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SPEAK (AGAIN), MEMORY: RETHINKING THE SCOPE OF CONGRESSIONAL POWER IN THE EARLY AMERICAN REPUBLIC

Eric Lomazoff*

GARY LAWSON, GEOFFREY P. MILLER, ROBERT G. NATELSON & GUY I. SEIDMAN, *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE* (Cambridge Univ. Press 2010). Pp. 190. Cloth. \$85.00.

PETER CHARLES HOFFER, *THE FREE PRESS CRISIS OF 1800: THOMAS COOPER'S TRIAL FOR SEDITIOUS LIBEL* (Univ. Press of Kan. 2011). Pp. 168. Cloth. \$34.95. Paperback. \$16.95.

HERBERT A. JOHNSON, *GIBBONS V. OGDEN: JOHN MARSHALL, STEAMBOATS, AND THE COMMERCE CLAUSE* (Univ. Press of Kan. 2010). Pp. 216. Cloth. \$34.95. Paperback. \$17.95.

The titles listed above represent three recent contributions to scholarship on antebellum constitutional history. The first offers a collective effort to locate and unearth the antecedents of the “Sweeping Clause,” a textual provision that Publius considered a “source[] of much virulent invective, and petulant declamation, against the proposed Constitution.”¹ The second documents the trial of a Republican newspaper editor on the charge of seditious libel — a trial that unfolded within earshot of the Sixth Congress and was enabled by the constitutionally questionable output of its predecessor. The final volume revisits the background to, and substance of, one of the “‘great’ nationalist decisions of the Marshall Court”² — the rejection of New York’s effort to regulate steamboat traffic in its waters.

Beyond their common preoccupation with constitutionalism in the Early American Republic, it is not immediately clear what these three texts share. Two of the books, for example, suggest that they may be engaging the “most important clause in the Constitution,” while Hoffer’s *Free Press Crisis* offers no such suggestion.³ Similarly,

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1. THE FEDERALIST NO. 33, at 172 (Alexander Hamilton) (E.H. Scott ed., 1898). On the clause as a source of anti-ratification sentiment, see ALEXANDER HAMILTON ET AL., THE FEDERALIST: WITH LETTERS OF “BRUTUS” 149 (Terence Ball ed., 2003). On the founding generation’s name for the Necessary and Proper Clause, see GARY LAWSON & GUY SEIDMAN, THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY 30 (2004).

2. Michael J. Klarman, *How Great Were the “Great” Marshall Court Decisions?*, 87 VA. L. REV. 1111, 1126 (2001).

3. HERBERT A JOHNSON, *GIBBONS V. OGDEN: JOHN MARSHALL, STEAMBOATS, AND THE COMMERCE*

two out of three focus on post-ratification efforts to elaborate constitutional meaning, leaving only the work of Lawson, Miller, Natelson, and Seidman on *Necessary and Proper* as a monument to the founding itself. To complete this three-set constitutional Venn diagram, two books engage the United States at a time when constitutional politics were heavily driven by relationships with London and Paris, leaving Johnson's account of *Gibbons v. Ogden* to capture a later period when more inward-looking concerns drove disputes over textual meaning.⁴

Of course, two out of three ain't bad. But, in keeping with the Venn diagram metaphor, I want to argue that the area of intersection between these books is actually far larger than just "antebellum constitutional history." For example, each book offers a critique of constitutional historiography, positing a significant gap between how its particular episode or dispute has been remembered and what actually transpired. To be sure, the salience of "memory" in these texts varies widely; it organizes the volume on the Necessary and Proper Clause, represents a secondary consideration in Johnson's work on *Gibbons*, and silently permeates Hoffer's account of free press politics. Harvesting the books in this manner nonetheless yields surprising fruit. Once the older constitutional narratives are jettisoned, it becomes clear that *all* of these books speak to the scope of congressional power under the Constitution. For those with limited exposure to the Sedition Act controversy, this may come as something of a surprise.

Gary Lawson and his colleagues start from a longstanding scholarly conclusion respecting the origins of the Necessary and Proper Clause: they are shrouded in mystery. Because the five-member Committee of Detail apparently left no explanation for its choice of language,⁵ and the Constitutional Convention as a whole failed to discuss the draft provision,⁶ the inspiration for "Necessary and Proper" has been judged inscrutable — effectively a scholarly act of constitutional orphaning. By contrast, the four authors of *Necessary and Proper* consider the Clause's parentage to be discernable, and thus aim "to challenge the conventional wisdom concerning [its] origins."⁷ While I am not convinced that they positively establish the origins of the clause, the authors lay an exceptionally good foundation for research that might do the same.

