprentice] Patrick O'Brien's mother . . . She went to Francis Spaight's country house, "where her hysterical cries were truly heart-rendering [sic]."

P. 133 (quoting an account in the *Limerick Times*).

[O]n July 30 [Captain Gorman, former captain of the *Francis Spaight*] took proceedings against [the mother] in the Limerick magistrates court. According to the only extended account, "Captain Gorman said he had had no peace for the last week on account of the defendant, who threatened to take away his life and his children [sic] as well." She denied this, saying "that all that she did was to fall on her knees, to beg he would tell her about her son that was killed, and instead of doing so, he abused her." She was duly bound over to keep the Queen's peace in the only legal proceedings to arise out of the death of her son.

P. 135.

moral indignation with which some received news of the sailors' conduct,²⁷ and the dissatisfaction expressed when people learned that no lottery had been used to select Richard Parker as the one to die.²⁸ Yet it would have been extraordinary, in the context encountered by the sailors of the *Mignonette*, had the crew rationally debated short and long straws versus "think of a number," or had they waited passively in a pool of excrement for savage thirst, unbearable hunger, and perhaps reactive psychosis²⁹ to signal that their lives were over.

It must have taken Simpson years to do the research for this section of *Cannibalism and the Common Law*, and it works as he no doubt intended: The upper class judges and government officials as well as the handful of comfortable newspaper editors who condemn Dudley and Stephens come to seem atrocious hypocrites. At the same time, in an odd way which I do not think Simpson intended, this accumulation of stories of the species *in extremis* (deceiving each other, mutilating each other, tossing each other overboard, ultimately eating each other—sometimes almost with pleasure) becomes quite depressing, so that far from expecting too

27. The *Standard*, for example, editorialized that it was "impossible to justify such revolting acts; even wild beasts will often die rather than eat their own species." P. 251. Popular feeling, however, generally ran in support of Dudley and Stephens, and certain sectors of opinion, sailors and their families, for example, strongly protested the notion that the men should be prosecuted. Pp. 84-86, 89-91. But once Dudley and Stephens were convicted of murder, Simpson suggests that public opinion began to turn against them. "[T]his indeed was the whole function of the legal decision." P. 242.

28. P. 84 (quoting *Southampton Times* report that "'many of the briny fraternity complain that an equality of chance was not given to the four exhausted survivors by the casting of lots.'" *But cf.* p. 250 ("[T]he *Saturday Review*, agreeing with the judges, described the notion that it was legitimate to draw lots in such circumstances as a 'blasphemous absurdity' and the act of the two men as 'a very base and wicked act.'").

29. AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 200 (3d ed. 1980):

The essential feature is the sudden onset of a psychotic disorder of at least a few hours' but no more than two weeks' duration The psychotic symptoms appear immediately following a recognizable psychosocial stressor that would evoke significant symptoms of distress in almost anyone. The precipitating event may be any major stress, such as the loss of a loved one or the psychological trauma of combat Behavior may be bizarre and include peculiar postures, outlandish dress, screaming, or muteness. Suicidal or aggressive behavior may also be present. Speech may include inarticulate gibberish or repetition of nonsensical phrases. Affect is often inappropriate and volatile. Transient hallucinations or delusions are common.

The case of the *Peggy* provides an example:

Three days later Campbell went mad and died; fearing to contract madness from his body, the others threw it overboard. . . . [T]he slave's body lasted from January 17 to January 26, and then lots were cast again. . . . The lot fell on Richard (or David) Flat, a "seaman much beloved on board." Flat accepted with resignation and asked Doud to shoot him. But Doud could not bring himself to do so, and after a short prayer some attempted to catch fish But the strain on the unhappy Flat was too much. By midnight he was deaf, and in two or three hours raving mad.

P. 124.

The insanity defense or perhaps the defense of diminished capacity might today play a role, which it did not in the past, in the defense of persons charged with homicide for survival cannibalism. *See* p. 233 (discussing defenses of insanity and diminished responsibility).

much of Dudley and Stephens, we begin to take it for granted that, being human, Dudley and Stephens were also no doubt acting inhumanly. The predictability of such behavior is a good reason for not punishing them, but it also leads us to develop a certain unexpected uneasiness toward them—perhaps because we fear the sight in them of our reflection—that attenuates our advocacy on their behalf. Yet perhaps we should simply be thankful that Simpson has shown up the other side as being such a dishonest and sanctimonious bunch. Simpson's accumulation of grisly details convincingly supports his indictment of the judges' self-righteousness.

The second issue on which Simpson casts new light concerns what went wrong on the way to the jury's verdict. "Central to the approach of Sir William Harcourt, the home secretary," according to Simpson, "appears to have been revulsion against the popular idea that Dudley was a hero."³⁰ Thus it comes as no surprise that the state was worried about whether it could find a jury that would convict Dudley and Stephens. What is surprising, however, is Simpson's revelation of the extent to which the state was willing to savage existing procedural rules, virtually bypassing the jury in order to place the fate of Dudley and Stephens in the hands of judges who had already decided what the outcome would be.³¹ In an examination as intricate as his discussion of the "custom of the sea" was exhaustive, Simpson demonstrates that: (1) the trial judge, Baron Huddleston, had by the time of the grand jury proceeding already decided that necessity was no defense at common law, and he did not permit defense counsel to argue the necessity defense at trial;³² (2) the same judge prevented the jury from making even a contingent decision on the question of guilt or innocence, contingent, that is, upon subsequent judicial determination of the legal question regarding the existence of a necessity defense;³³ (3) Huddleston wrote the text for the jury's findings in

30. P. 89.

31. Pp. 195–229. Compare with the following statement of the sacredness, in England, of the right to a jury trial:

If I turn to an eighteenth-century compendium of the laws which was placed by the desk of every JP at that time, and turn up the entry under "Jurors," I find that the normally businesslike author suddenly breaks into eloquence: "Trial by juries is the *Englishman's* birth right, and it is that happy way of trial, which notwithstanding all revolutions of the times, hath been continued beyond all memory to this present day; the beginning whereof no history specifies, it being contemporary with the foundations of this state, and one of the pillars of it, both as to age and consequence."

E. THOMPSON, *The State of the Nation*, in WRITING BY CANDLELIGHT 191, 229 (1980) (quoting R. BURN, *THE JUSTICE OF THE PEACE* (1754)).

32. Pp. 200–02 (recounting "highly exceptional and indeed irregular" procedure followed by Baron Huddleston).

33. Pp. 208–10 (describing how Baron Huddleston pressured jury to agree to special verdict that reserved key legal question of necessity defense for appellate court while preventing jury from deciding on guilt or innocence).

its special verdict³⁴ and even tampered with it after it was approved by the jury in order to avoid new defense arguments pertaining to jurisdictional issues.³⁵ In Simpson's telling, the appellate court's determination of the key question of guilt or innocence in the guise of merely resolving a legal point regarding the necessity defense appears as an outrageous yet nearly foregone conclusion.³⁶ In terms of procedural integrity, this is Anglo-American justice at its worst.

Simpson is firm in his insistence that a condemnation for murder was precisely the state's purpose almost from the beginning of the sailors' legal ordeal. The public by and large supported the pardoning of Dudley and Stephens should they be found guilty of murder, and, indeed, there was considerable expectation both in and out of the legal system that the death sentences pronounced upon them would not be carried out.³⁷ Their sentences were in fact commuted to six months' imprisonment,³⁸ but no one could have been quite certain what was to happen to them when they "were called to stand and told, 'You have been convicted of murder. What have you to say why the Court should not give you judgment to die?'"³⁹

III.

There are two weaknesses in Simpson's analysis of the case of Dudley and Stephens. The first concerns his theory of why the legal system did not simply ignore the two sailors instead of bringing them to trial and predetermined conviction. The second is his inattention to the opinion rendered by Lord Chief Justice Coleridge for the appellate court, which, as Simpson observes, actually constituted the verdict in the case.

Running through the book is an undercurrent of assumption on the author's part that the purpose of the prosecution was to delegitimize the "custom of the sea" and to persuade the order of seamen that they were governed, on sea as well as on land, by the same laws as everybody else. Those laws were made, as Dudley and Stephens were to be forcefully reminded, not by the members of the "briny fraternity,"⁴⁰ but rather by the elite members of the *legal* fraternity in London. Yet this otherwise exhaustively documented book presents little evidence to support the idea

34. P. 213.

35. P. 218.

36. See pp. 227-29 (describing how Lord Chief Justice Coleridge, author of appellate opinion, amended jury's findings to include a conditional verdict). Compare *Regina v. Dudley and Stephens*, 1 T.L.R. 118, 125 (1884) (reporter giving first version of special verdict) with *Regina v. Dudley and Stephens*, 14 Q.B.D. 273, 275 (1884) (reporter giving amended version).

37. Pp. 240-55.

38. P. 247.

39. P. 239.

40. See *supra* note 28.

that this policy goal was what motivated the prosecution of Dudley and Stephens.

When considering, for example, the legal system's option of having juries decide, without judicial interference or guidance, the difficult questions raised by the necessity defense, Simpson observes that this option was out of the question "if the custom of the sea was to be declared bad *as a matter of law*."⁴¹ Repeating this argument as a preface to his assault on the devious Baron Huddleston, Simpson asserts:

Frustrated 10 years earlier in their attempt to bring the custom of the sea before a court of law for condemnation, the officials of the Home Office and that of [sic] the treasury solicitor may have taken particular pains over the prosecution of the latest cannibals to land in England, but most of the preparatory work is undocumented.⁴²

By "10 years earlier," Simpson means 1874—the year of the *Euxine* incident. In that case, the British Home Office had declined to prosecute an instance of survival cannibalism not very different from that of Dudley and Stephens. When the *Euxine* caught fire off St. Helena in 1874, captain and crew abandoned her and set off in lifeboats.⁴³ One of the boats lost contact with the others and was eventually cast adrift, as in so many other disheartening accounts recorded by Simpson. "The following day . . . a small sail was set, and the five survivors continued their voyage, now become all but hopeless. The men included a small, dark-skinned Italian boy of about 20, who spoke very little English."⁴⁴ The reader can easily guess who had the misfortune of drawing the short straw in the lottery.

Simpson canvasses a number of authorities without coming to any certain conclusion as to the shared motives of the key actors in the *Euxine* episode. Thomas Gray of the Board of Trade's Marine Department doubted a jury would convict. Nor, apparently, would he: "My view is that no crime was committed in killing and eating a fellow seafarer under these circumstances."⁴⁵ The Colonial Office did not pursue a British prosecution at least in part because it was aware that "the Home Office would be displeased if the home government had to bear the cost of a trial that should have taken place in the colonies at colonial expense."⁴⁶ With regard to the Home Office itself, Simpson merely observes that "the papers

41. P. 236. *See also* p. 234 ("the whole point of the prosecution was to reject the barbarous practices of seamen").

42. P. 195.

43. Pp. 177–78. For further discussion of the *Euxine* incident, see pp. 176–94.

44. P. 179.

45. P. 188.

46. P. 190.

had no doubt been circulating, but . . . it is not possible to reconstruct the stages in [their] circulation or tell who was consulted."⁴⁷ The home secretary simply did not believe that the case of the *Euxine* was one "in which it would be advisable to institute proceedings against these men."⁴⁸ To this Simpson adds: "That was that."⁴⁹ There is nothing here about a frustrated attempt to bring the custom of the sea before a court of law for condemnation.

Similarly, the motives of the key actors in the prosecution of Dudley and Stephens are quite opaque. The harbor police in Falmouth arrested Dudley because, given his story, it would have been difficult not to detain him and the decision to prosecute would not be theirs.⁵⁰ The Home Office, as Simpson himself indicates, apparently went ahead with a trial to counteract the popular toleration—even celebration—of the *Mignonette*'s survivors.⁵¹ Sir Henry James, a law officer to the Home Office, advised the home secretary that Dudley and Stephens should be prosecuted, and indicated that if they were not convicted he would "decline for the future to sit near any man with a large appetite."⁵² James added, however, that "[w]hen convicted you can let them off."⁵³ Leniency was justified by the fact that Dudley and Stephens had been "in a state of comparative phrensy quite upsetting the ordinary balance of the mind."⁵⁴

After careful consideration, Home Secretary Harcourt (who, it will be recalled, had originally decided to proceed with a trial of Dudley and Stephens) determined that the death sentences should be commuted to brief terms of imprisonment. Harcourt's son had warned him that "it would be very mischievous to excite sympathy with [Dudley and Stephens] by the infliction of a long term of imprisonment."⁵⁵ On the other side of the ledger, Harcourt weighed a concrete fear of what might come from a full pardon: "If to kill an innocent person to save your own life is an act deserving of pardon, by what right can a Fenian assassin be

47. P. 191.

48. P. 191. Simpson also suggests a plausible political motive for the Home Office's reluctance to prosecute: "The crew of a ship owned by a prominent Conservative ship-owner, himself notorious among seamen for starving his crews, had actually been reduced to eating each other. This would hardly have been welcomed politically, whatever the outcome of the case might be . . ." P. 192. But Simpson provides no evidence of a competing desire by the State to officially censure the custom of the sea.

49. P. 191.

50. Pp. 1-11.

51. See *supra* note 30 and accompanying text.

52. P. 246 (quoting letter from Sir Henry James to Sir William Harcourt (n.d.)).

53. P. 246 (quoting letter from Sir Henry James to Sir William Harcourt (n.d.)).

54. P. 246 (quoting letter from Sir Henry James to Sir William Harcourt (n.d.)).

55. P. 247 (quoting journal of Lewis Harcourt (Dec. 8, 1884)).

punished who kills because the lot has fallen upon him to do the murder and if he does not execute it he knows his own life will be forfeited[?]"⁵⁶

As to Baron Huddleston, the trial judge, there is only a hint of evidence that he was trying to overturn the "custom of the sea." According to Simpson, the Baron had been judge advocate of the fleet. He was upwardly mobile and a snob. "[P]resumably the only judge who had been directly involved with naval discipline was the obvious man to be sent there to do what had to be done, particularly as he had a reputation for getting his own way with juries and was well known in the West Country."⁵⁷ Simpson has nothing to say about the motivations of Lord Coleridge, author of the procedurally anomalous Queen's Bench Division opinion.

Based on Simpson's evidence, it makes as much sense to regard the treatment of Dudley and Stephens as designed to send a message to the Fenian assassin, that is, the Irish nationalist terrorist, as to likely followers of the "custom of the sea" at the end of the era of the great sailing ships. If it was specifically the custom of the sea that the mandarins of the legal system were after, one wonders why they waited until the end of the nineteenth century. Simpson's explanation, although plausible, is undocumented and incomplete. Where, then, can we look for further explanation of why it was so important to prosecute and convict *these* cannibals when so many others had been pitied or hailed but left alone?

IV.

An obvious place to look for this explanation would be Lord Chief Justice Coleridge's opinion in *Regina v. Dudley and Stephens*,⁵⁸ which occupies but ten pages of the *Law Reports*. Yet this opinion, in which Coleridge manipulates doctrine with the same vigor as his colleague Huddleston manipulated procedure, is neither reprinted nor analyzed by

56. P. 247. (quoting letter from Sir William Harcourt to Lewis Harcourt (n.d.)). Cf. F. HARRISON, *THE DARK ANGEL: ASPECTS OF VICTORIAN SEXUALITY* 64 (1977):

Although Britain enjoyed an enviably peaceful political atmosphere by contemporary standards, [the late-Victorian period] was an age of terrorism. All over Europe extremists of various denominations, particularly anarchists, were putting into action their belief in "propaganda by deed" by not only assassinating, or attempting to, presidents and other prominent citizens, but by also indiscriminately bombing and murdering ordinary members of the bourgeoisie. Political violence in Britain was mostly confined to Ireland, and to Irish issues, with occasional outbreaks of bombing in London, but the property-owning classes nevertheless absorbed the general air of apprehension generated by events which befell their neighbours across the Channel.

57. P. 198. See also pp. 197-98 (noting that Huddleston may also have been reacting against "the ugly reality of the sailor's world which he had learned many years earlier from his father," who had also been in the navy).

58. 14 Q.B.D. 273, [1881-5] All E.R. Rep. 61, 1 T.L.R. 118 (1884).

the author.⁵⁹ Careful analysis of what Coleridge is up to would have deepened Simpson's criticism of the legal process afforded Dudley and Stephens.

Although Simpson does evaluate some of the theoretical bases for the defense of necessity in criminal law,⁶⁰ he gives insufficient weight to the legally recognized arguments that would have supported the conduct of Dudley and Stephens.⁶¹

Consider, for example, the defense of necessity as grounded in self-preservation. Neither Coleridge in his opinion, nor Simpson in his book, quotes Blackstone's statement, recited at oral argument by Dudley and Stephens' counsel:

There is one species of homicide *se defendendo*, where the party slain is equally innocent as he who occasions his death: and yet this homicide is also excusable from the great universal principle of self-preservation, which prompts every man to save his own life preferably to that of another, where one of them must inevitably perish.⁶²

Yet there was sufficient recognition of Blackstone's "species of homicide *se defendendo*" for Cambridge University professor E.C. Clark to write, in his little "restatement" of criminal law published four years before Dudley and Stephens were tried, that:

Self-defense or, more properly, **self-preservation** is the overpowering motive in that hypothetical case of *unavoidable necessity*, which Blackstone recognizes as constituting, if not a legal involuntariness, at least an absolute excuse for homicide The principle of self-preservation, extended to the case of *others* whom the agent was bound to protect, is generalized by Sir James Stephen, under the head of *necessity*, into an *excuse* of acts done, only in order to avoid consequences which could not otherwise be avoided, and which would have inflicted upon the agent, or such other persons, inevitable and irreparable evil, provided no more is done than was reasonably necessary for the purpose, and the evil inflicted is not disproportionate to the evil avoided. This is at any rate good sense, and should be law.⁶³

The concluding sentence reveals Regius Professor Clark to be a good

59. Simpson *does* reprint the jury's special verdict, but he spends only one page analyzing Lord Coleridge's opinion. P. 238.

60. Pp. 230-36.

61. See G. FLETCHER, *RETHINKING CRIMINAL LAW* 759-829 (1978) (discussing necessity defense); G. WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* 722-46 (2d ed. 1961) (same).

62. 4 W. BLACKSTONE, *COMMENTARIES* *186, *quoted by* Arthur Collins, defense counsel, Regina v. Dudley and Stephens, 1 T.L.R. at 121.

63. E. CLARK, *AN ANALYSIS OF CRIMINAL LIABILITY* 35-36 (1880).

deal more candid than most modern "restaters." But what is most interesting is his mention of Stephen's extension of the necessity defense,⁶⁴ placing it upon a new theoretical foundation: that of utility. Indeed, it is upon this ground that the contemporary defense of necessity in the United States is usually based.⁶⁵

Simpson permits the Lord Chief Justice's analysis to go unchallenged. Coleridge treats what is arguably a classic utility case, since the sailors killed one man to save three (and even justified their decision in utilitarian terms),⁶⁶ as a homicide which could be justified only by self-defense or self-preservation.⁶⁷ Since Parker had not attacked anyone, Coleridge appropriately rejects self-defense; he also rejects self-preservation on the ground that such a rule would violate the principle that no person's life is worth more than another's.⁶⁸

The self-defense and self-preservation situations discussed by Coleridge entail the loss of one life in order to avoid the loss of one other life, the sole question being who shall die. These situations therefore do not pose a utilitarian problem. By focusing on them, Coleridge avoids having to apply Stephen's utilitarian rule. Coleridge cannot, however, ignore Cicero's hypothetical situation of "the two drowning men and the plank adequate to support only one."⁶⁹ This hypothetical has fascinated legal thinkers for centuries because it presents the dilemma of whether one should be excused for causing the other's death or whether the law should require that both die. Yet Coleridge treats even this hypothetical as if it were an ordinary case of self-preservation rather than a case of utility, and Simpson fails to point out what Coleridge wishes to bury: the argument that the drowning man may keep hold of the plank, not merely to save himself, but because it is better that one rather than two should die. Coleridge's analysis obscures the fact that Parker's death may have saved the lives of three men.

