On Campus

Two Centuries of 'Columbian' Constitutionalism

By
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Nine justices of the United States Supreme Court, including three chief justices, have had strong ties to Columbia, and nearly all of them played a substantial role in shaping American constitutionalism.

The nine justices with strong Columbia ties are John Jay, H. Brockholst Livingston, Samuel Blatchford, Charles Evans Hughes, Benjamin Nathan Cardozo, Harlan Fiske Stone, Stanley Reed, William O. Douglas, and Ruth Bader Ginsburg.

In assessing the collective contribution of the Columbia justices, two salient facts stand out. First, the Columbians were broadly engaged in public life. Their careers as justices followed, and, in two cases, interrupted, their extraordinary accomplishments in other fields. Second, to a remarkable degree, one can trace a distinctly Columbian approach to constitutionalism. As against what might be understood as a Jeffersonian commitment to a nation of yeoman farmers, the Columbian vision—traceable to Ur-Columbian Alexander Hamilton, who studied at Columbia from 1773 to 1774—celebrates America as a mercantile republic in which a strong central government fosters the national economy while the federal judiciary protects individuals against the threat of majoritarian tyranny.

First, consider the richly varied career paths of some of the Columbian justices.

Before taking the oath as the first chief justice of the United States, John Jay had a distinguished record of service to the young nation. He was a delegate in both the first and second Continental Congresses, having been elected president of the latter in 1779. He co-authored the Federalist Papers with fellow Columbian Hamilton and Virginia’s James Madison. He was instrumental in negotiating the Treaty of Paris in

1783, and even while serving on the Court, he continued in a diplomatic capacity, negotiating the eponymous Jay Treaty in 1794. Jay resigned from the Court in 1795, becoming governor of New York. Although Chief Justice John Marshall is generally credited with building the Supreme Court into the institution it became, Jay's leadership in its early years was vital because, among other things, he lent his considerable prestige to the Court.

Jay's model of broad engagement in public affairs was carried forward especially by the twentieth-century justices. Charles Evans Hughes, like Jay before him, served as governor of New York. He was first appointed to the Court as an associate justice by President Taft in 1910. Hughes resigned from the Court to run for president in 1916. He won the Republican nomination but lost the general election. Also like Jay, Hughes served his country in international matters, as secretary of state from 1921 to 1925, and then as a delegate to the Permanent Court of Arbitration and on the Permanent Court of International Justice. Hughes was reappointed to the Supreme Court, this time as chief justice, in 1930. He served in that capacity until 1941.

Although Benjamin Nathan Cardozo wrote important opinions as a justice of the Supreme Court, like his Columbia forebears, he is equally if not better known for his other contributions. Cardozo served as an associate justice of the Supreme Court for only six years. His well-deserved reputation as one of the greatest common-law judges in American history stems from his fifteen years as a judge, the last six as Chief Judge, of the New York Court of Appeals, the highest court of the state. His opinions in the 1916 case of *MacPherson v. Buick Motor Co.* and the 1928 case of *Palsgraf v. Long Island Railroad*, concerning, respectively, the duties owed by product manufacturers to their foreseeable users, and legal causation, permanently reshaped tort law. His 1921 book, *The Nature of the Judicial Process*, traced a middle path between the formalism of previous generations and the thoroughgoing skepticism of some of his contemporaries in the legal realist movement. It remains the single best exposition of how a judge's decisions are constrained but not fully determined by law.

Following the Columbia pattern, Harlan Fiske Stone was also a Renaissance man of the law. For a quarter of a century, Stone simultaneously maintained an active private practice of law while serving as a professor and later dean of Columbia Law School. His moonlighting did not undermine his effectiveness. The "Stone-Agers," as Columbia graduates from the period of Stone's deanship fondly call themselves, report that Stone was personally acquainted with every student to pass through the

law school during his tenure. President Coolidge appointed Stone attorney general of the United States in 1924 and associate justice of the Supreme Court the following year. In 1941, President Roosevelt elevated Stone to the position of chief justice, in which he served until his death in 1946.