Because three "potential intellectual influences on the founding generation's choice of language"⁸ are outlined in this volume, and each is explicitly associated with one or more of the individual contributors, the authors feel compelled "to add that [the]

CLAUSE 5 (2010) ("It is not an exaggeration to say that the commerce clause, with the possible exception of the Fourteenth Amendment, is the most important provision in the federal Constitution."); GARY LAWSON ET AL., *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE 4* (2010) ("There is a good argument that [the Necessary and Proper Clause] is the most important clause in the Constitution.").

4. See *Gibbons v. Ogden*, 22 U.S. 1 (1824). I borrow the outward/inward distinction (with the Battle of New Orleans as a rough temporal cut-off) from GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789-1815*, at 2 (David M. Kennedy ed., 2009). On the primacy of Great Britain and France in American politics during the 1790s, see STANLEY ELKINS & ERIC MCKITTRICK, *THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788-1800*, *passim* at 4 (1993).

5. Mark A. Graber, *Unnecessary and Unintelligible*, 12 CONST. COMMENT. 167, 168 (1995); see also JOSEPH M. LYNCH, *NEGOTIATING THE CONSTITUTION: THE EARLIEST DEBATES OVER ORIGINAL INTENT 4* (1999).

6. Randy Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183, 185 (2003).

7. LAWSON, *supra* note 3, at 4.

8. *Id.* at 6.

book is *not* an edited collection of essays. To the contrary, [it] is an integrated volume.”⁹ There is much truth to this claim, in both a negative and a positive sense. In negative terms, the authors jointly reject two additional candidates for the origins of “Necessary and Proper,” eighteenth-century British statutes and state constitutions drafted between 1776 and 1788. Subordinating for a moment the question of influence, it is not even clear that the term had a distinctive meaning in either historical context. In a positive sense, each contributor’s hypothesis respecting origins involves an application of “agency law” concepts — those associated with principals granting limited authority to agents — to public actors. What is more, the substantive overlap between these hypotheses suggests that “reasonably confident assertions about the clause’s actual origins” are within reach.¹⁰

The collective claim of integration, however, is partially spoiled by the reality that individual contributors advance *competing* accounts respecting the origins of “Necessary and Proper.” In other words, there is a non-trivial distinction between Robert Natelson’s suggestion that the Sweeping Clause may have roots in private “power-conveying documents”¹¹ — instruments that frequently conferred some discretion on selected actors — and Gary Lawson and Guy Seidman’s belief that a principle of eighteenth-century British administrative law — namely the requirement that government authority be exercised in a “reasonable” fashion — informed the drafting and adoption of the Necessary and Proper Clause. Furthermore, neither of those hypotheses is wholly compatible with Geoffrey Miller’s contention that the relevant constitutional language may have been inspired by corporate charters from that era, which frequently defined the discretion of institutional agents in terms similar to “Necessary and Proper.” This feature of the book is hardly problematic, for it simply begs the presentation (and comparative evaluation) of supporting evidence.

In general, the chapters that tender positive arguments concerning origins are more effective at demonstrating the correlation between the legal principle under discussion and the language drafted in Philadelphia than firmly establishing a causal link between the two. Consistent with this reading, the volume is sprinkled with prose more suggestive of a cause-and-effect relationship than empirically supportive — claims like “the Necessary and Proper Clause tracks the language found in” one potential antecedent,¹² or represents “an excellent way to describe” the principles enshrined in another,¹³ or enjoys an “unmistakable parallel” with terminology employed in a third.¹⁴ Like the reality of competing hypotheses discussed above, this feature of the book does not significantly compromise its value for those interested in taking a fresh look at a stale constitutional site. If the aim of *Necessary and Proper* is to achieve a full scholarly reboot on the enterprise of discerning textual antecedents — and the authors explicitly speak of making their array of new material “conveniently accessible” for future researchers¹⁵ —

9. *Id.* at 9.

10. *Id.* at 8.

11. *Id.* at 68.

12. LAWSON, *supra* note 3, at 6.

13. *Id.* at 141.

14. *Id.* at 154.

15. *Id.* at 6.

then the book succeeds admirably.

Robert Natelson offers the first positive argument respecting the origins of the Necessary and Proper Clause. He views eighteenth-century private agency instruments — documents that empowered individuals to serve as estate administrators, attorneys, “bailiffs, executors, factors, guardians, servants, stewards, and trustees” — as crucial for understanding its roots.¹⁶ Natelson carefully lays two separate foundations for this claim, and then brings them to bear (as a superstructure) upon the known history of the Constitutional Convention.