Stephen commented on Lord Coleridge's opinion three years later:

64. Simpson observes that "Stephen's Homicide Law Amendment Bill of 1874 embodied a defense of necessity, which he defended before a select committee against criticisms from the senior judges." P. 235. Stephen, whose views had been cited by the defense in *Dudley*, expressed agreement with the court's judgment. P. 248. Nevertheless, contrary to what Simpson suggests, he had not changed his mind with respect to the necessity defense. See *infra* notes 70 & 71 and accompanying text.

65. See, e.g., MODEL PENAL CODE § 3.02 (Proposed Official Draft 1962): ("Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that: (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; . . ."); see also G. FLETCHER, *supra* note 61, at 818-29.

66. Pp. 61-63.

67. *Regina v. Dudley and Stephens*, 14 Q.B.D. at 281-86.

68. *Id.* at 287.

69. P. 230.

I should have agreed with the rest of the Court had I been a member of it in *R. v. Dudley* though not in all the reasoning of the judgment. I should have based my judgment on the fact that the special verdict found only that if the boy had not been killed and eaten the survivors "would *probably* not have survived;" and on the principle that in this particular class of cases an error on the side of severity is an error on the safe side. . . . I could not go so far as to say, as the judgment delivered by Lord Coleridge says, that any case can impose on a man "a duty" (if the word means a legal duty) "not to live but to die." . . . Whatever estimate may be formed of self-sacrifice, it seems to me to be a duty of which the law can take no notice, if indeed it is a duty at all, which is not a legal question.⁷⁰

Now *that* is good, old, hard-headed liberalism!

It is significant that Stephen might well have applied the defense of necessity in *Regina v. Dudley and Stephens* to exculpate the defendants⁷¹—had the jury not found that Parker's death only *probably* saved the others.⁷² This brings us back to the central accomplishment of Simpson's research: its specificity with regard to what rarely shows up in the case reports or the digests. Simpson brings out that on this very point Baron Huddleston altered the jury's findings:

The foreman also said that, in the jury's view, "they would have died if they had not had this body to feed on." Baron Huddleston mendaciously steamrolled in reply, "That is as I put it." It was not; he read out the text, which was as follows: "That if the men had not fed upon the body of the boy they would *probably* [Simpson's emphasis] not have survived"⁷³

Italics in Simpson's report and italics in Stephen's—but no italics in the case report. And Huddleston, addressing the jurors, no doubt said the

70. J. STEPHEN, *DIGEST OF THE CRIMINAL LAW* 37 n.2 (7th ed. 1926).

71. Stephen's utilitarianism led him to justify the necessity defense even in the hardest case: that in which one man kills several others to save his own life. "Several men are roped together on the Alps. They slip, and the weight of the whole party is thrown on one, who cuts the rope in order to save himself. Here the question is not whether some shall die, but whether one shall live." *Id.* That the life saved belongs to the actor is pure coincidence as far as utility theory is concerned. It is just a question of mathematics.

72. Simpson points out the obvious rejoinder:

Since men can adapt their actions only to what they expect to happen, not on [sic] what does in fact happen (for then it is too late), a utilitarian theory of necessity must be based on what the individuals foresee. This was appreciated in *U.S. v. Holmes* [26 F. Cas. 360 (C.C.E.D. Pa. 1842) (No. 15,383)] by Holmes' counsel, who ridiculed the prosecutor's contrary thesis. "They ask us to wait until the boat has sunk. We may, then, make an effort to prevent her from sinking. They tell us to wait till all are drowned. We may, then, make endeavours to save a part."

P. 233.

73. P. 214.

word in a way they really did not notice. Clearly, a more rigorous examination of Lord Coleridge's opinion and its doctrinal foundation would have provided Simpson with further grounds for his systematic and measured suspicion of everything surrounding the conviction of Dudley and Stephens.

V.

If Simpson's explanation that the "custom of the sea" was a target of the legal elite is insufficient, there are some general characteristics of late-Victorian society that might add another dimension to our understanding of why the legal system was so reluctant to recognize a defense of necessity in this case of survival cannibalism, and of why Lord Coleridge described the defense, with some hyperbole, as "the legal cloak for unbridled passion and atrocious crime."⁷⁴

According to Fraser Harrison,

The distinction to be drawn between the preceding years and the final three decades of the century is the presence of a deeply disturbing sense of fear. Although the country was not plunged into revolution, nor submerged by financial ruin, nor even overpowered by atheists, socialists or advocates of free-love, the middle-class imagination was persistently haunted by the fear that these catastrophes were about to come to pass. The old mid-Victorian world, its values and affluence, its spiritual and commercial confidence, its comforting belief in the rectitude of everyone knowing his or her place and its robust faith in its own progress, all seemed to be crumbling into chaos.⁷⁵

With social catastrophe threatening from without and "unbridled passion" threatening from within, the late-Victorian judicial mind may well have been averse to tolerating excuses for eating human flesh. Late-Victorian society, like any other, was defined as much by what it excluded as by what it included, as much by its fears as by its aspirations.⁷⁶ Cannibalism, of course, had never met with societal approbation, but the fact that cases similar to that of Dudley and Stephens had not previously been prosecuted suggests that cannibalism had been viewed as excusable and

74. *Regina v. Dudley and Stephens*, 14 Q.B.D. at 288.

75. F. HARRISON, *supra* note 56, at 64. For similar, if less strongly stated, views of this period, see E. HOBBSAWM, *THE AGE OF CAPITAL* 303-08 (1975); D. LANDES, *THE UNBOUND PROMETHEUS* 231-32 (1969). Another source of anxiety among late-Victorian men was the transformation of sexual roles and relationships. See F. HARRISON, *supra* note 56, at 118 (describing "turmoil and anxiety" provoked by "radical alteration in the relationships between the sexes").

76. See generally M. FOUCAULT, *MADNESS AND CIVILIZATION* (1965) (using changing societal views of madness to illuminate other aspects of culture and society).

perhaps even natural in the desperate circumstances of the lifeboat. In the late-Victorian era, the perception of cannibalism changed: It came to be feared as a loosening of the strictures of morality, a bursting forth of uncontrolled instinctual passions. Anthropological theories of social evolution, conveniently legitimating imperialism abroad and inequality at home, expressed the belief that cannibalism had once been universal, and that only the restraints imposed on instinct by the progress of civilization kept humankind from relapsing into anthropophagy.⁷⁷

This view of cannibalism arose naturally in a society whose ascendant bourgeoisie "defined itself morally against the promiscuous proletariat and the sensual nobility as the class with virtuous self-denial."⁷⁸ Joseph Conrad's perspective, described by his friend Bertrand Russell, was emblematic: "He thought of civilized and morally tolerable human life as a dangerous walk on a thin crust of barely cooled lava which at any moment might break and let the unwary sink into fiery depths."⁷⁹ Simpson's book, while detailed and revealing, fails to relate the judicial reaction to cannibalism to this cultural world of late-Victorian England.

The late nineteenth century was a period of exaltation of the will—the belief that disciplined exertion of will power in opposition to the lower, more animal, self was the only thing keeping society from anarchy, chaos, and "atrocious crime." No excuse or justification, not even those of utilitarian conduct or self-preservation, could be admitted. The smallest slip backward by the forces of the will, perpetually warring with the seduction of submission, might mean that all would be lost.⁸⁰ "[A] man has no right to declare temptation to be an excuse," stated Coleridge.⁸¹ "[I]t is enough in a Christian country to remind ourselves of the Great Example whom we profess to follow. It is not needful to point out the awful danger of admitting the principle which has been contended for."⁸² For Lord

77. Pp. 112–14 (describing 19th-century theories of cannibalism). See also F. GILBERT, *THE END OF THE EUROPEAN ERA* 31–32 (2d ed. 1979) (discussing use of racism and social darwinism to rationalize contradiction between liberal ideal of equality on the one hand and inequality and imperialism on the other); E. HOBBSAWM, *supra* note 75, at 265–68 (discussing development of racist and evolutionary physical and social anthropology).

78. M. POSTER, *CRITICAL THEORY OF THE FAMILY* 169 (1978).

79. B. RUSSELL, *PORTRAITS FROM MEMORY* 82 (1956).

80. A. FELLMAN & M. FELLMAN, *MAKING SENSE OF SELF: MEDICAL ADVICE LITERATURE IN LATE NINETEENTH-CENTURY AMERICA* 133 (1981) ("Thus the entire ideological construct which culminated in the will was very fragile. Fear of disorder and chaos paralleled belief in self-control and the will. Perhaps evil resided in humankind's natural biological state . . ."). Cf. Clark, *The Rejection of Psychological Approaches to Mental Disorder in Late Nineteenth-Century British Psychiatry, in MADHOUSES, MAD-DOCTORS, AND MADMEN* 271, 274–75 (A. Scull ed. 1981) (describing late-Victorian view of mental illness as failure of control by the will over imagination and instincts).

81. *Regina v. Dudley and Stephens*, 14 Q.B.D. at 288.

82. *Id.* at 287.

Cannibalism and the Common Law

Coleridge, the true source of the principle of necessity was Satan himself. Quoting Milton's *Paradise Lost* he warned:

"So spake the Fiend, and with necessity,
The tyrant's plea, excused his devilish deeds."⁸³

83. *Id.* at 288 (quoting J. MILTON, *PARADISE LOST* Bk. IV, lines 393-94 (Satan justifies as necessary his plan to tempt Eve into violating dietary prohibition on eating from Tree of Knowledge)).

The "crime" of cannibalism may be approached, in its symbolic aspect, as a matter of fundamental transgression of a dietary prohibition. Drawing upon anthropology, psychoanalysis, and semiology, Julia Kristeva argues:

In order to understand . . . the introduction of a meat diet, one must assume a cataclysm— . . . a violation of divine rule and subsequent punishment. It is indeed only *after the Flood* that authorization is granted to eat "every moving thing that liveth" (Genesis 9:3). Far from being a reward, such permission is accompanied by an acknowledgment of essential evil, and it includes a negative, incriminating connotation with respect to man: "For the imagination of man's heart is evil" (Genesis 8:21). As if there had been an acknowledgment of a *bent toward murder* essential to human beings and the authorization for a meat diet was the recognition of that ineradicable "death drive," seen here under its most primordial or archaic aspect—devouring.

J. KRISTEVA, *THE POWERS OF HORROR: AN ESSAY IN ABJECTION* 96 (1982).

This association of man as carnivore with man as sadistic murderer and naturally aggressive personality persists in a strand of 20th-century psychology and anthropology. Commenting upon this line of analysis, anthropologists Richard Leakey and Roger Lewin state:

The idea was proposed that man is unswervingly aggressive, an idea that was given scientific credence by proponents such as Professor Raymond Dart and Dr. Konrad Lorenz, and successfully popularized by Robert Ardrey.

The core of the aggression argument says that because we share a common heritage with the animal kingdom we must possess and express an aggressive instinct. And the notion is elaborated with the suggestion that at some point in our evolutionary history we gave up being vegetarian ape-like creatures and became killers, with a taste not only for prey animals but also for each other. It makes a good gripping story. More important, it absolves society from attempting to rectify the evil in the world. But it is fiction—dangerous fiction.

Unquestionably we are part of the animal kingdom. And, yes, at some point in our evolution we departed from the common dietary habits of the large primates and took to including a significant amount of meat in our menu. But a serious biological interpretation of these facts does *not* lead to the conclusion that, because once the whole of the human race indulged in hunting as part of its way of life, killing is in our genes."

R. LEAKEY & R. LEWIN, *ORIGINS* 10 (1977).

For other approaches to the significance of cannibalism and flesh eating by humans, see E. JONES, *ON THE NIGHTMARE* 131-53 (1951) (discussing werewolf myth; suggesting psychoanalytic relation between "werewolves" and "outlaws," two words betraying etymological connections); P. READ, *ALIVE: THE STORY OF THE ANDES SURVIVORS* (1974) (best account of *contemporary* case of survival cannibalism where, although no one was killed to be eaten, some of same symbolic questions were raised concerning ingestion of human flesh); P. SOROKIN, *HUNGER AS A FACTOR IN HUMAN AFFAIRS* (1975) (among the best historical sociologies of hunger, including cannibalism; touches upon *Regina v. Dudley and Stephens*). See also Fuller, *The Case of the Spelunccean Explorers*, 62 *HARV. L. REV.* 616 (1949) (hypothetical about cannibalism and cave disaster).

Ordinary Scholarship

Ordinary Vices. By Judith N. Shklar.* Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 1984. Pp. 268. \$16.50.

Jean Bethke Elshtain†

Any new book by Judith Shklar, whose previous works include interpretations of Rousseau's social theory¹ and Hegel's political philosophy,² as well as *After Utopia*³ and *Legalism*,⁴ merits attention. Her texts are characterized by crisp, authoritative prose and a subdued erudition. Shklar has very definite ideas on what others have said and the implications of their having said it. She never shirks from specifying what, in her view, counts as decent or deadly politics. An unabashed celebrant of liberal democracy, she views past thought and practice as well as present possibility and peril from the standpoint of one secure in her own position and certain in the knowledge that, while liberalism may not secure the best of all possible worlds, it helps to guard against the worst.

*Ordinary Vices*⁵ is yet another affirmation of liberalism, this time through an examination of "the sort of conduct we all expect, nothing spectacular or unusual."⁶ In tribute to Montaigne, the "hero of this book" whose "spirit" is on every page,⁷ Shklar begins her introduction with his epigram: "Treachery, disloyalty, cruelty, tyranny . . . are our ordinary vices."⁸ Shklar quickly adapts the list to her purposes, dropping tyranny, subsuming treachery and disloyalty into "betrayal," and adding hypocrisy, snobbery, and misanthropy.

A discourse on vice presupposes the possibility of a discourse on virtue; we cannot coherently look at one without some background notion of the other. Vices are defects, corruptions, depravities. They are wicked or degrading in nature,⁹ and to mention them is to conjure up a picture of a

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1. J. SHKLAR, *MEN AND CITIZENS* (1969).

2. J. SHKLAR, *FREEDOM AND INDEPENDENCE* (1976).

3. J. SHKLAR, *AFTER UTOPIA* (1957).

4. J. SHKLAR, *LEGALISM* (1964).

5. J. SHKLAR, *ORDINARY VICES* (1984) [hereinafter cited by page number only].

6. P. 1.

7. P. 1.

8. P. 1, quoting M. MONTAIGNE, *Of Cannibals*, reprinted in 1 *THE ESSAYS OF MONTAIGNE*, 202, 210 (E. Trechmann trans. 1927).

9. This is both everyday understanding and the dictionary definition, 12 *THE OXFORD ENGLISH*

Ordinary Vices

lapse, a falling away, or an active repudiation of an incorrupt, non-depraved good or goodness. To rebuke someone for the vice of cruelty, for example, is to acknowledge some alternative standard. "Non-cruelty," or refraining from cruelty, is not itself a standard. It has meaning only by reference to the prior endorsement of, for example, mercy or compassion as qualities of character or performative imperatives. Shklar, however, offers no explanation for the tacit framework that locates her vices—to the extent they are vices—as primary. That each element in her list bears "both personal and public dimensions"¹⁰ does not suffice to forge links between and among them. The problems with *Ordinary Vices* begin at its beginning, then, with Shklar's characterization of her project.

I.

Shklar fires a series of polemical volleys that signify her intent and her method of proceeding. Various categories or traditions are dismissed, pretty much out of hand, for having said nothing worthwhile about her primary vice, cruelty. She claims, for example, that "theologians" in general—and Christians in particular—have been virtually mute on the vice of cruelty; moreover, Christianity historically did little to inhibit its practice.¹¹ In her view, theologians and other adherents of "revealed religion" are preoccupied with offenses against the divine order, and hence incapable of doing any serious thinking about everyday problems.¹²

"Philosophers," who constitute a second generic category, are indicted for having "so little to say about cruelty."¹³ This charge is not wholly unjustified. In the name of analytic rigor, certain highly abstract philosophers couch moral dilemmas in terms that distance human subjects from the problem under consideration, creating often bizarre and trivial hypothetical cases for our ostensible edification. Such analysis leads to exasperated befuddlement.¹⁴ If these are the philosophers Shklar has in mind, her rejection of philosophy is well taken.

Moral philosophy of the past several decades, however, offers many examples of a serious coming to grips with public and private dilemmas. I have in mind, as a partial list, the work of Stuart Hampshire, Bernard

DICTIONARY 176 (1933).

10. P. 2.

11. Pp. 10-14.

12. P. 1.

13. Pp. 1, 7.

14. See, for example, Phillip Abbott's discussion of the treatment by analytic philosophers of abortion. They framed the debate through hypotheticals involving spores filtering through window screens, adults hooked up to violinists, and a whole plethora of arid abstractions all scrupulously avoiding pictures of adult human beings cradling babies in their arms—or not. P. ABBOTT, *THE FAMILY ON TRIAL* 133-46 (1981).

Williams, Thomas Nagle, Sissela Bok, Stephen Toulmin, Philip Hallie, Peter Singer, and others who, with Singer, have taken up the challenge to do deep moral thinking about animals. Among political philosophers, Alasdair MacIntyre, Michael Sandel, and Michael Walzer are important for their inquiries into civic virtue and moral judgment in wars. Feminist discourse too has challenged received understandings of public and private vice. Shklar's sweeping dismissal of the philosophers is simply wrong.

Unlike theologians and philosophers, Shklar, following Montaigne, will put cruelty first. Cruelty, she claims, "is often utterly intolerable for liberals, because fear destroys freedom"¹⁵ and because cruelty "puts us face to face with our irrationality, as nothing else does."¹⁶ Freedom demands that we put cruelty first. Granting that we all "have trouble grading the vices,"¹⁷ Shklar insists that we go ahead, although she admits that putting cruelty first threatens reason and may result in our becoming "politically disoriented and deeply confused."¹⁸ Still, once the wise man puts cruelty first, he "will be careful" to control his misanthropy, "lest it becomes rage."¹⁹

Evidently Shklar's schema—cruelty first, misanthropy second—is supposed to alert the moral agent to facts that would otherwise be unavailable for his or her scrutiny, enabling him or her to maintain moral equilibrium. Why this is so is uncertain, but it is certain that Shklar believes this supposed illumination to be one of the central justifications for her project. For example, she argues that if we put misanthropy first, we will have no check against "our most destructive political possibilities."²⁰ The result could be anything from depression to a "political fury" bringing us "to the point of mass murder."²¹ It is unclear what lies behind this rhetoric. The McDonald's massacre indeed seems to have been perpetrated by a misanthrope, but his rage was hardly political. And the mass murders endemic to modern war cannot be understood by attributing misanthropic motives to those who engineered them. Character flaws may account for some deeds of violence, but the most enormous acts of violence are committed as a means toward the political ends of states. In this regard, a charge of misanthropy illumines absolutely nothing about the cruelties of,

15. P. 2.

16. P. 3.

17. P. 3.

18. P. 3. That we must rank the vices is open to dispute, despite Shklar's insistence that otherwise we court confusion. Establishing a hard and fast ranking may move us towards an abstract universalism that puts pressure on the very moral complexity she seeks to preserve. One might argue instead that we should make distinctions as to which vice is most in evidence or most to be eschewed in particular situations.

