Spring and summer of 2011 brought to mind two instructive American chronological landmarks: the 235th anniversary of the signing of the Declaration of Independence and the 150th anniversary of the outbreak of the Civil War. One was as uplifting as the other was disheartening.

In launching a nation, the Declaration captured the core of democratic theory in its reference to “[g]overnments... deriving their just powers from the consent of the governed.” Eighty-seven years later, as the American states were at war with each other after eleven of them refused to accept the outcome of the election of 1860, President Abraham Lincoln restated the principle of consent on the battlefield at Gettysburg as “government of the people, by the people, and for the people.” However phrased, this founding principle had to be made operational. Otherwise, the “dependence on the people” that James Madison acknowledged in 1788 in The Federalist, No. 51, as “the primary control on the government” would not be achieved.

The Framers deployed the principle of consent in various ways in the plan of government they devised in Philadelphia in the summer of 1787. The Constitution entrusted the conduct of elections for national offices to the popularly elected legislatures of the pre-existing states, subject to modifications that Congress might make. People eligible to vote for “the most numerous Branch of the State Legislature” elected members of the House of Representatives, as Article I dictated. State legislatures designated members of the Senate. Electors, in numbers apportioned among the states in accord with the size of their congressional delegation and “appoint[ed], in such Manner as the Legislature [of each state]... may direct,” chose the President and Vice President, as Article II dictated. Except for constitutional amendments that instituted popular election for Senators and significantly broadened the franchise, these provisions still control the election of national officers. By determining peacefully those who shall govern and by bestowing legitimacy on the decisions they make, the provisions have provided workable answers to the crucial question faced by every political system: who shall govern?
Yet, how did the Framers link the Supreme Court to the principle of consent? They deliberately detached that body from any meaningful “dependence on the people.” The President, “by and with the Advice and Consent of the Senate,” was to “appoint . . . Judges of the supreme Court” who, along with judges of the “inferior Courts” were to “hold their offices during good Behavior” and to enjoy “a Compensation, which shall not be diminished during their Continuance in Office,” as Article III outlined. Thus, in April 1788, when Alexander Hamilton in The Federalist, No. 78 imagined the Supreme Court and a national judicial power, he defended this “independence of the judges” as “an essential safeguard” against popular sovereignty, “against the effects of occasional ill-humors in the society.” Of primary concern to Hamilton were “infractions of the constitution,” which the anticipated power of judicial review would not only block and contain once they had occurred but perhaps even prevent. As Princeton’s Professor Edward S. Corwin would observe 160 years later, “judicial review represents an attempt by American Democracy to cover its bet.”

Hamilton, however, strove valiantly in the seventy-eighth Federalist to lodge consent in the Court. Judicial review, he argued, did not “suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both.” It was this convergence of an appointed Bench with the popular will that Chief Justice John Marshall articulated in Marbury v. Madison, the first defense of judicial review in a decision by the U.S. Supreme Court. “That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental. . . . Those, then, who controvert the principle, that the constitution is to be considered, in court, as a paramount law, . . . reduce[,] to nothing, what we have deemed the greatest improvement on political institutions, a written constitution . . .”

For Marshall, consent consequently had two dimensions: popularly derived authority to rule combined with popularly derived limits on that rule. This is the link Justice Robert H. Jackson succinctly captured almost a century and a half later in the Steel Seizure Case: the command of Article II that the President “shall take Care that the Laws be faithfully executed . . . gives a governmental authority that reaches so far as there is law,” advised Jackson. Likewise, the Fifth Amendment’s command that “[n]o person shall be . . . deprived of life, liberty or property, without due process of law . . . gives a private right that shall go no farther. These signify about all there is of the principle that ours is a government of laws, not of men, and that we submit ourselves to rulers only if under rules.”

Of course, John Marshall continues to cast a large shadow on the Constitution and on the development of American political institutions. To write about the fourth Chief Justice after 1800 is to write about the Supreme Court, and—with only a few exceptions, such as William Johnson and Joseph Story—to write about the Supreme Court in the first third of the nineteenth century is to write about John Marshall. Indeed, Marshall is sometimes referred to as the Great Chief Justice, as if no one else could ever be his equal. His place in the American pantheon means, therefore, that he has rarely been allowed to stray far from the center of scholarly attention. Alongside several biographies is a host of more narrowly focused volumes, reams of articles, plus countless other studies in which Marshall’s handiwork figures prominently. At the 1955 bicentennial of his birth, one bibliography counted nearly 750 titles. The intervening years have surely pushed that number above 1,000.

To the current count one must now add two recent books on Gibbons v. Ogden, one of the Marshall Court’s most significant
Two new books about Gibbons v. Ogden illuminate the importance of that Marshall Court decision, which involved a steamship monopoly.

decisions. Indeed, for Indiana Senator Albert J. Beveridge, Marshall’s first major biographer, that opinion “has done more to knit the American people into an indivisible Nation than any other one force in our history, excepting only war.” Both of these new books on Gibbons carry the case name as their titles. The first of these, Gibbons v. Ogden, Law, and Society in the Early Republic, is by Thomas H. Cox, who teaches history at Sam Houston State University in Huntsville, Texas. Originally written as a doctoral dissertation at the State University of New York at Buffalo, Cox’s book happily reads more like a freshly commissioned work and less like a treatise amassed for a doctoral examining committee. The second treatment is Gibbons v. Ogden: John Marshall, Steamboats, and the Commerce Clause by Herbert A. Johnson of the University of South Carolina School of Law, formerly editor of the Papers of John Marshall. The Johnson volume is one of the latest books to appear in the Landmark Law Cases & American Society Series. Published by the University Press of Kansas under the general editorship of Peter Charles Hoffer and N.E.H. Hull, this series of case studies now claims nearly five dozen titles, almost all of them treating decisions by the United States Supreme Court. As a distinct scholarly category, the case study has been a venerable part of the literature on the judicial process for at least the past five decades, easily predating even the Landmark Law Cases series.