First, he reviews William Blackstone’s commentary respecting the doctrine of incidental powers, which defined fiduciary authority *beyond* the “express provisions of the authorizing document.”¹⁷ More specifically, Blackstone construed specific grants of power to include incidental powers “*indispensable* to the use of the principal,”¹⁸ required to avoid seriously impairing the “value of the principal,”¹⁹ or “*customary to the use of the principal*.”²⁰ Natelson’s second move is to conduct an extensive review of private agency instruments from the eighteenth century, with an eye to discerning how terms like “necessary” and “proper” were used to grant authority beyond that obtained via the strict construction of an express grant. He produces five formulae for these “further-powers clauses”²¹ and briefly measures each against the aforementioned incidental powers doctrine. The formulations range from those in excess of such powers (e.g., the power to do things “deemed necessary” by an actor) to those essentially equivalent to the same (e.g., the power to act in “necessary” ways) to those arguably inferior to incidental powers (e.g., the power to do things that are “necessary *and* proper”).

The payoff from this considerable preliminary work comes when Natelson applies Blackstone’s commentary and his own further-powers formulae to events from the 1787 convention. Edmund Randolph’s labor on the Committee of Detail included composition of a first full draft of the Constitution, and one of his provisions stated that when the scope of legislative power was at issue, “all incidents without which the general principles [*sic*] cannot be satisfied shall be considered, as involved in the general principle.”²² This formulation largely embodied Blackstone’s first conception of incidental powers, as enumerated above. John Rutledge proceeded to revise Randolph’s language, substituting for it the power “to make all Laws necessary to carry the foregoing Powers into Execu[tion].”²³ The substantive change here was negligible, however, since Rutledge’s formula (when matched to Natelson’s formulae) was *equivalent* to incidental powers. For Natelson, this functional paraphrase makes the subsequent, and collective, decision by the Committee to insert “and proper” within Rutledge’s language all the more important. Its addition was designed to “*confine* . . . the scope of congressional authority,”²⁴ arguably to something *less than* incidental powers.

16. *Id.* at 56-57.

17. LAWSON, *supra* note 3, at 60.

18. *Id.* at 64.

19. *Id.* at 65.

20. *Id.*

21. *Id.* at 72.

22. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 144 (Max Farrand ed., 1937).

23. LAWSON, *supra* note 3, at 88.

24. *Id.* at 91.

I offer the spotlight to Natelson here because he labors to identify Randolph and Rutledge as draftsmen of “Necessary and Proper” whose work included the expression of principles explicitly derived from private agency law. That is to say, Natelson tries to link his favored intellectual antecedent to the known moments of textual drafting. Though Natelson is arguably less successful at demonstrating that members of state ratification conventions read the Necessary and Proper Clause with these principles in mind, even a partially-realized commitment to documenting the link between proffered antecedent and the work of flesh-and-blood members of the founding generation should be contrasted with the other contributions to *Necessary and Proper*. For example, in an effort to determine whether the administrative law principle of reasonableness “was actually constitutionalized in the Necessary and Proper Clause,” Gary Lawson and Guy Seidman rely less on “direct historical evidence” that Convention drafters and state-based ratifiers “expressly employed [that] kind of reasoning” and more on how a “hypothetical reasonable observer” in 1788 would have understood the text.²⁵ Meanwhile, Geoffrey Miller seems to share Natelson’s desire to explicitly link principles to known participants — and offers some evidence that members of the founding generation were familiar with corporate law — but modestly volunteers that “there is no proof that the Necessary and Proper Clause was in fact taken from corporate charters.”²⁶

That being said, readers of *Necessary and Proper* should focus less on the extent to which these “Raiders of the Lost Clause”²⁷ experienced difficulties excavating in a dark site, and more on the substantive and methodological torches they have lit for future diggers. Not only have three particular surfaces been surveyed and partitioned off as promising places for constitutional archaeologists, but alternative tools for this search have also been implicitly identified. If neither the surviving records of the Constitutional Convention nor material on state ratifying conventions illuminate textual origins — that is, if existing *situational* tools offer no help — then perhaps resort to more *personal* instruments could lend support to one or more of the new hypotheses. That is to say, approaching the question of origins anew from a biographical perspective — starting with the papers and correspondence of the five members of the Committee of Detail, and gradually expanding to including key ratification figures — certainly cannot hurt the cause of successful excavation.

If the volume on the Necessary and Proper Clause is explicitly organized around the issue of memory — namely the conflict between how its origins have been portrayed and what they actually are — then Peter Charles Hoffer’s *Free Press Crisis* represents something very close to the opposite. Nowhere in the body of his short book does Hoffer address the Sedition Act’s historiography directly, and previous scholarship on the crisis is mentioned only sporadically. And yet, the popular memory of this episode seems silently at issue throughout the book, as Hoffer describes an early piece of federal legislation fraught with not one but *multiple* constitutional problems. A word on this feature of the Sedition Act controversy is certainly in order.