William O. Douglas was yet another Columbia polymath. As a law professor at Columbia and Yale, Douglas specialized in business subjects, which led to his appointment by President Roosevelt to the Securities and Exchange Commission, which he chaired from 1937 through 1939. As a justice, Douglas was best known for consistently championing the causes of underdogs, especially in civil rights cases. He served as an associate justice from 1939 through 1975, the longest tenure in the Court's history.

Like Stone and Douglas, Ruth Bader Ginsburg was a prominent legal academic before taking her seat on the bench. As a professor at Rutgers and Columbia, Ginsburg combined an interest in the technicalities of civil procedure with a trailblazing litigation clinic. In the latter capacity, she argued a series of cases establishing that the Constitution's Equal Protection Clause prohibits most forms of sex discrimination. Ginsburg's ingenious strategy relied on claims by men that official distinctions based on sex unfairly stereotyped both men and women. Ginsburg was appointed to the U.S. Court of Appeals for the District of Columbia Circuit in 1980, and became the second female justice of the Supreme Court in 1993. As a justice, Ginsburg is best known for her careful opinions in cases presenting technical questions of "lawyer's law" and her powerful opinion in the 1996 case of *United States v. Virginia*, invalidating the Virginia Military Institute's all-male admissions policy.

These brief biographical sketches of six Columbian justices show them to be important, sometimes towering, figures in the law and beyond. But what of my second claim—that there is a distinctly "Columbian" approach to constitutionalism? I cannot in this short space provide anything like a comprehensive proof of the point, but I do think I can make it plausible. I begin with a Columbian patron saint who did not serve on the Supreme Court, Alexander Hamilton, for it was Hamilton who devised the arguments that we associate most closely with American constitutionalism in general, just as (I shall shortly argue) it was Stone who devised the argument that we associate most closely with modern American constitutionalism.

The two most enduring precedents of American constitutional law are *Marbury v. Madison*, decided in 1803, and *McCulloch v. Maryland*, decided in 1819. These cases respectively establish the power of judicial review and set forth a method for construing the Constitution broadly, as a flexible charter. They are widely understood as Chief Justice John Marshall's legacy, simultaneously building the young nation and the Court's role in the national government. Yet the central arguments of each case were clearly anticipated by Hamilton.

Marshall's argument for judicial review in *Marbury* proceeds syllogistically. (1) "It is emphatically the province and duty of the judicial department to say what the law is." (2) Because "the constitution is superior to any ordinary act of the legislature," when the former conflicts with the latter, "the constitution, and not such ordinary act, must govern the case to which they both apply." (3) And therefore the judiciary has the power to invalidate Acts of Congress as unconstitutional.

Marshall's syllogism has become canonical. Yet it is only a peculiarity of our precedent-based legal system that we do not credit the syllogism to Hamilton. In *Federalist* No. 78, he wrote:

"The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning. . . . If there should happen to be an irreconcilable variance between the [Constitution and a statute], that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute. . . ."

In *Marbury*, Marshall simply restated Hamilton's argument.

The same is true of *McCulloch*. At issue was the constitutionality of a federal statute creating the (second) Bank of the United States. Congress's enumerated powers include, among others, the power to tax, to spend, to coin money, and to regulate interstate and foreign commerce. The power to create a national bank is not expressly provided and the Tenth Amendment reserves "powers not delegated to the United States . . . to the States." At the same time, the last clause of Article I, Section 8, states that Congress may "make all Laws which shall be necessary and proper for carrying" out the expressly enumerated powers. The question posed in *McCulloch* was whether chartering a bank was necessary and proper to Congress's other powers or whether, on the contrary, it was reserved to the states.

