



THE SUPREME COURT
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Mel Urofsky Griswold Prize Lecture

The Society occasionally awards the Griswold Prize to a book regarded as an exceptional contribution to the understanding of Supreme Court history. The prize was awarded this year to Professor Melvin I. Urofsky for his book: *Louis D. Brandeis: A Life*, published in 2010. The award was presented at the Court on February 22, 2011 by Justice Elena Kagan, assisted by Society President Ralph Lancaster.

Melvin Urofsky is professor of law and public policy and a professor emeritus at Virginia Commonwealth University. He is well known to Society members as the editor of the *Journal of Supreme Court History*, as a frequent lecturer and as the author of many books on Supreme Court history including multiple volumes of the edited papers of Justice Brandeis.

As part of the ceremony Professor Urofsky delivered the prize lecture titled "Dissenters."

The Griswold Prize was created in 1995 by the law firm of Jones Day Reavis and Pogue (now Jones Day) to honor Erwin Griswold who at the time of his death was a partner of the firm. But long before joining the partnership, Griswold had carved out an enduring place in legal history by serving as Dean of the Harvard Law School from 1946-1967 and as Solicitor General (1967-1973). Dean Griswold's stature in the American legal community is proven by the fact that he was appointed Solicitor General by Democrat Lyndon Johnson and then continued to serve during the administration of Republican Richard Nixon. The Society is proud that Dean Griswold also served as Chairman of the Board of Trustees from 1989 to 1994.

Justice Kagan was a logical choice to introduce the

Griswold honoree, since she had also served as both Dean of the Harvard Law School and as Solicitor General of the United States. In addition, Justice Kagan occupies the "Brandeis seat" on the Court. She noted that her place might also be called "the longevity seat" since Brandeis, who had served as a Justice for 23 years, was succeeded by Justice William O. Douglas who served for 36 years, and Douglas was replaced by Justice John Paul Stevens, who was on the Court for 34 years.



PHOTO BY STEVE PETTMAN

Prior to being appointed to the Supreme Court, Associate Justice Elena Kagan served as Solicitor General of the United States and as Dean of the Harvard Law School.

In his lecture, Professor Urofsky noted that it was not his intention to reprise his book, but rather to explore the role of Justice Brandeis as a dissenter. Tracing the history of dissents from the Court's earliest days he noted that the first important dissenter was Jefferson appointee William Johnson, who served during the John Marshall era. But Urofsky called Justice Stephen P. Field's opinion in the so-called *Slaughterhouse Cases* of 1873 the "first great modern dissent." He then cited Justice John Marshall Harlan's thunderous opinion in *Plessy v. Ferguson* in 1896 as the next great contribution to the genre of modern dissent.

Professor Urofsky offered the thesis that dissent plays a major role in constitutional dialogue and that this role is tripartite. First, dissents contribute to the ongoing dialogue that the Justices have among themselves. Next, dissents can play a major role with the ongoing constitutional dialogue which the Court has with the President and Executive Branch and with both houses of Congress. And lastly, dissents are another important part of the dialogue which the

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Court must always have with the American people. Constitutional understanding and constitutional implications are not frozen in stone. The understanding of what the Constitution means and of the part which it plays in American government is ongoing.

Justice Brandeis, Professor Urofsky noted, was a “great” dissenter, but not necessarily a frequent one. He did not seek out an opportunity to play that role and indeed, on some occasions, he joined his colleagues in an opinion of the Court with which he disagreed. But these “played-down” disagreements were normally on relatively unimportant topics. If the issue was important, and particularly if the issue involved first amendment rights, his dissents were vigorous



Jonathan Rose (left), Justice Kagan and Ralph I. Lancaster, Jr. posed following the lecture. Dean Griswold was a partner at Jones Day at the time of his death and Mr. Rose helped establish the prize to honor his memory.



PHOTOS BY STEVE FETTERWAY

At the conclusion of the program, Professor Melvin Urofsky (left) received the Erwin Griswold prize for his biography of Louis Brandeis from Justice Kagan and Ralph I. Lancaster, Jr.

and eloquent. Today Justice Brandeis is especially remembered for his role in the evolution of the American understanding of free speech. What were once Brandeis dissents have now become accepted constitutional doctrine—accepted by conservatives and liberals alike and accepted by the vast majority of the American people.

Following the lecture, the reception for all participants was hosted by Justice Kagan. The complete text of Professor Urofsky’s remarks will be published in a forthcoming issue of the *Journal of Supreme Court History* to be distributed to all active members of the Historical Society.

Quarterly

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Managing Editor	Kathleen Shurtleff
Advisory Editor	James B. O’Hara

Calendar of Society Events for Spring 2011

2011 Leon Silverman Lecture Series: The People Behind the Supreme Court’s Religion Cases

April 28, 2011 6 PM George Reynolds (*Reynolds v. United States*)
Lecture by Professor Sarah Gordon, University of Pennsylvania School of Law

May 5, 2011 6 PM John Kedroff (*Kedroff v. Saint Nicholas Cathedral*)
Lecture by Professor Richard Garnett, Notre Dame Law School

May 10, 2011 6 PM Edward Schempp (*Abington School District V. Schempp*)
Lecture by Professor Douglas Laycock, University of Virginia Law School

Thirty-Sixth Annual Meeting of the Society
Monday, June 6, 2011

Annual Lecture 2 PM Nine Scorpions in a Bottle: The Roosevelt Court in Retrospect
Lecture by Professor Noah Feldman, The Harvard Law School

6 PM Business Meetings
7 PM Black Tie Reception and Dinner

Check the Society’s web site for further information on all events.

A Letter from the President



The opening days of the year have been busy. The Erwin Griswold Prize for an outstanding book in the field of Supreme Court history was awarded to Professor Melvin Urofsky. He delivered an interesting lecture about Brandeis and his role as a dissenter set in the broader

context of dissenting opinions in the history of the Court. An article about the program appears on the cover page of this magazine. The 2011 Leon Silverman Lecture Series, "The People Behind the Supreme Court's Religion Cases", is underway with the first lecture held on March 16. The schedule of the remaining programs appears on page 2. On the back page of this issue is the notice of the program the Society is sponsoring in conjunction with the Historical Society of the Courts of the State of New York. It is the first in a series of programs that will take place over several years, and will focus on the many and diverse contributions of the state of New York to the Supreme Court Bench. It should be a very rewarding evening and offers CLE credits to members of the New York State Bar. Invitations will be mailed to members in the general geographical area, but all members of the Society are invited. Further information is on the back page of the issue, and appears on the Society's web site as well.