I came to Hoffer’s book with limited knowledge of the Sedition Act controversy,

25. *Id.* at 126 & n.25.

26. *Id.* at 146.

27. *Id.* at 1.

much of it supplied by popular accounts of the Adams presidency.²⁸ This baseline included an assumption that the lone constitutional problem with the legislation — at least from the perspective of congressional Republicans and their fellow partisans in the electorate — was its apparent conflict with the First Amendment. A brief review of popular press books that reference the controversy suggests that mine was (and perhaps remains) a fairly common memory of the Sedition Act fight. Cass Sunstein, for example, has written, “[i]n contemporary textbooks, as well as in modern Supreme Court opinions, the Sedition Act is commonly described as an act of evil and unquestionably unconstitutional censorship.”²⁹ Howard Zinn wrote, “seven years after the First Amendment became part of the Constitution, Congress passed a law very clearly abridging the freedom of speech. . . . This act seemed to directly violate the First Amendment.”³⁰ Finally, Geoffrey Stone has suggested, “[i]n its bitter debate over [the Sedition Act of 1798], Congress first began to explore the meaning of the First Amendment.”³¹

Hoffer’s account of the Sedition Act, and the prosecution of editor Thomas Cooper under it, deviates from this tradition by recalling a *multi-prong* constitutional assault upon the law. When congressional debate over the bill commenced in the summer of 1798, Federalist Harrison Gray Otis and Republican Albert Gallatin — both members of the House — engaged in “one of the most intellectually compelling exchanges in the history of American political dialogue.”³² In principle, the exchange encompassed the existence (or not) of federal power to punish seditious libel. Otis publicly adopted the position that the Constitution incorporated the English common law of crimes, which permitted the prosecution of those criticizing the government in print.³³ In other words, Otis did not find the absence of express authority to punish such acts problematic. Gallatin would later argue that such an absence created a fatal flaw in the Federalist plan — a power not explicitly granted in the Constitution could not be exercised — but nonetheless commenced his floor speech on Otis’s own terms. If the Constitution incorporated the common law of crimes, why was the Sedition Act needed at all? Could

28. See, e.g., DAVID MCCULLOUGH, JOHN ADAMS 504 (2001).

29. CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH xiv (1993). Sunstein is likely referring here to *Abrams v. United States*, 250 U.S. 616, 630 (1919), where Justice Holmes in dissent wrote: “I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. . . . I had conceived that the United States . . . had shown its repentance for the Sedition Act of 1798.” Sunstein is also almost certainly referring to Justice Brennan’s opinion for the Court in *New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964) (citation omitted), which announced: “Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history. . . . [B]ecause of the restraint it imposed upon criticism of government and public officials, [the Act] was inconsistent with the First Amendment.” On Brennan’s statement in *New York Times* respecting the Sedition Act and the First Amendment, see also SANDRA DAY O’CONNOR, THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE 45-46 (Craig Joyce ed., 2004).

30. HOWARD ZINN, A PEOPLE’S HISTORY OF THE UNITED STATES 1492-PRESENT 100 (2003).

31. GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 36-37 (2004).

32. PETER CHARLES HOFFER, THE FREE PRESS CRISIS OF 1800: THOMAS COOPER’S TRIAL FOR SEDITIOUS LIBEL 37 (2011).

33. The Otis position was substantially at odds with that taken by Justice Samuel Chase two years earlier in *United States v. Worrall*, 2 U.S. 384, 394 (1798). In *Worrall*, according to Hoffer, Chase said, “[t]he federal government had no power to bring indictments under English common law without an enabling statute of Congress.” HOFFER, *supra* note 32, at 6.

not prosecutions for seditious libel proceed without it? For Gallatin, the very resort to legislation indicated that Otis did not believe his own words. What is more, any resulting search for express authority to pass the legislation would come up dry.

The floor exchange between Otis and Gallatin also included a second (and historically more prominent) strand of debate over the bill's constitutionality — one focused squarely on the Bill of Rights. Hoffer's account presents both the Federalist and Republican constructions of the First Amendment within Congress — Otis's claim that "liberty of the press [was] merely an exemption from all [prior] restraints"³⁴ and Gallatin's contention that it was "preposterous to say, that to punish a certain act was not an abridgment of the liberty of doing that act."³⁵ This return to the best-known feature of the constitutional controversy, however, is short-lived. In the very next chapter, Hoffer demonstrates that Gallatin's point about the absence of enumerated federal power took on new life outside the halls of Congress.