Johnson’s book on Gibbons had the benefit of Cox’s research, in that Cox shared his dissertation with Johnson prior to its publication by the Ohio University Press. The result is a pair of well-researched, readable, and insightful contributions to American constitutional history. Not surprisingly, Cox’s is the stronger in the depth of the detail it provides about the case itself, while Johnson’s makes the stronger link between Marshall’s opinion and recent controversies under the Commerce Clause. Each is a valuable resource.

Except for those who live within view of a seaport or major navigable river, most Americans probably think about waterborne commerce today only when some calamity of nature such as flooding or a hurricane shuts it down. In an age when the country is dotted by airports and crisscrossed by railroads and interstate highways, it may be difficult to imagine a time when much of the movement of people and merchandise was by water, not by land or air. But that was the nature of transportation for much of the inland United
States in the first third of the nineteenth century, before railroads began to displace mule-drawn and pole-pushed canal boats and coast-hugging sailing vessels. *Gibbons v. Ogden* arose as a result of the introduction of a revolutionary contrivance into this way of life: the steamboat. This invention opened up unparalleled possibilities, because, in combining speed and power, it freed water transportation from reliance on wind and currents. Now commerce and communication in what had become the United States would be able to move beyond the four-mile-per-hour world they had long inhabited. As Cox explains, perhaps “nothing symbolized the economic growth of the young nation more than the spectacle of steam power, a scientific marvel that promised economic progress through technological innovation with minimal social upheaval. Unlike British factories, which invoked images of oppression and drudgery, steamboats appeared to early Americans as floating symbols of progress that would bring raw goods to market and refinement to the backcountry.”

Such opportunities were bound to breed conflict. In 1798, Chancellor Robert Livingston secured a monopoly from the New York legislature over steam travel in local waters, and he partnered with Robert Fulton in 1807 to produce the first practical steamboat. Ex-Governor Aaron Ogden of New Jersey held a license under the monopoly to operate a steam-powered ferry between New York and New Jersey. Georgia planter and former Savannah mayor Thomas Gibbons, who possessed a “coasting license” under a congressional statute but no license from the monopoly, operated boats on the same route in competition with Ogden. After litigation commenced, Chancellor Kent of the New York court upheld the monopoly and maintained that Congress had no direct jurisdiction over internal commerce or waters. While the story of the steamboat monopoly is complex, Cox relates it in great detail and, in so doing, opens a window into life and politics in southern New York and northern New Jersey at that time.

When the case reached the Supreme Court in February 1821, it involved the basic clash between the defenders of the monopoly and its enemies. From this distance, the strong-willed litigants and their associates in the various twists and turns of what had become a long-running controversy would today all seem be strong candidates for roles in a television miniseries. There were fortunes to be made, unmade, or retained. There were reputations to be vindicated or destroyed. Opposing counsel included Thomas Emmet, Thomas Oakley, Daniel Webster, and William Wirt. As Justice Joseph Story wrote an acquaintance, “We are to take up in a few days, another question, whether a State can give to any person an exclusive right to navigate its waters with steamboats, against the rights of a patentee, claimed under the laws of the United States . . . The arguments will be splendid.”

With extensive newspaper coverage along the East Coast of the oral arguments that stretched over four days in February 1824, interested parties and the general public understandably awaited a decision with great anticipation. At one level, vast sums of money were at stake in this clash between vested rights and the entrepreneurial spirit. At another level was a tangible conflict between states’ rights and congressional power. At still another level was the meaning of the Constitution’s Commerce Clause itself, and not far removed from any discussion of the commerce power of Congress was slavery and the traffic in slaves. Moreover, although government under the Constitution had been under way since 1789, the Hartford Convention of 1814–1815 was still a haunting and very recent reminder that a union of the states might still not be a truly accomplished fact.

Even the composition of the Bench that would decide the case had been uncertain for a time, after Justice Brockholst Livingston died in March 1823. For a successor, President James Monroe informally offered the seat
to Smith Thompson, his Navy Secretary and a former New York judge who had ruled in favor of the monopoly in one of the saga’s earlier courtroom bouts in state court. As Cox explains, however, Thompson had presidential aspirations and equivocated. Wirt then urged the President to nominate James Kent instead, but the Republican Monroe was hesitant to put a strong Federalist on the Court. When early summer arrived with the seat still vacant, Justice Story wrote Chief Justice Marshall about his “deep anxiety as to the successor of our lamented friend, Judge Livingston. I have heard strange rumors on the subject. If the President does not make a very excellent appointment, he is utterly without apology, for there was never a more enlightened bar from which to make the best selection.”

Having concluded by December that his presidential hopes were too tenuous, Thompson agreed to accept the seat. Yet he had no part in resolution of the steamboat case: his daughter’s untimely death delayed his swearing in until after the case had already come down.

Moreover, to the consternation of many, the Court had to delay its planned announcement of the decision. Returning from dinner at the White House in February, the Chief Justice stepped on some ice and fell, dislocating his shoulder and briefly losing consciousness. “Although I feel no pain when perfectly still,” he wrote to his wife Polly, “yet I cannot get up and move about without difficulty & cannot put on my coat. Of course I cannot go to court.” Before the decision was actually announced on March 2, rumors even surfaced that Justice Story was writing the opinion. The opinion, however, not only carried Marshall’s name but reflected his jurisprudence, approach to constitutional interpretation, and style. As was his custom, he wrote a good deal more than was necessary to decide the case, in that a simple resolution could have been had at the outset merely by finding a conflict between the congressionally based license and the state-conferred monopoly. The Supremacy Clause of Article Six would have then dictated the outcome. Marshall, however, seemed to have larger purposes on his mind and was successful in persuading his colleagues to follow his lead as he navigated around the interpretive shoals. For example, he expounded on the nature of the commerce power before finding the existence of a conflict. Counsel for Gibbons had contended that navigation was separate from commerce. Marshall insisted on a broad reading of the word: “This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more—it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations which shall exclude all laws concerning navigation.” Similarly, “the power of congress does not stop at the jurisdictional lines of the several states. It would be a very useless power, if it could not pass those lines. . . If congress has the power to regulate it, that power must be exercised whenever the subject exists.”