19. P. 3.

20. P. 3.

21. P. 2.

Ordinary Vices

for example, fascism. The distance that separates a Scrooge's "Bah, humbug!" from a calculatingly rationalized policy of engineered extermination is too great to be bridged by a single "vice" as indeterminate and watery as misanthropy.²²

Given her ranking of vices, and in light of the alleged silence of theologians and philosophers on the topic, Shklar tells us at the outset that "we must turn" to "historians, dramatists, and poets"²³ for illumination. These modes of discourse exemplify moral complexity, enabling us to recognize the diversity of our own tradition and culture and thereby to sustain freedom. History and art fortify the defender of liberalism against its "clerical and military critics"²⁴ who see in liberalism's essence "selfishness," judging it amoral as a result.²⁵ Despite the charges of its critics, liberalism's tolerance of diversity reveals "an enormous degree of self-control."²⁶

Although liberalism eschews coerced uniformity, it does impose a public ethos—a form of self-control with public implications—that begins with fear and thus with what is to be avoided. The liberal self is constituted around a healthy core of fear and is thus braced for the "extremely difficult and constraining"²⁷ task of liberalism itself. Several questions suggest themselves: How does the liberal self arise and how is "it" sustained? For if the self that liberalism presupposes can be shown to be problematic, the liberal project is jeopardized. Does a "liberalism of fear" constitute a public ethos of "what is to be avoided" as securely as Shklar claims? Might not fear, together with putting cruelty first, invite the solution of Hobbes' *Leviathan* rather than a system of constraints and power balances that work to keep open space for freedom?²⁸

22. The misguided thinkers who give misanthropy pride of place are not the only ones Shklar denounces. Those who put dishonesty or betrayal first, Shklar informs us, open up another Pandora's box of unpleasant possibilities, for "then there is no built-in restraint upon fury, which did indeed inspire unstable outbursts and violent misanthropy in the early modern period and again in the years immediately after World War I." Pp. 3–4. Whose fury and what outbursts is not at all clear. In addition, the locution "fury . . . did indeed inspire" attributes agency to a (collective) vice, further obscuring matters.

23. P. 1.

24. P. 4.

25. P. 4.

26. P. 4.

27. P. 5.

28. See T. HOBBS, *LEVIATHAN* (M. Oakshott ed. 1946) (1st ed. London 1651). Hobbes is the greatest philosopher of fear in the English language. His omission from a book dedicated to a liberalism of fear is startling, for one of the things we need to understand, if we are to accept Shklar's argument, is how we sustain just the right amount of fear, no more and no less. By showing us where endemic—indeed ontological—fear takes us, Hobbes offers a benchmark for all subsequent discussions of a politics of fear.

II.

In search of answers to these questions, I shall follow Shklar's weighting by concentrating upon "Putting Cruelty First." Shklar repeats the charge made in her introductory comments that to "hate cruelty more than any other evil involves a radical rejection of both religious and political conventions."²⁹ Religion focuses on the divine; Christians are concerned with sins, with offenses against God. But "cruelty—the willful inflicting of physical pain on a weaker being in order to cause anguish and fear—is a wrong done entirely to *another creature*."³⁰

Montaigne provides Shklar's map to the moral terrain. In his attack on Machiavelli in the *Essays*, Montaigne reinforces "his conviction that Christianity had done nothing to inhibit cruelty."³¹ Although the cruelty Machiavelli endorses as necessary for his prince is at odds with Christian morality, Shklar sees Montaigne digging deeper and finding in Machiavellian discourse glaring evidence of the inability of Christianity to prevent celebrations of cruelty. In a strange twist to the tale, Machiavelli's *attack* on Christian morality in politics becomes additional proof that Christianity is a failure. If one adds to Montaigne's insights a consideration of the brutal conduct of the Spaniards in the New World³² (not to mention the Inquisition), Christianity's alleged indifference to cruelty seems manifest.

This is a curious argument. I will not linger over whether Machiavelli and Montaigne meant the same thing by cruelty. Shklar's mode of reasoning is more interesting: If some act or advocacy of wretched behavior occurs subsequent to the enunciation of a standard at odds with that behavior, it follows that the prior standard was ineffectual. If this were the case, all expressions of moral ideals could be condemned as futile, for one could always point to an action or expression that violated the ideals in question.³³ This argument leads to absurd conclusions. That many centuries elapsed from the time that an inclusive definition of humanity was articulated until slavery was finally abolished in the Western world is no indictment of the ideal. It is, instead, an indication of the intractability of one form of institutionalized cruelty. The more interesting question is whether

29. P. 8.

30. P. 8 (emphasis in original).

31. P. 11.

32. Pp. 11-12.

33. My formulation here does not offer a knock-down argument against Shklar, for I must go on to consider, as I cannot in this review, the matter of widespread violation of ostensibly deeply-held standards. This is a complex matter, requiring nuanced consideration of history, moral philosophy, and ordinary language.

slavery would ever have been abolished had it not first been morally problematized by the ideal of ontological equality.³⁴

Still, Montaigne and Shklar have a point. Cruelty in the name of Christ is especially reprehensible because Christianity is a religion that blesses the merciful and the peacemakers; that locates “forgiveness” as a central virtue; that worships a prince of peace. Hannah Arendt discussed the political importance of “the role of forgiveness in the realm of human affairs.”³⁵ Arendt saw in Jesus’ “radical” formulation the deepest possibility for a new beginning by ending some repetitive and often destructive pattern, breaking cycles of vengeance that enclose “both doer and sufferer in the relentless automatism of the action process.”³⁶ Forgiveness promises freedom, and it must be taken seriously “in a strictly secular sense.”³⁷ Cruelty, particularly Christian cruelty, prevents the promise from being fulfilled.

In her zeal to indict, however, Shklar distorts the historic record; not all was cruelty. Christians in late antiquity expressed horror and disgust at what they considered a culture of cruelty. Indeed, it was Christian revolution that finally put an end to the unspeakable cruelty of the Roman games in which human beings and animals were slaughtered and tortured in elaborately staged bloodbaths for the entertainment of crowds. Church councils preached against the widespread practice of infanticide and abandonment of infants, especially girls, and pressured the fourth century imperial state to end the practice. Christians downgraded the social status of warriors and required that those who reverted to soldiering do penance.³⁸

Inaccuracy aside, Shklar’s vision is unduly circumscribed. Her determination to avoid theological discourse leads to brief, unsatisfactory asides on Augustine and Aquinas. She claims that Augustine was preoccupied with “cupidity,” not cruelty.³⁹ But in the Augustinian metaphysic the vices cohere—cruelty is internally linked to *cupiditas*, a fundamental orientation that invites and rationalizes a whole range of vices. Augustine indicts a “lust for domination” that “brings great evils to vex,” from imperialist

34. It is not the case that the discourse of “sin” forces disconcert with cruelty. “Sins Crying to Heaven for Vengeance” in traditional Catholic teaching, for example, are willful murder, sodomy, oppression of the poor, and dishonesty in wage payments to workers. Each involves a social relationship; each implicates the doer in a deed committed against another; each either *involves* cruelty by definition or *may* invite cruelty.

35. H. ARENDT, *THE HUMAN CONDITION* 236–43 (1958).

36. *Id.* at 241.

37. *Id.* at 238. It is this freedom from vengeance, from the perpetuation of cruelty, whether private or public, of which religious thinkers opposed to the death penalty speak when they call for the “cycle of cruelty” to be broken.

38. See, e.g., P. BROWN, *THE CULT OF THE SAINTS* (1981); P. DRONKE, *WOMEN WRITERS OF THE MIDDLE AGES* (1984); M. MILES, *FULLNESS OF LIFE* (1981); 1 E. TROELTSCH, *THE SOCIAL TEACHING OF THE CHRISTIAN CHURCHES* (1931).

39. Pp. 7, 240–41.

conquest to gladiatorial combat.⁴⁰ To see a disregard of cruelty in condemnations of massacres, rapes, the razing of towns, and the loss of life of combatants and civilians alike is inexplicable. Or, to proclaim that "many Christians" who, although believing in sin, wish that Augustine "had talked a bit less about sex and a lot more about hypocrisy,"⁴¹ is a weak reed with which to support such a blanket indictment. Perpetuating our rather smug stereotypes concerning Augustine's supposed sex obsession ignores his struggles with domination of the self by a force that may compel the self to use others instrumentally. He did not preach loathing of the body—indeed he did the opposite—but instead sought to free the body from a domination that invites cruelty.⁴²

Augustine anticipated Freud's declaration that the "history of human civilization shows beyond any doubt that there is an intimate connection between cruelty and the sexual instinct" and that this impulse to cruelty, unless chastened by the emergence of a later "barrier of pity brings with it a danger that the connection between the cruel and erotogenic instincts . . . may prove unbreakable in later life."⁴³ This fusion of cruelty and sexuality, which manifests itself in private and public ways, in the brutalization and abuse of sex partners, in assaults on children, in the sexualized torture of prison inmates by other inmates or guards, is one of the most common faces of cruelty as an "ordinary vice" in our time, and fully justifies Augustine's concentration on *cupiditas*.

III.

If Shklar's genealogy of cruelty is flawed by its failure to take seriously into account any pre-Montaigne discussions of the phenomenon, her case additionally falters because she does not follow through on her most dramatic claims. Take, for example, her recognition that, overwhelmed by cruelty, we may be driven to look for "positive qualities" in "those ultimate victims of human cruelty, the animals."⁴⁴ Although she diminishes somewhat the force of this formulation by calling both "plants and animals" our "chief victims" just one page later—though how a plant can be a victim seems mysterious—this remains pretty strong stuff and invites consideration of what the implications of such recognitions might be. Instead, Shklar veers away from our "ultimate victims" to a worry that

40. AUGUSTINE, *CITY OF GOD* 104 (D. Knowles ed. 1972).

41. P. 241.

42. See, for example, the discussions in Peter Brown's masterful biography, P. BROWN, *AUGUSTINE OF HIPPO* 148-57 (1967) and in M. MILES, *supra* note 38, at 62-78.

43. S. FREUD, *Three Essays on the Theory of Sexuality*, in 7 *THE STANDARD EDITION* 123, 159, 193 (1953).

44. P. 13.

those who recognize this victimization may become extreme misanthropes. This misanthropy may in turn lead us to overrate our victims, whether—her list—animals, peasants, Jews, or children.

The idealization of the victim, which makes victimization something of a *sine qua non* of virtue, and grants to the victimized a privileged position in the moral universe, is indeed undignified and ultimately demeaning. Additionally, Shklar reminds us, victimization invites fantasies of revenge. The victimized, once they gain the upper hand, may turn into executioners: “They are only waiting to change places”⁴⁵ We are warned of the consequences of victimization through a brief exegesis of Sartre’s claim that the “victim can learn to respect himself only through violence,” a view that invites zealous cruelty.⁴⁶ Shklar concludes from all this that “no history . . . can tell us how to think about victimhood.”⁴⁷ Surely this is wrong, as a closer look at animal and human victimization demonstrates.

Even if human victims sometimes seek to victimize others in turn, the same cannot be true for animal victims of human cruelty. In a recent film, “Star Man,” an interplanetary visitor asks his human companion why men kill deer. “Do deer attack your species?” he queries. “No.” “Well, why then? To eat?” “Yes, I guess.” “But deer do not eat humans?” “No.” “And there is other food?” “Yes.” “A strange species,” he concludes, and his reference is not to the deer. The deer cannot turn on us; nor can those monkeys confined to “primate chairs” in our laboratories.⁴⁸ *We* may idealize them—surely some animal protectionists do—but *they* cannot idealize themselves, nor turn their status as victim into a tool against their oppressors. Thus our ultimate victims do not warrant the skepticism Shklar advances in the case of human victims. Indeed, if one believes animals to be our ultimate victims, it is unacceptably complacent to fail to act in light of this recognition, or to fail to “review critically the judgments we ordinarily make and the possibilities we usually see,” the task of political theory in Shklar’s words.⁴⁹

When we turn to human victimization, we also find ways to think about victimhood that repudiate the seduction of vengeance. Locating militant nonviolence in opposition to passive acquiescence in victimization at

45. P. 18.

46. P. 21.

47. P. 23.

48. See A. ROWAN, *OF MICE, MODELS, AND MEN* (1984). Electrodes are screwed into their brains and they are tortured. Higher and higher levels of pain are administered until they die, victims of unnecessary tests aimed at “measuring” how much pain can be tolerated before the animal perishes from shock and trauma.

49. P. 226. See Singer, *Ten Years of Animal Liberation*, N.Y. REV. BOOKS, Jan. 17, 1985, at 46–52 (review of ten new titles reflecting on cruelty to animals and human conduct). Just two other titles from among a long list of possibilities are: M. MIDGLEY, *ANIMALS AND WHY THEY MATTER* (1983), and J. TURNER, *RECKONING WITH THE BEAST* (1980).

one extreme, and violent action against it at the other, Martin Luther King proclaimed a route to self-respect for victims. Militant nonviolence, he argued, enables the agent to "transmute hatred" in order to liberate himself and his oppressor from the cycle of victim/victimizers. "Nonviolence had tremendous psychological importance to the Negro," he wrote, for it "vindicate[d] his dignity."⁵⁰ Victims, Sartre notwithstanding, need not become the new executioners. Perhaps this way of thinking and acting about victimization falls out of Shklar's picture because it calls upon moral identities and convictions her liberal psychology of fear cannot capture.

Shklar draws a muted conclusion from her resounding insistence on putting cruelty first. The consequences of this ordering of vices, she proclaims, have been "faced fully" only by Montaigne. "It makes political action difficult beyond endurance, may cloud our judgment, and may reduce us to a debilitating misanthropy and even to moral cruelty. These pitfalls can be avoided by skepticism and an isolating aloofness. This is open to few of us"⁵¹ Thinking about cruelty being so difficult to endure, we become "just as evasive" as "our philosophic ancestors" and deploy various dodges, referring instead to "sadism" or "aggression."⁵² We find ourselves in Montaigne's paradoxes and puzzlements and "talk around cruelty because we do not want to talk about it."⁵³

These remarks deflect from cruelty to comfort thinkers who put it first, sympathizing with the difficulty of the task. But many are propelled by their recognition of cruelty to act, not to evade. They manage to endure the political imperatives that flow from a primary concern with cruelty. What is "beyond endurance" is the cruelty they fight, whether torture of helpless sentient creatures in the name of science; torture of humans in the name of politics; or assaults on human dignity through systematic denial of basic freedoms and justice.⁵⁴

The questions only proliferate if we seek the consequences of putting

50. M. KING, *WHY WE CAN'T WAIT* 31 (1964).

51. P. 43.

52. P. 43.

53. P. 44.

54. Shklar also rescues Jeremy Bentham, a prime mover in reform movements to limit cruelty, from an unnamed enemy or school of thought. Pp. 35-37. Her reference is clearly to Michel Foucault when she writes: "It is among the more grotesque intellectual misinterpretations that Bentham should now occasionally be regarded as in some way a contributor to the terrors of contemporary dictatorship. His plan for improved prisons is now scorned as the model for future gulags and camps. This libel, designed to discredit all critics of the traditional order, need not detain us." P. 35. But it should, particularly if one cares about democracy. For Foucault's point is that Bentham's Panopticism, while it may indeed limit physical cruelty, enhances possibilities for surveillance and an "indefinite discipline." See M. FOUCAULT, *DISCIPLINE AND PUNISH* 195-228 (A. Sheridan trans. 1977).

cruelty first. What about the death penalty? What about animal experimentation? What about ways to respond to domestic violence that preserve some notion of a private sphere free from state intrusion? What about the cruelty of poverty? What about cruelty to children: Must we move in the direction of “children’s liberation” or are there other options? What about media violence and its effect upon the hearts and minds of citizens, young and old? What about abortion and euthanasia? Shklar is right not to tell us “what is to be done,” but wrong to refuse to carry through on the political implications of her own scale of vices.

IV.

Considerations of hypocrisy, snobbery, betrayal, and misanthropy follow. Though hypocrisy “remains the only unforgivable sin,”⁵⁵ Shklar forgives it in the end because she finds antihypocrites so off-putting and because she repudiates “ideological discourse,” which inevitably puts hypocrisy first and skews our politics. In her view, “all ideologies” are infected by a “basic hypocrisy” that invites the pretense that the “ideological needs of the few correspond to the moral and material interests of the many.”⁵⁶ Shklar’s targets include “*all* politically active intellectuals, who generally are also extreme antihypocrites.”⁵⁷ The “all”—my emphasis—is an undiluted indictment that ignores the many who do not fit her description. Albert Camus comes immediately to mind.⁵⁸

Hypocrisy, rather than cruelty, provides the framework for Shklar’s most sustained discussion of war. She sees discourse on war as a cycle of repetitive charges of hypocrisy and counter-hypocrisy, or what she terms the “normal process of recriminations.”⁵⁹ Shklar deflates “just war discourse”—a tradition of reflecting and judging morally about justifications and means of war. She claims that if “one puts cruelty first, one will follow some version of Kant’s doctrine and see war as beyond the rules of good and evil, just and unjust.”⁶⁰ It will be clear that “the very possibility of justice” is extinguished in “the world of kill or be killed.”⁶¹ Locating war beyond moral consideration gives it the status of a *force majeure*, on a par with some natural disaster. It is unclear where this leaves the citizen

55. P. 45.

56. P. 66.

57. P. 66. (emphasis supplied).

58. Camus’ work is that of the *engaged* political intellectual who repudiates ideological constructions that blunt moral sensitivity and locate the intellectual in an elite status. See A. CAMUS, *THE REBEL: AN ESSAY ON MAN IN REVOLT* (A. Bower trans. 1956); A. CAMUS, *RESISTANCE, REBELLION, AND DEATH* (J. O’Brien trans. 1961).

59. P. 83.

60. P. 80.

61. P. 80.

of a liberal democracy seeking to locate herself with reference to the carnage of war and to find a language in which to discuss it.⁶²

Curiously, Shklar omits Hannah Arendt's insightful discussion of "[t]he momentous role that hypocrisy and the passion for its unmasking came to play in the later stages of the French Revolution."⁶³ According to Arendt, it was "the war upon hypocrisy that transformed Robespierre's dictatorship into the Reign of Terror."⁶⁴ Exploring how it is that hypocrisy ("one of the minor vices") came to be "hated more than all the other vices taken together," Arendt located the assault upon hypocrisy inside a larger war upon "society as the eighteenth century knew it," making of the Revolution the "explosion" of some uncorrupted core through the "outward shell of decay."⁶⁵

Shklar's next target, snobbery, is a curious choice for a major vice, but Shklar finds it both "very destructive" and "quite ineradicable."⁶⁶ Snobbery "habitually cause[s]" pain and rage and is "wholly out of place" in a democratic society.⁶⁷ Her authorities are La Bruyère, Molière, Thackeray, and Francis Grund. She anticipates the criticism that snobbery is small potatoes in the overall scheme of things by conceding that imperialism, racism, nativism and anti-Semitism are deeper issues; racism, in particular, being "far more significant than snobbery."⁶⁸ Yet there is a "not irrelevant" connection between the two, for "two of Europe's main racist theorists . . . were bogus counts."⁶⁹ Snobbery and racism, she concludes, are "cousins."⁷⁰ Primary snobbery, a remnant of aristocratic disdain and bourgeois toadying, assaults democracy. But secondary snobbery, the compulsion to form cliques and associate with one's own group to the partial exclusion of others, is integral to freedom.

