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Christopher Tomlins

## PURSUING JUSTICE, CULTIVATING POWER

*The Evolving Role of the  
Supreme Court in the  
American Polity*

### Inside

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The media blitz surrounding recent Supreme Court nominees highlights the pivotal role that the highest Court is perceived to play in the contemporary environment. Yet throughout its history, the Supreme Court has not only made headlines with contentious decisions, it has also labored at times in relative obscurity. An authoritative guide to the history of this powerful judicial institution, *The United States Supreme Court: The Pursuit of Justice*, was recently published by Houghton Mifflin. Developed in cooperation with the American Bar Foundation and edited by **Senior Research Fellow Christopher Tomlins**, the volume offers a definitive portrait of the Court over its 200-year-plus life span.

Houghton Mifflin asked Tomlins to design and edit a book on the Supreme Court that would complement similar works it had already published on the history of the Presidency and of Congress. He then commissioned essays from eighteen top scholars of constitutional law and Supreme Court history. As Tomlins points out, the book is not only a scholarly reference tool but it also provides an accessible point of entry for the general reader who wants to acquire a better understanding of the Court. The history is brought vividly to life in a series of chronological chapters, organized by the terms of each Chief Justice, that describe the Court's internal workings and social and political

impact. Each chapter is self-contained, but together they provide a consecutive series of iterations of the Court over time. The book also has extensive appendices of reference information, including complete biographies of all Supreme Court Justices and the most complete accounting ever compiled of the Supreme Court's budget over the full period of its existence.

But Tomlins did not want to produce just a chronological overview. As critical as those essays are to the enterprise, he wanted that information supplemented with additional chapters that would speak to other aspects of the Supreme Court as it exists in American law and society. To that end, the book also includes essays that examine the origins of the Supreme Court in the constitutional and congressional debates of 1787–91; the relationship between advocacy and adjudication in Court practices; the role of the Court in American popular culture; and the place of the Court in American politics.

One essay that Tomlins finds of great interest is a study of the Court's material culture, a subject he also addresses in his introductory essay. Material culture in this context refers to the Court's built environment, the buildings that the Court has inhabited at various times, its ceremonies, its dress, its deportment—all the elements that

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Shari Seidman Diamond

## UNDERSTANDING THE EFFECTS OF UNANIMITY

### *Non-unanimous Verdicts and the Civil Jury*

Jury deliberations have been largely shrouded in mystery and penetrated only partially by jury simulation studies and post-trial surveys of jurors. Using a unique set of real jury deliberations, **ABF Senior Research Fellow Shari Seidman Diamond** has been analyzing the decision-making processes of actual juries. In one phase of this ongoing study, Diamond and her collaborators, **Professor Mary R. Rose** and **ABF Project Coordinator Beth Murphy**, argue that their analysis raises serious questions about the trend toward dispensing with the unanimity requirement in civil jury trials and suggests that the benefits of unanimity outweigh its costs.

Throughout most of the nineteenth century unanimity was a standard feature of the American jury trial. But exceptions were gradually carved out. At the present time, jury verdicts in felony trials must be unanimous in federal courts and in all states except Louisiana and Oregon. For civil cases, the unanimity standard is less pervasive. While Federal juries must be unanimous, only eighteen states require unanimity and another three accept a non-unanimous verdict after six hours of deliberation. The other states allow super-majorities of between two-thirds and five-sixths in civil cases.

Those who support the non-unanimous verdict assert that it “protects the jury from the obstinacy of the erratic or otherwise unreasonable holdout juror, decreases the likelihood of a hung jury, and reduces the costs associated with re-trying a case when the jury fails to reach a verdict,” the authors note. Critics claim that the non-unanimous decision rule “weakens the ability of jurors holding plausible minority viewpoints to be heard, undermines

robust debate, and threatens the legitimacy of jury verdicts.”

Scholars and judges who debate the merits of the unanimity standard, however, have not only focused primarily on criminal cases but they have also not had access to information about how actual juries deliberate when non-unanimous verdicts are permitted. By drawing on a unique set of 50 civil jury deliberations, the authors were able to examine the dynamics of the decision-making process when unanimity is not required. These deliberations were available for analysis because the Arizona Supreme Court allowed Diamond and her colleagues to videotape a series of civil trials and the deliberations of the juries for the purpose of evaluating an innovation that allowed juries to discuss evidence among themselves prior to formal deliberation. The court also provided copies of exhibits and other written documents that were part of the trial record, and further data were obtained from questionnaires administered to the jurors, the judge, and the attorneys at the end of the trial. Juries in civil cases in Arizona consist of eight jurors. Three-fourths, or six, of the jurors must agree to reach a verdict.