Significantly, Marshall linked his definition of commerce to his theory of national power. “This power, like all others vested in congress,” he declared, “is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution . . . If, as has always been understood, the sovereignty of congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in congress as absolutely as it would be in a single government.”

Recall that the steamboat case was decided only five years after the famous bank case of *McCulloch v. Maryland*, in which the Chief Justice had laid out not only his doctrine of national supremacy but also his doctrine of implied powers. Not only did the Necessary and Proper (or elastic) Clause of Article One,
Section 8 give Congress a choice of means in carrying out the powers that the Constitution expressly granted, but by “necessary” Marshall reasoned that the powers so implied needed to be merely convenient and appropriate, not essential. Thus, Congress possessed not only those powers granted by the Constitution but an indefinite number of others as well unless prohibited by the Constitution. Joined with that understanding of implied powers, the authority of Congress to regulate commerce possessed a staggeringly broad potential—a potential probably beyond the capacity of most early nineteenth-century minds even to envisage.

Moreover, the breadth that the Constitution allowed in a choice of means was largely a matter for Congress, not the judiciary, to decide. That is, the limits on Congress were largely to be electoral or political, not judicial. “The wisdom and the discretion of congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.”

Yet Marshall left unanswered the important question of whether the congressional commerce power was exclusive: “There is great force in this argument, and the Court is not satisfied that it has been refuted.” To have adopted an exclusive construction of the commerce power at this point would have cast grave constitutional doubt on the validity of any state law once it was held in fact to be a regulation of commerce.

Only late in the opinion did Marshall turn to the conflict between the congressionally authorized license and the monopoly—the conflict that decided the case. But the final part of the opinion revealed the larger concern on the Chief Justice’s mind that probably explains the depth and breadth of the opinion. “Powerful and ingenious minds, taking, as postulates, that the powers expressly granted to the government of the Union are to be contracted, by construction, into the narrowest possible compass, and that the original powers of the States are retained, if any possible construction will retain them, may, by a course of well digested, but refined and metaphysical reasoning, founded on these premises, explain away the constitution of our country, and leave it a magnificent structure indeed, to look at, but totally unfit for use.”

Marshall thus said not only a good deal more but also a good deal less than was required to decide the case. Moreover, Cox notes, Marshall’s overall use of language in this case matched architect Benjamin Henry Latrobe’s assessment of the future Chief Justice’s rhetorical style from nearly three decades earlier that entailed “placing his case in that point of view suited to the purpose he aims at, throwing a blazing light upon it, and keeping the attention of his hearers fixed upon the object to which he originally directed it.”

Cox and Johnson both properly emphasize Justice William Johnson’s concurring opinion, in which he ventured a position on the very issue Marshall had only skirted: the exclusivity of the national commerce power. “Power to regulate foreign commerce,” Johnson explained, “is given in the same words, and in the same breath, as it were, with that over the commerce of the States and with the Indian tribes. But the power to regulate foreign commerce is necessarily exclusive. . . . If there was any one object riding over every other in the adoption of the Constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints. And I cannot overcome the conviction that, if the licensing act was repealed tomorrow, the rights of the appellant to a reversal of the decision complained of would be as strong as it is under this license.” In other words, the federal statute in play was of dubious significance in Johnson’s view because, even in its absence, the Commerce Clause, by its own force, opened New York’s waters to Gibbons and neutralized the
restraints of the monopoly. Ironically, Justice Johnson—whom the third President sent to the Court, after all, in part to provide an intellectual counterweight to Marshall—seems to have out-Marshalled Marshall. Indeed, a newcomer to the case who reads that strongly nationalistic passage may be forgiven for thinking that Johnson had wandered off the Jeffersonian reservation.

Both authors believe that the South Carolinian’s views in Gibbons rested on broad concerns and that they were reinforced by his own circuit decision in Elkison v. Delieseline, decided in the wake of an attempted slave revolt in South Carolina that prompted the state legislature to pass the Negro Seaman Act. This statute required black sailors to remain quarantined on board ship while their vessels were in port. When the Charleston sheriff arrested Henry Elkison, his attorney contended that the statute violated the Commerce Clause and a treaty with Great Britain. Johnson repudiated this statute “as altogether irreconcilable with the powers of the general government.” If the state could flout one national mandate, then “it may be done as to all; and, like the old Confederation, the Union becomes a mere rope of sand.”

For the first time, an American court had found in the Commerce Clause a basis for invalidating state legislation. The right of the “general government to regulate commerce with the sister states and with foreign nations is a paramount and exclusive right,” Johnson declared. The very words of the grant to Congress “sweep away the whole subject, and leave nothing for the states to act upon.” For the first time, an American court had found in the Commerce Clause a basis for invalidating state legislation. The right of the “general government to regulate commerce with the sister states and with foreign nations is a paramount and exclusive right,” Johnson declared. The very words of the grant to Congress “sweep away the whole subject, and leave nothing for the states to act upon.” Understandably, the decision did not sit well with many of Johnson’s fellow South Carolinians. As Marshall wryly remarked to Justice Story, “Our brother Johnson, I perceive, has hung himself on a democratic snag in a hedge composed entirely of thorny states’ rights in South Carolina, and will find some difficulty, I fear, in getting off on smooth open ground.”

A reading of either the Cox or Johnson books will be enriched by revisiting the splendid discussion of Justice Johnson’s role in the steamboat case as it is presented in Donald Morgan’s insightful biography of Marshall’s colleague. Morgan does not overlook the influence of the Elkison case, but he argues that something else was at work as well. Indeed, Morgan suggests that, if any one person persuaded Johnson to state his views in the case, “it was not Marshall but Jefferson.” Accordingly, Johnson’s Gibbons opinion expressed an economic philosophy that he had been formulating for many years: an enthusiasm for free commercial enterprise. “[T]his Republican justice found comfort in what he took to be Jefferson’s conception of commerce. That leader had done much . . . to stimulate international trade, for commerce between the nations strengthened the bonds of international society, diffused among all countries the achievements of each, and propagated the truths of science and religion.”