Shklar recalls the Students for a Democratic Society through the prism of snobbery, bringing forward one of her few examples drawn from recent political history. She credits SDS with creating a "less snobbish climate in the universities," but accuses them of writing a "chapter in the political history of both snobbery and the effort to eradicate it" and failing "on both counts."⁷¹ SDS' call for participatory democracy is reduced by Shklar to anti-snobbery. The history of SDS becomes a tale in which activists

62. Cf. M. WALZER, *JUST AND UNJUST WARS* (1977) (discussing morality of war "from a rights-oriented just war perspective").

63. H. ARENDT, *ON REVOLUTION* 98 (1963).

64. *Id.* at 99.

65. *Id.* at 100-01, 105-06.

66. P. 87.

67. Pp. 90-91.

68. P. 111.

69. P. 111.

70. P. 111.

71. Pp. 133-34.

“from the top of society” go to “the bottom” and are rejected. Guilty of *noblesse oblige*, which has “no place in a democracy,” SDS was doomed at the outset.⁷² Not only is this story of SDS a partial construction that turns a complex story of external and internal pressures into a foreordained morality play, but the claim that *noblesse oblige* has no place in a democracy is wrong. It ignores the roles such motivation has played historically in calling attention to social conditions and promoting reforms that enhanced the democratic features of American society. What starts as *noblesse oblige* may be transformed, through political action, into a genuinely democratic identification with the suffering of others and a determination to put an end to it. The career of Eleanor Roosevelt is exemplary in this regard.⁷³

On to betrayal, the “main theme of our literature and history.”⁷⁴ Shklar begins by reminding us of the obvious—that there can be “genuine conflicts of loyalty.”⁷⁵ Examples are drawn from Shakespeare, Henry James, Louis Auchincloss, Frank Norris, William Faulkner, William Dean Howell, Evelyn Waugh, and the film “Casablanca.” Shklar is irked by E. M. Forster’s proclamation of personal love and loyalty against the claims of the state, in which he declares that were he forced to choose between betraying his country and betraying his friend, “I hope I should have the guts to betray my country.”⁷⁶ For Shklar this is “not an intelligent statement” because Forster failed to specify “the kind of ‘state’ involved or how one’s friends might betray it.”⁷⁷ He did not, for example, recognize the differences between “decent” legal systems, the United States and Great Britain, which did not force such choices, and the Soviet Union and Nazi Germany, which did. In a statement that comes off as unintendedly smug, Shklar notes: “For quite apart from how one chooses, the most important political and personal aim must always be to live under laws that do not force us to make intolerable choices. Parents and children should simply not be put into such situations.”⁷⁸ Well, perhaps not, but many are and have been. Montesquieu’s Enlightenment conviction, that “only the claims of humanity as a whole should count,”⁷⁹ is not much help in traversing this moral terrain, nor are Shklar’s *segués* into Montaigne

72. P. 134.

73. See J. LASH, *ELEANOR AND FRANKLIN* (1971); J. LASH, *ELEANOR: THE YEARS ALONE* (1972).

74. P. 138.

75. P. 141.

76. P. 155.

77. P. 156.

78. P. 156.

79. P. 158.

on friendship, Shakespeare's *Richard II*, Marlowe's *Jew of Malta*, Racine's *Britannicus*, and so on.

Shklar's most interesting claim in her chapter on betrayal is that "it is in republics . . . that treason and subversion are most thoroughly despised" because "a Lockean political society depends on trust more than any other."⁸⁰ Our obsession with subversion, which she locates in "the very structure of politics in a representative democracy,"⁸¹ invites excessive fears of betrayal that can themselves subvert order. This insight warrants a more complete discussion than she provides.

Misanthropy, Shklar's final vice, can "initiate slaughters,"⁸² but need not. She identifies three main types of misanthropic characters, endorsing a "calm misanthropy," which "became the basis of constitutional government, especially in America."⁸³ "That was one of Montesquieu's many contributions to politics" and represents misanthropy's "finest hour."⁸⁴ Once again, a complex constellation of historic events and ideas is squeezed into a narrow frame that purports to be the whole story. We gain little by describing mistrust of concentrations of power as misanthropy. Why not "realism" or "pessimism"? The dictionary is clear: Misanthropy is "hatred" of mankind. Jefferson was no hater. To call skepticism about human perfectibility or goodness misanthropy skews the discussion in a direction most compatible with Shklar's insistence that a liberalism of fear is "the whole basis" of liberalism itself. This may explain, but it cannot justify, Shklar's interpretation.

V.

Shklar's final chapter, "Bad characters for good liberals," has all the earmarks of an afterthought. She restates that she has neither moved towards a goal nor linked chapters by a continuous argument, declaring it the job of political theory "to make our conversations and convictions about our society more complete and coherent and to review critically the judgments we ordinarily make and the possibilities we usually see."⁸⁵ Her "we" here refers to people who are "familiar with the political practices"⁸⁶ of liberal society, who have a certain sort of education, and who take the institutions of constitutional government as a political given.

She sees *Ordinary Vices* as a way of getting closer to "men and

80. P. 177.

81. P. 183.

82. P. 193.

83. Pp. 196-97.

84. P. 197.

85. P. 226.

86. P. 227.

events,”⁸⁷ of being more concrete than conceptual analysis and model building allow. We must “look to literature” to find the “essence” of the vices.⁸⁸ But looking to literature, and storytelling, are more complex activities than Shklar acknowledges. Storytelling of the sort Shklar endorses involves a prior commitment to a narrative structure that presumes a guiding *telos*, an endpoint. Additionally, Shklar endorses implicitly a theory of mimesis whereby literary representations reveal the “real” to itself. But her many examples, as interesting and lively as they often are, fail to locate the reader inside a complex social world that includes concrete political dilemmas; rather, one finds oneself constantly tugged away from a potential debate Shklar touches upon—for example, cruelty to animals—into yet another excursus.

She moves to bolster the shaky architecture of *Ordinary Vices* in her final few pages by calling upon Kantian “moral fortitude,” endorsing a collective stiffening of spines.⁸⁹ Liberalism, after all, is no project for the faint hearted. This apparent endorsement of Kantian formulations and the Kantian moral inheritance *tout de suite* begs more questions than it answers. To assert that a “deeper connection between personal character and liberal government than one might guess”⁹⁰ exists, and that this connection lies in government “keeping its hands off our characters”⁹¹ by providing a framework that itself presupposes no substantive moral ends, fails to demonstrate how such a connection is forged and sustained. Shklar seems to presume that features of American culture other than liberal constitutionalism do not form our characters in an important way, ignoring, for example, the importunate intrusions of consumerism, the continued force of family, religious, and ethnic ties, the nature of work-life, and the changing face of male-female relations.

The Kantian subject, whose spiritual inner core and deepest impulses lie outside the scope of public authorities and fellow citizens, is a bracing artifact of a powerful discursive tradition. This notion of self as a rational being prior to and independent of his or her objects and any particular experiences gives way as the subject is severed from his or her situation and projects.⁹² Shklar fails to confront the strongest critics of her position; indeed, she acknowledges no serious criticism of Kantian foundationalism

87. P. 228.

88. P. 230.

89. P. 234.

90. Pp. 234–35.

91. P. 235.

92. For an elegant critique of a Kantian derived deontological liberalism, see M. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982). From a very different angle, Hannah Arendt argues controversially that Adolph Eichmann adhered closely to a popularized understanding of the requirements of Kant’s categorical imperative and to Kant’s precept that “a law . . . [is] a law.” H. ARENDT, *EICHMANN IN JERUSALEM* 135–37 (rev. ed. 1964).

at all.⁹³ Yet, even within Shklar's own schema, Kant's insistence that man owes it "to himself to avoid wanton acts of cruelty to animals,"⁹⁴ is thin gruel if one puts cruelty first. A morality that presumes rational consent between self-interested, contracting parties who are equals, necessarily restricts the range of our moral consideration.⁹⁵

Shklar describes *Ordinary Vices* as "a ramble through a moral minefield, not a march toward a destination."⁹⁶ This is an odd choice of words. One doesn't "ramble" through a minefield. One moves with purposive caution, for a single careless misstep may prove fatal. One rambles only after the minefield has been swept and transformed into safe terrain. Shklar's choice of vices and examples, her refusal to press hard cases, to draw out the political implications of her own claims, or to take strong criticisms into account, suggests that a more apt metaphor would be a stroll through a garden where vices, like weeds, sometimes erupt but are kept under control by a vigilant gardener. The order and stability of the whole are quite unspoiled. Unfortunately, the world is more like a minefield than a garden.

93. Women, for example, are a problem for Kant's moral project, being more imbedded, in his view, in the embodied and the "immediate." See Blum, *Kant's and Hegel's Moral Rationalism: A Feminist Perspective*, 12 CAN. J. PHIL. 287 (1982); Elshtain, *Kant, Politics, and Persons: The Implications of His Moral Philosophy*, 14 POLITY 205 (1981).

94. P. 233.

95. M. MIDGLEY, *supra* note 49, at 51. To be sure, Kant *wants* us to behave responsibly toward animals, but they are not self conscious; they exist merely as a means to an end. That end is man.

96. P. 6.

Joseph Story's Commentaries on the Constitution: A Belated Review

Commentaries on the Constitution of the United States. By Joseph Story. Boston: Hilliard, Gray, & Co. and Cambridge: Brown, Shattuck & Co., 1833. Vol. I: Pp. xxxiv, 494. Vol. II: Pp. 555. Vol. III: Pp. 776.

H. Jefferson Powell*

Over a century and a half have passed since the publication of Justice Joseph Story's *Commentaries on the Constitution*,¹ the most massive and most widely discussed treatise on constitutional law in pre-Civil War America.² In their day, the *Commentaries* were both praised as an "incomparable monument of sound and healthy and incontestable constitutional principles,"³ and damned as a "regrett[able]" collection of "mere dogmas" lacking support in history or principle.⁴ The specific political and constitutional struggles to which the *Commentaries* made an important intellectual contribution have long since been resolved, and the treatise itself has faded from the consciousness of constitutional lawyers. Nevertheless, Joseph Story's central historical role as scholar and judge in the

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1. J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (Boston & Cambridge 1833) [hereinafter referred to as *Commentaries*; cited by volume and page number only].

2. See W. SWINDLER, THE CONSTITUTION AND CHIEF JUSTICE MARSHALL 18 (1978). The *Commentaries* were a major, if unacknowledged, source of Alexis de Tocqueville's classic *Democracy in America* (Paris 1835). See E. BAUER, COMMENTARIES ON THE CONSTITUTION 1790-1860, at 356-57 (1952).

3. Letter from James Kent to Joseph Story (June 19, 1833), reprinted in 2 J. STORY, LIFE AND LETTERS OF JOSEPH STORY 135 (W. Story ed. Boston 1851) [hereinafter cited as LIFE]. Story's colleague and mentor on the Supreme Court, Chief Justice John Marshall, described the *Commentaries* as a "great work" and a "comprehensive and an accurate commentary on our Constitution, formed in the spirit of the original text." Letter from John Marshall to Joseph Story (July 31, 1833), reprinted in 2 LIFE, *supra*, at 135.

4. A. UPSHUR, A BRIEF ENQUIRY INTO THE TRUE NATURE AND CHARACTER OF OUR FEDERAL GOVERNMENT 53 (Petersburg 1840). Upshur's 132 page "brief enquiry" was a critical review of the *Commentaries* setting forth a states' rights interpretation of the Constitution. The preeminent states' rights theorist John C. Calhoun offered an even harsher evaluation of Story's treatise: "I regard Story's *Commentaries* as essentially false and dangerous." Letter from John Calhoun to A.D. Wallace (Dec. 17, 1840), in 15 J. CALHOUN, THE PAPERS OF JOHN C. CALHOUN 389 (C. Wilson ed. 1983).

development of American law was recognized from an early date. Nineteenth-century states' rights theorists perceived in the *Commentaries* the antebellum era's most substantial intellectual challenge to their views;⁵ indeed, Alexander H. Stephens credited Story with virtually creating *ex nihilo* the nationalist constitutionalism that legitimized Abraham Lincoln's successful war against secession.⁶ Students of American thought have long recognized Story's importance as a creator and prime exemplar of the American legal mind,⁷ and Story's place on the pages of legal history proper has been prominent.⁸ In recent years, Professor Morton Horwitz has identified Story as a key actor in "the transformation of American law" between 1780 and 1860,⁹ while Professor James McClellan has portrayed Story as, even more than John Marshall, the author of the political and constitutional system of the modern United States.¹⁰

What is perhaps most striking about the commentary on Story's contribution to American law is its essential uniformity. Despite a chronological spread of a century and a half, despite an ideological range from Confederate apologist to critical legal scholar, the interpretations have remained nearly constant.¹¹ For example, notwithstanding the yawning gap between their normative evaluations of Story's role, Horwitz and McClellan agree

5. Upshur regarded the commentaries of Story and Kent as holding the "first rank" among those published since *The Federalist*, but considered only Story's work important enough to merit refutation. A. UPSHUR, *supra* note 4, at 6. Henry St. George Tucker's states' rights lectures also chose the *Commentaries* as a target. See H. TUCKER, LECTURES ON CONSTITUTIONAL LAW (Richmond 1843); E. BAUER, *supra* note 2, at 205. Alexander Stephens dismissed Chancellor Kent with the remark that Kent "goes into no argument. He barely deals . . . in assertion." 1 A. STEPHENS, A CONSTITUTIONAL VIEW OF THE LATE WAR BETWEEN THE STATES 505 (Philadelphia 1868). Stephens, finding Story a more formidable opponent, went to greater length in refuting the *Commentaries*. See *id.* at 59-81, 117-70, 498-522. Jefferson Davis also found it necessary to attack Story. 1 J. DAVIS, THE RISE AND FALL OF THE CONFEDERATE GOVERNMENT 114-15, 129-34, 141-45 (1881).

6. Stephens claimed that no respectable jurist had argued for a nationalist reading of the Constitution before Kent's treatise in 1826 and Story's in 1833, 1 A. STEPHENS, *supra* note 5, at 505, and discounted Kent's short discussion as mere "assertion." For Stephens, it was Story who had given nationalism intellectual plausibility. See *supra* note 5.

7. See, e.g., P. MILLER, THE LIFE OF THE MIND IN AMERICA 124-25, 136-39, 141-42 (1965); 2 V. PARRINGTON, MAIN CURRENTS IN AMERICAN THOUGHT: THE ROMANTIC REVOLUTION IN AMERICA 300-03 (1927).

8. See, e.g., L. FRIEDMAN, A HISTORY OF AMERICAN LAW 119, 288-90 (1973); H. HYMAN & W. WIECEK, EQUAL JUSTICE UNDER LAW 18-19, 57-61 (1982); G. WHITE, THE AMERICAN JUDICIAL TRADITION 35-63 (1976). None of these recent works shares in the old practice of regarding Story as a schoolmasterish and even faintly ludicrous disciple of John Marshall. That view is reflected in the well-known, although probably apocryphal, account of Marshall stating a holding and then saying, "Now Story, that is the law; you find the precedents for it." J. MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION 307 & n.149 (1971) (quoting alternative versions).

9. See M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 255-56 (1977).

10. See J. MCCLELLAN, *supra* note 8, at 305-09. For a critique of McClellan's book, see Horwitz, *The Conservative Tradition in the Writing of American Legal History*, 17 AM. J. LEGAL HIST. 275 (1973).

11. Vernon Parrington's remarks about James Kent vividly summarize this consensus view of Story: "Like John Marshall and Joseph Story he was expert in devising legal springes to catch unwary democrats, and while the Jeffersonians were shouting over their victories at the polls, he was

in categorizing Story as an opponent of "democracy" intent on frustrating the results of the political process. He sought to accomplish this goal, they argue, by the creation of a body of "anti-majoritarian" constitutional law¹² biased in favor of the capitalist entrepreneur at the expense of agrarian and labor interests. This consensus interpretation presupposes that the impact of Story's work on the distribution of political and economic power in America "explains" his thought. What such an approach intentionally depreciates is the significance and meaning of Story's thought viewed as an intellectual construct.

The purpose of this review is not to quarrel with the legitimacy of political and economic analysis in legal history, but rather to argue for the value of a complementary approach: the re-presentation of a text, in this case Story's constitutional treatise, "as it bore meaning in the mind of the author."¹³ There are, of course, certain perspectives from which such an enterprise seems pointless, most notably the vulgar derivations of Marxism that see all language and all thought as camouflage for the assertion of class interest. But economic reductionism is unacceptable as an exclusive interpretive methodology because it ignores the compelling sociological view that intellectual forms and concepts "are part of the reality they order, that language is part of the social structure and not epiphenomenal to it."¹⁴

This "belated review" of Story's *Commentaries* approaches Story in his self-proclaimed role as constitutional thinker. It thus seeks to recapture Story's presentation of his constitutional vision "from within," as that vision appeared to the man himself. This does not involve divorcing Story's words from their historical setting—far from it—for an examination of that setting is essential to understanding the meaning and purposes of the *Commentaries*. But this approach does require us to take seriously Story's

engaged in the strategic work of placing the Constitution under the narrow custodianship of the English law." 2 V. PARRINGTON, *supra* note 7, at 197–98. See also H. ABRAHAM, JUSTICES AND PRESIDENTS 81 (1974) (Story "neither a democrat nor a confirmed majoritarian"); G. WHITE, *supra* note 8, at 39, 47 (1976) (Story's judicial doctrines concerned with protecting propertied classes against broadening of political power).

12. See M. HORWITZ, *supra* note 9, at 255–56 (Story's public law opinions dominated by conservative fear that legislatures might invade private property rights); J. MCCLELLAN, *supra* note 8, at 269–70 (Story's opinions represent attempt to erect "unsurmountable barrier" against democratic encroachment on private property rights and liberties).

13. J. POCOCK, POLITICS, LANGUAGE AND TIME 6 (1971). See also *id.* at 9 ("historical explanation" of a text seeks "what the author meant to say").

14. J. POCOCK, *supra* note 13, at 38. See also Hovenkamp, *The Economics of Legal History*, 67 MINN. L. REV. 645, 691–97 (1983) (economic approach to history, while valuable, cannot explain all aspects of legal change). Sophisticated Marxists have not disagreed. See, e.g., Letter from Friedrich Engels to Joseph Bloch (Sept. 21–22, 1890), in BASIC WRITINGS ON POLITICS & PHILOSOPHY: KARL MARX AND FRIEDRICH ENGELS 397–98 (L. Feuer ed. 1959) (neither Marx nor Engels ever claimed that forms of thought including "political, juristic, philosophical theories" do not exert influence on historical development).

arguments *as arguments*, and not just as means toward some political or social end. The results of this attempt to restate Story's constitutionalism draw into question the consensus interpretation of Story, for the Constitution which Story depicted in the *Commentaries* was not an immutable barrier against popular rule but rather a flexible instrument guided by the dictates of republican and majoritarian rule.