#### **Case Distribution and Verdicts**

The sample of 50 cases mirrors the overall distribution of case types in Pima County Superior Court. It consisted of 26 (52%) motor vehicle cases, 17 (34%) non-motor vehicle tort cases, 4 (8%) medical malpractice cases, and 3 (6%) contract cases. The issues in the tort cases ranged from common rear-end collisions with claims of soft tissue injury to severe and permanent injury or death. Plaintiffs received an award in 65% of the tort cases. Awards ranged from \$1,000 to \$2.8 million with a median award of \$25,500.

Of the 50 juries, 33 reached unanimous verdicts on all claims.

One case ended in a hung jury. The remaining 16 cases ended with at least one holdout on at least one claim. Among the juries that reached non-unanimous verdicts, there were 31 holdouts on at least one claim or on the verdict involving one of multiple plaintiffs. In half of the holdout cases, two jurors held essentially the same minority position; in five trials involving holdouts one juror was the lone

**By drawing on a unique set of 50 civil jury deliberations, the authors were able to examine the dynamics of the decision-making process when unanimity is not required**

dissenter. The remaining three juries had two holdouts, but they disagreed on different plaintiffs in the same case or in different directions on the same plaintiff.

#### **Active Participants**

In the deliberations of all 50 cases, the jurors were active participants, debating the evidence and evaluating competing accounts. "They closely scrutinized the claims of plaintiffs with a skeptical eye, applying commonsense norms of behavior and drawing on their own experiences to sort out the inconsistent claims," the authors report. The jurors relied on and tested their fellow jurors' impressions and corrected errors in recall and inference. They "expressed frustration with witnesses (and attorneys) who were unclear,

condescending, or evasive, and thus stood in the way of the jurors' efforts to separate the wheat from the chaff in the unfamiliar legal system where they had been involuntarily pressed into service." Revealing a practical bent, jurors were determined to come up with the right verdict and to resolve their differences in a timely manner, "consistent with what they viewed as their obligations as jurors."

#### **Referencing the Non-unanimous Verdict Option**

Even though jurors were aware that unanimity was not required, some juries were determined to resolve disagreements and arrive at a consensus verdict. In one case the defendant admitted negligence in causing an automobile accident, but the defense argued that the plaintiff's medical expenses were largely incurred as a result of pre-existing injuries. Seven of the eight jurors agreed on a modest award, but the eighth juror argued that the plaintiff's injuries were serious enough to warrant a much higher award. While the jurors realized that they did not need the eighth juror's vote, they continued to press her to accept the lower amount while she, in turn, continued to argue for a higher award. "When she ultimately agreed to join the others and accept the figure that was on the table, the jurors applauded at achieving the now unanimous verdict," the authors report. But it is not clear if a unanimity requirement would have motivated her to continue lobbying for a larger award, they note.

In some instances juries were unable to sway the holdouts, "but their deliberations reflected active debate between the majority and the vocal minority." In one case two jurors did not sign the verdict form, but they had actively participated in reconstructing and assess-

ing the events in the case "well before the jury attempted any vote or mentioned the quorum required for a verdict."

Many of the juries either never mentioned the option of non-unanimous verdicts or did so only when the verdict forms were being signed. "The majority of the juries, however, revealed the salience of

**The majority of the juries revealed the salience of the quorum required to reach a verdict by pointing it out early in the deliberations**

the quorum required to reach a verdict by pointing it out early in the deliberations," the authors report. In three-quarters (37) of the cases, at some point during deliberations, at least one of the jurors mentioned the size of the quorum required for a verdict; in 12 of those cases the quorum was mentioned within the first ten minutes. "Juries with eventual holdouts were twice as likely to have early mentions of the quorum rule (6 of 16) than juries that reached unanimous verdicts (6 of 33), raising the possibility that early attention to the non-unanimous decision rule undercut efforts in deliberations to resolve disagreement," the authors suggest.

#### **Deliberating Dissenters**

Even though jurors are aware that unanimous verdicts are not required, it is still possible that minority viewpoints might be considered during deliberations. Some juries, however, "did use the quorum requirement to suppress

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## Non-unanimous Jury Verdicts

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debate," the authors observe. In one case an early vote revealed that the majority of the jurors found both the plaintiff and the defendant to be partially at fault. But one juror sided with the defendant because he believed the plaintiff was solely responsible for the accident. The jurors were beginning to discuss damages when the bailiff entered the room. The foreperson asked if a juror who disagrees with the others can be excused. The bailiff replied that the juror has to stay. The foreperson then said to the juror: "All right, no offense, but we are going to ignore you." During the rest of the deliberations the dissenting juror participated sporadically but in the end "the group divided fault between the two parties without further participa-

**Since holdouts did not tend to favor the defense, the analysis does not support the prediction that plaintiffs are routinely disadvantaged by a unanimity requirement**

tion from the [dissenting juror] on the percent allocation or the total damage figure." Yet the minority juror's argument was acknowledged by at least one juror when comparative liability was being assessed so she had a continuing, although silent, impact on the outcome.