Justice Johnson’s role in Gibbons highlights a major theme of Professor Johnson’s study: that the case “represents an important transitional point in Marshall’s career—and it is also the most significant example of his ability to gain agreement despite the existence of extreme differences among his colleagues.” Because of the traditional tendency of scholars of the Marshall Court to see the Chief Justice as a strong leader, the steamboat opinion should instead be studied as a “mediated opinion and a demonstration of the deft use of dicta coupled with a narrow holding” that is “entitled to much closer attention than it has hitherto received.”

The concluding chapter of the Johnson volume lends a helpful perspective to the steamboat case. “Historically and geographically, John Marshall’s opinion . . . has indeed had a very long and formative impact on American law. It shows no promise of declining in importance as a vital area for the interpretation of federalism in the union, and as an instrument for implementing programs both within the nation and in the international world. Yet Gibbons deserves its lasting
reputation as much for what it left unsaid as for what it decided. In its broad and catholic discussion of interstate commerce, it laid down general principles of law and economic regulation that have lasting validity. And, in its balanced approach to federal and state authority, taking care that neither governmental system should improperly usurp the functions of the other, it provided a primer for constitutional thought in the vital areas of business and economics. For these reasons, the passage of time has not diminished the impact of what undoubtedly is one of Marshall’s greatest achievements in shaping future constitutional jurisprudence in the United States of America.”

At least since publication of Senator Beveridge’s mammoth biography of Marshall nine decades ago, any discussion of the fourth Chief Justice usually evolves—sooner rather than later, and for obvious reasons—into a discussion of leadership. A path-breaking paper presented professionally fifty-one years ago (and since reprinted in at least one anthology on judicial behavior) applied the concept of small-group leadership functions—specifically “task” and “social” leadership—to the Chief Justice. From this perspective, a task leader is one who presents views with force and clarity, defends them successfully in discussions with colleagues, provides guidance for handling perplexing situations, and assumes responsibility for orienting conference deliberations and writing opinions. A Chief Justice excelling in social leadership relieves tensions, encourages solidarity and agreement, attends to the emotional needs of colleagues, and may be one of the most liked members of the Bench. This conception of leadership confirms “the common sense observation that a man who wishes to exert influence over his fellows can do so most effectively if he is both intellectually disciplined and tactful in interpersonal relations.”

Inhering in the idea of task leadership in a judicial setting, however, are two distinct functions: managerial and intellectual leadership. Considering these separately may offer a clearer window into judicial leadership, especially when a Chief Justice might be stronger with respect to one than to the other. A Chief Justice as managerial leader keeps the Court abreast of its docket, maintains a maximum degree of Court unity, provides expeditious direction of the judicial conference, and assigns opinions thoughtfully and purposefully. A Chief Justice as intellectual leader presents his views persuasively, is a principal source of ideas and doctrine, and provides tactical and strategic guidance in political dilemmas. This division thus allows a probing of three measures of leadership: social, managerial, and intellectual. Moreover, it invites a consideration of leadership with respect to members of the Court other than the Chief Justice.

From this trichotomy, the first element seems especially appropriate in assessing William J. Brennan, Jr., who is now the subject of a substantial and exceedingly admiring study by Seth Stern, who apparently did most of the writing, and Stephen Wermiel, who apparently did most of the research. Stern is a reporter for Congressional Quarterly, and Wermiel is the former Supreme Court reporter for the Wall Street Journal and now teaches at the law school of Washington’s American University. Their Justice Brennan: Liberal Champion should be read as an authorized biography, although the authors insist that the Justice never tried to exercise editorial control over the content of the project. He did encourage clerks and family members to cooperate, and the authors report that more than 100 of the some 108 clerks during his years as a sitting Justice agreed to be interviewed.

Without question, Stern and Wermiel have selected a subject particularly worthy of study. Brennan’s thirty-four-year tenure on the Court, from his appointment in 1956 until his retirement in 1990, ranks him among the longest-serving Justices appointed during the twentieth century. That time span is all the more noteworthy when one realizes that it includes all but three years of the Warren Court, all of
the Burger Court, and part of the Rehnquist Court. As most students of the Supreme Court are aware, those periods, straddling as they did all or part of the administrations of eight Presidents, qualify as among the most active, fascinating, and legally eventful in American constitutional history. Thus, even had Brennan had only a bit part in the Court’s business during that time, he would nonetheless remain an intriguing focus for a book. Brennan, however, was hardly a passive Benchwarmer. Through as many as 1,350 opinions that bear his name, Stern and Wermiel believe that he had a leading part.

Indeed, as not so subtly suggested by the book’s subtitle, the theme that runs through their extensively documented book is that of a champion of liberal political values who was not only persistent but also effective. As they insist near the outset,

[L]ittle in his career as a corporate labor lawyer and New Jersey state judge suggested that William Brennan would emerge as perhaps the most influential justice of the entire twentieth century. No one could ever have predicted that Brennan would become the most forceful and effective liberal ever to serve on the Court. In fact, few if any of the eight men who served as president during his tenure could claim to have had such a wide-ranging and lasting impact. Brennan interpreted the Constitution expansively to broaden rights as well as create new ones for minorities, women, the poor, and the press. His decisions helped open the door of the country’s courthouses to citizens seeking redress from their government and ensured that their votes would count equally on Election Day. Behind the scenes, he quietly helped craft a constitutional right to privacy, including access to abortion, and bolstered the rights of criminal defendants. In the process he came to embody an assertive vision for the courts in which judges aggressively tackled the nation’s most complicated and divisive social problems.  

While much of this impact came through the “extraordinary influence” Brennan exhibited while working alongside Chief Justice Warren, Brennan continued to enjoy nearly as much success under two Republican-appointed successors, “largely holding the line against a conservative retrenchment.”

Brennan apparently resented the perception, fueled particularly by publication of The Brethren in late 1979, that he “operated in the Court like a savvy Irish ward boss.” Yet the authors believe that “the justice himself understated his role as a political operator. Brennan tried to portray himself as someone who remained completely detached in his chambers, relying on formal memos to communicate with colleagues. But he regularly deployed his clerks as a diplomatic corps to gather information and to act as middlemen with other chambers.”

Stern and Wermiel quote scholar Mark Tushnet’s observation that the Justice was successful as a politician in a deeper sense: “Like all good political leaders, Brennan structured the process of decision and gave his colleagues reasons for doing what he understood to be the right thing.”