I turn back to a topic relating to the early years of the Society. Walking past the large seated statue of John Marshall on the ground floor of the Supreme Court Building one evening, I commented on its size and weight and speculated on how it was brought into the edifice itself. David Pride then shared with me the story of the "relocation" of the statue from the west front of the Capitol Building where it had resided for almost a century.

The statue was sculpted by William Wetmore Story, son of the long-serving Associate Justice Joseph Story. Justice Story served for more than 30 years on the Court, most of them under the leadership of Chief Justice Marshall. Story was chosen to create the sculpture because of his ex-

pertise, and also because of his father's friendship with the subject. Unlike most pieces of artwork displayed in public buildings, the funds, although appropriated by Congress, had been provided through a special fund. Even more unusually, that fund had languished for nearly fifty years before being utilized.

Following Marshall's death in 1835, the Bar of the city of Philadelphia started a subscription requesting donations to build a fitting tribute to the Great Chief Justice to be erected in the Capital of the nation. The total raised was insufficient to create an appropriate statue, and the money was invested by Trustees appointed by the Bar. Almost fifty years passed and the fund was largely forgotten. Upon the death in 1881 of the survivor of the original trustees, Peter McCall, the existence of the fund came to light. New Trustees were appointed who discovered to their amazement, that the original fund of \$2,557 raised through subscriptions had grown nearly ten-fold to nearly \$20,000 in the intervening years. The Trustees advised Congress of the availability of the money and their desire to carry out the original purpose of the fund and the 47th Congress appropriated a sum "up to \$20,000" to commission such a statue. The finished statue was placed on the terrace of the Capitol overlooking the



The statue of Chief Justice Marshall being moved into the great hall

Mall. The Court had met, and continued to meet, in the Capitol Building until 1935 when its new home was erected. However, the statue of the Great Chief Justice was not relocated to the building at that time. In the 1980s the Architect of the Capitol recommended that the statue be relocated to an interior location because it was deteriorating.

After discussion and negotiation, Chief Justice Burger succeeded in obtaining permission to relocate the statue to the ground floor of the Supreme Court Building. The moving experience required the use of cranes to relocate it in the building. It had been mounted originally on a much taller marble base with panels of bas relief. When the statue was relocated, the original stone base was decreased in depth, and the panels were removed. The panels are now displayed in a permanent exhibit behind the statue so that visitors can view them. The statue has now presided over the lower Great Hall for nearly thirty years where it seems in perfect harmony with its surroundings.

Ralph Lancaster

William Paterson's Notebook

By Dr. Jude M. Pfister*

William Paterson (1745-1806) is probably best known today, if he is known at all outside of a small group of dedicated historians or alumni of the College which bears his name, for the "New Jersey Plan," or the "Paterson Plan," introduced during the Constitutional Convention in 1787. Even residents of Paterson, New Jersey, may be unaware that their city is named for William Paterson. However, far from being a figure to be known for one shining moment in

was his future Supreme Court colleague Oliver Ellsworth of Connecticut.

Paterson spent much of the decade of the 1760s in academic or intellectual pursuits of one sort or another. After taking his undergraduate degree in 1763, he stayed on and completed his graduate work in 1766. Simultaneously, he was apprenticed to Richard Stockton (one of the New Jersey signers of the Declaration of Independence) in the study of the law. Paterson was admitted to the bar in 1769.

One tool in any historian's toolbox is the primary resource. In the case of William Paterson and others of his stature, there are undoubtedly many remaining manuscripts to choose from in various repositories around the country. Determining the type of manuscript to utilize would depend on what one was writing about. While many of these figures are well known today because of their work as adults, it is somewhat unique to be able to study their early lives when they were just beginning to mature into adults.

In the case of William Paterson a single ledger or notebook held in the archives at the Morristown National Historical Park allows researchers a chance to enter the evolving mind of a young law student. Part of the large Lloyd W. Smith archival collection which the park has maintained since 1957, this notebook allows us to take the measure of Paterson as he contemplated the legal world of his day and of his potential place within that world.

During the mid to late 1760s the colonies were still very much a part of the British Empire and in fact still celebrated the King's birthday at the College of New Jersey annually. Whether or not Paterson participated in these activities is not known, but he surely knew about them. The other issue to keep in mind is that this is precisely the time that William Blackstone was publishing his *Commentaries of the Laws of England*, although few Americans had copies prior to the 1771 printing in Philadelphia. Richard Stockton was known to possess a marvelous library, and just perhaps he had an early British edition of the *Commentaries* for Paterson to study.

Paterson's notebook is serious. There are no doodles or mindless wanderings over pages with a pen which one might expect to accompany a student's notebook. Instead, the erudition which he was already known for and which he would build a career upon is evident throughout. One interesting and somewhat confusing point is on the first page—Paterson has written his name four times with two



Portrait by William Sharples Sr., Collection of the Supreme Court of the United States

Portrait of William Paterson while he was a Supreme Court Justice (1793-1806)

time, Paterson is in fact someone who had many shining, and some not so shining, moments in the early history of the American Republic. Indeed, Paterson is someone awaiting an updated exploration of his influential career.

Paterson was born in Ireland and brought to the colonies by his parents at the age of two. They had a somewhat untethered existence before settling in Princeton, New Jersey by 1750. His father's modest prosperity, combined with William's intellectual acumen, enabled him to gain admittance to the College of New Jersey (later Princeton) where he graduated in 1763. One of his classmates



Paterson attended Princeton College (shown above). Some of his papers and writings were published in a small volume titled *Glimpses of Colonial Society and the Life at Princeton College 1766-1773*.

different dates. One is “November 29, 1763,” the other “June 1769.” Given that he was finishing his undergraduate work in 1763 it seems unlikely that the notebook with legal musings was composed then; conversely it seems odd that the same year he was admitted to the bar (1769) he would have been putting down in print what came across as mostly beginning law studies. In any event, sometime between 1763 and 1769, Paterson filled this notebook with a variety of legal subjects designed to aid in his studies.