Whether jurors who were opposed to finding the defendant liable should then participate in discussions on damage awards presented a dilemma for some juries. In one case, two jurors voted against liability. When the jury went on to consider damages, the foreperson who had opposed liability expressed concern about whether he should participate in the discussion on damages. The other jurors assured him that he should. But when the debate over the size of the award became contentious, with the foreperson arguing that the amount favored by another juror was too high, the juror pointed out that the foreperson voted against liability and that it was not right that he should have a role in the monetary decision. The foreperson pointed out that he was part of the panel and that dissenting jurors have a voice in the decision.

What role a juror who favored a defense verdict should play in deliberations on damages is not clear, the authors point out. In most cases the decisions on liability and damages are legally independent "so in principle a juror should be able to accept the majority's decision on liability and be unencumbered by a reluctance to find the defendant liable when considering how much injury the plaintiff sustained." But jurors who do not see the plaintiff as a credible witness may be less likely to believe the plaintiff's testimony on damages as well as on liability. Also defense-oriented jurors may engage in strategic efforts to reduce awards in an attempt to achieve on liability. Jury instructions do not speak to this issue. "Thus, while the unanimity rule requires a give and take among jurors at each step of the deliberation process, the quorum rule permits, and does not guide, the variety of approaches

jurors may take to obtain a quorum," the authors observe.

### No Plaintiff Edge

The expectation that non-unanimous verdicts give plaintiffs an advantage assumes that holdouts are more likely to favor the defendant's view of the case. But the data in the 50 Arizona cases do not support the view that plaintiffs fare better if the holdouts are not needed to reach a verdict. There were fewer cases with holdouts (3) for a defense verdict on liability issues than for a plaintiff verdict (5.5). (Cases in which there were different decisions for two plaintiffs are treated as a half [.5] case.)

**When patterns of disagreement were examined, there was no evidence that the holdout jurors were advocating indefensible positions**

When the cases in which holdouts favored one side or the other solely on the issue of damages are added, a total of 6 cases had holdouts who would have found for the defense or given a lower award, while 6.5 of the cases had holdouts who would have found for the plaintiff or given a higher award. "Although a sample of 50 cases does not guarantee that a larger sample of cases would show the same pattern of results, it provides the best empirical evidence available on the positions taken by outvoted holdout jurors under a non-unanimity rule," the authors note. Since holdouts did not tend to favor the defense, the analysis does not

support the prediction that plaintiffs are routinely disadvantaged by a unanimity requirement.

Although holdouts do not systematically favor one side, they could represent extreme or unreasonable positions, the authors point out. If so, a non-unanimous rule could potentially improve jury decision-making by limiting the influence of those with irrational positions. On the other hand, "if holdouts empowered by a unanimous decision rule would actually have a salutary and appropriate moderating effect, non-unanimous jury verdicts might threaten the ability of the jury system to deliver grounded and predictable jury verdicts." While it is not possible to know how juries operating under a unanimity rule would have decided these cases, the researchers examined the holdouts "and their specific positions in these cases to analyze whether they represent extreme or indefensible stances that the jury may have been better off ignoring or discounting."

### Defensible Positions

Holdout jurors may be an impediment to effective deliberations if they hold unjustified views of the appropriate verdict and continually resist the arguments of the majority. The researchers "examined the holdout jurors for evidence of distinctive background characteristics and for indefensible positions taken during deliberations." The holdouts did not differ significantly from majority jurors on gender, race, age, education, or occupational background. The holdouts were also equally likely to have served on juries previously, to be selected as forepersons, and to speak as frequently as other jurors.

When the patterns of disagreement were examined, there was no evidence that the holdout jurors were advocating indefensible positions. "The disagreements did

