University of Minnesota Law School
Scholarship Repository

Constitutional Commentary

1996

Book Review: The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth. by William R. Casto.

Stephen B. Presser

Follow this and additional works at: https://scholarship.law.umn.edu/concomm

 Part of the Law Commons

Recommended Citation

Presser, Stephen B., "Book Review: The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth. by William R. Casto." (1996). *Constitutional Commentary*. 1021.
https://scholarship.law.umn.edu/concomm/1021

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Constitutional Commentary collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

Book Review

THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH. By William R. Casto.[1] Columbia, S.C.: University of South Carolina Press, 1995. Pp. xvi, 267. Cloth, $49.95.

Stephen B. Presser[2]

Let's be blunt. These have not been happy times for us legal romantics. What, you may well ask, is a "legal romantic?" A legal romantic, to be distinguished from a "legal nihilist,"[3] is someone who believes that there actually is some content to the rule of law and who believes that it is the task of judges, juries, legislatures, and executives to find that content, not making things up as they go along, but trying to implement received ideals of justice which are more than the sum of individual desires, and which partake of divinity itself. Since secularism and individual self-gratification are the twin dominant goals of currently fashionable legal analysis on and off the bench, we legal romantics often feel isolated, if not abused and depressed. Our fellows in the academy regard us with bemused tolerance at best and naked hostility at worst.[4]

As we legal romantics swoon and watch current events unfold—the latest atrocity being the Los Angeles jury's acquittal of O.J. Simpson—we wonder what it would be like to live in a society that took law seriously, which regarded it as a set of eternal

---

1. Professor of Law, Texas Tech University.

2. Raoul Berger Professor of Legal History, Northwestern University.

3. See generally the exchange between Dean Paul Carrington and Robert Gordon, reprinted in Stephen B. Presser and Jamil S. Zainaldin, *Law and Jurisprudence in United States History* 992-1017 (West, 2d ed. 1989).

4. This does not mean that we can't fight back. See generally Stephen B. Presser, *Recapturing the Constitution: Race Religion and Abortion Reconsidered* (Regnery, 1994). Cf. Kenneth Baker, ed., *I Have No Gun But I Can Spit: An Anthology of Satirical and Abusive Verse* (Eyre Methuen, 1980).

rules to live by, and in which the practice of law was regarded as a higher calling, much like the ministry once was.

Professor William Casto, best known as the author of several excellent but highly specialized works on late eighteenth century legal topics, in his new book (building upon and synthesizing his earlier work), has given us a look at such a society—that of our founding generation. This is a study of the Justices and their jurisprudence before John Marshall—that of the Jay and Ellsworth courts—during the period before Thomas Jefferson took office, and when the Federalist party (the Anglophiliac conservatives who served in the Washington and Adams administrations and shared the views of Washington's brilliant and accomplished secretary of the treasury, Alexander Hamilton) dominated not only the executive and the judiciary, but also the Congress. This was the era of the two rebellions in Pennsylvania, of the Jay treaty, of the X,Y,Z affair, and of the undeclared war with France, and the era when our national political schizophrenia began to manifest itself. Spurred on by the world's first largely unshackled periodical press, Americans in the late eighteenth century began to divide profoundly along regional, class, and economic lines, as the emerging Jeffersonian party (which preferred France to England, localism to cosmopolitanism, and agrarian pursuits to high finance) campaigned to wrest control of the legislative and executive branches from the Federalists. Eventually the Jeffersonians succeeded, of course, although the Federalist ideals were reborn, first with the Whigs, and then with our own era's Republicans, continuing the pattern of never-ending political sectarian strife which characterizes our history.

But before Jefferson's victory in 1800, an interesting jurisprudential experiment conducted by the Federalists took place, as the Justices under Jay and Ellsworth sought to implement the court system which they believed to have been ordained by the Constitution and the Judiciary Act of 1789 (both documents, by the way, clearly reflecting the efforts of some of the first Supreme Court Justices, most notably Wilson, Paterson, and Ellsworth, as Casto demonstrates). To the victors belong the spoils of writing history, and history departments have been dominated since time out of mind by Jeffersonians. Not surprisingly, then, just about all that most of us have heard about the pre-Marshall Justices has not been particularly good. If they are remembered at all, it is for their being sub-standard or worse. Most of us have heard about Samuel Chase's peccadilloes, which resulted in his impeachment (though not conviction) by the Jeffersonians once

they came to power.[5] We might even have heard about the alleged insanity of the man nominated to be the Second Chief Justice, John Rutledge, or even about James Wilson's ignominious end in bankruptcy and despair. Casto tells these stories well, stripping away much of the Jeffersonian gloss that has accumulated over the last two centuries. (It must be admitted, however, that Casto is not as understanding of Chase as I would have liked, but we'll let that pass.)[6]