In the notebook, there are several sections with headings for pleas; administration; leases; indictment; juries; jointure; mortgages; appeal; devises; and evidence. Throughout are references to English cases which supply the reasoning and precedent for which Paterson bases his argument upon. Also scattered throughout are areas where Paterson wanted to highlight the importance of a passage and he identifies this with the highly effective hand with a pointing finger symbol. Throughout as well are “Q” and “A” to correspond to the question and answer method which he employed throughout much of the notebook.

A brief sample of Paterson’s entries follows (punctuation and spelling have been updated where necessary):

Q: Were the first principles of the Laws known to Pagans?

A: No, for the most learned men among the Pagans knew so little of them, that they had established rules which violate and destroy them. Thus, the Romans too by the same license as other people did too take away the lives of their slaves, and of their own children.

Q: How may we judge of the certainty of the principles of the Laws?

A: We may judge of their certainty, by the double impression which such truths ought to make upon our minds, which God reveals to us by religion, and makes us to apprehend by our reason.

Q: What is the nature of man?

A: His nature is nothing else but that Being which is created after the Image of God and capable of professing that supreme Good, which is to be his Life and his Blessedness.

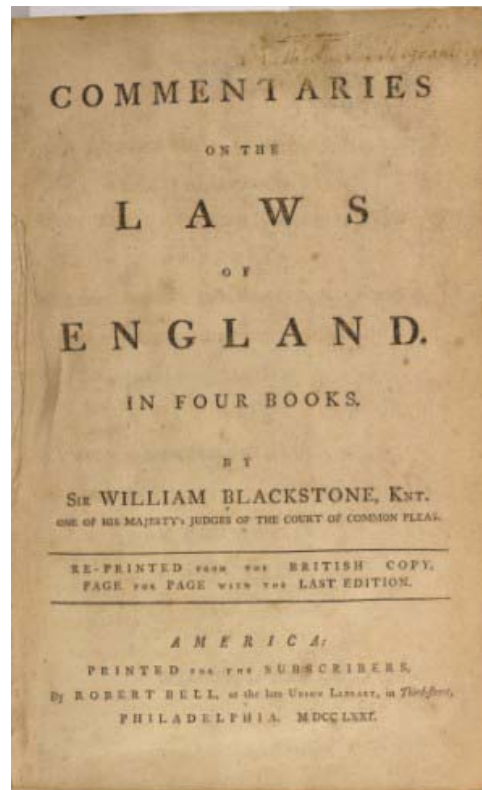
Q: What is the first law of man?

A: His first Law, is that which enjoins him to search after and

to love that sovereign Good with all the force of his mind and of his heart.

Q: From whence arise all the disorders in society?

A: From man’s disobedience to the first Law; which commands him to love God.



William Blackstone’s *Commentaries on the Laws of England* was extremely influential in the development of the American legal system.

Q: How many sorts of Laws are there?
A: two, viz, immutable and arbitrary.

Q: What are immutable Laws?

A: They are natural, and so just at all times, and in all places, that no authority can either change or abolish them.

Q: What are arbitrary Laws?

A: They are those which a lawful authority may enact, change, and [Paterson does not finish the sentence].

Q: Do natural Laws regulate both the Time past, and Time to come?

A: Yes, and nobody can pretend Ignorance of them.

Q: Can a mortgage be taken in a Negro slave?

A: Negroes are considered as making part of the personal estate and as such are always taken on in [?] and sold: Therefore, it is natural to suppose, as mortgage taken on a Negro slave would be good. It is certainly consistent with

the general principle which regulates slaves, and indeed in every point of light appears highly reasonable—Beside, slaves may be sold; it is every day’s practice to make bills of sale, which are absolute disposals of them. Now, reasoning from the greater to the less, if a man can make an absolute, he may certainly make a conditional alienation of his slave.

In addition to the question and answer format, Paterson relies on simple note taking. Writing out sections of law and precedent and citing sources. As examples:

“If a man marries a woman who has a term for years settled on her in trust, the husband may as well dispose of this first, as if the legal interest was in her.”

“Where a woman marries a second husband leaving the first, and the second not privy; as to what she acquired during the cohabitation, the C.J. said he would esteem her as a servant to the second husband, who is entitled to the benefit of her labor.”

“One hath power to make a lease for 10 years, and he makes a lease for 20 years, yet in equity this is good for 10 years; and so has been settled several times.”

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“If a person makes a lease for so many years as he shall live, it is absolutely void for the uncertainty of its continuance.”

“If A lets to B for 10 years, who lets to C for 5 years, C cannot surrender to A by reason of the intermediate interest of B but in such case B may surrender to A and after so many years C likewise, because then his lease of 5 years is immediate to the revision of A.”

It is apparent Paterson was in part studying Edward Coke, in several places he starts a series of notes by stating “My Lord Coke lays it down for a general rule....” References also abound to Francis Bacon as well.

Smaller “notes to self” are found scattered throughout the notebook. One example concerns a section labeled Juries. Paterson writes “Judges cannot fine a jury for giving a verdict contrary to evidence.” Another entry states “after a jury is sworn they shall be impounded till they all agree.”

It is clear from this brief overview that Paterson in some ways had already formed opinions on certain topics. It is also clear that Paterson was certainly a man of his times with all the apparent prejudices and shortsightedness we associate with the legal profession of that era.

While it is not my purpose to analyze Paterson through his notebook—which would be unfair without looking at his other writings of the time—it is still nonetheless important to point out how archaic his studies sound to the twenty-first century ear.

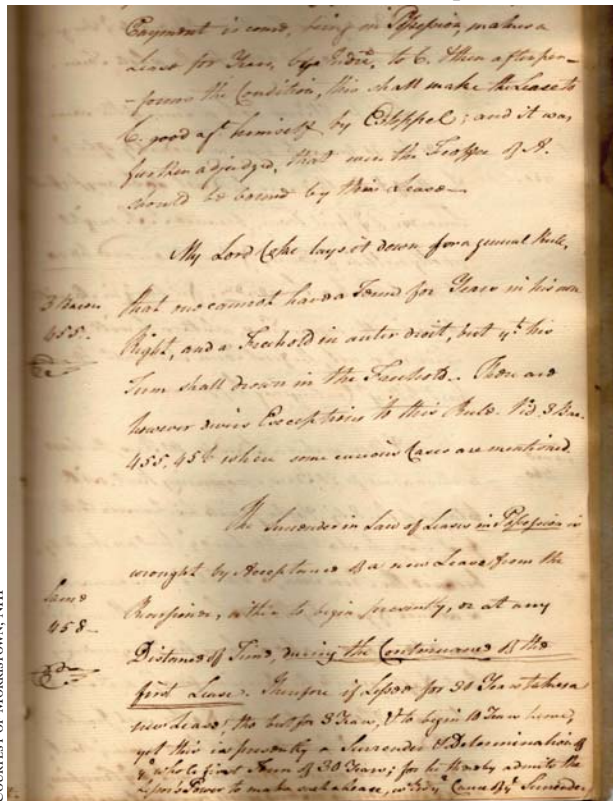
For questions or more information on this manuscript or any manuscript held at the Morristown NHP, please

contact Dr. Pfister at 973-539-2016 x204. For information of making an appointment, please visit: <http://www.morristownnhplibrary.blogspot.com/>.