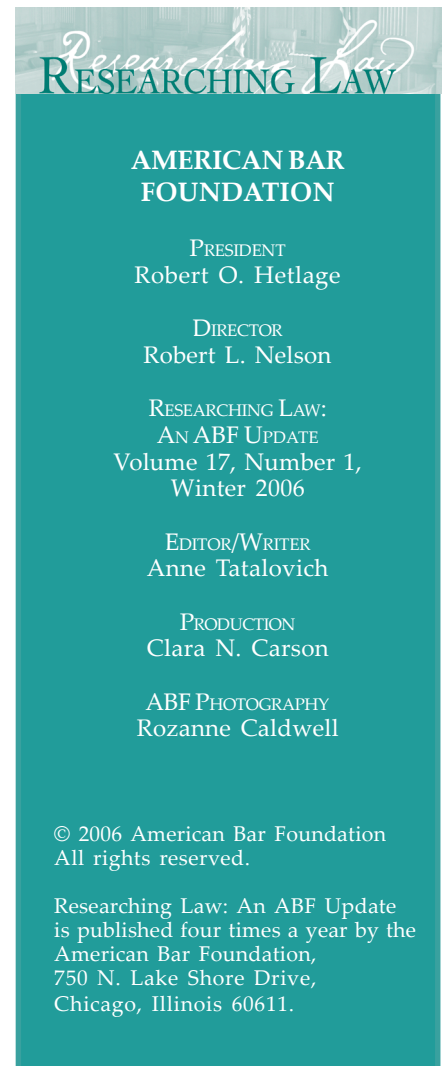
## On eight of the holdout cases, the judge would have reached the same verdict as the jury did, but on six of the holdout cases, the judge reached the same conclusions as the holdouts

not arise from confusion about the content of the evidence," the authors note, "but rather from conflict over how to interpret it and which witness to believe." The holdout jurors uniformly articulated reasons for their positions based on judgments about what constituted reasonable or proper behavior by the parties, inferences about what caused an injury, and assessments of how much injury or damage actually occurred, including the nature and amount of reasonable expenses the plaintiff incurred.

In all but one of the cases, divergent views about the credibility of witnesses were the defining factors that separated the majority from the holdouts. In the one case that did not involve credibility judgments, the disagreement centered on the meaning of a jury instruction, "but it was the holdout who accurately interpreted the somewhat confusing language in the instruction," the authors report. The case centered on the liability of the owner of a property where the plaintiff was injured. The majority determined that the owner was not liable because he did not believe the condition of the

site where the injury occurred was dangerous. The holdout argued that if the area was in fact dangerous, the defendant's belief that it was not a hazard was immaterial. When a vote revealed that the majority had sufficient votes for a defense verdict, there was no further mention of the meaning of the instruction. "Although the same outcome may have occurred if unanimity had been required, another possibility is that the need to obtain the holdout's vote might have stimulated a question to the judge to resolve the conflict on the meaning of the instruction," the authors suggest.

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EDITOR/WRITER  
Anne Tatalovich

PRODUCTION  
Clara N. Carson

ABF PHOTOGRAPHY  
Rozanne Caldwell

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The reactions of judges to these cases also suggest “that valuable perspectives may be lost on occasion when the position of the holdouts is weakened by a non-unanimous decision rule.” Each judge in the study completed a questionnaire while the jurors deliberated, indicating how they would have decided the case if it had been a bench trial. On eight of the holdout cases, the judge would have reached the same verdict as the jury did, but on six of the holdout cases, the judge reached the same conclusions as the holdouts. It is impossible to determine

**Majority jurors rated their deliberations as less thorough and their fellow jurors as less open-minded than did jurors on unanimous juries**

who was more accurate since there is no infallible measure of the “correct verdict,” the authors point out. At times, DNA may show that a criminal defendant could not have committed a particular offense, but such independent evidence is rare in both criminal and civil cases. “With that caveat in mind, the agreement between the judge and the holdout jurors on a substantial number of cases suggests that the conflict on some of these juries posed precisely the kind of challenge to the majority position that a deliberative process should address.”

**Premature Closure**

There is no way of knowing what verdicts the Arizona juries would have reached had unanimity been required, although it is likely that the majority would have prevailed in most of them, as it typically does. “Nonetheless, the deliberations provide evidence that the jury occasionally reached premature closure when the majority appeared to have the requisite number of votes, even when some of the votes were tentative.” In one case that involved two plaintiffs in an automobile accident in which the defendant admitted negligence, the dispute centered on whether the accident caused injury to the plaintiffs. The jurors discussed the issue of plaintiff #1’s pre-existing injuries, which made it difficult to attribute any of the alleged soft-tissue injury to the accident itself. An early vote revealed that only one juror favored a verdict for this plaintiff. The other jurors noted that they did not need a unanimous decision and began signing the verdict form. While the signing was occurring, one juror asked the holdout to explain her position, and two others showed some support for the holdout’s justification for a modest award, but it was pointed out that signing was already underway. Under a unanimity rule, deliberations would have given the holdout juror an opportunity to develop support from fellow jurors willing to listen to argument, the authors point out. “Moreover, the inclination [of the holdout juror] to find in favor of the plaintiff was not idiosyncratic: The judge in this case also would have awarded damages to the plaintiff.”