This was especially true in the 1980s, when Brennan’s leadership skills faced their biggest challenge. It was a time when the Court’s liberal bloc had, at most, four members in good standing: Thurgood Marshall, Harry Blackmun, John Stevens, and Brennan himself. In many instances, therefore, it was a story of four votes in search of a fifth if the legacy of the old Warren Court was to prevail.

The authors base their claims about Brennan’s leadership upon research that drew not only from conventional published sources and manuscript collections available to any diligent scholar, but also from sources access to which was practically restricted to them. These
include, for example, more than sixty hours of interviews that Wermiel conducted with Brennan in his Chambers, the privilege of being present at morning coffee sessions between Brennan and his clerks, and—perhaps most important—access to Brennan’s “Term histories,” which apparently have been seen by only a few people outside the Court. According to the authors, one of the others given such access was Professor Bernard Schwartz of New York University for use in his book Super Chief about the Warren Court. 48 “Ironically, the book did more to reveal Brennan’s significant influence and contributions behind the scenes on the Warren Court than it did to enhance Warren’s reputation.” 49 While The Brethren “provided a glimpse” of that role in the early Burger years, Schwartz’s book “was the first to document fully how quietly influential he was during Warren’s tenure. Brennan’s central role would later be taken for granted, but at the time it was a true revelation.” 50 Equally ironic, perhaps, was Brennan’s reaction to Schwartz’s book: “I must say I had expected something better,” the Justice wrote to Judge Ruggero Aldisert in 1984. 51

As Stern and Wermiel explain, the Term histories were produced in the Court’s print shop and “physically resembled the justices’ opinions in appearance and style. To be sure, these accounts cannot be relied on as a definitive historical record or as Brennan’s personal memoir. Although many were written in the first person, the clerks did nearly all the drafting, usually with little overt instruction or input from Brennan in advance and scant editing upon completion. The resulting products vary greatly in length, quality, and detail. Many were colored by the biases of clerks who wrote them or a desire to please their boss.” 52 Nonetheless, Stern and Wermiel find the histories to be a “valuable subjective chronicle of what Brennan and his clerks directly observed and how they perceived events.” 53 This they seem to acknowledge for at least two reasons. First, the histories “often provide the only record of private meetings and conversations between justices.” Second, they “make it possible to track changes in Brennan’s tactics and strategies—and his impressions of colleagues—over time.” 54 Still, in the interest of careful scholarship, one would hope that the authors exercised due diligence in their use of the histories, especially in terms of cross-checking with other sources where possible. Instances where the histories might be the sole source would seem to be those that properly call for injecting real hesitancy into any conclusion drawn by either the authors or any reader.

With these limitations as well as advantages, readers should realize that the book is very much a Supreme Court biography. That is, the principal focus is on Brennan as Justice. His upbringing, education, law practice, and service on the New Jersey supreme court receive only relatively brief attention. This is hardly a negative comment about the book, only an observation about what the authors presumably thought most important to include within the length of what their editor would allow. As it is, there was enough about Brennan as a member of the U.S. Supreme Court alone to fill the nearly 600 pages in the book.

Consider, for example, Brennan’s nomination, to which the authors properly devote a full chapter that they fittingly entitle “Ike’s Mistake.” Among twentieth-century presidents, Eisenhower’s impact on the Supreme Court measured solely by number of appointments was substantial. Except for Franklin D. Roosevelt, only William Howard Taft, with six, bested Eisenhower’s five. Eisenhower’s third opportunity to name someone to the High Court arrived with the retirement of Truman appointee Sherman Minton. After hints of Minton’s departure reached the White House, the President directed Attorney General Herbert Brownell to start thinking about “a very good Catholic, even a conservative Democrat.” On another occasion Brownell was told to find “an outstanding man, with court experience, regardless of his political affiliation” 55 as well as someone who was in good health...
and relatively young. Eisenhower was singularly unimpressed with what he viewed as President Truman’s “patronage selections.” Emphasis on selection of a Catholic came at the insistence of New York’s Cardinal Spellman who, the authors report, “made deals and traded favors with such aplomb that it was as if he operated out of Tammany Hall rather than St. Patrick’s Cathedral.” The Catholic emphasis—there had been no Catholic on the Court since Justice Frank Murphy’s death in 1949—and willingness to consider a Democrat also reflected Eisenhower’s impending campaign for a second term.

Assisting Brownell in the process was his deputy attorney general, William Rogers. Both understood that the nomination posed a challenge. “Only a handful of judges in the entire country satisfied all of Eisenhower’s criteria... There were only two federal judges who qualified, and one of them had never served as an appellate judge. At the state level, Brennan, at fifty, was the only Catholic appellate judge under the age of sixty.” With so few candidates, Brennan became an inviting prospect, particularly since the Conference of State Chief Justices had reminded the President that no state judge had been picked for the High Court in nearly three decades. Rogers, who later recalled that he had been the first to put forward Brennan’s name because of the New Jersey judge’s impressive performance at a Justice Department conference a few months earlier, “quietly began reaching out to people in New Jersey who knew Brennan and researching his opinions.” Brownell then quizzed New Jersey’s Chief Justice Arthur Vanderbilt in several telephone conversations. According to Stern and Wermiel, the Attorney General later said that he had “read all thousand pages of Brennan’s four hundred New Jersey Supreme Court opinions, an unthinkable level of involvement by an attorney general today.” As the process moved along, only three weeks lapsed between Minton’s formal announcement of his retirement and Brennan’s summons to Washington to meet with Eisenhower. According to the authors, Senator Joseph McCarthy of Wisconsin, who had been highly critical of Brennan during the Judiciary Committee’s hearings, “uttered the single loud ‘no’” when the Senate confirmed the New Jersey judge in March 1957, making permanent the recess appointment Brennan had received in October 1956.