Note: Readers might find it interesting to learn that in 1903 a scholar named W. Jay Mills published a volume he titled Glimpses of Colonial Society and the Life at Princeton College 1766-1773, By One of the Class of 1763. The volume is a collection of William Paterson’s writings that record his experiences as a student at Princeton. Many of Paterson’s papers had been preserved in a letter-chest, and the papers found within the chest provided a complete record of his life. The materials pertaining to his days as a student at Princeton were published in a small volume. Mills described the

content of the volume by indicating that it contained “[e]ssays prepared at the College of New Jersey in 1760; poems written on portions of old law-briefs, bearing dates when he served as a law-apprentice to Richard Stockton; his earliest and last love-epistles to Cornelia Bell, the fair Jersey girl who became his wife; packets of letters from a host of faithful friends, together with a tear-stained copy of the order for his tombstone.” This fascinating little volume provides personal insight to the experiences and character of William Paterson.

**Dr. Jude Pfister is the chief of cultural resources at the Morristown National Historical Park. He oversees the library, archival and museum programs. He has worked in a variety of curatorial settings impacting many of our nation’s important historic sites and collection.*



A page of Paterson’s Notebook

National Heritage Lecture Planned for May 16, 2011 Save the Date

The White House Historical Association in partnership with the Supreme Court Historical Society and the Capitol Historical Society will present a program marking the 50th anniversary of the White House Historical Association. The program will be held in the Dean Acheson Auditorium, Department of State, on the evening of Monday, May 16 and will celebrate the first live televised presidential press conference conducted in the same auditorium by President John F. Kennedy. The moderator for the evening will be Mike McCurry, press secretary for President Clinton, joined by a panel of journalists who covered the Kennedy White House and subsequent administrations.

Invitations should arrive in mid-April. Please check the web site for further information.

Clerk's Corner

Tom C. Clark Reminiscences

By Ernest Rubenstein*

In February 2010, a reunion of former clerks to Justice Tom C. Clark was held in Washington, D.C. Mimi Clark Gronlund, Justice Clark's daughter attended to represent the family of the late Justice. During the reunion, Mrs. Gronlund discussed her biography of her father, "*Supreme Court Justice Tom C. Clark: A Life of Service.*" The book is a full-length biography of the Justice who served as Attorney General of the United States from 1945-1949 and as Associate Justice of the Supreme Court of the United States from 1949-1967. A short review of her book appeared in the "Letter of the President" in the previous issue of the Quarterly.

Ernest Rubenstein clerked for Justice Tom C. Clark in 1953 - 1954. Following the reunion of the Clark clerks, Mr. Rubenstein wrote some memories of his clerkship in a letter to the Justice's daughter Mimi Clark Gronlund. Excerpts from his letter appear below.

"I arrived for a briefing by the outgoing clerks (principally my Yale Law School friend Fred Rowe) at the end of June 1953 and began working on July 1st. Apart from Fred's explanation of the Justice's routine, his expectations from his law clerks and the "mechanics" of the job, two subjects are impressed on my memory.

First, was the then very recent excitement about Justice Douglas's stay of execution of Julius and Ethel Rosenberg as the Court was recessing for the summer, Chief Justice Vinson's decision to call the Court back from vacation, and the Court's decision to vacate the stay. That was barely two weeks before I arrived.

Second, was the then current "gossip" about the likely outcome of the school desegregation cases, which had been argued the prior Fall and had been set down for re-argument in the Fall of 1953. For security reasons, the Justices had decided not to discuss with or otherwise involve their clerks in those cases. So law clerk gossip and speculation were my only sources information. I was told the Court would likely hold school segregation unconstitutional by a vote of at least 6-3, but no one was sure. There was no doubt that Justice Clark would vote with the majority. That seemed clear from his position in the higher education cases in the immediately preceding years, which Mimi so carefully covers in her book, and reinforced by his position in the Texas

White Primary case. His voting record in the area of racial justice was impeccable.

Mimi, in your book you write about the pain and embarrassment the family experienced in 1942 when you drove from California to Washington, D. C. with Betty, the family's black housekeeper, who had difficulty finding a place to sleep in the highly segregated world we then lived in. As I read that, I thought of Earl Warren's experience in the winter of 1954 (during a court recess) when he tried to visit Civil War monuments in Virginia with his black driver. The driver had to sleep in the car because no local motel or hotel would accept him. The Chief Justice learned of this the next morning and was so embarrassed that he cancelled the balance of the trip and returned to Washington. (This touching anecdote appears in Richard Kluger's monumental 1976 work *Simple Justice.*)

The next memorable event of my year was the sudden death of Chief Justice Fred Vinson in September 1953 and the prompt recess appointment of Earl Warren as the new Chief Justice by President

Eisenhower. I joined the other clerks in attending the Vinson funeral at the National Cathedral, wholly oblivious to the importance to the pending school segregation cases of that change in the Court's leadership. With the passage of time and the perspective of history, I am convinced that had Vinson remained as Chief Justice that court term, there never would have been a unanimous *Brown* decision and there never would have been a single opinion in which all the Justices joined. That change in court leadership had no impact on Justice Clark's position. I do not believe his position on the merits ever wavered."



Justice Clark at age 70

*Ernest Rubenstein is a retired partner and of counsel at Paul, Weiss, Rifkind, Wharton & Garrison, LLP. He graduated from Yale Law School and has practiced law for 57 years. His practice areas include corporate and tax law, among others. In his letter to Mrs. Gronlund he observed that he was a bit dismayed to realize that he was the earliest of the Tom Clark clerks present for the occasion. The Editors thank Mr. Rubenstein for his contribution.