**Reassured by Unanimity**

Jurors’ views of the deliberation process provide other insights into the effects of unanimity. “If jury deliberations enable jurors to fully discuss the evidence, present their

arguments, and debate their different perspectives, jurors should come away from the experience with a favorable impression of the quality of their deliberations and the open-mindedness of their fellow jurors.” On a scale of 1 to 7 the jurors rated how thoroughly other jurors’ views were considered, how open-minded the other jurors were, and how influential they personally were during deliberations.

It is not surprising, the authors point out, that holdouts indicated they had significantly less influence than did majority jurors and jurors who reached unanimous verdicts. Majority and unanimous jurors saw themselves as equally influential. In contrast to the majority jurors, however, the holdouts rated their fellow jurors as significantly less open-minded and their deliberations as less thorough. These differing perceptions could be a result of the satisfaction derived from being on the winning side. But it does not account for a another difference: majority jurors rated their deliberations as less thorough and their fellow jurors as less open-minded than did jurors on unanimous juries. The presence of holdout jurors could explain why the majority viewed their fellow jurors as less open-minded but it does not explain why the majority jurors saw their deliberations as less thorough, the authors point out. Although some jurors on unanimous juries indicated in a post-trial questionnaire that they would have preferred a different verdict than the one the jury settled on, “jurors on the unanimous juries were, on average, significantly more enthusiastic about their deliberations than were the jurors who ended with a quorum verdict, regardless of whether the quorum jurors were among the holdouts or in the majority,” the authors note.

While the differing nature of the cases may explain this disparity, the three groups of jurors had similar ratings of how easy the evidence and instructions were, how easy it was to decide who should win, and how close the case was. As a result, the authors conclude, “the process of reaching a verdict is a likely explanation for the lower ratings of the perceived quality of the deliberation process when the case ended in a quorum verdict.” Unanimity signals confidence that a correct verdict was rendered and legitimizes the decision-making process. As one juror observed about the verdict his jury reached: “The fact that it was unanimous and that it was so quick tells them that we’re sure.”

### Costs and Benefits of Unanimity

Unanimity enhances public respect for jury verdicts and the jurors’ own impressions of the deliberation process but there may be costs that outweigh the benefits of unanimous verdicts, the authors point out. Hung juries may burden the civil justice system when one or two jurors can block a verdict. But hung juries in civil cases are quite rare. In federal courts, hung jury rates averaged 0.8% between 1980 and 1987. Even in jurisdictions with twelve-member juries required for unanimity, juries in civil cases rarely hang. For example, in Delaware the rate was 2.7% in fiscal years 1997–1999. In Cook County, Illinois the rate was 0.0% during 2003–2004. Under a unanimity rule, a civil hung jury rate of 3% is a generous assumption. If a non-unanimous rule cut that rate in half (another generous estimate), the drop would be 1.5%, bringing the remaining rate to 1.5%. While there is no systematic research on what occurs following a hung jury in civil cases, it is likely that most

of the cases settle. In criminal cases that result in hung juries, only one-third are retried, and half are disposed by plea agreements or dismissals. “If one-third of [civil] cases were re-tried, mirroring the criminal jury rate, an estimated trial savings of 0.5% would result—a real but very modest cost savings,” the authors argue.

The low rate of hung juries in civil cases stands in sharp contrast to the much more frequent occur-

**While a unanimity rule may produce a slight increase in hung juries and the potential for longer deliberations, these costs may be outweighed by the benefits of a tool that can stimulate robust debate and potentially decrease the likelihood of an anomalous verdict**

rence of majority verdicts on juries that do not require a unanimous verdict. Among the 50 juries studied in Arizona, 32% were non-unanimous. If the holdouts are neither eccentric or irrational, as the analysis suggests, “the failure to win them over may reflect a loss in the quality of debate within the jury even if they ultimately would agree to endorse the majority

position if unanimity were required,” the authors argue. Unanimity may also provide a counterbalance to the occasional erratic verdict. “The more jurors who must agree to endorse a verdict, the less likely it is that the verdict will be the product of a deviant sample of juror opinions.”

When unanimity is mandated, juries are likely to deliberate longer because more extensive debate is likely to occur. Although judges and lawyers can turn to other activities, the jurors cannot. “It is therefore of particular interest that jurors operating under a unanimity rule express greater satisfaction with their deliberations despite the greater effort required to reach consensus than to reach a quorum verdict.” While a unanimity rule may produce a slight increase in hung juries and the potential for longer deliberation, these costs may be “outweighed by the benefits of a tool that can stimulate robust debate and potentially decrease the likelihood of an anomalous verdict,” the authors conclude.

The authors report on this research in “Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury” *Northwestern University Law Review* (forthcoming.)