The Kentucky and Virginia Resolutions of 1798 — early state-based responses to the Sedition Act — remain part of the constitutional canon because of their claims concerning the nature of the Union,³⁶ and their attending conclusions respecting the location of interpretive authority.³⁷ Hoffer's chapter on the resolutions helpfully shifts some attention back to their substantive claims about the Sedition Act, namely its incompatibility with the Constitution. His review of the work done by Thomas Jefferson (for Kentucky's legislature) and James Madison (for Virginia's) reveals that each set of resolutions addressed both federal power *and* rights. For Kentucky, Jefferson argued that (a) the Sedition Act "create[d], define[d], or punish[ed] crimes, other than those so enumerated in the Constitution," and (b) Congress had been explicitly enjoined from passing legislation concerning the press.³⁸ Similarly, Madison wrote for Virginia that Congress had not only exercised "a power not delegated by the [C]onstitution," but one "expressly and positively forbidden by one of the amendments thereto."³⁹ Read in conjunction with the Otis-Gallatin exchange above, Hoffer's gloss on the Kentucky and Virginia Resolutions confirms that the Sedition Act controversy was as much about the scope of federal power as the meaning of the First Amendment.

I was surprised to learn, upon further review of published material, that the author's extended attention to both parts of the constitutional question does *not* represent a significant advance in knowledge about the Sedition Act controversy. Over fifty years ago, James Morton Smith wrote that while "no one contended that the Constitution specifically delegated to Congress the [power] to pass a sedition act," Republicans also complained that "the First Amendment deprived the government of this power."⁴⁰ More recently, the late David Currie observed, "[t]here were two constitutional objections to

34. HOFFER, *supra* note 32, at 40.

35. *Id.* at 46 (internal quotations omitted).

36. See ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 199 (4th ed. 2005).

37. At least one prominent casebook discusses the resolutions as part of a unit on "[w]ho [m]ay [a]uthoritatively [i]nterpret the Constitution." WALTER F. MURPHY ET AL., *AMERICAN CONSTITUTIONAL INTERPRETATION* 279, 381-385 (4th ed. 2008).

38. HOFFER, *supra* note 32, at 56.

39. *Id.* at 62.

40. JAMES MORTON SMITH, *FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES* 135-136 (1956).

this bill . . . [n]o provision gave Congress [the] power to adopt it, and it was forbidden by the first amendment.”⁴¹ Along similar lines, H. Jefferson Powell has written that the “Republicans’ constitutional attack on the [sedition] bill had two major prongs.”⁴² Finally, Phillip Blumberg recently summarized the Republican assault as follows: “First, the Act was nowhere authorized by the limited powers granted to the Congress by the Constitution. . . . [T]he Bill [was also] a blatant violation of the constitutional guaranty of freedom of speech and press.”⁴³ The irony here is that Hoffer’s reliance upon a known feature of the controversy only *reinforces* the value of his book.

The works cited above — by Smith, Currie, Powell, and Blumberg — are all clearly geared toward scholarly audiences. As such, it is not at all surprising that they review the constitutional quarrel comprehensively. Hoffer, however — whose scholarly bona fides are beyond question — also wrote *Free Press Crisis* for a wider audience of “students and general readers,”⁴⁴ an audience presumably more familiar with the Sedition Act controversy as memorialized by the likes of Sunstein, Zinn, and Stone. As such, his book holds considerable promise as a device for *updating* popular understandings of the episode, principally by highlighting the scope of federal power as a second (and equally-important) constitutional feature of the controversy. This chronicle of an older generation of congressional Republicans railing against the exercise of unenumerated power is also especially welcome at a time when some members of the current generation have pressed for every piece of federal legislation to “cite its specific constitutional authority.”⁴⁵

Though my treatment of *Free Press Crisis* has focused exclusively on the constitutional status of the Sedition Act, Hoffer’s book also offers a thorough and engaging account of Thomas Cooper’s trial for seditious libel. Cooper, characterized at his trial as “a person of a wicked and turbulent disposition” by federal prosecutor William Rawle, was charged under the Sedition Act with “print[ing] and publish[ing] a false, scandalous and malicious writing” against President John Adams in November 1799.⁴⁶ Rawle’s prosecution, which stemmed from Cooper’s written suggestion that Adams had interfered with on-going business in the federal court system, was technically successful; Cooper was convicted of seditious libel, but served less than six months in jail. While Hoffer’s version of a trial “transcript” cannot fail to impress in its own right, his larger achievement lies in firmly placing that trial within the broader currents of American constitutional politics.

41. DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801*, at 260 (1997) (footnote omitted).

42. H. JEFFERSON POWELL, *A COMMUNITY BUILT ON WORDS: THE CONSTITUTION IN HISTORY AND POLITICS* 55 (2002).

43. PHILLIP I. BLUMBERG, *REPRESSIVE JURISPRUDENCE IN THE EARLY AMERICAN REPUBLIC: THE FIRST AMENDMENT AND THE LEGACY OF ENGLISH LAW* 87 (2010).

