General Introduction

Stanley N. Katz

Kathryn Turner Preyer – Kitty to her friends – was one of the most admired legal historians of my generation, and surely the least well-known eminent scholar in the cohort. She was highly regarded by the legal history community not only for the series of stunningly original research essays she produced but because of her extraordinary capacity to befriend and nurture younger scholars in the field. But she never published a monograph, and historians tend to judge their peers by their books. This volume is our effort to put together the culminating volume she planned to write. The editors hope that this volume will introduce Preyer to the broad readership she deserved.

I was a latecomer to Preyer's specific academic field, early American legal history, having been trained as a colonial political historian. But it was my great good fortune to be selected as a Fellow of the Charles Warren Center at Harvard in its first year, and to meet Kitty Preyer, another Fellow. That was the year I was beginning to work in legal history, and Preyer took me under her wing. It is a wing I sheltered under for thirty-eight years. Only someone who worked with Preyer as a fellow scholar would know the distinctive way in which she brought the rest of us along. She was always patient, for of course she knew everything and we did not, but she was impatient when we made stupid mistakes. She let us know so in the bluntest of terms, and she knew how to ask the tough questions about what we were doing. She also expected us to engage ourselves in what she was doing, and she was not satisfied with simple-minded pieties – she wanted to know where we thought she had gone wrong. At the Warren Center, we talked about many things, and I have discussed a variety of topics (especially politics) with Kitty and Bob

Preyer over the years. But, above all, Preyer loved historical shop talk. She was a pro, and she taught me what it meant to be a pro.

After her death, Bob sent me the most up to date *curriculum vitae* he could find. She was not interested in self-promotion, so it is not surprising that the document dates from 1989. It is actually quite a lousy document of its type – her degrees (Goucher B.A. and Wisconsin Ph.D.) and teaching jobs (easy, since apart from a single year as an Instructor at Rockford College, she spent her entire career at Wellesley); five lines on various administrative assignments for the College over the years; four lines on fellowships; a page of major paper presentations; and two detailed pages of publications (none with a precise enough bibliographical reference that would have made it easy for a novice to find the article in the library!). As a professional, Preyer was concerned with teaching and scholarship.

What a fine and distinctive scholar she was. In Isaiah Berlin's terms, Preyer was a *hedgehog*. You will remember Berlin's definition:

> There is a line among the fragments of the Greek poet Archilochus which says: 'The fox knows many things, but the hedgehog knows one big thing'. . . . For there exists a great chasm between those, on one side, who relate everything to a single central vision, one system less or more coherent or articulate, in terms of which they understand, think and feel – a single, universal, organizing principle in terms of which alone all that they are and say has significance – and, on the other side, those who pursue many ends . . .[1]

Preyer's "one big thing" was the role of law in the creation of the American republic, and especially the role of judges in articulating that law. Everything she wrote over her long and productive career addressed that problem, and of course the choice of that problem resulted from her "single central vision" – that the rule of law, supervised by a competent judiciary, is the key to the success of democratic society. Her related sub-theme concerned the democratization of the criminal law in a constitutional regime. She sometimes personified the problem by analyzing judicial appointments, especially in her fine article on the selection of John Marshall as Chief Justice of the Supreme Court (Chapter 2 of this volume).

Preyer was of course a historian, not a lawyer, though she spent a year (1962–63) as a Carnegie Fellow at the Harvard Law School, which became very much a home away from home for her. A student of Merrill Jensen and Merle Curti's at the University of Wisconsin, she was particularly influenced by Merrill's devotion to the rigorous analysis of source

[1] Sir Isaiah Berlin, *The Hedgehog and the Fox* (1953).

materials and by both his and Merle's profoundly progressive understanding of the origins of our national state. Her dissertation – a work of scholarship that has never been replaced or surpassed in nearly fifty years – was a study of the Judiciary Act of 1801, a piece of legislation that is still one of the cornerstones of the federal judicial framework. In it, and in her later work, she displayed a dual competence in history and law, one of the first historically trained legal historians to do so. And, as she once said about Morton Horwitz:

> Considerable effort has been made to make the history of technical areas of law understandable to the nonlegally trained scholar, and to treat the law as one of the dynamics of historical change, while retaining, as the center of gravity, the internal technical life of legal doctrine.[2]

Merle and Merrill taught Preyer that style was related to content, and she never forgot. Hers was a style that I would call quietly magisterial – Hemingway meets Oliver Wendell Holmes.