More importantly, Casto, by systematically exploring particular subject matter areas, such as the origins and formation of the Constitution's Article Three and the Judiciary Act of 1789, property and contract rights, national security law, federalism, and constitutional interpretation, shows us how much Marshall and his successors simply borrowed from or built upon an already highly-developed collection of rules and principles of national jurisprudence. Casto throughly explodes the myth of pre-Marshall incompetent nonentities. Moreover, Casto implicitly suggests that the accomplishments of our first Justices were made possible because these men shared a natural law view of jurisprudence, instead of the positivism that dominates our era. In short, our earliest judges were legal romantics. This is not a point that dominates Casto's analysis, and, indeed, his clear suggestion that the Justices he studies were also keenly astute pragmatic judicial politicians appears somewhat to run counter to the suggestion that they were profoundly influenced by natural law, but this inconsistency is certainly something that can be left to be worked out at a later day. What Casto has given us is the best comprehensive guide to the work of the early Supreme Court, and an entertaining and witty introduction to the personalities and views of the earliest Justices.

Returning to review the work of our earliest Justices—Casto's project—is also the project of several other notable scholars of legal and constitutional history, including, among others, Maeva Marcus (and her crew who are now producing the multi-volume Documentary History of the earliest Justices), Wythe Holt, Herbert Johnson, George Haskins, and Kathryn Preyer, all of whom have clearly influenced and been of great use to Casto. They have helped Casto produce a work of legal history at its best—thoroughly grounded in the primary sources,

5. For the details, see my *The Original Misunderstanding: The English, the Americans and the Dialectic of Federalist Jurisprudence* (Carolina Academic Press, 1991).

6. See id. at 8 ("[I]t is difficult not to conclude that Samuel Chase was the most brilliant of the first justices.").

aided in interpretation by discriminating use of secondary sources, and appropriately acerbically critical of the conclusions reached by others, particularly some law professors (here to remain nameless to protect the guilty) who have only dimly perceived the outlines of what constitutional thought was actually like in the early years of the Republic. Many of these non-historically trained scholars have tried to rummage indiscriminately in our past for data to support their expansionist notions of what the Supreme Court ought to do today, and, in particular, to legitimize the Fourteenth Amendment decisions of the Warren and Burger courts. A close study of Casto's work, which is now required of any legal scholar seeking to understand developments on the earliest Supreme Court, shows the dubious nature of this scholarly scavenger hunt.

Even so, as recent events both in Europe and America have begun to suggest to the most astute historians among us (one thinks here particularly of Eugene Genovese[7]), there *is* a need to fashion new political and legal approaches which understand the real nature of human needs, and seek to construct a republican or communitarian ethos to replace the increasingly unsatisfactory liberal paradigm of a jurisprudence dedicated to self-expression and self-actualization. Perhaps a legal romantic revolution, inspired by and in the spirit of the nation's founding, is in the process of being launched, and Casto's study can offer glimpses of our future as well as our past. Given that we are now a people simultaneously committed to what may be mutually incompatible and temporally unattainable goals (popular sovereignty, Judeo-Christian morality, economic expansion, individualism, secularism, racial and gender equality, and the rule of law, for starters), it is not likely that our deep divisions will end any time soon, nor could we really continue to be Americans without our semi-chuckleheaded confidence that it's our job to achieve the impossible for the first time in the history of the universe. Nevertheless, a reminder of the kind that Casto offers, that (to borrow the leading legal Romantic, Paul Carrington's, phrase) "law matters,"[8] might make us able to see more clearly where real injustice exists, and help us achieve the "judgment and courage" (again to borrow from Carrington)[9] necessary to eradicate it.

---

7. See, in particular, Eugene D. Genovese, *The Southern Tradition: The Achievement and Limitations of an American Conservatism* (Harvard U. Press, 1994).

8. Presser and Zainaldin, *Law and Jurisprudence* at 1009-12, 1015, 1017 (cited in note 3).

9. Id. at 996-99.