I. THE SETTING OF THE *Commentaries*

Legal education in the United States during the late 1820's was largely pursued in non-academic settings. The famous law school founded by Tapping Reeve in Litchfield, Connecticut was in decline and would finally close its doors in 1833.¹⁵ Other legal academies proved ephemeral.¹⁶ Although chairs of law existed at several colleges, these professorships had failed to constitute the nuclei of enduring programs of instruction.¹⁷ Many Americans rejoiced in the Republic's apparent freedom from a complex and esoteric body of law taught and administered by professional lawyers.¹⁸ Leading members of the bench and bar, however, believed the creation of regular institutions of legal training an essential part of their campaign to professionalize—and restrict—the practice of law.¹⁹ Writing in 1817, Joseph Story labelled it a “common delusion, that the law may be thoroughly acquired in the immethodical, interrupted, and desultory studies . . . of a practising counsellor.” He therefore hailed “the importance, nay, the necessity, of the law-school” that Harvard College had recently created with the establishment of the Royall chair of law.²⁰

Despite the founding of the Royall professorship, legal education at Harvard remained in a “near-moribund” state over a decade later.²¹ Much of the credit for establishing the Harvard Law School as a permanent institution must be given to Nathan Dane, a distinguished figure in Massachusetts legal and political life.²² Dane's penultimate contribution to the legal profession was his *General Abridgment and Digest of American*

15. See L. FRIEDMAN, *supra* note 8, at 279.

16. *Id.* at 279–80.

17. R. STEVENS, *LAW SCHOOL* 4–5, 8 (1983).

18. L. FRIEDMAN, *supra* note 8, at 265–66; P. MILLER, *supra* note 7, at 99–116.

19. P. MILLER, *supra* note 7, at 109–16.

20. J. STORY, *Course of Legal Study*, in *THE MISCELLANEOUS WRITINGS OF JOSEPH STORY* 66, 91–92 (W. Story ed. 1851) [hereinafter cited as *WRITINGS*].

21. G. DUNNE, *JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT* 284–85 (1970).

22. A delegate to the Confederation Congress in the 1780's, Dane was the primary author of the famous Northwest Ordinance of 1787. He served afterwards in the Massachusetts General Court and on several state law reform commissions. Although a participant in the Hartford Convention of 1815, convened by New England Federalists opposed to the war measures of the Republican administration, Dane proved a staunch nationalist during the nullification crisis of 1828–33. For a biographical sketch of Dane's career, see E. BAUER, *supra* note 2, at 124–32.

Law.²³ A vast compilation of legal materials that enjoyed great popularity with the bar, the *General Abridgment* was modelled after the widely used eighteenth-century English abridgment of Charles Viner. Viner had endowed the first chair of common law at Oxford from the royalties of his book,²⁴ and when the *General Abridgment* proved financially successful, Dane imitated Viner by offering Harvard ten thousand dollars out of its receipts to establish a chair of law.

Dane's offer specified that the professor should deliver and revise for publication lectures on a number of subjects, including "Federal Law and Federal Equity." Dane further specified Supreme Court Justice Joseph Story as the first incumbent of the position, "if he will accept the office."²⁵ Although Story had previously refused Harvard's Royall chair, he eventually agreed to accept the new professorship, and on August 25, 1829, Story was installed as the first Dane Professor of Law.²⁶

Dane's selection of Story was due in large part to the two Massachusetts natives' shared concern for legal learning.²⁷ The young Story, fresh from his undergraduate years at Harvard where he devoted himself to belles-lettres, had been dismayed at first by "the intricate, crabbed and obsolete learning"²⁸ he encountered in studying the law. Once in practice, however, Story quickly established himself as a skilled legal technician; his research into the more recondite details of legal lore became a cherished avocation as well as a means to professional advancement.²⁹

Story's ability as a practitioner allayed much of the original hostility which he encountered from the overwhelmingly Federalist Massachusetts bar because of his Republican political opinions. At the time of his admission Story was, he later wrote, the only lawyer in Essex County "who

23. Dane began work on the *General Abridgment* in the 1780's, and finally published the eight volume work in 1823-24. A ninth supplementary volume came out in 1829. E. BAUER, *supra* note 2, at 129.

24. The first Vinerian Professor was William Blackstone. Story admired Blackstone's *Commentaries on the Laws of England* (1765-1769) and, in writing his own *Commentaries*, he adopted the treatise form used by Blackstone.

25. Letter from Nathan Dane to the President and Fellows of Harvard University (June 2, 1829), reprinted in 2 LIFE, *supra* note 3, at 3-6. Dane stipulated that the incumbent should not be required to reside in Cambridge so that Story could accept the post while remaining on the Supreme Court.

26. 2 LIFE, *supra* note 3, at 6-7.

27. See Letter from Nathan Dane, *supra* note 25, at 5 (Story qualified to teach both "by study and practice").

28. J. STORY, *Autobiography* (1831), in 1 LIFE, *supra* note 3, at 73.

29. A year after being admitted to the bar Story anonymously published a collection of judicial decisions entitled *American Precedents of Declarations* (1802); in 1805 a handbook of *Pleadings in Civil Actions* came out under his own name. From 1809 to 1811 Story prepared American editions of three standard legal texts, Chitty's *Bills and Notes*, Abbott's *Ships and Shipping*, and Lawe's *Assumpsit*. See G. DUNNE, *supra* note 21, at 40-41, 74.

was either openly or secretly a *democrat*.³⁰ Despite his youth, Story rapidly became one of the most prominent Republicans in Massachusetts and in May 1808 he was elected to serve out the unexpired term of a deceased Republican congressman. Story's short period of service in Washington (December 1808–February 1809) was dominated by controversy over the Jefferson administration's conduct of foreign policy. In retaliation for European violations of neutral rights, the administration had obtained from Congress an act embargoing trade with the belligerents. The embargo crippled New England's sea-faring economy, and the Federalist regional majority in Congress countenanced evasion of and even direct resistance to the act. Although deeply concerned about the embargo's impact on the region's commerce,³¹ Story recognized that the administration was acting in good faith in a difficult situation, and he denounced the "deeply criminal" Federalist resistance to the embargo.³² Congressman Story nonetheless became convinced that continuance of the embargo would seriously threaten the integrity of the Union. He therefore took an active role in securing an end to the embargo,³³ and in the process irrevocably alienated President Jefferson.³⁴ After his single congressional session, Story served in the lower house of the state legislature (as speaker for almost a year)³⁵ and continued his private legal practice, representing the successful party in the reargument before the Supreme Court of the great case of *Fletcher v. Peck*.³⁶

The death of United States Supreme Court Justice William Cushing in September 1810 led to Story's return to Washington. President James Madison wished to choose a successor to Cushing, a Massachusetts native, from the small group of New England Republican lawyers, but he experienced considerable difficulty doing so. Madison's first nominee refused to serve for health reasons, and his second was rejected by the Senate; his third choice, John Quincy Adams, preferred to remain at his diplomatic post in Europe. Over Jefferson's private but vehement objections, Madison turned to Joseph Story.³⁷

Story brought to his judicial duties a delight in legal learning and a

30. 1 LIFE, *supra* note 3, at 95.

31. See e.g., Letter from Joseph Story to William Fetteyplace (Feb. 28, 1808), in 1 LIFE, *supra* note 3, at 165–66.

32. Letter from Joseph Story to Joseph White (Dec. 31, 1808), in 1 LIFE, *supra* note 3, at 172–73.

33. See Letter from Joseph Story to Joseph White (Jan. 4, 1809), in 1 LIFE, *supra* note 3, at 174–75; Letter from Joseph Story to William Fetteyplace (Jan. 14, 1809), in 1 LIFE, *supra* note 3, at 175–83; G. DUNNE, *supra* note 21, at 60–69.

34. E. BAUER, *supra* note 2, at 138.

35. See 1 LIFE, *supra* note 3, at 194–200.

36. 10 U.S. (6 Cranch) 87 (1810).

37. See G. DUNNE, *supra* note 21, at 77–82.

belief in the necessity of a unified nation with a strong central government. As a circuit justice, he played a key role in the growth of early nineteenth-century admiralty and commercial law. On the Supreme Court, Story's most notable performance prior to his appointment to the Dane Professorship was his opinion for the Court in *Martin v. Hunter's Lessee*,³⁸ which vigorously asserted the supremacy of the federal government and specifically upheld the Court's authority to review state court decisions on federal questions. Story's nationalism, like his erudition, commended him to Dane.

Professor Story proved to be an extremely popular teacher, and his efforts and prestige were a major factor in the Harvard Law School's flourishing state during the sixteen years that he served as Dane Professor.³⁹ Equally important to the growth of a legal academic tradition and to the professionalization of American law were his scholarly labors, undertaken in obedience to the terms of Dane's gift.⁴⁰ Between 1832 and 1845, Story published nine lengthy treatises and secured a world-wide reputation as a legal scholar.⁴¹ After sending his first treatise, on bailments, to the publishers in the middle of 1831, Story began work on a commentary on the United States Constitution.⁴² Story completed the *Commentaries* in the latter part of 1832, and prepared an abridged one volume textbook edition while the unabridged three volumes were in press. The unabridged version appeared in January 1833 and the textbook in April.⁴³ Although Story considered preparing a second edition of the unabridged version, he never did so, and the January 1833 text was to remain his chief extrajudicial contribution to American constitutional law.

The picture of the *Commentaries'* origins painted above is a familiar and peaceful one—distinguished lawyer and judge becomes professor, dedicating himself to instruction and scholarship. But it is only a partial truth at best. The *Commentaries* were not simply the product of an academic's tranquil reflections; they were, even more, Story's response to what he saw as attacks on his personal integrity and threats to his nation's public order.

38. 14 U.S. (1 Wheat.) 304 (1816).

39. L. FRIEDMAN, *supra* note 8, at 281.

40. Because Story's teaching style was "by familiar and conversational expositions, and not by written lectures," he elected to write a series of "systematic treatises" on the subjects designated by Dane rather than to publish his lectures. 2 LIFE, *supra* note 3, at 69.

41. The series eventually included *Bailments* (Cambridge 1832), the *Commentaries*, *Conflict of Laws* (Boston 1834), *Equity Jurisprudence* (Boston 1836), *Equity Pleadings* (Boston 1838), *Agency* (Boston 1839), *Partnership* (Boston 1841), *Bills of Exchange* (Boston 1843), and *Promissory Notes* (Boston 1845). See also 2 LIFE, *supra* note 3, at 648–65 (collecting favorable reviews, many of them from British and European publications).

42. 2 LIFE, *supra* note 3, at 69.

43. See *id.* at 129–30.

The threats derived from the nullification crisis of 1828–1833.⁴⁴ The roots of the crisis lay deep in the history and character of America, but its immediate cause was an 1828 protective tariff intended to foster domestic, primarily Northern, manufacturing industries. Labeled the “tariff of abominations” by its primarily Southern opponents, the act provoked a storm of protests claiming that it was both unjust and unconstitutional.⁴⁵ The attack on the tariff took its most extreme, and most official, form in South Carolina. In December 1828, the state legislature approved a report that became known as the *South Carolina Exposition*.⁴⁶ The *Exposition*, invoking the authority of the Virginia and Kentucky Resolutions of 1798 and 1799,⁴⁷ asserted the right of each state to judge for itself the constitutionality of federal actions affecting the state’s interests, and to interpose its sovereign authority to prevent enforcement of federal measures that in its view were unauthorized by the constitutional compact.⁴⁸ The crisis did not abate with the inauguration of the supposed states’ rights candidate for President, Andrew Jackson, and after it became evident in early 1830 that Jackson would uphold federal authority in the matter, Vice President Calhoun openly assumed the leadership of the anti-tariff forces. The crisis came to the edge of violence in November 1832, when a South Carolina state convention passed an ordinance purporting to nullify the tariff.⁴⁹

44. The serious nature of this affair was recognized by contemporaries. For example, in a series of resolutions adopted on January 12, 1833, the Alabama General Assembly called on South Carolina to renounce nullification and Congress to repeal the tariff in order to end “this fearful crisis.” The assembly declared that the “alarming attitude” of South Carolina and the “obnoxious duties” imposed by Congress were threatening to “peril the union of these States, and make shipwreck of the last hope of mankind.” STATE DOCUMENTS ON FEDERAL RELATIONS 180–81 (H. Ames ed. 1906) [hereinafter cited as STATE DOCUMENTS].

45. *Id.* at 152. See also *id.* at 152–89 (collecting state papers).

46. 6 J. CALHOUN, WORKS OF JOHN C. CALHOUN 1 (R. Crallé ed. New York 1855). The *Exposition* was drafted secretly by Vice President Calhoun, a fact widely known by the time Story wrote the *Commentaries*. See II: 431 n.1.

47. *South Carolina Exposition* (adopted Dec. 1828), reprinted in J. CALHOUN, *supra* note 46, at 43–44. The Virginia and Kentucky Resolutions of 1798, drafted by James Madison and Thomas Jefferson respectively, were adopted by those states as a formal protest against the Alien and Sedition Acts. The Jeffersonian Republicans regarded these acts as unconstitutional measures designed by the dominant Federalists to suppress dissent and perpetuate the latter party’s power. When no state concurred in the Resolutions, and several denounced them, the Kentucky legislature reaffirmed its position in an additional set of Resolutions in 1799, and Virginia approved a Report drafted by Madison early in 1800. See J. MILLER, CRISIS IN FREEDOM 160–81 (1951). The Republicans regarded their subsequent electoral victory in 1800 as a decisive vindication of the Resolutions by the people, and a more or less enthusiastic acceptance of the Resolutions was constitutional orthodoxy outside the nationalist Supreme Court before the nullification crisis. See Letter from Thomas Jefferson to Spencer Roane (Sept. 6, 1819), in T. JEFFERSON, THE POLITICAL WRITINGS OF THOMAS JEFFERSON 151–53 (E. Dumbauld ed. 1955) (describing the 1800 election as a revolution by which “the people” repudiated nationalist “consolidation”); see also Murrin, *The Great Inversion, or Court versus Country: A Comparison of the Revolution Settlements in England (1688–1721) and America (1776–1816)*, in THREE BRITISH REVOLUTIONS: 1641, 1688, 1776, at 368, 404–28 (J. Pocock ed. 1980) (American political life in nineteenth century basically adhered to the Jeffersonian “country” ideology).

48. 6 J. CALHOUN, *supra* note 46, at 41–46.

49. STATE DOCUMENTS, *supra* note 44, at 169–73.

President Jackson answered the following month by issuing an emphatically nationalist proclamation.⁵⁰

The tariff crisis itself was defused finally by adroit political maneuvering. Congress enacted a Force Act providing Jackson with authority to use federal arms to enforce the tariff, and then passed a lower tariff economically acceptable to the Southerners. A South Carolina convention in turn repealed the nullification of the tariff and nullified the Force Act.⁵¹ Both sides thus saved face. Perhaps the most lasting effects of the episode were intellectual. South Carolinians and their allies elsewhere had shown a willingness to pursue the implications of state sovereignty constitutionalism to the logical endpoint of disunion. At the same time, the nationalist interpretation of the Constitution that the Marshall Court had been upholding, often in isolation, during three decades of Republican rule,⁵² emerged free of its association with Federalist oppression and became a constituent element of politically popular Jacksonian Democracy. It is within the context of the nationalist response to the nullification movement⁵³ that the *Commentaries* must be read. Story's three volumes provided nationalists with a detailed refutation of the historical and theoretical underpinnings of the states' rights theory of the Constitution, and supplied supporters of an expansive domestic role for the federal government with a vigorous assertion of the federal government's powers and

50. Story expressed strong approval of Jackson's proclamation, which was published in time for excerpts from it to be bound at the end of volume two of the *Commentaries*. "As a state paper," he wrote, "it is entitled to very high praise for the clearness, force, and eloquence, with which it has defended the rights and powers of the national government. . . . [It is] among the ablest commentaries ever offered upon the constitution." II: 543 n.* Privately, Story doubted that Jackson would be willing or able to adhere to the proclamation's stand. See Letter from Joseph Story to Richard Peters (Dec. 22, 1832), in 2 LIFE, *supra* note 3, at 113; Letter from Joseph Story to Judge Fay (Feb. 10, 1833), in 2 LIFE, *supra* note 3, at 119-21.

51. See STATE DOCUMENTS, *supra* note 44 (reprinting text of state convention ordinances).

52. Every President elected between 1800 and 1836 was elected as a "Republican," even the nationalist John Quincy Adams. The generally nationalist Whig Party that emerged as an organized opposition during the Jacksonian era was no direct successor to the defunct Federalists and sought to link itself to the memory, if not the doctrines, of the Virginia and Kentucky Resolutions. See, e.g., Speech by Henry Clay in Hanover County, Virginia (June 27, 1840), reprinted in 6 ANNALS OF AMERICA 565, 568 (1968) ("The Whigs of 1840 stand where the Republicans of 1798 stood . . ."); see also D. HOWE, THE POLITICAL CULTURE OF THE AMERICAN WHIGS 90-91 (1979) (Whig Party claimed to be heir of Republican party of Jefferson).

53. Early responses in the legal literature to the nullification crisis that adopted the nationalist position included, in addition to Story's: an appendix Nathan Dane added to his 1829 supplementary volume to the GENERAL ABRIDGMENT; J. ADAMS, FOURTH OF JULY ORATION (Boston 1831); W. DUER, OUTLINES OF THE CONSTITUTIONAL JURISPRUDENCE OF THE UNITED STATES (New York 1833); P. DU PONCEAU, A BRIEF VIEW OF THE CONSTITUTION OF THE UNITED STATES (Philadelphia 1834); T. WALKER, INTRODUCTION TO AMERICAN LAW (Philadelphia 1837). The first volume of James Kent's COMMENTARIES ON AMERICAN LAW (New York 1826), which treated constitutional issues in accordance with the views expressed by the Marshall Court, appeared before the crisis.

responsibilities. The *Commentaries* did not merely offer readers ammunition for a political debate, however, for in his treatise Joseph Story articulated a coherent theoretical account of the Constitution. It is to that account we now turn.

II. THE SCIENCE OF GOVERNMENT

For most educated Americans of the early nineteenth century, belief in "science" was an essential part of the constellation of values that characterized what was best in the new Republic.⁵⁴ The "science" they celebrated did not, however, include any and all of the areas of human thought that Western culture had traditionally fit under that rubric.⁵⁵ The hallmark of the type of science these Americans praised was its practicality: Science was valuable and important because it was *useful*.⁵⁶ Republicans might indict Federalists for obscurantism, and the latter return the compliment with charges of visionary madness, but in fact Thomas Jefferson and John Adams (together with most of their allies and followers) agreed on the necessity of science to the progress of humanity.⁵⁷ In contrast to their perception of Europe as a land where ignorance and oppression had historically prevented the triumph of rationality, Americans believed that their new society could properly calculate its true needs and wants, and employ the means most likely to achieve those ends.⁵⁸

Story shared in this general approbation of practically useful knowledge.⁵⁹ A few months after his inauguration as Dane Professor at Harvard, Story paid tribute to such knowledge in an address to the Boston Mechanics' Institute:

If I were called upon to state that which, upon the whole, is the most striking characteristic of our age, that which in the largest extent exemplifies its spirit, I should unhesitatingly answer, that it is the superior attachment to practical science over merely speculative science. Into whatever department of knowledge we may search, we shall find that the almost uniform tendency of the last fifty years has

54. See H. MAY, *THE ENLIGHTENMENT IN AMERICA* 337 (1976) (describing American intellectual acceptance of "science, progress, intellectual freedom, republicanism").