As the authors note, with hindsight it is not hard to find several of Brennan’s state court opinions “that might have given a conservative Republican pause,” but the opinions were reasoned and written well, and there were no character concerns with Brennan. Besides, both Rogers and Brownell were moderate Republicans with ties to the Thomas Dewey wing of the party, not to the Robert Taft wing. Moreover, this was at a time long before what are today known as social conservatives came to be a force within the Republican party. “Brownell, who had chaired the Republican National Committee for four years, surely appreciated the value of picking a nominee who might curry favor with Catholic voters.
in the Northeast—including Brennan’s home state.” Thus the authors’ analysis suggests that, for both Rogers and Brownell, ideology—at least as ideology came to be understood after Brennan ascended the Bench—was not centrally important. They “appeared to have devoted more energy to ensuring that Brennan was a faithful Catholic than that he was a reliable vote for the Court’s conservative bloc.” Accordingly, at least in this reader’s eyes, the chapter might perhaps more accurately be titled “Herb and Bill’s mistake.”

But it is Brennan’s work on the Court that fills the bulk of the volume. Here the book is rich with numerous examples of instances in which a decision bore a heavy Brennan imprint, as the discussion of _Terry v. Ohio_ illustrates. Indeed, the authors regard his imprint as sufficiently heavy in this case that they conclude that _Terry “may be the most formidable example of Brennan [sic] ghost-writing an opinion that term.”_ Brennan’s draft attempted to modify the tone of Warren’s draft, which Brennan believed might encourage police to stop individuals freely, a practice that might inflame racial tensions that were already so evident in the late 1960s. As Brennan confided to his Chief, “In this lies the terrible risk that police will conjure up ‘suspicious circumstances’ and courts will credit their versions.” Presumably, his fear may have been that the stop would become incident to the frisk rather than the frisk remaining incident to the stop.

Yet Brennan abandoned “the use of probable cause as the required threshold for police to stop and frisk,” although the authors do not explain if that was because of Warren’s change of mind or because the shift was essential to retain at least five votes. Instead Brennan drew upon the Fourth Amendment’s phrasing of “unreasonable” searches and seizures to introduce the standard that should guide police. Brennan must have concluded that the traditional probable cause standard “was simply not a feasible approach to the immediacy of the stop-and-frisk situation.” One wonders whether this shift may have been driven at least in part by the particular facts of the case, in which the investigating police officer seemed to take precisely the steps most law-abiding business owners or other citizens on the street would have expected him to take.

As _Terry_ came down, Warren’s opinion for the majority explained that the officer need have only “reasonable suspicion” (not probable cause) for his action, a standard that has seemed to apply both to the stop and to the subsequent frisk. The initial insistence on probable cause as an essential prerequisite to the initial stop survived only in a solo dissent by Justice William O. Douglas. Neither of the individual concurring opinions filed by Justices John Harlan and Byron White expressed the slightest bit of discomfort with the generous latitude the decision handed to police. _Terry_ was thus a remarkable decision. In a
decade characterized by Warren Court rulings expanding the rights of criminal suspects and restricting the police, the holding pointed entirely in the opposite direction.

While still a justice on the Supreme Judicial Court of Massachusetts, Oliver Wendell Holmes, Jr. maintained that theory “is the most important part of the dogma of the law, as the architect is the most important man who takes part in the building of a house.” Happily, Justice Brennan’s biographers do not slight theory entirely. In particular, they revisit a debate in which Justice Brennan played a part in the mid-1980s, when Edwin Meese III was Attorney General of the United States, and he and others in the administration of President Ronald Reagan had made changing the direction of the Supreme Court and the lower federal courts a top priority. Indeed, Brennan became “the very archetype of the kind of justice they wanted to avoid appointing. So too would Brennan become the leading target as conservatives sought to articulate what was wrong with the Supreme Court,” which, from the perspective of conservatives, had become in reality a super-legislature.

Meese, in turn, “saw himself engaged in a war of ideas over how to interpret the Constitution.” In the wake of the Court’s ruling in 1973 creating a constitutional right to abortion, the preferred approach to constitutional interpretation had taken on a degree of urgency and intensity perhaps not felt since the debate over the constitutional validity of the New Deal in the 1930s. With an enlarged public affairs unit at the Justice Department, the Attorney General wanted “to spark a broader public debate” about the “proper role of the unelected Court in a democratic system.” Accordingly, Meese used an address to the American Bar Association in July 1985 to speak on a “Jurisprudence of Original Intention” in which he accused the Justices of abandoning the text of the Constitution and construing the document “to mean whatever they wanted. As Meese’s advisers hoped, the attack received significant press coverage.”

Well before Meese’s speech in July, however, Brennan had agreed to participate in a symposium at Georgetown University in October. As early as June, Brennan’s clerks had begun work on the October remarks. As delivered, they amounted to a rebuttal of Meese’s argument. Attempting to “find legitimacy in fidelity” to the Framers of the Constitution “was little more than arrogance cloaked as humility,” Brennan insisted. He accused advocates of originalism of engaging in a “facile historicism.”

Newspapers understandably construed the Georgetown speech as a counterattack on Meese, although the authors report that Brennan insisted this was not his intention, a denial corroborated by his clerks. Nonetheless, even if Brennan had not set out to take on Meese, “he nevertheless liked the publicity that resulted when everyone else thought he had.” Moreover, the Meese-Brennan debate receded neither quickly nor quietly. The following year, Assistant Attorney General William Bradford Reynolds spoke of Brennan at the University of Missouri School of Law as one “who prefers to turn his back on text and historical context, and argues instead for a jurisprudence that rests, at bottom, on a faith in the idea of a living, evolving Constitution of uncertain and wholly uninhibited meaning.” Meese and Brennan did not originate the debate in the American constitutional tradition over originalism, but they certainly made it come to life for a new generation.

A second arena of theory in which Brennan had considerable impact concerns a seemingly mundane topic that some scholars have labeled judicial federalism—the interaction between state and federal courts. Yet, this subject is anything but unexciting or humdrum. One of the dimensions of judicial federalism involves Supreme Court review of state court decisions, which arguably rest on a state, not on the national, constitution. At least since Cohens v. Virginia was decided in 1821, it has been textbook political science that the
Supreme Court may properly sit in judgment on the decisions of the highest court of a state when a federal question is involved in a case. Once a federal question is present, the Supreme Court becomes the ultimate arbiter of its resolution. This rule encourages uniformity among the states. In contrast, the absence of a federal question encourages diverse policies, because there is no overarching judicial mechanism for imposing uniform rules of law on the states. In such situations, resolution of an issue rests with the individual states.