Preyer was a political historian of the law who understood fully that law resides in a social and political system. Her earliest published essay, on John Adams's appointment of the "midnight judges," shows how skilled she was in contextualizing legal events:

> As a whole, the group of midnight judges reflected the relatively moderate political positions of the men who had selected them. They were not facsimiles of the fanaticism which had led the Federalists to prosecute the Whiskey Rebels and John Fries for treason and to enforce the Sedition Act with such vigor. One might have expected that some Republicans would even have sighed relief that Samuel Chase, Associate Justice of the Supreme Court, would ride the circuit no more![3]

Another of my favorite examples of Preyer's flair for context comes in one of her brilliant articles on the emergence of a distinctively American approach to criminal law. Consider these three Gibbonian sentences:

> Neither certainty nor proportionality characterized penal measures in the late eighteenth century to those who made the laws and administered them. At the same time as the European world, but particularly fuelled with the ideology of the beneficent potentialities of a newly independent American republic, some, although not all, former colonies joined other nations in the conviction that a more rational criminal code which made punishment certain but genuinely humane would not only increase enforcement of the law but could also reform the offender and in so doing actually reduce the number of criminal offenses. It was easy in

[2] Review of *The Transformation of American Law, 1780–1860*, *Journal of American History*, 1978, p. 1099.
[3] *Penn Law Review*, 1960–1, p. 522.

America to identify reason and humanity, the watchwords of the Enlightenment, with the successful republicanism of the new nation and to find in imprisonment the ideal embodiment of these new goals.[4]

Alas, Preyer's faithfulness to documentary evidence (a commitment she brought to her long advisory support of Maeva Marcus's *Documentary History of the Supreme Court of the United States* [Columbia University Press, 1986–2007]), and her reluctance to publish until she had her ideas and text "just right," meant that she put into print tragically little of the groundbreaking research that she had undertaken.

The deeper point is that Preyer's relatively modest publication record, in part the result of her dedication to her role as undergraduate liberal arts teacher, belies the huge influence she has had on our understanding of the primary role of law in American history. Reading over her list of publications, one realizes that she reviewed every significant book in early American legal history published since 1958 for one or another of the major scholarly journals. These reviews are a remarkable tribute to the breadth of her knowledge, the depth of her historical insight, and her uncanny ability to criticize without hurting. Would that the last quality were in greater supply.

Preyer was among the leading legal historians of the last half century. Her gem-like essays will always be monuments to her unique amalgam of intelligence, originality, breadth of vision, historical sensitivity, and deeply humane vision. That her scholarship on the early nineteenth century remains so germane to today's conflicts of law and politics is a testament to the enduring worth of what she wrote.

[4] "Penal Measures," *Journal of American History*, 1982, p. 353.

PART I

LAW AND POLITICS IN THE EARLY REPUBLIC

Introduction

Maeva Marcus

The four essays in this section – three of which are Kathryn Preyer's earliest publications – exemplify her engagement with what Stan Katz has called "Kitty's 'one big thing' . . . the role of law in the creation of the American republic, and especially the role of judges in articulating that law." The first three derive from Preyer's dissertation, "The Judiciary Act of 1801," and contain a thorough and perceptive examination of judicial affairs in the nation's first eleven years under the Constitution. The fourth, her last published article, deals with the trial of James Thompson Callender for seditious libel, but continues Preyer's lifelong search for the larger meaning of particular legal events for the nation's history. As she wrote, some scholars treat *United States v. Callender* "as a way station to a discussion of Justice Samuel Chase's impeachment. Yet some of the most important issues arising under the Judiciary Act of 1789 are to be discovered in the case: the relationship of federal and state authority, the relationship of judge to jury, the power of the judge at trial, the role of the jury, and the place of federal judicial authority."

A review of Preyer's dissertation and the four essays in this section reveals her unerring scholarly judgment and historical sense. Preyer's insights and intuitions, broached in a tentative voice when she does not have enough documentary evidence to support them, hold up well today. Her study of the Judiciary Act of 1801 demonstrates that the act was not a power grab by Federalists dismayed by their loss of the presidency and Congress. Rather, by starting with the Judiciary Act of 1789 – much praised but clearly deficient in several respects – she shows that members of the judicial and legislative branches had been intent on judicial reform well before the political troubles of the Federalists began. Looking not

only at the progress of legislation dealing with changes in the judicial system, but also at the political and economic history of the republic during its initial years, she concludes that what propelled the 1801 Act was a burgeoning desire "to extend the *scope* of federal *jurisdiction*" in order to support Federalist policies, joined with the need for a new organization of the third branch. The end of Federalist Party hegemony encouraged speedy consideration of the judiciary bill, she writes, but that bill had been bouncing around Congress long before the election of 1800, and the reforms contained in it were the product of years of trials and tribulations under the 1789 act. The purpose of the 1801 Act was inextricably linked to "the totality of major Federalist party policy."[1]