In addition to her affiliation with the ABF, **Shari Seidman Diamond** is Howard J. Trienens Professor of Law and Professor of Psychology, Northwestern University Law School. Mary R. Rose is Assistant Professor of Sociology and Law, University of Texas at Austin. Beth Murphy is Coordinator of the Civil Jury Research Project at the ABF.

project how the Court desires to be seen. "It has always seemed to me that quite apart from the opinions that it offers, a great deal of the Court's authority lies in the very appearance it projects," Tomlins suggests. Occasionally a particular opinion will galvanize popular attention, and pundits and the media can become quite obsessed with the Court and its activities, he notes. But it is not clear how far that obsession with cases extends into the public's general consciousness. Yet it is likely that a large

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proportion of the populace, while perhaps not able to name a Supreme Court Justice, would be able to describe what one looks like, and the image would be that of a relatively remote figure wearing black robes. And they would be able to describe the physical appearance of the Supreme Court as an imposing building with many columns and steps. "Those kinds of appearances are not simply the ephemera that accompany what the Court really does—hears arguments, makes decisions, writes opinions—they are important in their own right," Tomlins contends. The Court itself, he notes, invests a great deal of its time attending to appearances, "so I think it is fairly safe to assume that the Chief Justice and the Associate

Justices realize that how they appear is of some considerable importance to how they are perceived and, consequently, to the authority that they wield."

In the book's introduction, Tomlins references a famous incident involving President Andrew Jackson who essentially dismissed a Supreme Court ruling with which he disagreed, saying that the decision is stillborn for the Court has no power of its own to enforce it. "President Jackson knows full well that the Court has no particular capacities to enforce its decisions, in the absence of some agency of support, either popular clamor or Federal action," Tomlins observes. "So the more the Court can appear authoritative the more difficult it is for the Court to be ignored." Conventional wisdom tends to see judicial review as more or less fully implied in the Constitution, and the early interpretations of the Constitution established it in the ratification debates as an extensive power of the Court. But, Tomlins notes, revisionist scholarship has been quite critical of the claim that judicial supremacy has an established constitutional basis. Instead the revisionists argue that judicial supremacy in matters of constitutional interpretation is something that the Court has assiduously cultivated over a long period of time and did not really manage to set in stone until the second half of the twentieth century. Whether one agrees with this interpretation or not, Tomlins points out that even when institutions are invested with certain powers, "they can find that the capacity to exercise them essentially disappears over time unless they pay careful attention to promoting those powers." For Tomlins, this process of cultivating authority and power "is just as interesting as what the Court actually is doing in a constitutional, legal sense."

The Court also consciously

fosters an image of solemnity, decorum, and, most importantly, remoteness. "Unlike Congress, with its open, messy, partisan chaos, and unlike the presidency, with its brass-band dignities and occasional peep-show notorieties, the Supreme Court sits deliberatively apart in its palace, physically separated not only from the other institutions of government but also from the crudities of the Washington street by a mountain of steps and a phalanx of columns," Tomlins writes in the introduction. And these features are reflected in the ceremonial ritual that accompanies the justices' appearance for oral argument. They emerge from behind curtains, take positions at the bench, and then disappear behind the curtains at the end. "It is not a cozy or friendly representa-

**The Court's physical location in earlier days conveys the sense of an institution that is outside the circle of accepted, established authority**

tion of law in action," he observes. Their deportment "is intended to cultivate dignity, separation, and even secrecy."

The chapter on material culture demonstrates how the very design of the Supreme Court building, which is of fairly recent vintage, is intended to reinforce the power of the institution. The building is the only dedicated structure that the Court has occupied. Construction was approved as a result of intense lobbying efforts by Chief Justice William Howard Taft. The doors opened in 1935. "Anyone who has been in the building knows the



scale is monumental and intended to be so," Tomlins notes. The architecture guides the visitor up many steps, through columns, down massive halls that crush

**Ultimately, the decision was so polarizing that the presidential election of 1860 was essentially a referendum on Dred Scott and brought one of the opinion's most vocal critics, Abraham Lincoln, to office**

sound, and into an immense courtroom, in which the eye is focused on the center of the bench. While at times there have been different numbers of justices—as few as six and as many as ten—an even-numbered Court is always ceremonially less effective because its presiding Chief Justice is not a focal point, Tomlins points out. With a Court of nine justices, there is a clear center. "One goal of the book is to highlight these aspects of the Court's story that tend to get lost in a history that considers only doctrine," he observes.

At particular moments in time the Court emerges from the shadows and captures public attention for reasons that are not readily apparent. So, for example, in the late nineteenth century, images of justices and of the Court as a collective body begin to appear in advertising. In 1890, an advertisement for cod liver extract featured

photos of the Justices to implicitly convey the message that this product can be trusted. In the 1930s and 1940s the Supreme Court was very much an icon of popular culture, with representations of the justices prominent in musical stage productions and movies.