44. MARK R. KILLENBECK, *M’CULLOCH V. MARYLAND: SECURING A NATION* 199 (2006). While Hoffer does not say this explicitly with respect to *Free Press Crisis*, he and N.E.H. Hull edit the larger series of which this book is a member. *LANDMARK LAW CASES AND AMERICAN SOCIETY* (Peter Charles Hoffer & N.E.H. Hull eds., 2007), available at <http://www.kansaspress.ku.edu/catllcas2007.pdf>. They enumerate this goal of the series in *M’Culloch v. Maryland: Securing a Nation*.

45. Richard E. Cohen, *House GOP: Bills will have to cite Constitution*, POLITICO (Dec. 17, 2010, 6:35 PM), <http://www.politico.com/news/stories/1210/46565.html> (internal quotation marks omitted).

46. HOFFER, *supra* note 32, at 84-85.

Imperfect memories of *Gibbons v. Ogden* neither organize Herbert Johnson's new study of the famous "Steamboat Case" nor operate as an unspoken subtext. Representative Daniel Webster's performance before the United States Supreme Court on behalf of New Jersey steamboat operator Thomas Gibbons — both how it has been memorialized and what it actually was — represents the *secondary* theme in Johnson's account. His primary focus, and the starting point for my own discussion, is Chief Justice John Marshall as an institutional leader.

Johnson's second chapter helpfully reminds us that the Steamboat Case sprang from a set of background facts that defies easy summary. In 1808, New York's legislature granted inventor Robert Fulton and state chancellor Robert R. Livingston a lengthy monopoly on steamboat navigation in state waters. The Fulton-Livingston monopoly presented a significant obstacle for Aaron Ogden (then governor of New Jersey) and Thomas Gibbons, who had partnered to operate a steamboat between northern New Jersey and New York City. Livingston died in early 1813, and the following year Fulton sought to avoid litigation by negotiating an agreement with Ogden-Gibbons — one that permitted the partnership to operate as a *licensee* of the Fulton-Livingston monopoly. For a short period of time, in other words, everyone was on the same side. Fulton died in early 1815, but more importantly, Ogden and Gibbons experienced a personal falling out in 1816. Their attending professional break left Ogden as the lone representative of the Fulton-Livingston monopoly and Gibbons as a new and bitter rival ready to challenge that arrangement in court. Gibbons' claim that the New York monopoly violated the Constitution's Commerce Clause grew from here.

The author all but plainly asserts that the institutional context in which *Gibbons* was heard offered a comparable degree of complexity. John Marshall's nomination and confirmation as Chief Justice of the United States came at a time (January 1801) when the Supreme Court was dominated by members of the Federalist Party. With control of both elected branches about to slip into Republican hands, it became "abundantly clear that time would clear the [F]ederalist bench . . . [and] new appointees would be chosen . . . and confirmed" by affiliates of the new regime.⁴⁷ A total of five appointments — three by Jefferson and two by Madison — followed in the next eleven years. This gradual change in the composition of the Court leads to Johnson's claim that long before *Gibbons* was argued, Marshall's role as institutional leader had begun to shift from "exercising influence with men who shared his political views" to mediating differences among a politically-diverse set of justices.⁴⁸ In other words, the composition of the Court would complicate any effort by Marshall to use *Gibbons* as a vehicle for expanding federal control over commerce.

This combination of background and institutional facts generates Johnson's signature claim regarding the decision in *Gibbons*: its "highly inconclusive" character — the precise meaning of the Commerce Clause was never articulated — represented John Marshall's "valiant attempt to mediate the differences on the Supreme Court"⁴⁹

47. JOHNSON, *supra* note 3, at xi-xii.

48. *Id.* at 7. Johnson stresses that while an older line of scholarship understood Marshall as the dominant institutional figure down to 1830, a "modest revision in historical understanding" (toward the chief justice as mediator on an increasingly diverse Court) commenced in the 1950s. *Id.* at 4.

49. *Id.* at 4.

Though the chief justice may have personally preferred an “exclusive” construction of the clause — one that would void state regulations of interstate commerce even in the absence of conflicting federal statutes — he nonetheless penned an opinion that narrowly struck the New York monopoly while saying precious little about the definitive meaning of the Constitution. What is more, Marshall did this in order to “reflect the various views held by [fellow] justices” and thereby minimize the risk of separate opinion-writing.⁵⁰

The image of a Supreme Court justice “bargaining” with peers over the language of an opinion, with a most-preferred outcome sacrificed in order to avoid a least-preferred outcome, is familiar to many students of the federal judiciary. Political scientists, for example, have labored to demonstrate both the logic and prevalence of strategic interaction among justices for close to fifty years.⁵¹ Moreover, much recent research in this vein has relied upon the surviving papers of Court members, especially “bargaining statements” circulated between justices.⁵² Accordingly, when Johnson stresses John Marshall’s role as a “mediator” of differences on the Court, it is only natural for a modern reader to anticipate verification of this claim via personal correspondence or other documentary evidence.