55. According to Doctor Johnson, the word "science" encompassed "[a]ny art or species of knowledge" and more specifically referred to any one of the seven liberal arts, including "rhetorick" and "musick". See S. JOHNSON, *A DICTIONARY OF THE ENGLISH LANGUAGE* s.v. "science" (London 1755).

56. See D. BOORSTIN, *THE LOST WORLD OF THOMAS JEFFERSON* 213-25 (1948). Perry Miller remarked that "the gospel of science was, in America, converted to stark utilitarianism." P. MILLER, *supra* note 7, at 290.

57. See M. PETERSON, *ADAMS AND JEFFERSON: A REVOLUTIONARY DIALOGUE* 76-77, 109-11, 116-18 (1976).

58. See H. COMMAGER, *THE EMPIRE OF REASON* 85-108 (1977).

59. See P. MILLER, *supra* note 7, at 291-92.

been to deal less and less with theory, and to confine the attention more and more to practical results.⁶⁰

Concern for “practical science” was for Story the chief engine of America’s increasing prosperity, as well as the source of the dignity that American society accorded his audience’s useful, mechanical arts.⁶¹ Story did not believe, however, that the realm of science was limited to the mechanical arts: It also covered the area of his own professional interests. In his 1834 lecture entitled “The Science of Government,”⁶² he explained what it meant to describe the study of government as a “science.”

Like any practical science, Story began, the science of government required a consideration of its “true ends,” that is, the practical advantages to be sought from it. Proper study of government also required an investigation into “the means, by which those ends can be best achieved or promoted.”⁶³ Because government touches on all aspects of human life and happiness, Story regarded its scientific study as the most intricate and abstruse of all human inquiries, one which “admits of very few fixed and inflexible rules.”⁶⁴ The means of government must always be adapted to the actual circumstances of the society to be governed, and the ends appropriate in one culture may be undesirable in another: “Government, therefore, in a just sense, is, if one may so say, the *science of adaptations*—variable in its elements, dependent upon circumstances, and incapable of a rigid mathematical demonstration.”⁶⁵

In his exposition of the science of government, Story advocated the balanced consideration of both means and ends. He identified two errors that arose when this balance was upset. One error, common in authoritarian or semi-free societies, was to disregard the importance of a government’s form (the means) as long as the private pursuit of happiness was left relatively undisturbed.⁶⁶ The contrary mistake, a “besetting delusion” in “all popular governments,” was to identify some simple, rigid theory as the proper principle of government in the abstract and then to adopt that theory as the end or purpose of the actual government.⁶⁷ Such an approach, Story argued, must inevitably fail. Except for monarchical despotism, no

60. J. STORY, *Developments of Science and Mechanic Art*, in WRITINGS, *supra* note 20, at 475, 478.

61. *Id.* at 498–501.

62. J. STORY, *The Science of Government*, in WRITINGS, *supra* note 20, at 614, 616. The idea of a science of government was a commonplace of Enlightenment thought. See H. COMMAGER, *supra* note 58, at 119.

63. J. STORY, *supra* note 62, at 615.

64. *Id.* at 616.

65. *Id.* at 616–17 (emphasis in original).

66. *Id.* at 617–18.

67. *Id.* at 618–19.

simple governmental theory was practically feasible: "In proportion as a government is free, it must be complicated."⁶⁸ Moreover, the exaltation of theory turned the means-end relationship on its head, for the "great object[]" of government in a free society was not to serve itself or to satisfy some political theory, but to secure the personal rights, the private property, and the public liberty of the people.⁶⁹

Despite the difficulty of the subject, Story expressed confidence that experience had disclosed the means appropriate to attain the true ends of free and popular government: the institution and administration of a "wisely framed" constitution, and the creation of an independent judiciary to enforce that constitution.⁷⁰ In America, characterized as it was by a complicated federal system and the absence of social checks on rapid change, there was an especially acute need for the caution and concern for continuity which only an independent judiciary could provide.⁷¹

The brief and general portrait of the science of government that Story presented in his 1834 lecture had been embodied a year earlier, in hundreds of pages and with specific reference to the federal Constitution, in his *Commentaries*. Even a cursory reading of the latter reveals Story's constant and consistent use of the notion of science in his interpretation of the Constitution. Repeatedly, Story warned that the Constitution must not be read as the product of "metaphysical . . . subtleties," but instead as a "practical" instrument, "adapted to the business and exigencies of human society."⁷² Unlike the famous philosophers and statesmen of the past, who fell into "utter folly" because they tried to "establish forms of governments upon mere theory,"⁷³ the framers of the United States Constitution were "practical reasoners."⁷⁴ Story admonished his readers to recognize that the American Constitution was "a new experiment in the history of nations"⁷⁵ and to regard the document as the outline of an ongoing institution rather than as a collection of political dogmas.⁷⁶ Arguing that it

68. *Id.* at 619.

69. *Id.* at 619-20.

70. *Id.* at 620-21.

71. *See id.* at 621-27. Story pointed to the necessity of "adjustments" in American government from time to time to avoid or repair collisions between the various political interest groups; he urged the use of "caution, skill, and patient investigation" when making such adjustments. *Id.* at 622.

72. I: 436-37; III: 37; *see* I: 392, 439.

73. I: 123 (referring to John Locke's draft constitution for the proprietors of the colony of Carolina). *See also* II: 7 n.2 (remonstrating against "wild and extravagant" governmental theories of John Milton); II: 31 n.3 (criticizing David Hume's "extravagant vagaries" and "speculative opinions").

74. I: 439. *Compare* III: 480-83 (lauding Framers' reliance on practical wisdom) with I: 120-21 (criticizing strictly theoretical constitution of John Locke). Story's great regard for practical experience became a guide for his interpretation of the Constitution: "The true and only test [of the meaning of the Constitution] must . . . be experience, which corrects at once the errors of theory." II: 25; *see* I: 270-71, 316, 343, 358; II: 407; III: 757-58.

75. III: 686.

76. I: 406-07, 414-17. *Cf.* J. STORY, *Value and Importance of Legal Studies*, in WRITINGS,

would have been vain and unscientific to attempt to foresee all the future needs of the Republic,⁷⁷ Story concluded that the framers created a Constitution which entrusted the governmental institution with “a very large mass of discretionary powers” capable of expansion or contraction according to circumstances.⁷⁸ The exercise of those powers was circumscribed only by flexible limitations to be adjusted by the federal courts or the people.⁷⁹

The government established by the Constitution is likened in the *Commentaries* to a “complicated machine.”⁸⁰ Just as Story admired the experimental progress demonstrated by the scientific mechanical achievements of the nineteenth century,⁸¹ so he argued that practical governmental experimentation was inherent in the constitutional structure. No matter how perfectly conceived, a complex machine will often require adjustments in the designer’s functional expectations (the means) so that the machine will perform the task for which it was designed (the end).⁸² In similar fashion, the great political machine erected and empowered by the Constitution often worked in ways that its wise master-builders failed to anticipate.

And, so far is it from being true, that the national government has by its familiarity become more simple and facile in its machinery and operations, that it may be affirmed, that a far more exact and comprehensive knowledge is now necessary to preserve its adjustments, and to carry on its daily operations, than was required, or even dreamed of, at its first institution. . . . And the important changes in the world during its existence has [sic] required very many developements of its powers and duties, which could hardly have occurred, as practical truths to its enlightened founders.⁸³

History disclosed to Story numerous instances in which early interpretations of the Constitution had been defeated by the actual practice of the

supra note 20, at 503, 528 (instructing law students to “distrust theory, and cling to practical good; to rely more upon experience than reasoning; more upon institutions than laws”).

77. I: 210, 408; III: 22, 111. “[N]o human government can ever be perfect; and . . . it is impossible to foresee, or guard against all the exigencies, which may, in different ages, require different adaptations and modifications of powers to suit the various necessities of the people.” III: 686.

78. I: 409.

79. III: 483 (judiciary’s role); III: 686–87 (adjustment by the people’s amending power).

80. I: 400; III: 757–58. *See also* I: 492 (amending power “forms great balance-wheel of our system”); II: 181–82 (Senate is “real balance-wheel”); III: 483 (judiciary is “balance-wheel”). Story’s machine seems to have rather too many balance-wheels.

81. J. STORY, *supra* note 60, at 475, 479–95.

82. *Id.* at 493–94.

83. II: 84–85. This, Story explained, should cause no surprise to the true political scientist, since “whatever is practical necessarily deviates from theory.” J. STORY, *supra* note 76, at 512.

government.⁸⁴ The most striking in his opinion was the complete frustration of the Framers', and the people's, expectations of how the electoral college would operate. Intended to serve as independent representatives of the people's interests in the selection of a chief magistrate, the electors had become by 1833 the mere registrars of the wishes of those who selected them. In this manner, "the whole foundation of the system [of presidential election], so elaborately constructed, is subverted."⁸⁵ This did not mean, however, that the Constitution's purpose—to select a politically responsible chief executive—had been frustrated or subverted. It indicated only that the "complicated machine" had turned out in practice to work somewhat differently than its inventors had imagined. Indeed, Story stated that for an elector now to exercise independent judgment, as the framers intended, would be "a political usurpation, dishonorable to the individual, and a fraud upon his constituents."⁸⁶ In contrast, Story regarded as radically defective the constitutional provisions for presidential election by the House of Representatives in the event no candidate received a majority of the electoral vote as a serious defect. These provisions were functioning as expected, but experience had shown that they were an inapposite means to the Constitution's ends.⁸⁷

For Story, then, the Constitution's proper interpretation was that which accorded with its actual and efficient functioning. In his preface to the first volume of the *Commentaries*, Story disavowed any desire to present a "new theory" of the Constitution and promised instead to discuss only that interpretation which was "confirmed and illustrated by the actual practice of the government."⁸⁸ He rejected any suggestion that the mechanics of the constitutional structure were to be construed in light of some theory they supposedly embodied.⁸⁹ The Justice frequently conceded that the Constitution's practical meaning, while at variance with his construction of the bare text, was settled beyond further contest.⁹⁰

The scientific nature of the Constitution required that it, like any other machine, be subject to periodic fine-tuning, and the wisdom of the Framers was confirmed for Story by their provision for an independent group of constitutional mechanics, the federal judiciary. Understanding the lessons of history, the Framers "established a balance-wheel, which, by its

84. See, e.g., I: 391-92; II: 116-17, 415.

85. III: 321.

86. III: 322.

87. III: 322-23.

88. I: vi. *Accord* I: 2 (careful review of history of American government necessary for full understanding of Constitution); *cf.* I: 206-08 (best exposition of rightful powers of Continental Congress is powers it actually exercised).

89. See, e.g., II: 13 (criticizing separation of powers theories), II: 174-77 (senatorial equality of states not product of theory).

90. See, e.g., III: 14, 20, 212, 255-56, 390-97.

independent structure, should adjust the irregularities, and check the excesses of the occasional movements of the system."⁹¹ The Supreme Court was for Story the ultimate "balance-wheel." The Court, therefore, served as the final interpreter of the constitutional text, not due to any theory about judicial supremacy, but out of practical necessity: Only the existence of an orderly method of resolving constitutional disputes and ensuring uniform obedience to such resolutions could prevent the whole system from grinding to a halt, or dissolving into anarchy.⁹² For problems too great for judicial adjustment to handle, the Constitution provided a second, extraordinary method of incorporating experienced need into the government—the amendment process.⁹³ The roadblocks to amendment accorded with the scientific rationale for the amending power. Those obstacles would insure that any change in the text of the Constitution was the result of deliberate choice, and not of the unthinking passions of the moment.⁹⁴

Story's portrayal of a scientific Constitution in the *Commentaries* can be seen as part of the broader effort of bench and bar in the first half of the nineteenth century to distinguish law from politics and morality so as to insure that the legal profession would control the legal sphere.⁹⁵ The image of a "complicated machine" tended by judicial mechanics obviously fits this pattern, but it is not the only theme of the *Commentaries*. Story, acutely aware of the criticisms leveled at the judiciary by Jeffersonians, Jacksonians, and advocates of states' rights,⁹⁶ provided a second, nonmetaphorical description of the constitutionalism for which he was contending.

III. THE LOGIC OF REPUBLICANISM

If "science" was one of the great values of early nineteenth-century America, republicanism was its shibboleth.⁹⁷ The Jeffersonians' political triumph, which reduced the Federalists to a dwindling regional minority, was due in large measure to their success in branding the latter as anti-

91. III: 483.

92. I: 352-60.

93. I: 492; III: 685-87.

94. III: 686.

95. See, e.g., M. HORWITZ, *supra* note 9, at 140-59; P. MILLER, *supra* note 7, at 99-265. On Story's role in this effort, see G. WHITE, *supra* note 8, at 43-47.

96. See G. DUNNE, *supra* note 21, at 215-16, 222-28, 365-68.

97. See A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 362-66 (1st ed. Paris 1835) (G. Lawrence trans. 1966) ("the republican principle" dominant in America); see also M. HOLT, *THE POLITICAL CRISIS OF THE 1850s* (1978) (pervasive concern in antebellum politics over the preservation of republicanism); L. KERBER, *FEDERALISTS IN DISSENT* 194-99 (1970) (Federalist adherence to republican ideal); M. MEYERS, *THE JACKSONIAN PERSUASION* 7 (1960) (general agreement in Jacksonian era regarding "popular" government).

republican. When nationalist John Quincy Adams, son of the second and last Federalist President, became chief executive he did so as a Jeffersonian Republican, and the party that coalesced around the effort to reelect him labelled itself the National Republicans. A few years later, when the nationalist opponents of Andrew Jackson organized, they reached even further back into America's republican heritage, and called themselves Whigs.⁹⁸ Outside the lingering pockets of Federalist sentiment in New England it had become political suicide not to insist upon one's wholehearted devotion to the values of republicanism as expounded by "the old Republicans of the Jeffersonian school, the genuine disciples of the Whigs of '76."⁹⁹

Young Joseph Story was a Republican,¹⁰⁰ and, despite his dislike for Jefferson in later years, initially a strong supporter of his party's leader.¹⁰¹ Story's role as a Republican congressman in ending the Jefferson administration's embargo, however, earned for him the President's lasting enmity. The publication of Jefferson's papers in 1829 revealed that he had labelled Story a "pseudo-republican" and argued against Story's appointment to the Supreme Court.¹⁰² Story had fought Jefferson over the embargo affair, but Jefferson's posthumously unveiled attack on his principles turned political disagreement into intense personal animosity.¹⁰³

98. The term "whig" conjured up images of the patriots of the American Revolution, and of the heroes of the English struggle against Stuart tyranny that culminated in the Glorious Revolution of 1688. Cf. I: 310-15 (discussing the views of "the great revolutionary whigs in 1688").

99. THE VIRGINIA AND KENTUCKY RESOLUTIONS OF 1798 AND '99, at 2 (J. Elliot ed. 1832) [hereinafter cited as VIRGINIA AND KENTUCKY RESOLUTIONS]. See also Speech by Henry Clay, *supra* note 52 (invocation of the doctrines of 1798 by Kentucky Whig).

100. J. STORY, *supra* note 28, at 1, 20-28.

101. See Letter from Joseph Story to Samuel Fay (May 30, 1807), in 1 LIFE, *supra* note 3, at 151-52 (describing meetings with Jefferson, and praising the President).

102. In late 1810, Jefferson wrote Madison reminding him that "Story and [Ezekiel] Baron [Republican congressman from Massachusetts, also under consideration for appointment to the Supreme Court] are exactly the men who deserted us" on the embargo. Jefferson went on to describe Story as "unquestionably a tory." G. DUNNE, *supra* note 21, at 78-79 (quoting letter from Thomas Jefferson to James Madison (Oct. 15, 1810)). The "pseudo-republican" slur is quoted in E. BAUER, *supra* note 2, at 138.

103. Jefferson's accusations that Story's Republicanism was hypocritical clearly rankled. In his *Autobiography*, Story went to great lengths to insist that he was a genuine Republican although not "a mere slave to the opinions of" Jefferson. J. STORY, *supra* note 28, at 20-21, 26-28, 31-34. As to the "epithet of 'pseudo-republican'" with which Jefferson had "sullied" Story's character, Story sarcastically remarked, "'Pseudo-republican,' of course, I must be; as every one was in Mr. Jefferson's opinion, who dared to venture upon a doubt of his infallibility." *Id.* at 33. Several years later, explaining his adherence to the Whigs after they became distinct from the Republican Party (which was by the 1830's usually called the Democratic Party, its alternative label), Story remarked: "I seem to myself simply to have stood still in my political belief, while parties have revolved about me; so that, although of the same opinions now as ever, I find my name has changed from Democrat to Whig, but I know not how or why." 1 LIFE, *supra* note 3, at 540. In a personal sense the *Commentaries* were a massive self-vindication by Story the Republican, as well as an indictment of the man Story personally despised and regarded as the real "pseudo-republican." See III: 408 n.1 (noting Jefferson's "constant insinuations" against those who disagreed with him).

Running throughout the *Commentaries* like a refrain is a series of criticisms of Jefferson remarkable for their acid quality.¹⁰⁴ While Story sometimes employed personal innuendo, his attack focused predominantly on Jefferson's political and constitutional opinions, which in 1833 were seen by many as the intellectual origin of the nullification movement.¹⁰⁵ But Story's rebuttal to Jefferson's libels on his republicanism went beyond negative counterattack. The *Commentaries* were a massive attempt to prove that the doctrines—nationalism, expansive construction of federal power, and judicial supremacy—for which Story stood and which Jefferson had opposed were in fact the logical conclusions of a truly republican faith.

At several points in the *Commentaries*, Story discussed the meaning of republicanism. He pointed out that not even the opponents of the Constitution's adoption had attempted to deny that the instrument was "strictly republican," since "all its powers were derived directly or indirectly from the people, and were administered by functionaries holding their offices during pleasure, or for a limited period, or during good behavior."¹⁰⁶ The impossibility of choosing these functionaries by universal consent made majoritarianism, in Story's opinion, a necessary corollary of the republican principle.¹⁰⁷ And the corollary of majority rule was the acceptance by the minority of the majority's decisions.¹⁰⁸ Finally, Story advised, "perfect equality" was an indispensable basis for republican government, both in order to avoid dividing the sovereign people into mutually hostile ranks or estates, and to inculcate that sense of civic pride and duty necessary to the healthy functioning of majority rule.¹⁰⁹

104. I: 251 n.3, 281 n.2, 346 n.2, 390 n.1, 493 n.1; II: 30 n.2, 353 n.1, 368 n.1, 389 n.1, 457 n.1; III: 159 n.1, 164 n.1, 199 n.1, 209 n.1, 323 n.2, 356 n.2, 408 n.1, 413 n.1, 476 n.1, 700 n.1, 749 n.1.