Marshall's opinion in *McCulloch* upheld the bank for two principal reasons. First, he argued that it is in the nature of a constitution to serve only as the frame of government, with details to be filled in through experience. "We must never forget, that it is a constitution we are expounding," he famously declared. Second, Marshall thought that "necessary" as used in the necessary-and-proper clause, referred to "such powers as are suitable and fitted to the object" rather than just those that are "absolutely indispensable." The clause was meant "to enlarge, not to diminish the powers vested in the government." Thus, Marshall concluded: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

Like the argument in *Marbury*, Marshall's argument in *McCulloch* is a standard of the constitutional canon. Yet also like the argument in *Marbury*, it was fully anticipated by Hamilton. The validity of the (first) Bank of the United States had been hotly debated within the Washington administration, where Hamilton was secretary of the treasury. His argument, which prevailed, prefigured Marshall's.

In a 1791 opinion letter to the president, Hamilton began where Marshall would later conclude. He wrote "that every power vested in a Government . . . includes by force of the term, a right to employ all the means requisite, and fairly applicable to the attainment of the ends of such power; and which are not precluded by restrictions and exceptions specified in the constitution. . . ." So too did Hamilton's argument about the meaning of the necessary-and-proper clause prefigure Marshall's. Hamilton wrote that to adopt the narrow interpretation of the clause "would be to depart from its obvious and popular sense, and to give it a restrictive operation. . . . It would be to give it the same force as if the word absolutely or indispensably had been prefixed to it."

Judicial review and flexible, purposive interpretation—our Hamiltonian, and thus Columbian legacy—are the twin pillars of our constitutional edifice. It is thus not surprising that our most heated constitutional controversies have concerned their scope. For example, after *Marbury v. Madison*, the Supreme Court did not invalidate another act of Congress until its infamous 1856 decision in *Dred Scott v. Sandford*. And it was the Court's willingness to use its power of judicial review aggressively from the 1890s through the 1930s to invalidate progressive and then New Deal legislation that prompted the Court-packing crisis.

During that crisis, the leadership of another Columbian, Chief Justice Hughes, was critical in maintaining the Court's ability to function as an independent, co-equal branch of government.

In deciding cases, Hughes attempted to steer a moderate course. He refused to go along with the most conservative of his colleagues who viewed the Constitution as an engine of laissez-faire. For example, as an associate justice, Hughes dissented in the 1915 case of *Coppage v. Kansas*, in which the majority invalidated a Kansas statute that prohibited labor contracts in which employees, as a condition of keeping their jobs, were required to promise not to join a union. He acknowledged the importance of freedom of contract, but thought that the Kansas act was a reasonable restriction of that freedom.

However, as chief justice, Hughes sometimes voted against the New Deal. He wrote the majority opinion in the 1935 case of *Schechter Poultry Corp. v. United States*, the famous "sick chicken" decision. There the Court invalidated a provision of the National Industrial Recovery Act that gave the President unilateral authority to convert a trade group's private rules into federal law. The Court ruled (among other things) that the act exceeded the scope of Congress's power to regulate interstate commerce because it regulated intrastate activities that had only an "indirect" effect on interstate commerce.

Yet only two years later, in *NLRB v. Jones & Laughlin Steel Corp.*, Chief Justice Hughes wrote the Court's decision upholding the National Labor Relations Act against the charge that manufacturing—as distinguished from transportation and trade—is not interstate commerce. Although his opinion cited *Schechter Poultry* as authority for congressional power over manufacturing, in time, *Jones & Laughlin* came to be understood as a repudiation of *Schechter Poultry's* distinction between direct and indirect effects on interstate commerce.

Jones & Laughlin was decided just two weeks after *West Coast Hotel Co. v. Parrish*, another landmark opinion authored by Hughes. In *West Coast Hotel*, the Court abandoned a line of cases that had read the due process clauses of the Fifth and Fourteenth amendments as providing expansive protection for freedom of contract and the right of property.