If readers approach Johnson’s thesis with modern expectations about its verification, they are likely to be disappointed. Simply put, there are no citations to memoranda sent by Marshall in the hope of persuading other justices to join his opinion. This is not surprising, given that Johnson was working with both a “paucity of official records” pertaining to *Gibbons* and a “relatively small corpus of private manuscript material” left by Marshall Court members.⁵³ Instead, the author labors — largely with success — to build an inferential defense of his thesis. First, Johnson notes that there was an “unusually long delay in the announcement of the Court’s opinion”⁵⁴ — three weeks, versus the customary three days — much of which cannot be attributed to other factors. Second, the chief justice had once favored an exclusive construction of the Commerce Clause, but only Justice William Johnson’s concurrence adopted that position. Finally, despite the wholly domestic character of the case, the final opinion did not even point in the direction of an exclusive construction with respect to *foreign* commerce — a gesture that might have strengthened “American diplomacy in commercial matters.”⁵⁵

While the author’s case for Marshall-as-mediator is persuasive, his extended attention to the oral arguments in *Gibbons* represents both the real gem of this work and the element tying it to the other books under discussion here. While all four presentations before the Court receive coverage — Daniel Webster and William Wirt on behalf of *Gibbons*, and Thomas Oakley and Thomas Emmet for Ogden — Johnson judged the first as deserving of special scrutiny. The author notes that Webster, “never known to underestimate his own forensic ability,”⁵⁶ later took the position that Marshall’s opinion

50. *Id.* at 128.

51. See generally LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 75 (1998); FORREST MALTZMAN ET AL., *CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME* (2000); WALTER F. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* (1964).

52. See EPSTEIN & KNIGHT, *supra* note 51, at 76.

53. JOHNSON, *supra* note 3, at xi.

54. *Id.* at 106.

55. *Id.* at 129.

56. *Id.* at 100-01.

in *Gibbons* channeled his oral argument: Marshall “did take it in, as a baby takes in its mother’s milk.”⁵⁷ More importantly, a number of “[c]ontemporaries and subsequent students of the case have . . . accepted Webster’s self-evaluation.”⁵⁸

A review of available material confirms Johnson’s claim. Maurice Baxter, a modern Webster biographer, has written, “[e]ven Thomas Oakley and Thomas Emmet, the losing counsel, thought” Marshall had adopted Black Dan’s argument.⁵⁹ Constitutional historian Charles Warren wrote nearly a century ago, “[o]f the indebtedness of the Chief Justice to Webster’s great argument, there can be no question.”⁶⁰ More recently, historian Robert V. Remini has claimed that “Marshall plucked his text directly from Webster’s brief.”⁶¹ Along similar lines, political scientist Peter Irons has argued that “Chief Justice Marshall repeated Webster’s argument almost verbatim in his opinion for a unanimous Court.”⁶²

The problem, of course, is that this particular memory of Webster’s performance does not match the historical reality. *Gibbons*’ lead advocate contended “that the power of Congress to regulate commerce is complete and entire, and, to a certain extent, necessarily *exclusive*.”⁶³ Webster meant two things by this particular formulation. First, state laws that regulated interstate commerce by design (like the New York steamboat monopoly) ran afoul of the Constitution even in the absence of a conflicting federal law. Second, state laws that merely “affected” interstate commerce (e.g., those “respecting turnpike roads, toll-bridges, and ferries”) embodied a “lower” branch of commercial regulation that did not infringe on the exclusive power of Congress.⁶⁴ Johnson then carefully notes that the Court did *not* adopt Webster’s position; Marshall’s opinion struck down the New York monopoly because it conflicted with a 1793 federal law, not because the monopoly was (by itself) a regulation of interstate commerce. Left unresolved by the opinion — and leaving hope for advocates of a “concurrent” construction — was the status of a state regulation of interstate commerce that did not conflict with existing federal law.

As with Hoffer’s gloss on the constitutional aspects of the Sedition Act controversy, Johnson is not the first to offer an alternate memory of Webster’s influence on the *Gibbons* outcome. Over fifty years ago, George Dangerfield wrote of the “mother’s milk” claim: “This was not quite the case.”⁶⁵ Similarly, the aforementioned Maurice Baxter has questioned his subject’s reading of the *Gibbons* decision.⁶⁶ Finally, Kermit Hall and John Patrick have recently characterized Webster’s “cocky” claim

57. 2 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY, 1821-1855*, at 63 (1922).