105. During the nullification crisis, John Quincy Adams wrote in his diary that Jefferson "more than any other man, contributed to introduce and make . . . prevalent" what Adams called the "insatiate rage of debating the question of constitutional power upon everything . . ." J. Q. ADAMS, *Diary* (Feb. 1, 1831), in 8 MEMOIRS OF JOHN QUINCY ADAMS 308 (C. Adams ed. 1876). The nullifiers enthusiastically accepted the mantle of Jefferson. See VIRGINIA AND KENTUCKY RESOLUTIONS, *supra* note 99, at 2 (describing Calhoun's *Fort Hill Address*, among other documents, as presenting "the Jeffersonian doctrines of '98"). Madison, on the other hand, regarded the nullifiers' invocation of Jefferson as a "perverted and disrespectful use" of the dead statesman's authority. Letter from James Madison to Joseph Cabell (Aug. 16, 1829), in 4 J. MADISON, LETTERS AND OTHER WRITINGS OF JAMES MADISON 43 (Congress ed. Philadelphia 1865). For a discussion of the relationship between Jefferson's thought and the nullification movement, see *infra* text accompanying notes 112–119.

106. I: 269; see also II: 67 ("[W]hen different legislative bodies are to succeed each other at short intervals, if the people disapprove of the present, they may rectify its faults, by the silent exercise of their power in the succeeding election.")

107. I: 299; II: 55–56.

108. I: 299.

109. III: 215. Story also accepted the common argument that a "general equality of the apportionment of property" was correlated closely with the rise and health of republican government. I: 166–67.

All of this was perfectly orthodox republican (and Republican) doctrine,¹¹⁰ and is paralleled by statements of Jefferson himself.¹¹¹ But Story derived from these common principles views quite different from those of the former President on the important constitutional issues of the early nineteenth century. The nullifiers based their constitutional arguments on the classic expressions of Republican constitutionalism: the Virginia and Kentucky Resolutions of 1798 and 1799, and the Virginia General Assembly's Report of 1800.¹¹² The Resolutions read the Constitution as a compact between sovereign states rather than as a charter of government granted by a unitary American people.¹¹³ This confederative compact was to be interpreted strictly, in accordance with the "intentions" of the high contracting parties and with the rule that sovereigns are not presumed to cede any rights that are not explicitly and expressly delegated.¹¹⁴ Since the federal government created by the compact was the mere creature of the states, disputes over the constitutional boundary between federal and state power could not be definitively resolved except by the states themselves. To permit the Supreme Court to decide these issues would be to vest the decision in the agent rather than the principal.¹¹⁵ Despite the objections of James Madison,¹¹⁶ the nullifiers invoked Jefferson's writings as support for their conclusion that each state had the constitutional right to exercise a type of quasi-judicial review over the constitutionality of federal acts. The state could void those acts it found unconstitutional, and it could

110. See D. EPSTEIN, *THE POLITICAL THEORY OF THE FEDERALIST* 118-25 (1984); Frisch, *Power and Responsibility: The Republican Statesmanship of Alexander Hamilton*, in *THE AMERICAN FOUNDING* 46, 50-55 (R. Rossum & G. McDowell eds. 1981). Republican commitment to majoritarianism is illustrated by James Madison's observation that "[a]ccording to Republican Theory, right and power being both vested in the majority, are held to be synonymous [sic]." 9 J. MADISON, *Vices of the Political System of the United States*, in *THE PAPERS OF JAMES MADISON* 345, 350 (R. Rutland & W. Rachal eds. 1975).

111. See, e.g., Letter from Thomas Jefferson to John Taylor (May 28, 1816), in T. JEFFERSON, *supra* note 47, at 50-53; Letter from Thomas Jefferson to Alexander Humboldt (June 13, 1817), in T. JEFFERSON, *supra* note 47, at 83-84.

112. Madison drafted the Virginia Resolutions of 1798 and the Report of 1800, Jefferson the Kentucky Resolutions of 1798; the authorship of the 1799 Kentucky Resolutions is uncertain. See A. KOCH, *JEFFERSON AND MADISON: THE GREAT COLLABORATION* 184-94, 201-07 (1950).

113. As Jefferson explained many years later, "the constitution of the United States is a compact of independent nations." Letter from Thomas Jefferson to Edward Everett (April 8, 1826), in T. JEFFERSON, *supra* note 47, at 151.

114. See Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. (forthcoming March 1985).

115. See T. JEFFERSON, *supra* note 47, at 156-57 (Jefferson's draft of the 1798 Kentucky Resolutions).

116. Although after retirement Madison avoided involvement in political disputes as much as possible, the invocation by the nullifiers of Jefferson's authority moved Madison to rebut them publicly. See A. KOCH, *MADISON'S "ADVICE TO MY COUNTRY"* 126-36 (1966) (discussing Madison's attack on the nullifiers); see also A. KOCH, *supra* note 112, at 287-88 (Madison's participation in the debate over the tariff prompted in part by his desire to "protect the name and memory" of Jefferson from "political misuse").

withdraw from the constitutional compact if in its judgment an unremedied usurpation warranted secession.¹¹⁷

Unlike Madison, Story had no interest in vindicating the memory of Thomas Jefferson and he was happy to equate the latter's views with those of the South Carolina nullifiers. Story's concern was to demonstrate that both President Jefferson and Vice President Calhoun¹¹⁸ were guilty of failure to understand the logic of republicanism. For Story, the entire edifice of states' rights constitutional theory was erected on an unacknowledged repudiation of the principle of majority rule. The nullifiers, and before them the Virginia and Kentucky Resolutions, asserted the right of a minority (a single state) to reject the decision of the majority (the nation). The states' rights theorists attempted to avoid the anti-majoritarian implications of their stand by contending that the relevant majority was the majority within each individual state; they supported this assertion with the claim that the states as bodies politic had preceded and created the Union.¹¹⁹

Story dismissed this historical move as false. In his lengthy and elaborate historical survey at the beginning of volume one of the *Commentaries*,¹²⁰ Story labored to show, first, that even before the Revolution, the American colonists were "for many purposes one people."¹²¹ Furthermore, the dissolution of royal authority in the separate colonies in 1774–1775 did not, as the South Carolinians claimed, lead to the formation of states and then to the creation of a league between them, but to the establishment of a de facto and de jure national government, the Continental Congress.¹²² The state governments were formed subsequent to the first meetings of the Congress and with its approval,¹²³ and both the declaration and the achievement of independence were the work of this national revolutionary government.¹²⁴ The Articles of Confederation, which Story noted

117. See, e.g., Letter from John Calhoun to Governor James Hamilton, Jr. (Aug. 28, 1832), in 6 J. CALHOUN, *supra* note 46, at 144–93.

118. Story recognized Calhoun's stature among the states' rights advocates. I: 288 n.1, II: 431 n.1. Shortly before the publication of the *Commentaries*, Story described Calhoun, who had resigned the Vice Presidency and returned to Washington as a U.S. Senator, and Webster as "the great champions" of the two main schools of constitutional thought. Letter from Joseph Story to John Brazier (Feb. 11, 1833), in 2 LIFE, *supra* note 3, at 124.

119. "The great and leading principle is, that the General Government emanated from the people of the several States, forming distinct political communities, and acting in their separate and sovereign capacity, and not from all of the people forming one aggregate political community . . ." *Address* (Fort Hill, July 26, 1831), in 6 J. CALHOUN, *supra* note 46, at 59, 60.

120. See I: 3–258.

121. I: 164.

122. I: 186.

123. I: 198.

124. I: 190–91.

Whatever, then, may be the theories of ingenious men on the subject, it is historically true, that before the declaration of independence these colonies were not, in any absolute sense, sovereign states; that that event did not find them or make them such; but that at the moment of their

came into effect only in 1781 when independence was practically secured, were admittedly a compact, but one which illustrated the evils of such an anti-majoritarian government structure.¹²⁵

Having established to his own satisfaction that "the people of the United States in the aggregate"¹²⁶ existed before the ratification of the Constitution, Story proceeded to draw out the consequences of that historical "fact."¹²⁷ The relevant majority in federal matters was a majority of the entire American people, and the Constitution was to be taken at face value, "as a solemn ordinance and establishment of government," ordained and established by the American people.¹²⁸ As a supreme law, enacted by the appropriate majoritarian "legislature," the Constitution and the federal laws enacted under it cannot be disobeyed or nullified by a disgruntled minority without the latter giving up its claim to republicanism. The Supreme Court's claim to final interpretive authority as against the states, moreover, was not the revolt of a creature against its creators, but the legitimate assertion of a power granted by the sovereign people.¹²⁹ Therefore, in rejecting the Court's authority, the states' rights theorists were rejecting the most basic principle of the republicanism they purported to revere.

State sovereignty interpretations of the Constitution had been linked, since the Virginia and Kentucky Resolutions, with a particular theory of constitutional interpretation: The Constitution was to be construed in accordance with the original "intention" of the contracting parties, the states. As originally propounded and practiced by Jefferson and Madison, this interpretive strategy permitted the interpreter to control the text by

separation they were under the dominion of a superior controlling national government, whose powers were vested in and exercised by the general congress with the consent of the people of all the states.

I: 202 (footnote omitted).

125. I: 244-46.

126. I: 332. The expression is Webster's. Cf. J. CALHOUN, *supra* note 119 (rejecting concept of aggregate American polity).

127. Like Story, Calhoun claimed that his diametrically opposed view of the Constitution "rest[ed] on facts historically as certain as our revolution itself." J. CALHOUN, *supra* note 119, at 61. The arguments of both men, from a more modern viewpoint, are based on a category mistake. It is, indeed, "historically certain" that the Constitution was ratified by state conventions, but whether we regard that as evidence that the instrument was a contractual arrangement between distinct communities, or as simply a product of the physical fact that the people of the United States had nowhere to meet except in those states, is a matter of legal or philosophical interpretation. The debate between nationalism and state sovereignty is not in fact capable of historical resolution, save in the pragmatic sense that later history (the Civil War) settled the question.

128. I: 319. See also *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816) (Story, J.) (Constitution established by "the people" and not by the states). Article VII of the Constitution, which provides that, upon ratification by nine states, the Constitution would be established between those states, was sometimes invoked as support for the proposition that the Constitution was a contract; Story's response was that the clause was a majoritarian safeguard intended to prevent a single recalcitrant state from blocking ratification. III: 709-10.

129. I: 342-43; III: 701.

inferences drawn from the sovereign character of the states and from the international law of treaties.¹³⁰ The personal intentions of the Philadelphia framers were, on this view, of little or no significance, and the apparent nationalism of the text could be given a meaning more congenial to state autonomy. Late in his life, Jefferson reiterated the importance of this “intentionalism” in a letter to Justice William Johnson that was published in Jefferson’s memoirs in 1829. Jefferson asserted that:

[t]he capital and leading object of the constitution was to leave with the States all authorities which respected their own citizens only and to transfer to the United States those which respected citizens of foreign or other States, to make us several as to ourselves but one as to all others. On every question of construction, [we should] carry ourselves back to the time when the Constitution was adopted, recollect the spirit manifested in the debates and, instead of trying what meaning may be squeezed out of the text or invented against it, conform to the probable one in which it was passed.¹³¹

These two canons of construction were, and were intended to be,¹³² a direct attack on the hermeneutical practices of the Marshall Court. Jefferson’s “capital and leading object” rule was a recapitulation of the earlier Republican argument that the states could not be held to have ceded any sovereign authority that they did not specifically delegate, and it directly contradicted the expansive construction of federal power Marshall and Story derived from their nationalist reading of the Constitution as an act of the sovereign people.¹³³ The second canon parodied the insistence of Marshall and Story that the Constitution’s text was to be interpreted by a close examination of its “natural sense.”¹³⁴

Once again, the *Commentaries* insisted, Jefferson and his nullifier offspring had shown the impurity of their republican faith. Story’s attack on

130. See Powell, *supra* note 114.

131. Letter from Thomas Jefferson to William Johnson (June 12, 1823), in T. JEFFERSON, *supra* note 47, at 147–48. Jefferson’s advice to “recollect the spirit manifested in the debates” is somewhat ambiguous, but is probably not a recommendation of “intentionalism” in the modern sense (*i.e.*, the historical reconstruction of the “intentions” of the Philadelphia framers) but rather a recommendation to read the text against the backdrop of the state ratifying conventions’ debates. It is in any event significant that Jefferson does *not* suggest historical research into the records of the debates. See Powell, *supra* note 114.

132. Jefferson wrote to Justice Johnson in order to voice his opposition to the Court’s opinion in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821) (holding that U.S. Supreme Court may take jurisdiction of state criminal case despite Eleventh Amendment). Jefferson also criticized *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). See Letter from Thomas Jefferson to William Johnson, *supra* note 131, at 146–47.

133. See, *e.g.*, *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (Marshall, C.J.).

134. See *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304 (1816) (Story, J.); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) (Marshall, C.J.).

the "intentionalism" of the Jeffersonians¹³⁵ first made an evidentiary point: There could be no certainty that the interpreter had correctly ascertained the intentions either of the state conventions, or of the individual members of those conventions. Furthermore, the very notion of legislative intention, except as that intention was embodied in the text of the law, was vacuous.¹³⁶ Finally, and most crucially, to permit the "private interpretation of any particular men," or the "cobwebs of sophistry and metaphysics about State rights and State sovereignty," to modify the obvious sense of the text would be to substitute personal fantasy for the deliberately expressed will of the people.¹³⁷ "The constitution . . . was submitted to the whole upon a just survey of its provisions, as they stood in the text itself Nothing but the text itself was adopted by the people."¹³⁸ Jeffersonian interpretive methodology was, in Story's opinion, a rejection of the fundamental republican principle that all power was derived from the people, and if the methodology were implemented, it would defeat the very purpose for which the people adopted the Constitution. The Justice declared:

It is obvious, that there can be no security to the people in any constitution of government, if they are not to judge of it by the fair meaning of the words of the text; but the words are to be bent and broken by the "probable meaning" of persons, whom they never knew¹³⁹

135. Story attacked the notion of "intentionalism" in general, I: 388-90, and Jefferson's two "canons" in particular, I: 390 n.1.

136. I: 388-89, 390 n.1.

137. I: 390 n.1 ("private interpretation"); 1 *LIFE*, *supra* note 3, at 325 ("cobwebs"); *see also* III: 754 (criticizing interpretations of Ninth Amendment that "make the sense of the passage bend to the wishes and prejudices of the interpreter").

138. I: 388-89. Story expanded on this point later in the *Commentaries*:

But, whatever may have been the private intentions of the framers of the constitution, which can rarely be established by the mere fact of their votes, it is certain, that the true rule of interpretation is to ascertain the public and just intention from the language of the instrument itself, according to the common rules applied to all laws. The people, who adopted the constitution, could know nothing of the private intentions of the framers. They adopted it upon its own clear import, upon its own naked text. Nothing is more common, than for a law to effect more or less, than the intention of the persons, who framed it; and it must be judged of by its words and sense, and not by any private intentions of members of legislature.

III: 143-46 (footnote omitted). It is not accidental that Story's elaborate "preliminary review" of "constitutional history" prior to adoption passes over the proceedings of the Philadelphia convention with four words, "[a]fter very protracted deliberations." I: 254. Madison's notes of the convention's debates had not been published, but the official journal and several other minutes of the proceedings were available. Although Story made use at times of the official journal, his basic attitude was that the framers' intentions, except as embodied in the text, were irrelevant. *See* III: 263 ("It has not been thought any objection to this interpretation, that [it] might not have been primarily, or even secondarily, within the contemplation of the framers of the constitution, when this clause was introduced.")

139. I: 391 n.1.

IV. *Elegantia Juris*: THE PRIMACY OF WORDS

At first glance there appears to be a disharmony between the two dominating motifs of the *Commentaries*—Story's idealization of a "scientific" Constitution and the insistence on text-bound interpretation derived from his republican premise. For the Constitution to accord with the science of government it must be open-textured and flexible, built to accommodate the changing needs of the Republic. At the same time, however, Story's interpretive principle locates the Constitution's meaning in a determinate text. As a science, constitutional law "must be forever in progress";¹⁴⁰ as a form of republican thought, it is bound to the past expression of the will of the people. The reconciliation of these two themes Story finds, not surprisingly, in the role of the judiciary. The proper function of the federal courts in the scientific and popular constitutional system is to adjust the "complicated machine" by an ever more detailed examination of the meaning of the text. This the judges do by the exercise of the *elegantia juris*, the law's search for the most precise terminology and the most discriminating logic. In the preface of the *Commentaries*, Story praised Chief Justice Marshall for the "masterly reasoning" which enabled Marshall to describe the Constitution's meaning "with a precision and clearness approaching, as near as may be, to mathematical demonstration."¹⁴¹ Story explained his own purpose in writing the *Commentaries* as the presentation of "a full analysis" of the Constitution "with clearness and accuracy."¹⁴² The subsequent three volumes frequently describe constitutional arguments in terms of "axiom" and "corollaries,"¹⁴³ and focus on the "force" and "cogency" of reasoning,¹⁴⁴ or their absence.¹⁴⁵

For Story, the crucial preliminary step in interpreting the Constitution was to resolve questions of terminology accurately and precisely.¹⁴⁶ Such careful consideration of terms was necessary to avoid the danger of a "solecism of language,"¹⁴⁷ the intrinsic pitfall for the constitutional reasoner. The false "metaphysics" of states' rights constitutionalism was, he thought, based on a fundamental misapplication of the terms "compact" and "sovereign[ty]." Story stressed that the Constitution did not describe

140. Cf. J. STORY, *supra* note 76, at 526 (common law "must be forever in progress"); see also J. STORY, *Life, Character, and Services of Chief Justice Marshall*, in WRITINGS, *supra* note 20, at 639, 695 (constitutional law described as a progressive science).

141. I: vi.

142. I: 1.

143. See, e.g., I: 425.

144. III: 504–05.

145. III: 717 (argument in *The Federalist* against the necessity of a bill of rights was an advocate's "argument" rather than a statesman's "reasoning").

146. I: 279–80.

147. I: 310 n.2.

itself explicitly in contractual language,¹⁴⁸ and he emphasized the presence of expressions (“ordain and establish,” “supreme law,” “constitution”) that are not “the usual or appropriate language for mere matters resting . . . in contract.”¹⁴⁹ Similarly, references to the “sovereignty” of the states are absent from the Constitution, and rest on a misapprehension of the term’s usage in political science and international law. The European and monarchical notion that a government properly can be termed sovereign is, for Story, unacceptable: “Strictly speaking, in our republican forms of government, the absolute sovereignty of the nation is in the people of the nation.”¹⁵⁰ Historical references to the states as sovereign used that term in a “subordinate and limited sense” that has proven misleading, for none of the states were ever properly “sovereign.”¹⁵¹ In the derivative sense in which a republican government can accurately be called “sovereign,” it is the government of the United States that should receive that designation.¹⁵² Thus, Story concluded, the Constitution should be defined as the sovereign people’s establishment of a national government, since “all other appellations, and definitions of it, such, as that it is a compact, . . . may mislead us into false constructions and glosses, and can have no tendency to instruct us in its real objects.”¹⁵³

Precision in terminology, while at its most important in the great questions of constitutional definition, is a concern throughout the *Commentaries*. Whether Story was discussing the American colonists’ right to

148. I: 318–22, 332, 335. Story concluded that it was for political reasons, and in accordance with “artificial reasoning founded upon theory,” that the notion of compact had been “with so much ingenuity and ability, forced into the language of the constitution, (for the language no where alludes to it).” I: 341, 343.