Three Virginia Justices

By James B. O'Hara*

Editors' Note:

The following is an after-dinner speech given by Prof. O'Hara on January 20, 2011 at the annual dinner of the Virginia Law Foundation. Readers will note that some of his remarks are tongue-in-cheek.

I

There is an old axiom about carrying coals to Newcastle. So here I am, in Williamsburg of all places, speaking about three distinguished Virginia lawyers and judges to a group of distinguished Virginia lawyers and judges. I hope that the adage does not betray me too much.

From the beginning of our constitutional era, there has been an extraordinarily close tie between the state of Virginia and the Supreme Court of the United States. The very first appointments to the Court by President Washington included a Virginian. The "Great Chief Justice," John Marshall, was a Virginian. In the 220 history of the Court, six Justices have been life-long Virginians: born here, raised here, educated here, lived here, practiced law here, and five of them are buried here. Four additional Justices were born in Virginia, and another spent part of his childhood in the State. Three more—including two Chief Justices—were living in Virginia at the time of their appointment. So, all together 14 Justices of 112—more than 10%—have been, at some point in their lives, fellow citizens of yours. I have not even mentioned at least another ten—Hugo Black, Robert Jackson, William Brennan, Thurgood Marshall, John Paul Stevens among them—who lived in Virginia after becoming Justices.

Counting all of these, Virginia can account for over a quarter of the Supreme Court, and that does not even count the Justices who became Virginians after death by being buried in Arlington!

Tonight, I want to center on three of those Virginia Justices. Even you Virginians will probably not know much about two of them. We can trace in their lives something about the history of the Supreme Court and its place in the life and development of American law. In fantasy, we can imagine each of these three men telling you about themselves and their service.

II

My name is John Blair, Jr. (I always signed my name with the "junior" attached, even long after my father had died.) I was born in 1732, here in Williamsburg. You can still see my house on Duke of Gloucester Street. I attended William and Mary, very proudly, because an ancestor of mine helped establish the school and was its first president. I studied law in London at the Middle Temple, and married my wife, Jean, while I was living there. My law practice flourished here in Williamsburg, and I served in the colonial

House of Burgesses before and after our country's independence. I was a Judge in a variety of Virginia Courts, initially at the trial level, and then in appellate courts. I helped write Virginia's first state constitution, and I was a delegate both to the Constitutional Convention in Philadelphia and to the Virginia Ratification Convention in Richmond. My contemporaries always seemed to regard me as even-tempered, not



COLLECTION OF THE SUPREME COURT OF THE UNITED STATES

Associate Justice John Blair was born in Williamsburg and practiced law there. He helped to pen the first Virginia state constitution.

given to extremes. These days, lawyers might say I had a judicial temperament. In Philadelphia, I shied away from Mister Hamilton's extreme (so they seemed to me) views on national government, and I looked to Mr. Madison's more balanced positions. In Richmond, Mr. Patrick Henry's diatribes against the Constitution I had signed shocked me, and I proudly voted for our state to ratify.

My friend George Washington named me to the Supreme Court just one day after the First Congress determined the number of Justices to be appointed. In those days, being a judge on the Court was not easy. To begin with, on the appellate level, there were few cases. The Supreme Court was in operation before the District Courts, so there were no cases ready for appeal. Secondly, Congress in its wisdom had decided that Justices should ride circuit and hear cases in District Courts. That meant we had to travel eight months

a year, away from homes and families, trudging over unpaved roads, often icy in winter, wet and muddy in the spring, dusty in summer. Some of my colleagues had to stay in filthy inns with all kinds of people, thieves, prostitutes, drunks. Sometimes 8 to 10 people slept in the same room. The food was disgusting, the cases were repetitious, the lawyers often uneducated and ill-prepared. Fortunately, most of my travel was only to Philadelphia.

After six years, I could not go on. I resigned and came back to Williamsburg. I died here in 1800 and I am buried in one of the holiest of Virginia places, the churchyard of Bruton Parish.



COURTESY OF MOUNT VERNON LADIES ASSOCIATION

Nephew and heir of George Washington, Bushrod Washington (above) was a classmate of John Marshall with whom he would later serve on the Supreme Court of the United States.

III

My name is Bushrod Washington. My rather unusual first name is simply my mother's maiden name. It's my last name that has been both a blessing and a curse. You see, George Washington is my uncle, my father's brother. It is not easy being George Washington's nephew. I was born in 1762 in Westmoreland County, in a house partially destroyed by the British during the War of 1812. I studied at William and Mary under George Wythe, and John Marshall was my classmate. I served as a private in the Continental Army, and then read law with that fine legal scholar, James Wilson. My law practice flourished—it didn't hurt to be George Washington's nephew. I was elected to the legislature and was also a delegate to the Virginia Convention which ratified the Constitution. After

Uncle George became President, I wrote to him, suggesting that I might make a fine US attorney for Virginia. Uncle George was not pleased. He told me that as the first President, everything he did set a precedent and that his administration would be in peril if he appointed his relatives and friends to public office. After that, I was more cautious with Uncle George.

I loved the law. It became my passion. I edited the first reports of Virginia appeals cases, and I regularly practiced with and against Virginia's finest lawyers: George Wythe, John Marshall, Patrick Henry, Edward Randolph. My legal scholarship undoubtedly caused me to neglect other worthy interests. It was once suggested that I could probably not name the author of *Macbeth*. My critics exaggerated, but not by much.

In 1789, President Adams named me to the Supreme Court. I served for 31 years. For most of that time, my Richmond friend and neighbor John Marshall was Chief. I took part in all the great constitutional cases: *Marbury v. Madison*, *Fletcher v. Peck*, *McCullough v. Maryland*, and *Dartmouth College*. My views were so close to John Marshall's that one of my colleagues—Justice Johnson—told President Jefferson that Marshall and I "were as one Judge." He did not mean it as a compliment, but I surely accepted it as one.

What did they say of me? Justice Story commended my "exactness," my "sincere good faith and simplicity" and my "unwillingness to overrule settled doctrine because of my private notions of policy or justice." And a knowledgeable Philadelphia lawyer called me the finest trial judge in



COURTESY OF MOUNT VERNON LADIES ASSOCIATION

Bushrod Washington was buried in the crypt at Mount Vernon along with George and Martha Washington.

America.

I died in Philadelphia in 1829. As my body was being brought home (I had inherited Mt. Vernon) my dear wife Julia died on the way. We were buried in another of the holiest of Virginia places, at Mt. Vernon, in the crypt, with Uncle George.