In the context of this principle, one of the dramatic changes in American constitutional law wrought by the Warren Court was to accelerate the process by which nearly every provision of the Bill of Rights was applied to the state governments and their municipal subdivisions. Originally added to the Constitution to limit the national government, the Bill of Rights became applicable to the states on a case-by-case basis in the decades following ratification of the Fourteenth Amendment in 1868. This nationalization of almost all parts of the Bill of Rights, which was nearly complete by the 1960s, has had immense consequences for federalism, personal freedom, and judicial power. Until this nationalization became a reality, Americans remained subject to a double standard of justice under the Constitution. For a defendant standing trial, for example, the federal constitutional rights she or he enjoyed depended on whether the trial was in state or federal court. Supreme Court review was far more demanding of the latter than of the former. However, as the Warren Court became the Burger Court in the 1970s, the pace of Bench-imposed reforms slackened, particularly in criminal justice matters. Into this breach stepped some state judges who would give greater protection to a right found in both state and federal constitutions and rest their decision on the former. This process meant that, in some instances, interpretation of a few state constitutions was friendlier to individual freedom than was the High Court’s construction of similar provisions in the federal Constitution. In Stern and Wermiel’s account, Brennan became an enthusiastic cheerleader for this movement.

The occasion for Brennan’s foray into what scholars would later term “the new judicial federalism” was an address to the New Jersey Bar Association in May 1976, in part to honor the Justice’s 70th birthday. The setting was the Playboy Great Gorge Hotel, about an hour’s drive northwest of Newark, where the carpet was “still patterned with the company’s signature bunny logo and cocktail waitresses bedecked as bunnies served drinks.” Brennan’s speech was a “passionate plea for state courts to take up the mantle of protecting constitutional rights he believed his colleagues on the Supreme Court had abdicated.” “State courts no less than federal are and ought to be the guardians of our liberties,” and he had come “prepared to cite more than a dozen recent cases where he believed his own Court had interpreted the Bill of Rights too narrowly and a few instances where state courts, including New Jersey’s, had stepped into the breach.” Whether due to the incongruity between the message and its setting or to the evening’s libations, the Justice faced a particularly inattentive audience, cut his speech short, and returned to his seat. Yet, when later published in the Harvard Law Review, the aborted remarks “became the most famous and widely quoted of his entire career” and were credited with “helping to launch or at least jump-start a renaissance in state constitutional law.”

With either the New Jersey Bar event or the unstaged exchange with Attorney General Meese, Brennan presumably expected some attention in the press. Indeed, based upon Justices and Journalists, by political scientist Richard Davis of Brigham Young University, such coverage in the news media would not only be anticipated, but, because it was anticipated, be seen by Brennan as desirable. The volume explores the sometimes awkward and occasionally rocky relationship between the Supreme Court and the news media—an awkwardness that derives in part from what
has been termed the Court’s “triple debility.” The first element of this debility is the Court’s ambivalent authority as to the legitimacy of its political function: alongside the express grants of power to Congress and the President in Articles I and II, did the Framers, in their conveyance of “the judicial Power” by way of Article III, truly intend the Court to have a major hand in policymaking? The second element is the Court’s antidemocratic function inherent in judicial review—the so-called countermajoritarian dilemma—whereby an unelected branch negates an action of the elected branches. The third element is the Court’s apparent aloofness: the electorally unaccountable Court decides cases largely in secret, and its constitutional decisions can be corrected, short of a change of mind by the Court, only through an extraordinary and only rarely successful political exertion called a constitutional amendment. Moreover, in contrast to elected officials—who go out of their way to cultivate positive publicity and to curry favor with voters—the Justices, through their robed appearance, ritual, and formal pronouncements of decisions, historically have seemed to follow a different model.

Or have they? What Davis shows is that, practically from the beginning, the Justices have not been nearly so detached from the world of publicity as they might sometimes pretend and that there have been very good strategic reasons both why news coverage of the Court matters and why the Justices have periodically attempted to shape that coverage. As is true with any good piece of political analysis, Davis’s book begins with a question arising from the facts of everyday life. Those facts cause him to suggest that today the “justices have shed their camera shyness” and then to ask, “Is something going on here? Are U.S. Supreme Court justices ‘going public’? Have the justices decided to become more visible to attract the attention of the press and the public? Has there been a conscious decision to raise their public profile? If so, why?”

As Davis describes the structure of his book, the first chapter portrays how and why justices “act as strategic actors in their relations with . . . the press and the public.” The second chapter “reviews general expectation of judicial behavior vis-à-vis the press and then offers explanations of recent factors that might contribute to a shift in justices’ attitudes toward the press and the public.” It is here that journalist Adam Liptak’s inclusion in his Foreword of a colleague’s published observation has relevance: “Justice ________’s ‘strange musings’ illustrate the danger of allowing Supreme Court justices to go on live television for their book tours.” The next two chapters probe the “extent to which the justices in the past have engaged in public relations, particularly via the press, and whether the current justices are acting differently from their predecessors.” In the major research contribution of Davis’s study, chapter six then presents the results of an extensive content analysis of press coverage of the Justices between 1968 and 2007. The final chapter centers on the recent appointees and discusses the implications of “going public” for individual Justices and for the Court as an institution. There seems to be little or no attention to the possible future role of social media such as Facebook, Twitter, or their probable successors. Attention to the debate over televised coverage of the Court’s public sessions falls in chapter two.

Davis’s analysis points in different directions. “On the one hand, the record of the past shows us that when justices ‘go public,’ they can assist the institution,” as illustrated by the efforts of both Chief Justice Marshall in “presenting a united front for the Court as well as the writing of essays in the face of external attacks on its role and legitimacy” and Justice Charles Evans Hughes, whose “written communication undermined support for the Court-packing plan.” But that kind of behavior is not risk-free, because the “Court’s role is still a tenuous one. Public approval, although still higher than that for the other institutions of government, waxes and wanes.” The challenge for the current Bench is substantial: “As today’s justices encounter their new media environment, the question of how their unique institution, with its antiquated traditions and
mores, survives in a highly contrasting media culture is one that will affect not only them personally but also the institution they represent.” The tension they face is one between “their own individual objectives” and “institutional imperatives.”