58. JOHNSON, *supra* note 3, at 101.

59. MAURICE G. BAXTER, *ONE AND INSEPARABLE: DANIEL WEBSTER AND THE UNION* 548 n.98 (1984).

60. WARREN, *supra* note 57, at 70.

61. ROBERT V. REMINI, *DANIEL WEBSTER: THE MAN AND HIS TIME* 207 (1997).

62. PETER IRONS, *A PEOPLE’S HISTORY OF THE SUPREME COURT: THE MEN AND WOMAN WHOSE CASES AND DECISIONS HAVE SHAPED OUR CONSTITUTION* 132 (Penguin Books 2000).

63. Daniel Webster, *The Case of Gibbons and Ogden: An Argument Made in the Case of Gibbons and Ogden, in the Supreme Court of the United States, February Term, 1824*, in EDWIN P. WHIPPLE, *THE GREAT SPEECHES AND ORATIONS OF DANIEL WEBSTER* 111, 114 (Little, Brown, & Co. 1879) (emphasis added).

64. *Id.*, at 115, 117.

65. George Dangerfield, *The Steamboat Case, in QUARRELS THAT HAVE SHAPED THE CONSTITUTION* 49, 59 (John A. Garraty ed. 1964).

66. BAXTER, *supra* note 59, at 177-78.

respecting the consumption of his argument as an “overstatement overlook[ing] the eloquence of Marshall’s written opinion”⁶⁷ As such, the author’s admirable achievement on this front — like Hoffer’s in *Free Press Crisis* — lies in cultivating a more nuanced memory of events for both student and lay readers.

Each of these books asks readers to somehow rethink the scope of congressional power in the Early American Republic: one by suggesting that a hitherto “mysterious” source of federal power has discoverable antecedents (*Necessary and Proper*), another by questioning a recurring claim about the Supreme Court’s interpretation of an express grant (*Gibbons v. Ogden*), and a third by implying that an oft-cited controversy — one traditionally about “rights” — was also about “powers” (*Free Press Crisis*). Any preoccupation with their substantive intersection, however, risks obscuring the shared approach — skepticism toward received constitutional history — that revealed this intersection. I want to close here by suggesting that this approach points to at least two broader questions of current interest to constitutional scholars.

Because these books speak to — and depart from — prevailing memories of American constitutional history, one might ask (in a general sense) how particular versions of events become favored in the first place. Applied to one case here, how did a rights-centric narrative of the Sedition Act controversy rise to prominence? Did it prevail in competition with rival accounts from the antebellum era, or was the “two-prong” character of the constitutional question only discovered in the twentieth century? Pamela Brandwein’s work offers important guidance for those interested in such questions; her study of competing Reconstruction narratives is designed to explore the “production of historical meaning” more generally.⁶⁸

Aside from investigating the process whereby certain accounts of past events become authoritative, one might also ask if memories are ever *purposefully* constructed in order to serve the goals of actors or groups. A number of specialists in American constitutional development have recently answered in the affirmative. Mark Graber, for example, has argued that a uniform (and incomplete) “libertarian tradition” respecting free speech was constructed in order to serve the political agenda of Progressives.⁶⁹ Similarly, Ken Kersch has recently suggested that multiple narratives designed to trace paths to modern constitutional liberalism both distort history and do so in order to serve political ends.⁷⁰ Finally, Justin Wert’s investigation of habeas corpus over the course of American history reveals that partial accounts of the “Great Writ of Liberty” are “[p]art and parcel of [its] use . . . by any political regime.”⁷¹ My citations of Graber, Kersch, and Wert are not meant to pre-judge those who produced the memories at stake in the books reviewed here, only to identify a question that scholars might continue to ask about older narratives.

67. KERMIT L. HALL & JOHN J. PATRICK, *THE PURSUIT OF JUSTICE: SUPREME COURT DECISIONS THAT SHAPED AMERICA* 37 (2006).

68. PAMELA BRANDWEIN, *RECONSTRUCTING RECONSTRUCTION: THE SUPREME COURT AND THE PRODUCTION OF HISTORICAL TRUTH* 3 (1999).

69. MARK A. GRABER, *TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM* 75-78 (1991).

70. KEN KERSCH, *CONSTRUCTING CIVIL LIBERTIES: DISCONTINUITIES IN THE DEVELOPMENT OF AMERICAN CONSTITUTIONAL LAW* 132 (2004).

71. JUSTIN J. WERT, *HABEAS CORPUS IN AMERICA: THE POLITICS OF INDIVIDUAL RIGHTS* 10 (2011).