IV

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POURTRAIT BY GEORGE AUGUSTIN, COLLECTION OF THE SUPREME COURT

Lewis F. Powell, Jr. shared an investiture ceremony with his new colleague, William H. Rehnquist who had also been nominated to the Court from the state of Virginia.

My name is Lewis Franklin Powell. I was born in Suffolk in 1907, and grew up in Richmond where my father owned a small business. My college and law school were also in Virginia, both at Washington & Lee. In 1934, I joined the old and respected firm of Hunton & Williams, and for 37 years that was my professional home. During World War II, I enlisted in the old Army Air Corps serving under the great General Carl Spaatz. I played a key role in the ULTRA unit which broke the German Command code. I truly believe that we helped shorten the European War and saved thousands of lives. After the War I returned to the firm, and ultimately become a name partner during a time of great growth. I mostly advised business clients, particularly about the legal implications of their strategic decisions. My *pro bono* work included chairing the committee which revised the Richmond City Charter. And I chaired the city school board during the aftermath of *Brown v. Board of Education*, when many Virginia public schools were closed. Professionally, I was at a peak. I even became President of the American Bar Association. At precisely the time when I was anticipating a more relaxed schedule and retirement, I heard that my name was on a short list for appointment to the Supreme Court. I firmly told the Attorney General to take me off the list. But then, in 1971, President Nixon called me and virtually insisted that I join the Court. I was 64 years old. With great reluctance, I accepted.

Of course in the 20th century, the Court was vastly different from the days of Justices Blair and Washington. There was no more circuit riding and the Supreme Court

was now a true constitutional court. The Justices had great discretion in choosing our cases, and many of those cases had us trying to avoid political quicksand. The Justices were all conscientious but often the press and the public at large did not really understand our roles or our limitations.

What did they say of me? I was called a moderate, a “swing vote” between liberal and conservative blocks on the Court. People sometimes called me an “honest broker.” I saw it differently. I saw myself as a common law judge trying to find middle ground between ideological extremes. That meant I was sometimes inconsistent, but I was not trying to formulate a grand constitutional vision. I was simply trying to apply a lawyer’s common sense to complicated problems. I like to think that most of the time, that worked.

When I retired in 1987, I was almost 80. I was touched by the genuine respect expressed in the press, and by my colleagues. I died in 1998 at the age of 90 and am buried in another of Virginia’s holiest places, Hollywood Cemetery in Richmond.

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So there it is; three Virginia Justices each serving in a different era. Each of them a scholar, each of them a fine lawyer, each of them bringing a gentle moderation and genuine wisdom to the issues of the day.

Today, the Supreme Court is sometimes criticized as too political. Confirmations have become tiresome exercises of partisan rancor. Justices are accused of having an agenda shared with an appointing president. Whether the criticism is accurate or not I leave to you to decide.

But if the criticism is in fact descriptive of a real problem, the remedy is clear. The lives of Justice Blair, Justice Washington and Justice Powell suggest it. We simply need a Court with nine Justices from Virginia!

* Professor James B. O’Hara is Chairman of the Society’s Publications Department



COURTESY OF THE HOLLYWOOD CEMETERY

Justice Powell is buried in the beautiful Hollywood Cemetery in Richmond, Virginia. While his own grave is marked by a fairly plain stone monument, the cemetery has many graceful sculptures such as the one above.

Father Chief Justice

Father Chief Justice: Edward Douglass White and the Constitution, a play centering on the life and accomplishments of Chief Justice Edward Douglass White, was staged on March 8, 2011 at the Coolidge Auditorium of the Library of Congress.

Paul R. Baier, Professor of Law at Louisiana State University, is the author of the play and he himself acted in a key role. Chief Justice White was played by Charles J. Cooper, a Society Trustee and member of the Executive Committee. Prominent members of the District of Columbia and Louisiana Bars filled out the cast as Justices Oliver Wendell Holmes, Louis D. Brandeis and John Marshall Harlan. Roberta I. Shaffer, Law

Librarian of Congress, acted as Holmes' wife Fanny. Approximately 400 people attended the presentation including Executive Director David Pride and several members of the Board of Trustees.

Father Chief Justice: Edward Douglass White and the Constitution was written by Professor Paul Baier and the play has been in production for 14 years. It premiered in Thibodaux, Louisiana, the birthplace of White, on March 8, 1997. Much of the play focuses on the interaction between White, referred to as "Confederate Soldier Boy of Bayou Lafourche," and Oliver Wendell Holmes, Jr., referred to as "Union Blue Coat of Boston" to underscore the fact that the two Supreme Court Justices had served as young men on opposing sides during the Civil War.

Edward Douglass White was the first Justice actually serving on the Court when he was appointed Chief. Initially named an Associate Justice by President Grover Cleveland in 1894, he was subsequently nominated as Chief Justice by President William Howard Taft in 1910.

Ironically, upon White's death in 1921, former President Taft succeeded him.

While generally forgotten now, White was deeply respected in his own day. His most enduring legal legacy

has been the "Rule of Reason" interpretation of the Sherman Anti-Trust Act. While not considered a great administrator, he was an affable and friendly man, popular with the other Justices and well thought of in the community at large. He is the only Louisianan ever to sit on the Supreme Court, and at the time of his appointment, only the second Catholic ever to serve.

A Society member recently inquired about the

large bronze statue of White by Bryant Baker now placed on Royal Street in New Orleans. The inscription below the statue spells White's middle name as Douglas—without the second "S". The spelling of the Chief Justice's middle name

has been something of a mystery to scholars. His father, who was governor of Louisiana, did not add the extra "S", while the Chief Justice apparently always did. Perhaps this was simply his way of distinguishing himself from his father without adding "Junior" to his signature. William D. Reeves in his book *Paths to Distinction* notes that a political figure named Edward Douglas was friendly with the White family and apparently both Governor White and his son were named after him. Interestingly enough this Edward Douglas in contemporary records sometimes has his name spelled with one "S" and sometimes with two.



Society Trustee Charles J. Cooper (left) played the part of Chief Justice White in the production. Paul Baier (right), the author of the play, also appeared in the play.

PHOTO CREDIT COURTESY OF PAUL BAIER



COLLECTION OF THE SUPREME COURT OF THE UNITED STATES

Although his father, for whom Chief Justice White (above) was named, did not append the additional "S" to their shared middle name, the Justice regularly signed his name using it.