Indeed, any personal effect may depend in part on a Justice’s experience in the public arena or the absence of such experience. As Davis observes, with the Court of 1997, five members came to the Bench with “experience as executive political appointees or legislators,” but “a little more than a decade later, there were only two—Thomas and newly appointed Justice Elena Kagan,” although it is not clear why the executive branch experience of Justice Alito and Chief Justice Roberts was apparently overlooked. Nonetheless, Davis reports that, except for a decade in the 1970s, this “was the first time since its inception in 1790 that the Court lacked a member who previously had served as an elected official.”

Whether the focus is on the current Supreme Court as Davis describes it, the Marshall Court that decided Gibbons v. Ogden, or the Court of the Brennan era, the four volumes surveyed here are reminders of the continuing role of the Supreme Court in American government. “Democratic institutions are never done.” observed Princeton’s Professor Woodrow Wilson over a century ago. “[T]hey are like living tissue—always a-making. It is a strenuous thing, this living of the life of a free people.” Because of the Supreme Court, America’s democratic institutions seem ever to be in a remaking role, as they reflect and embody the foundational principle of the consent of the governed as both an affirmation of and a limit on majority rule.

THE JUDICIAL BOOKSHELF

The books surveyed in this article are listed alphabetically by author below.


ENDNOTES

2 5 U.S. (1 Cranch) 137 (1803).
3 Id., 176, 178.
4 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 646 (1952) (Jackson, J., concurring).
7 22 U.S. (9 Wheaton) 1 (1824).
10 A sampling of Cox’s research has already been shared with readers of this Journal. See Cox’s “Contesting Commerce: Gibbons v. Ogden, Steam Power, and Social Change,” in Journal of Supreme Court History vol. 34 (March 2009), 55–73.
13 For example, see Clement E. Vose, Caucasians Only: The Supreme Court, the NAACP, and the Restrictive Covenant Cases (1959); and C. Herman Pritchett and

14 As Johnson writes in his acknowledgements, “he kindly permitted me access to the text of his dissertation before its publication, and this was most helpful in allowing me to check various details concerning the case and the social and economic factors touching upon the development of the steamboat and the Livingston-Fulton monopoly.” Johnson, xiv.

15 Cox, x.

16 Quoted in id., 126.

17 Quoted in id., 140.

18 Id., 153–54.

19 22 U.S. 1, 189–90.

20 Id., 195.

21 Id., 196, 197.

22 17 U.S. (4 Wheaton) 316 (1819).

23 22 U.S. (9 Wheaton) 1, 197 (1824).

24 Id., 209.

25 Id., 222.

26 Cox, 154.

27 22 U.S. at 228, 231–32.


29 Id., 496.

30 Id., 494–495.

31 Quoted in Cox, 142.


33 Id., 191.

34 Id.

35 Johnson, xii.

36 Id., 174–75.


38 Id.

39 Id.


43 Id., xiii.

44 Id.


46 Stern and Wermiel, 464.

47 Id.


49 Id., 491.

50 Id.

51 Id.

52 Id., 465–66.

53 Id., 466.

54 Id.

55 Id., 77.

56 Id., 74.

57 Id.

58 Id., 78.

59 Id.

60 Id., 79. In fact, one would think that 400 state court opinions would greatly exceed 1,000 pages in total length.


62 Stern and Wermiel, 79.

63 Id., 79.

64 Id.

65 392 U.S. 1 (1968).

66 Stern and Wermiel, 301.

67 Id., 300.

68 Id.

69 Id., 301.

70 Id., 300.

71 Id., 301.


73 Stern and Wermiel, 503.

74 Id., 503–504.


76 Stern and Wermiel, 504.

77 Id., 504.

I had modest contact with both Justice Brennan and Mr. Meese shortly after their exchange. The occasion was the preparation of the eighth edition of American Constitutional Law: Introductory Essays and Selected Cases, which I coauthored with Alpheus Thomas Mason and which was published by Prentice Hall in 1986 with a copyright date of 1987. As a pedagogical feature of the book, Professor Mason and I included several classic “unstaged debates” to illustrate certain issues in constitutional interpretation. We decided that the Brennan-Meese exchange would be a timely addition for the new edition. As junior author, I wrote to Justice Brennan and to Mr. Meese as work on the revision began, to obtain their permission to reprint their respective remarks. I received a prompt reply from Justice Brennan, but heard nothing from Mr. Meese. Professor Mason and I then decided to summarize the main points of the exchange in an introductory essay and to reprint Justice Brennan’s remarks in the appendix, along with a reference to an insightful analysis of both positions that had been written by Stuart Taylor and published in The New Republic (Jan. 6 and 13, 1986, pp. 17–21). Several months later, as production of the new edition was well under way and the book was already in the page-proof stage, I received a telephone call at my campus office from an assistant to Mr. Meese, belatedly giving permission and urging us to include Meese’s remarks. By then, of course, it was too late to make the addition, so the eighth edition appeared with only Justice Brennan’s remarks, entitled “The Constitution of the United States: Contemporary Ratification.” See Mason and Stephenson, American Constitutional Law (8th edition 1987), 10–11, 607–15.

The first example of what came to be called Fourteenth Amendment incorporation was C. B. & Q. R. Co. v. Chicago, 166 U.S. 226 (1897), in which the Court applied the Fifth Amendment’s Just Compensation Clause to the states and their municipal subdivisions. As of this writing, the most recent example of Fourteenth Amendment incorporation is McDonald v. Chicago, 130 S. Ct. 3020 (2010), in which the Court applied the Second Amendment to the states.


Richard Davis, Justices and Journalists (2011), hereafter cited as Davis.

Donald Grier Stephenson, Jr., Campaigns and the Court: The United States Supreme Court in Presidential Elections (1999), 23, 234.