Together, *West Coast Hotel* and *Jones & Laughlin* mark what is commonly known as the "switch in time that saved nine." And because Hughes, along with Justice Owen

Roberts, had been a “swing vote,” siding with the liberals in some cases and with the conservatives in others, he has sometimes been portrayed as having succumbed to political pressure. But careful scrutiny belies this picture.

As his dissent in *Coppage* illustrates, Hughes had long resisted reading the Constitution as a laissez-faire charter. And although *Jones & Laughlin* was a reversal from *Schechter Poultry*, it is worth noting that *Schechter Poultry* itself was a unanimous decision, garnering the votes of liberals such as Cardozo as well as the conservatives and swing justices. The anomaly that warrants explaining is *Schechter Poultry*, not *Jones & Laughlin*.

To the extent that 1937 marked a real switch, the best explanation is probably the one given by Hughes himself in *West Coast Hotel*. At the end of the opinion, Hughes remarked that, besides matters of technical legal doctrine, “[t]here is an additional and compelling consideration which recent economic experience has brought into a strong light. . . . We may take judicial notice of the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent despite the degree of economic recovery which has been achieved.” True to his Hamiltonian legacy, Chief Justice Hughes was willing to read Congress’s powers broadly to achieve the great aims of the nation.

If the modern understanding of the Constitution was conceived in 1937, it was fully born the following year. For while the 1937 cases established the proposition that Congress and the states would be granted substantial deference in regulating the economy, there remained the question of when the courts could properly overrule decisions taken by democratic means. Stone foreshadowed the answer in a famous footnote to the Court’s otherwise obscure 1938 decision in *United States v. Carolene Products Co.*

Writing for the Court, Justice Stone explained that the general principle of deference should not apply in three categories of cases: (1) laws infringing upon specific constitutional provisions such as those enumerated in the Bill of Rights; (2) “legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation”; and (3) laws directed at religious, national, racial, or other “discrete and insular minorities.”

The transformation of the Supreme Court from an institution that principally protected the wealthy to one that championed the rights of the voiceless would not

be completed until long after Stone's death in 1941, but it is no exaggeration to call his brief footnote in *Carolene Products* a blueprint for the next era of constitutional law. In it, Stone foretold: (1) the extension of most of the provisions of the Bill of Rights, which previously had only been applied to the federal government, to state governments as well; (2) the one-person-one-vote jurisprudence that would result in wholesale reapportionment of state legislatures; and (3) the long-overdue effort to disentrench American apartheid through landmark decisions such as *Brown v. Board of Education in 1954.*

The last three decades of constitutional law have been a struggle over the boundaries of judicial review bequeathed to us by Hughes, Stone, and the New Deal Court. Conservatives have lately shown less deference to Congress, invalidating, since 1995, provisions of the Brady Handgun Act, the Religious Freedom Restoration Act, the Gun Free School Zones Act, the Age Discrimination in Employment Act, the Violence Against Women Act, and the Americans with Disabilities Act. With one exception, each of these decisions has been by the same 5–4 margin. Justice Ginsburg has voted with the dissenters, affirming a broad principle of deference to Congress—in her view, the same broad principle that can be traced all the way back to the Marshall Court's adoption of Hamilton's reasoning in *McCulloch v. Maryland*.

At the same time, the Court continues to struggle over the meaning of the discrete-and-insular-minorities prong of Justice Stone's footnote. Justice Ginsburg believes that the constitutional principle of equal protection focuses on patterns of subordination. She would uphold most government programs of affirmative action for traditionally subordinated groups. Accordingly, Justice Ginsburg has dissented from the Court's decisions striking down race-conscious measures under what she regards as a misguided principle of color blindness. Meanwhile, she has persuaded her colleagues that when it reinforces gender stereotypes, sex discrimination offends the Constitution even though women are neither insular nor a minority.

What influence future Columbian justices will have on the course of constitutional law cannot be known. To this point, however, we can say that the story of Columbian justices in a real sense is the story of American constitutionalism.