Rembrandt Peale's Lithograph Portrait of George Washington

By Franz Jantzen*

In 2009, the Supreme Court acquired a lithograph portrait of George Washington, made in 1827 by Rembrandt Peale (1778-1860). The print has a particularly important place in the history of American portrait printmaking, and is still in its original French Empire-style frame, which has recently been restored. The purchase was made possible with funds provided by the Supreme Court Historical Society.

While the Supreme Court generally collects objects directly related to Justices and the Court, several things make this particular print of President Washington a natural fit for the Court's collection, the most important being its close relationship to the Court's own portrait of Chief Justice John Marshall, also by Peale, which hangs in the East Conference Room. Both are from a very small series that have become known as Peale's "porthole" portraits. It is likely that Peale intended to portray a series of prominent Americans using this unique motif, but he ultimately painted only two in this way: President Washington and Chief Justice Marshall. (A third "porthole" portrait, of Baltimore businessman John Oliver, is at the Maryland Historical Society.) Of these, the painting of Washington is the only one to have been made into a lithograph, and to tell the story of the lithograph one must first begin with the story of the painting.

Rembrandt Peale was born into a family of artists, and at the age of 17 he had the good fortune to paint Washington's portrait from life alongside his father, the well-known painter Charles Willson Peale. This privilege made a lifelong impression on him, and nearly 30 years later, by then a successful artist in his own right, he decided to paint Washington again. With the Revolutionary War era fading into memory, Peale asserted that, as the last living painter to have painted Washington from life and who was still at the height of his artistic powers, he alone was a crucial bridge between past and present. This gave him the ambition and

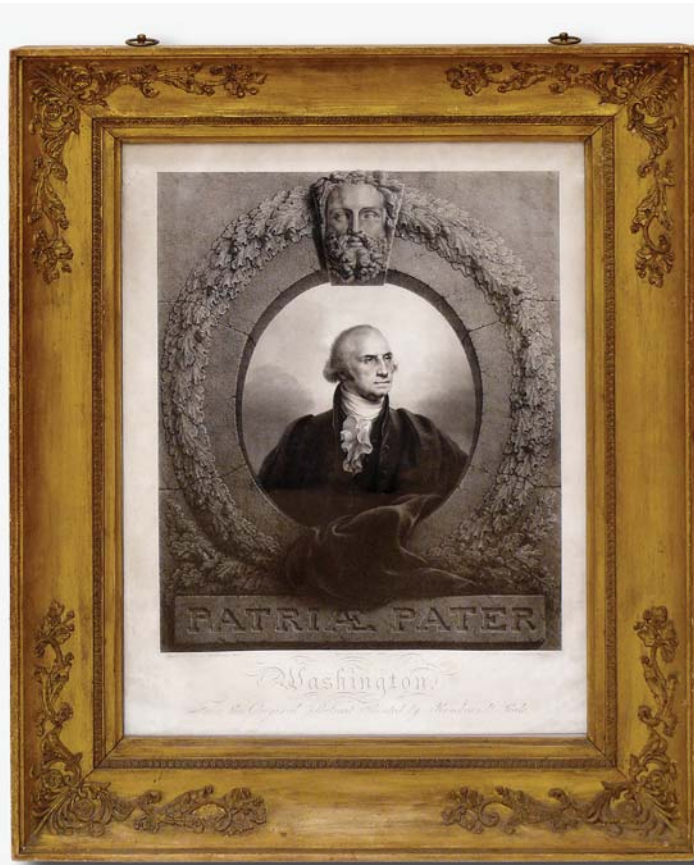
responsibility to aim for nothing less than "the standard National Likeness" of Washington which would transcend all others.

To this end he sequestered himself in his Philadelphia studio for three months, much to the consternation of his wife. The bold, new portrait of Washington that emerged in early 1824 had no precedent in American art, depicting its subject behind a trompe-l'œil porthole of stone with dramatic, ethereal clouds of smoke swirling behind him, the Roman god Jupiter in the keystone above and "PATRIÆ PATER" ("Father of His Country") carved in the tablet below.

To underscore the painting's accuracy and thus the legitimacy of his ambitions, Peale solicited testimonials from men who had known Washington, including Associate Justice Bushrod Washington and Chief Justice Marshall. Both were impressed. Marshall commented upon viewing it that, "It seems as if I were looking at the living man....It is more Washington himself than any Portrait of him I have ever seen." Peale fervently tried to sell the portrait to Congress for exhibition in the U.S. Capitol, but Congress was reluctant to commit the funds. (It would not be until eight years later, in 1832, that they would purchase it to commemorate the 100th anniversary of Washington's birth.)

In 1827, and still without a buyer for his Washington painting, Peale made the unusual decision to produce a lithographic version of it. He would then be able to print multiple copies, the sale and distribution of which would both provide income and help further his goal of establishing this image of Washington as a new standard likeness.

Peale was the first prominent American painter to learn the relatively new printmaking process of lithography, in which one draws with a crayon on stone to produce a drawing-like image which is capable of both crisp detail and subtle shading. Using this new process, Peale himself



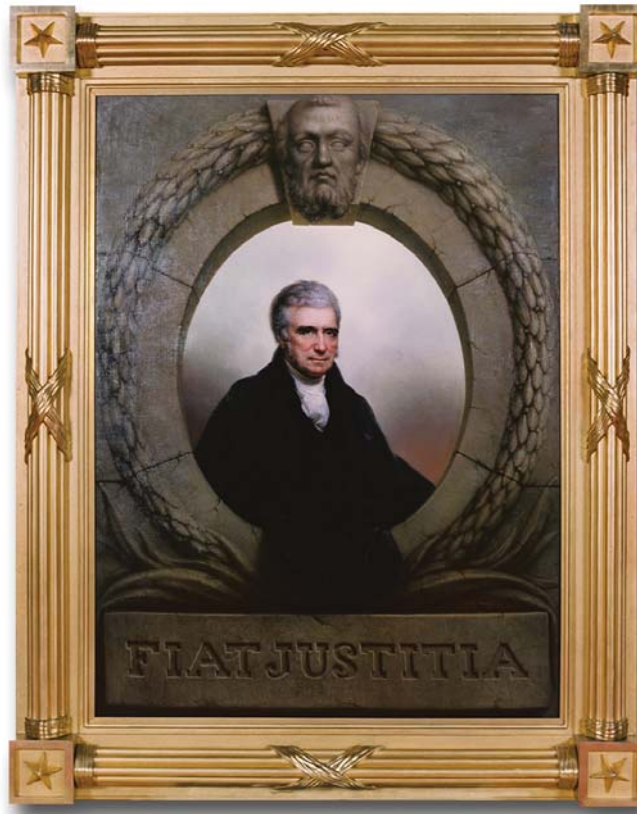
The Society recently purchased this lithographic portrait of George Washington by Rembrandt Peale and provided it to the Collection of the Supreme Court of the United States