The chapters that review the history of the Court under each Chief Justice bring to light aspects of the Court's development that even those readers attuned to the institution's evolution may not vividly recall. The opening chapter, which focuses on the founding era, "is very persuasive in emphasizing the lack of thought given to the position of the Supreme Court in the federal system," Tomlins points out. The second chapter, which covers the early courts before the Marshall era, demonstrates how quickly the Court became isolated on a controversial issue. In *Chisolm v. Georgia* (1793), the Court affirmed the jurisdiction that allowed a citizen of another state to sue the state of Georgia. The Court was following the letter of the Constitution in holding that citizens could enter actions against states in which they did not reside. The decision was not popular, and in just two years the Eleventh Amendment to the Constitution was ratified, eliminating federal jurisdiction over suits against states undertaken by citizens of other states. The case illustrates the comparative weakness of the Court as an institution during this period. It is also interesting to note where the Court was physically located during its early years, Tomlins observes. The Court, like the other branches of the federal government, was situated first in New York and then in Philadelphia, and its space was quite modest. In New York, \$50,000 was appropriated to refurbish accommodations for Congress, but the Court was allocated just \$500. In both New York and Philadelphia the Court shared space with local courts.

When the federal government moved to the District of Columbia, the Court met initially in a Congressional committee room. When it finally got space of its own, it was housed in the basement of the Capitol. The Court's physical location in earlier days conveys "the sense of an institution that is outside the circle of accepted, established authority," Tomlins notes.

After the precarious founding period, the following eras of the Court's history are characterized by a still cautious but nonetheless cumulative building of authority, Tomlins observes. Yet there are

**One motif that is evident throughout much of its history is a blurring of any clear-cut division between the Court and political institutions**

times when the Court is very much a flashpoint. The chapter on the Taney Court ends with the resounding fiasco of *Dred Scott*. Chief Justice Roger Taney's sweeping opinion in the 1857 case sought to forever deny any rights to African Americans, slaves or freemen. Yet it took a little while for the heinous nature of the decision to sink in. "Not everyone rounds on Taney in disgust," Tomlins points out. Among northern Democrats who are not opposed to slavery, the decision is a rallying point and Taney's opinion is printed and distributed in pamphlet form. Ultimately, however, the decision was so polarizing that the presidential election of 1860 was essen-

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tially a referendum on *Dred Scott* and brought one of the opinion's most vocal critics, Abraham Lincoln, to office.

It was not intended that the book provide a distinctively new interpretation of the Supreme Court, Tomlins points out. "What you gain from the historical chapters is an authoritative description and analysis of the Court's evolving place in the federal system." Certain themes emerge from this chronology of the Court's activities, he notes. One motif that is evident throughout much of its history is a blurring of any clear-cut division between the Court and political institutions. The recruitment patterns reveal that Presidents frequently nominated

**As part of this juridicalization of the Supreme Court, legal elites have become very dominant in setting the terms of who is an appropriate nominee**

candidates for Chief Justice who were members of their administration, as, for example, was the case when Adams appointed Marshall, when Jackson appointed Taney, and when Lincoln appointed Chase. There is no expectation of prior service as a judge. Rather, "there is an impression of relatively tight political-legal elites with Chief Justices recognized as explicitly political appointments during these periods." One overarching theme that unfolds is "the extent to which judicial supremacy is to some degree an artifact of the later half of the twentieth century." And

**Some of the most successful Chief Justices were not great legal minds but they were effective managers, and the Courts they led were very influential**

this is also the period when the legal professionalization of the Court begins fully to take hold, and the notion of tight legal-political elites is replaced by an image of the elite legal professional as the presumptively qualified justice. "That is quintessentially the case in the last set of Supreme Court nominations," Tomlins suggests. Judge Roberts and Judge Alito are sold as total lawyers, and their elite legal credentials trump any earlier expressions of opinion. "As part of this juridicalization of the Supreme Court, legal elites have become very dominant in setting the terms of who is an appropriate nominee," Tomlins observes.

The crucial role of the Chief Justice has long been recognized but the most important attribute is not necessarily a keen intellect, Tomlins points out. "The long-term success of any Chief Justice is going to be determined not so much by their capacity to lead the Court intellectually but by their ability to manage the Court's business and prevent associates from wreaking havoc on the Court, as, for example, Justice Felix Frankfurter was prone to do." Some of the most successful Chief Justices were not great legal minds but they were effective managers, and the Courts they led were very influential.

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Christopher L. Tomlins received a Ph.D. in American history from Johns

Hopkins University.

*The United States Supreme Court: The Pursuit of Justice* can be purchased at the ABA Web Store. ABA members receive a discount. See page 11.

**Contributors:**

Paul Finkelman, University of Tulsa School of Law

William E. Forbath, University of Texas School of Law

David C. Frederic, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., Washington, D.C.