149. I: 306–07 & n.1 (“A compact among states is a confederation, and is always so named, (as was the old confederation) and never a constitution.”).

150. I: 194–95.

151. I: 203–04. *See also* I: 191–92 (before Declaration of Independence, none of the colonies “were, or pretended to be” sovereign states in the proper sense of the term).

152. III: 124, 154. The image of federal powers being “carved” out of the original totality of sovereign authority belonging to each individual state and leaving the “residuary mass” of sovereign powers with each state was prominent in states’ rights thought. *See* T. JEFFERSON, *supra* note 47, at 157; 1 ST. G. TUCKER, *BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA* pt. 1, app. 152–53 (Philadelphia 1803); 5 *id.* at app. 4. Story’s historical discussion with its description of the historical priority of a sovereign Continental Congress over the revolutionary state governments was an implicit repudiation of this imagery. I: 186, 202. Story transferred the language about “residuary sovereignty” to the American people in the aggregate. III: 752.

153. I: 343.

traditional English privileges,¹⁵⁴ their assemblies' claims to legislative autonomy,¹⁵⁵ the meaning of Article I's grants of power,¹⁵⁶ the status of federal treaties in judicial proceedings,¹⁵⁷ or the nature of the "establishment of religion" prohibited by the first amendment,¹⁵⁸ his first impulse was to clarify his terms so as to ensure that he could deduce accurate conclusions.¹⁵⁹

For Thomas Jefferson, the Constitution's interpretation rested on a few simple principles, accessible to "men of ordinary understanding," and was not the end-product of judicial attempts to "squeeze" sense out of the words of the document. For Joseph Story, however, squeezing meaning out of the Constitution's laconic text was the proper and essential task of the judge, and he praised the resulting volumes of increasingly complicated judicial exposition.¹⁶⁰

V. CONCLUSION: THE PASSING OF THE OLD CONSTITUTION

Joseph Story was, in one sense of that much-abused term, a deeply conservative man.¹⁶¹ In October, 1832, he wrote his friend James Kent to

154. I: 134-38.

155. I: 145.

156. See, e.g., II: 367-69, 379.

157. III: 694-97.

158. III: 722-24.

159. Story's concern for the proper use of language as the essential prerequisite for accurate constitutional interpretation frequently led him in the *Commentaries* to censure the semantic sloppiness of other commentators. While Jefferson, of course, attracted the lion's share of Story's terminological criticism, the *Commentaries* also took to task many constitutionalists whom Story admired, including John Quincy Adams (I: 309 n.2), John Jay (I: 295-96, 317 n.1), William Johnson (III: 435 n.1), James Kent (III: 8 n.2), James Madison (I: 329, 375; II: 372), James Monroe (III: 28 n.2, 152 n.3), and William Rawle (I: 326-27). On one occasion Story gently corrected John Marshall's imprecise reference in *Gibbons v. Ogden* to the states as "sovereign" prior to the Constitution's adoption. I: 202 n.1. Story often noted how terminological confusion had led a commentator to deduce incorrect conclusions, e.g., I: 326-27 (Rawle's mistaken acceptance of a state's right to secede stemmed from his use of compact language for the Constitution), to produce an argument that actually proved the opposite proposition from that which the commentator was trying to establish, e.g., III: 152 n.1 (Monroe's argument that Congress could not construct roads and canals but could appropriate funds for such purposes was "irresistible" reasoning in support of the former, broader power), or to refuse to accept the logical implications of his reasoning, e.g., I: 289 & n.2 (the doctrines of nullification and secession "flow[ed] naturally" from the compact theory of the Constitution, although some who accepted the theory did not accept its consequences, including Tucker and Madison).

160. "Let it be remembered, that texts, which scarcely cover the breadth of a finger, have been since interpreted, explained, limited, and adjusted by judicial commentaries, which are now expanded into volumes." J. STORY, *supra* note 140, at 695 (describing with praise Marshall's contributions to the science of constitutional law). Jefferson would have agreed with Story's description of Marshall's work, but he would have seen nothing to praise.

161. James McClellan's ambitious study of Story's thought, see J. MCCLELLAN, *supra* note 8, concludes that Story was the disciple of Edmund Burke in the exposition of "conservative principles," and asserts that Story "loved the American Constitution because it was to him a conservative Constitution." *Id.* at 274, 312. Story unquestionably regarded himself as a "conservative" in later life, see, e.g., Letter from Joseph Story to Charles Sumner (Aug. 11, 1838), in 2 LIFE, *supra* note 3, at 300, and was deeply alarmed at the progress of the Jacksonian Democrats. See G. DUNNE, *supra* note 21, at 335-38, 381-84, 423-26. Furthermore, he was an enthusiastic admirer of Burke, whose antipathy

praise the second edition of the latter's treatise on American law and to describe briefly his own constitutional *Commentaries*, then at the publisher. "They are written," Story avowed, "with a sincere desire to commend, and to recommend the Constitution upon true, old, and elevated principles."¹⁶² Despite his belief in progress, the theme of the "old" and "original" principles of the Constitution recurs throughout his writings,¹⁶³ and Story viewed himself as unchanging in his essential opinions.¹⁶⁴ He did not claim originality for the views expressed in the *Commentaries*, and indeed the individual elements making up those views were, for the most part, borrowed.¹⁶⁵ Nevertheless, the result of Story's efforts to "commend" the old principles of the Constitution was the creation of a new and radically different vision of the Constitution, one that undermined the anti-democratic, property-oriented Constitution of New England Federalism no less than the states' rights Constitution of the Jeffersonian Republicans. In demonstrating the mutability and adaptability of a "scientific" Constitution and in developing the republican logic of a "majoritarian"

for theory and reliance on the ongoing traditions of society greatly influenced Story's thinking. But Story's conservatism existed within a general attitude of support both for popular, majoritarian rule and for the change which accompanied such rule. Viewing from abroad the more placid British political scene, Story expressed to his British correspondents support for extension of the franchise as well as an equal distaste for both Tories and Radicals. See Letter from Joseph Story to Evelyn Dennison (Jan. 24, 1832), in 2 LIFE, *supra* note 3, at 81-82; Letter from Joseph Story to Harriet Martineau (Jan. 19, 1839), in 2 LIFE, *supra* note 3, at 308-09. Story's concern over events in his native country was due in large measure to his fear of too-rapid change; its basic premise was his acceptance of the republican principle that the majority's will, rather than Burkean tradition, *should* control. It is anachronistic to label Story, or Burke for that matter, a "conservative" if that term is used with all of its modern connotations.

162. Letter from Joseph Story to James Kent (Oct. 27, 1832), in 2 LIFE, *supra* note 3, at 109.

163. See, e.g., Letter from Joseph Story to Sarah Story (March 7, 1819), in 1 LIFE, *supra* note 3, at 325.

164. For Story's perception of the consistency of his political views, see *supra* note 88; he was as strongly convinced that, on the bench, his judicial views had remained constant, see Letter from Joseph Story to Harriet Martineau (Apr. 7, 1837), in 2 LIFE, *supra* note 3, at 277.

165. I: vi (*Commentaries* presents no "novel views" or "new plan of interpreting" the Constitution). The most powerful influences on Story's constitutional views, as he acknowledged, were *The Federalist* and the writings of John Marshall. I: v-vi. Story was indebted deeply to Hamilton's famous opinion on the constitutionality of a national bank for his approach to construing federal powers. See II: 389 n.2; III: 135 n.4, 519 n.1. The influence of Blackstone is often evident, especially in Story's views on the ultimate uncontrollability of sovereign power (although Story, as noted above, applies the notion to the people rather than to the legislature as did Blackstone). I: 191-93 (meaning of "sovereignty"); I: 383-84 (on methods of constitutional interpretation); II: 4-5 (value of separation of powers). Burke, although seldom cited in the *Commentaries*, was the apparent source of many of Story's ideas about the impossibility of constructing government solely on theoretical grounds, and about the wisdom of changing institutions only slowly. But Story understood Burke as a participant in the Anglo-American Whig tradition of 1688 and 1776, not as a reactionary conservative. See II: 49 n.4 (on propriety of the people choosing representatives directly, Story contrasted Burke's firm support with equivocal statement by Jefferson); see also I: 315 & n.2 (listing, as in agreement on the sovereign power of the people, "the great revolutionary whigs in 1688," "the great Whig leaders of the House of Commons . . . in 1709," and "Mr. Burke").

Constitution, Story was forced radically to circumscribe the Constitution's protection of substantive values.¹⁶⁶

Story's personal devotion to certain substantive legal values was strong. The preservation of the "principles of justice" was for Story one of the most basic purposes of any government, and one of the defining characteristics of "free" government.¹⁶⁷ The inability of the Articles of Confederation to fulfill this goal was, he emphasized, one of the causes for the framing and adoption of the Constitution, a motive reflected in its preamble's explicit commitment to the "establish[ment of] justice."¹⁶⁸ Story's conception of justice encompassed not only the mere satisfaction of procedural regularity, but the substantive protection of an individual's "character [and] fortune [and] life"¹⁶⁹ as well: "The fundamental maxims of a free government seem to require, that the rights of personal liberty, and private property, should be held sacred."¹⁷⁰

In his early years as a judge, Story suggested on occasion that the federal judiciary could enforce these rules of natural justice even apart from specific constitutional provisions.¹⁷¹ It is striking, therefore, that the *Commentaries* repeatedly describe the Constitution's protection of these rights as relative, and not absolute. By 1833, Story's view was that the sovereign government of the people could have no ultimate limits except those accepted by the majority through considerations of "policy, or convenience, or justice."¹⁷² If the majority chose to endorse oppression through constitutional forms, those whose rights were infringed had only "the ultimate appeal to the good sense, and integrity, and justice of the majority of the people."¹⁷³ Such majoritarian oppression, Story conceded, was "certainly irremediable under any known forms of the constitution," for the amending power permitted the majority, with almost no limitations, to "change the whole structure and powers of the government, and thus legalize any

166. From a modern perspective, the *Commentaries* proposed a "process-based" view of the Constitution. See Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 *YALE L.J.* 1063 (1980). Story's vision is, of course, not a pure process-based theory, for he also openly embraced certain substantive values, something that "process-perfecters are at such pains to avoid." *Id.* at 1064.

167. I: 262-63, 463-64.

168. I: 463-70.

169. J. STORY, *Progress of Jurisprudence*, in *WRITINGS*, *supra* note 20, at 198, 227. See also Story, *Natural Law*, in *ENCYCLOPEDIA AMERICANA* (F. Lieber ed. 1836), reprinted in J. McCLELLAN, *supra* note 8, at 313, 315 ("man has a perfect [determinate] right to his life, to his personal liberty, and to his property").

170. III: 268.

171. See, e.g., *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 52 (1815); *United States v. La Jeune Eugenie*, 26 F. Cas. 832, 846 (C.C.D. Mass. 1822).

172. II: 55. See I: 194, 299-300.

173. I: 306.

present excess of power."¹⁷⁴ The Constitution, designed to establish justice, might become—constitutionally—the instrument of injustice.¹⁷⁵ The oppressed would be bound legally and perhaps morally to submit.¹⁷⁶ Story considered the Constitution's restraints on majoritarianism, especially the independent judiciary and the complicated amendment process,¹⁷⁷ valuable because they provided checks on hasty political passions, "the momentary ebullitions of those, who act for the majority, for a day, or a month, or a year."¹⁷⁸ But Story believed that, even with respect to private property rights, there were no final limitations on a decision by the majority.¹⁷⁹

Story came close to admitting the existence of immutable legal limits on majoritarian rule in his discussion of the Constitution's interdiction of state impairment of contracts.¹⁸⁰ After listing the potentially unjust acts that the Constitution did *not* forbid, Story raised the question whether "independently of the constitution of the United States, the nature of republican and free governments does not necessarily impose some restraints upon the legislative power."¹⁸¹ He noted the widespread judicial opinion that no state government "can be presumed to possess the transcendent sovereignty" enabling it to transfer private property from one individual to another by legislative act.¹⁸² No American court "would be warranted in assuming" that a power "so repugnant to the common principles of justice and civil liberty, lurked under any general grant of legislative authority," since "[t]hat government can scarcely be deemed to be free, where the rights of property are left solely dependent upon a legislative body, without any restraint."¹⁸³ For all this rhetoric, however, Story could find only a presumption against legislative power to destroy vested property rights. His argument concluded that judicial protection of property would have to bow to a "very strong, and positive declaration" that the sovereign people had delegated to their legislature that power.¹⁸⁴ Thus,

174. I: 374.

175. III: 538-39.

176. Compare I: 302 n.2 (claiming that right of minority to withdraw from government or to overthrow it "has no foundation in any just reasoning") with I: 374-75 (arguing that if there exists a remedy for constitutional oppression, it is "a remedy never provided for by human institutions. It is by a resort to the ultimate right of all human beings . . . to apply force against ruinous injustice."). Story's later expressions of a belief in absolute limits on the will of the majority in his private correspondence, e.g., Letter from Joseph Story to Francis Lieber (Aug. 15, 1837), in 2 LIFE, *supra* note 3, at 278, presumably refer to moral rather than legal limits.

177. III: 473, 686.

178. III: 473. See also I: 267 (Constitution's complicated structure fulfills the need to "check, as well as enlighten, public opinion").

179. I: 299-300; II: 55-57; III: 473.

180. III: 266-69.

181. III: 268.

182. *Id.*

183. *Id.*

184. III: 269.

Story clearly conceded that there were not, and in a republican polity should not be, any limitations on the deliberate decision of the majority.

Story believed that the subordination of the Constitution to the considered will of the majority solved one of the most discussed problems of antebellum constitutional discourse, the idea of constitutional "perversion." As explained by Calhoun:

There may be many, and the most dangerous infractions on the part of Congress, of which, it is conceded by all, the court, as a judicial tribunal, cannot, from its nature, take cognizance . . . [such as] *where Congress perverts a power from an object intended, to one not intended, the most insidious and dangerous of all infractions; and which may be extended to all of its powers . . .*¹⁸⁵

To the proponents of nullification, the tariff of abominations was a prime example of perversion. The Constitution undeniably delegated to Congress the power to impose a tariff,¹⁸⁶ but it did so, the argument went, to enable Congress to raise revenue. The challenged act was a perversion of the power because it was designed instead to protect Northern manufacturing interests against foreign imports.

Story's response to the concept of constitutional "perversion" was two-fold. First, he pointed out the difficulties accompanying any attempt to discern an illegitimate purpose behind congressional exercise of a delegated power.¹⁸⁷ But the states' rights theorists accepted the existence of this evidentiary problem, and used it as a justification for claiming for the states final interpretive authority in matters of federal power.¹⁸⁸ Story's second, and more basic, objection to the concept of "perversion" was that it was fundamentally anti-majoritarian. He conceded that, as an exercise of thought, "cases may readily be imagined, in which a tax may be laid, or a treaty made, upon motives and grounds wholly beside the intention of the constitution."¹⁸⁹ But he insisted that the remedy in such cases "is solely by an appeal to the people at the elections; or by the salutary power of amendment."¹⁹⁰ Therefore, "[i]f the oppression be in the exercise of powers clearly constitutional, and the people refuse to interfere in this

185. J. CALHOUN, *supra* note 119, at 70 (emphasis in original).

186. U.S. CONST. art. I, § 8, cl. 1.

187. Story observed that such an attempt would require "an inquisition into the motives of every member," an impossibility since the motives of many would either be mixed, self-contradictory or "incapable of ascertainment." Even more fundamentally for Story, reliance on the reviewer's reconstruction of congressional motives could entail rejecting "the written intent of the legislature" for "conjecture, and parol declarations, and fleeting reveries, and heated imaginations." II: 533-34.

188. *See, e.g.*, J. CALHOUN, *supra* note 119, at 69-76.

189. I: 346.

190. I: 347.

manner, then indeed, the party must submit to the wrong"¹⁹¹ Story was thus driven by the logic of his argument to deny the propriety or possibility of final limits on governmental power at a time when that power was in the hands of men with whom he disagreed on fundamental issues.¹⁹² Story's very real despair at the political course set by the Jacksonian Democracy was predicated on his intellectual acceptance of the constitutionality of the majority's choice.¹⁹³

The constitutional vision presented in the *Commentaries* is a curiously modern one. We have accepted, for the most part, Story's rejection of the concepts of constitutional compact, interposition, nullification, and constitutional perversion that were the stock in trade of early nineteenth century discussion. Story's "scientific" view of the Constitution's flexibility, and its corollary the omni-competent federal government, triumphed during the New Deal era. His majoritarianism has been a recurrent theme, albeit with rather different nuances, of both the Warren and the Burger Courts. Even the form of Story's argument, with its reliance on Supreme Court opinions and legal commentaries to the virtual exclusion of the broader vistas of ethics and political philosophy, can be discerned in the pages of the *Commentaries'* most recent descendant.¹⁹⁴ The *Commentaries* provide the prime example of the nineteenth century's translation of the basic questions of American political values into those narrow confines of legal idiom that today still dominate constitutional discussion. It is ironic that Joseph Story, who described himself only a few years later as "a monument of the past age, and a mere record of the dead,"¹⁹⁵ should have created in his *Commentaries* so perfect a reflection of the future.

191. III: 539.

192. Despite his approval of Jackson's nationalist stand during the nullification crisis, Story regarded most of the other prominent measures of that administration as wrong-headed and even unconstitutional. 2 LIFE, *supra* note 3, at 207-08. Soon after Jackson left office, Story wrote his colleague John McLean that the "state of unexampled distress and suffering" in which the country found itself was the "natural effect" of the "experiments of General Jackson." "Will the people awake to their rights and duties? I fear not. They have become stupefied, and are led on to their ruin by the arts of demagogues and the corrupted influences of party" Letter from Joseph Story to John McLean (May 10, 1837), in 2 LIFE, *supra* note 3, at 273. This harsh retrospective judgment on Jackson's presidency corresponded with Story's earlier fears. See Letter from Joseph Story to Ezekiel Bacon (Aug. 3, 1828), in 1 LIFE, *supra* note 3, at 538 (approaching election "momentous, both in principles and consequences"; Story "sincerely anxious" for Adams' reelection).

193. This despair, which Story sometimes expressed privately in very strong language, see, e.g., Letter from Joseph Story to Justice John McLean (Aug. 16, 1844), reprinted in C. SWISHER, THE TANEY PERIOD 1836-64, at 43 (1974), must be understood in conjunction with his publicly expressed support, in the *Commentaries* and elsewhere, for majority rule, and with the evidence that he was saddened, not confirmed, by his personal views regarding the apparent failure of republicanism in America. See, e.g., Letter from Joseph Story to William W. Story (Jan. 25, 1845), in 2 LIFE, *supra* note 3, at 510-11.

194. See L. TRIBE, AMERICAN CONSTITUTIONAL LAW (1978). I am not suggesting that Tribe is himself unaware of these vistas.

195. Letter from Joseph Story to Harriet Martineau (Feb. 8, 1836), in 2 LIFE, *supra* note 2, at 226.

The Editors dedicate this issue to Professor Rostow for his distinguished career as a scholar, Dean of the Yale Law School, and public servant. His vision, his courage, and his devotion to the rule of law in domestic and international affairs have inspired his students and his colleagues.



Eugene V. Rostow