GEORGE WASHINGTON, BY REMBRANDT PEALE, 1827 (LITHOGRAPHIC PRINT ON PAPER, 19 1/4" X 15 1/8"), COLLECTION OF THE SUPREME COURT

redrew the portrait on stone, rather than passing it on to another printmaker. The resulting lithograph became a celebrated success far sooner than the painting, and won the prestigious Franklin Institute's highest honor that same year for "...the best specimen of American lithography ever seen by the committee on fine arts – a silver medal."

It is ironic that such a celebrated print which was to disseminate a new standard likeness of Washington is also relatively rare. In 1970 a Peale scholar was able to locate six extant prints, and with the internet as an additional tool, this author was barely able to double that. Thus, far more paintings of this "porthole" portrait of Washington exist than lithographs, since Peale is known to have painted an astounding 79 subsequent versions in oil after the first one in 1824. Peale's attempt to disseminate his likeness of Washington through sheer repetition is itself an entirely unique project in the history of American, and probably European, art.

"JOHN MARSHALL" BY REMBRANDT PEALE, C. 1834 (OIL ON CANVAS, 89 1/2" X 71 1/2"), COLLECTION OF THE SUPREME COURT



This portrait by Peale of John Marshall was a companion piece to the portrait of George Washington that appears in the lithograph recently obtained for the collection. They used to hang opposite one another in the US Capitol Building.

With his lithograph of Washington, Peale became the first prominent American artist to produce a print version after his own painting. Because of his reputation and the acclaim he received from this print in particular, other artists were quickly drawn to lithography. The idea of producing affordable versions in multiple after a single painting thus established a familiar pattern that continues today. With new developments in lithography and chromolithography, and the popularity of printmakers who adopted these new printing methods, such as John James Audubon and Currier & Ives, a new age of American printmaking had begun which would continue to flourish throughout the mid-19th century.

**Franz Jantzen is the Collections Manager in the Office of the Curator of the Supreme Court of the United States*

WANTED

In the interest of preserving the valuable history of the highest court, The Supreme Court Historical Society would like to locate persons who might be able to assist the Society's Acquisitions Committee. The Society is endeavoring to acquire artifacts, memorabilia, literature and any other materials related to the history of the Court and its members. These items are often used in exhibits by the Court Curator's Office. If any of our members, or others, have anything they would care to share with us, please contact the Acquisitions Committee at the Society's headquarters, 224 East Capitol Street, N.E. Washington, D.C. 20003 or call (202)543-0400. Donations to the Acquisitions fund would be welcome. You may reach the Society through its website at www.supremecourthistory.org

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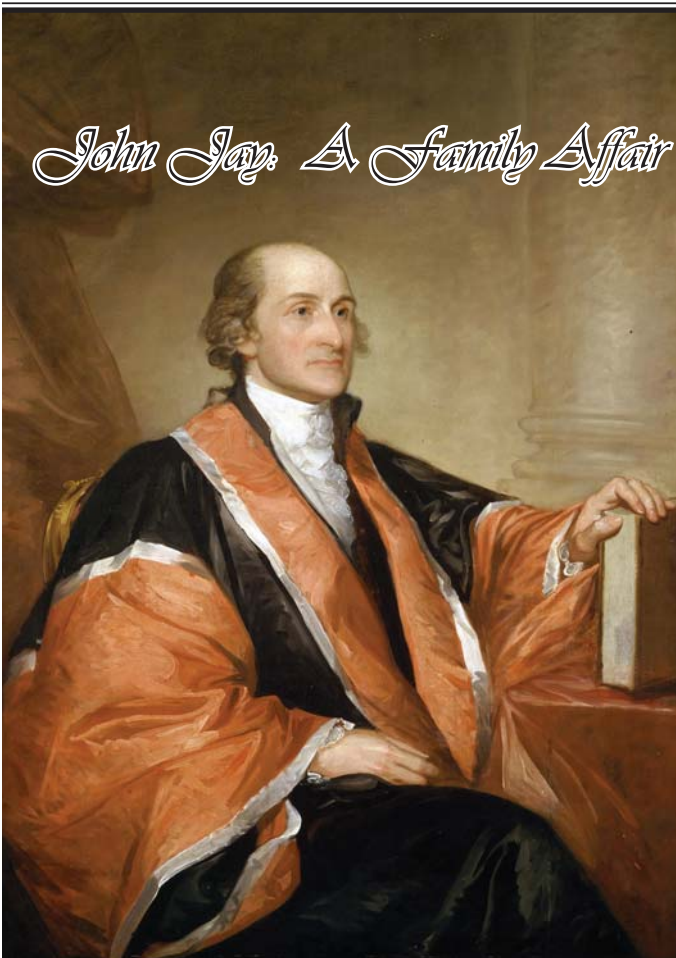
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**Nominated From New York:
The Empire State's Contributions
To the Supreme Court Bench**

Lecture by Walter Stahr, Esquire
Readings from letters between John and Sarah Jay
Janet M. Wedge, Louise North
&

Hon. Albert M. Rosenblatt
Wednesday, May 4th, 2011
Reception and Registration at 5:30 PM
Program at 6:30 PM

Association of the City Bar of New York Building
42 W. 44th Street,
New York NY 10036

The series Nominated From New York: The Empire State's Contributions to the Supreme Court Bench focuses on the state's many contributions to the Supreme Court Bench. Nominations from the state of New York are not only numerous, but extremely diverse in character and include such "firsts" as the first Portuguese American appointed to the Bench (Cardozo), the first African American (Marshall) the first Italian American (Scalia) and the first Hispanic American (Sotomayor).

This program is cosponsored by the Supreme Court Historical Society and the Historical Society for the Courts of the State of New York. Further information about the program is available by accessing the websites for either of the sponsoring organizations.

supremecourthistory.org
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