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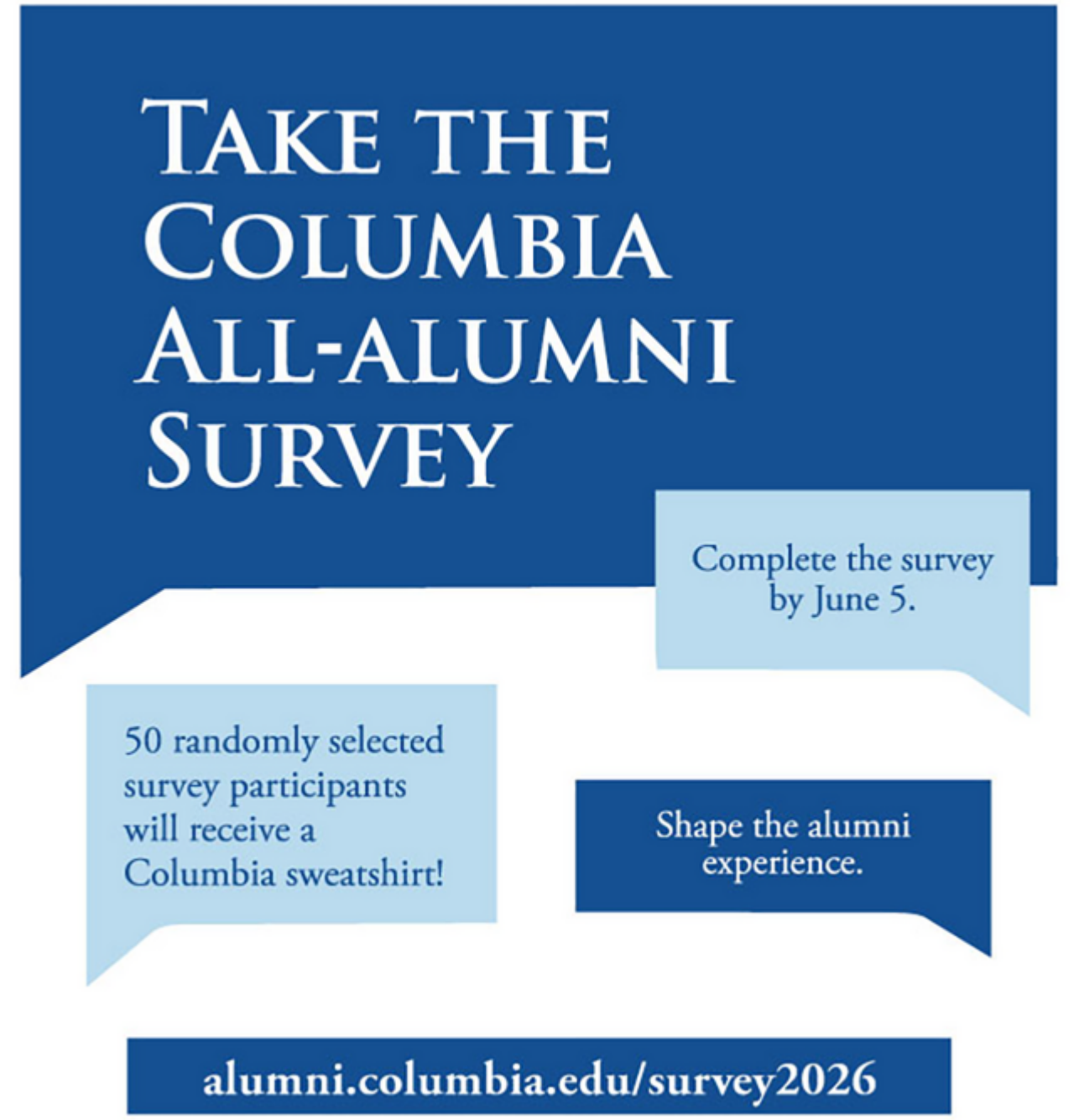

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