Howard Gillman, University of Southern California

Stephen E. Gottlieb, Albany Law School

Charles F. Hobson The Papers of John Marshall, College of William & Mary

Wythe W. Holt, Jr., University of Alabama School of Law

Maeva Marcus, Documentary History of the Supreme Court of the United States, 1789–1800

Lucas A. (Scot) Powe, Jr., University of Texas School of Law

Linda Przybyszewski, University of Cincinnati

Norman L. Rosenberg, Macalester College

William G. Ross, Cumberland School of Law, Stanford University

Katherine Fischer Taylor, University of Chicago

Christopher Tomlins, The American Bar Foundation

Mark Tushnet, Georgetown University Law Center

Melvin I. Urofsky, Virginia Commonwealth University

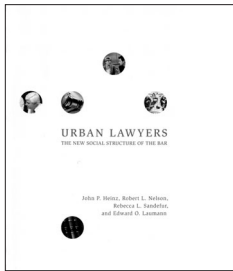
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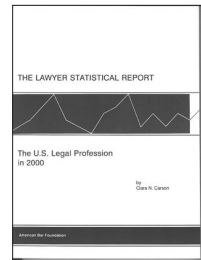
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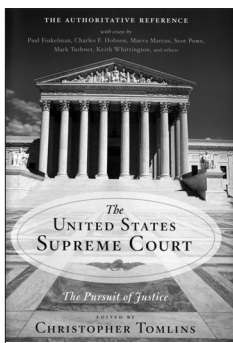
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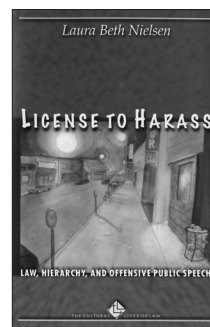
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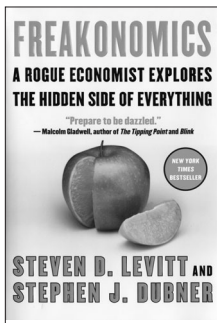
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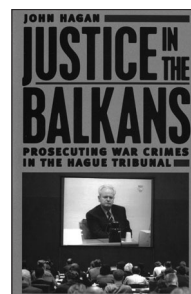
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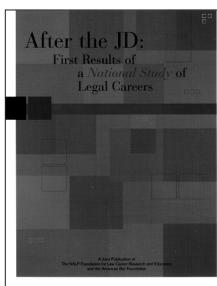
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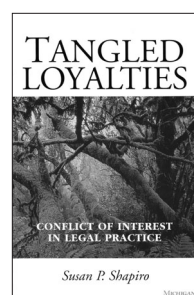
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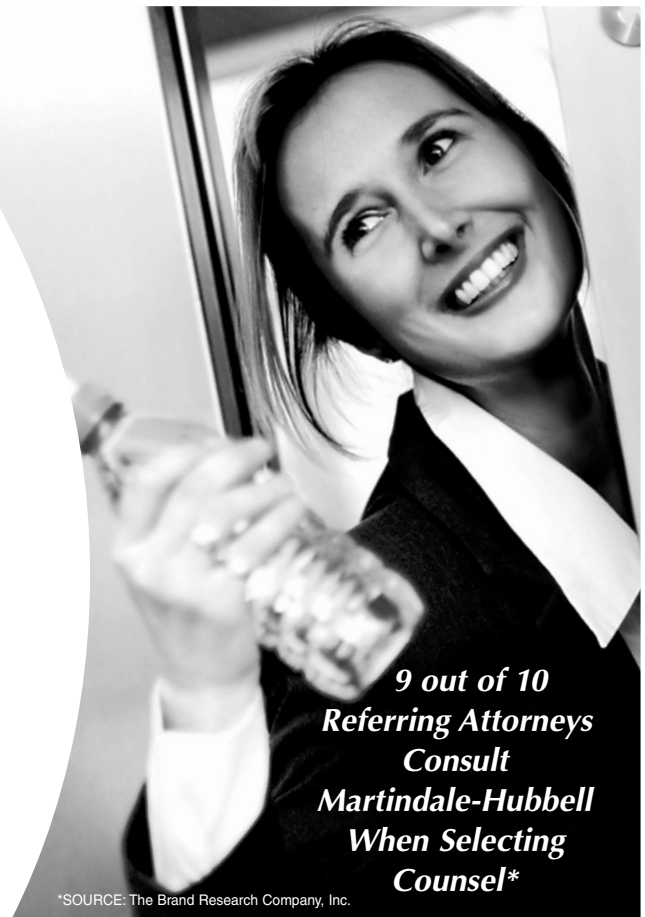
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