Preyer points out the error of looking at the history of the federal judiciary's first decade through the prism of the debates surrounding the Repeal Act of 1802 and the events leading to the *Marbury* decision, though she understands fully why historians tend to do this: no documentary record of sustained discussion about the judiciary existed before 1802. Her commonsense explanation for the fact that during the first five congresses, Congress had paid relatively little attention to the need for revisions in the federal judiciary is an obvious one: "In comparison to the domestic and foreign problems confronting Congress during the early years of the national history, the problems of the judiciary did not loom very large." Congressional records and newspapers of this period indicated that the federal judiciary rarely gained public attention. Other historians had noticed this and largely ignored the judiciary in their work. But Preyer did not make that mistake: the fact that the judiciary was considered relatively unimportant in the first decade did not mean that it actually *was* unimportant in building the new nation. Despite the lack of published court records, which would make research easier, Preyer delved into the events of the 1790s in order to point out the connections between economics, politics, and the judicial system that led to the passage of the Judiciary Act of 1801 and its subsequent repeal. As she noted at the end of her article on that Act: "At the center of the political maelstrom in 1801, the role of the federal judiciary had become one of the most concrete manifestations of the division between the proponents and opponents of the extension of federal power."

The conclusion of the final essay in this section, "*United States v. Callender*: Judge and Jury in a Republican Society," shows Preyer still

[1] Kathryn Conway Turner, "The Judiciary Act of 1801," Ph.D. dissertation, University of Wisconsin, 1959, pp. 309 and 302.

grappling with the large themes that occupied her entire scholarly life. Having demonstrated in the body of the essays how what happened at the trial logically flowed from a decade of conflict between the federal judiciary and the states, Preyer notes the absence by 1800 of any strong national institutions. She credits the Judiciary Act of 1789 with trying to deal with the complicated federal structure imposed by the Constitution, thus allowing an embryonic federal law and national legal culture to grow. The effort to define the relationship between nation and state that underlay many of the judiciary's problems is, in Preyer's words, "the single greatest link between past and present in this country's traditions." And it is what makes Preyer's scholarship important and relevant today.

1

Federalist Policy and the Judiciary Act of 1801

Kathryn Turner

In analyses of the Federalist decade, the organization of the government under the Constitution, fiscal and revenue programs, neutrality and foreign affairs, and the Alien and Sedition Acts all receive proper emphasis as identification marks of the Federalist party in power. Only passing reference, if that, is made to the Judiciary Act of 1801, enacted in the lame duck session of the last Federalist Congress. Indeed, awareness of the Act seems to have been kept alive chiefly because it must be summoned to serve as the cause of its own repeal in March 1802. The creation of sixteen new circuit court judgeships, followed by the appointment of Federalist partisans to judicial offices, has often been advanced to justify its repeal by outraged Republicans; by inference, the Act itself has come to be regarded as evidence of the political perversity of the Federalists in defeat. However, the timing of the passage of this Judiciary Act easily obscures the timing of its birth, and emphasis on organizational changes and partisan appointments easily obscures the significance of the jurisdictional revisions provided by the legislation.[1] Only when attention is given

Kathryn Turner is a member of the Department of History, Wellesslley College.

[1] Legal scholars who have commented on jurisdiction have not adequately placed the story in historical context. See, for examples of this, William W. Crosskey, *Politics and the Constitution in the History of the United States* (Chicago, 1953), I, 610–611, II, 759–764; Felix Frankfurter and James M. Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* (New York, 1928), 24–29; Erwin C. Surrency, "The Judiciary Act of 1801," *American Journal of Legal History*, II (1958), 53–65. Historians focusing on organization have failed to examine jurisdiction – e.g., Max Farrand, "The Judiciary Act of 1801," *American Historical Review*, V (1899–1900), 682–686. Recent studies of the Federalist period give virtually no attention to the legislation.

to the latter can the Judiciary Act of 1801 be seen as an integral part of Federalist policy; the Act was clearly not occasioned by the Republican victory in 1800.

The question of what authority should be conferred upon the federal courts always represented one important element in the struggle between advocates of centralization and the advocates of state power. The establishment of a system of inferior federal courts was among the issues sharply disputed at the Constitutional Convention;[2] evident within some of the state ratifying conventions were currents of fear over the potential challenge to the states represented by the authorization of the lower federal courts in Article III of the proposed Constitution.[3] In the first Congress, the contest between those who wished to confine the federal power within narrow limits and those who wished to vest in the federal courts the full judicial power that the Constitution authorized, resulted in a compromise measure, the Judiciary Act of 1789.[4]

The organization of the lower federal judiciary into two tiers of trial courts, district courts and circuit courts, is familiar. The three circuit courts, composed of two Supreme Court justices and a district judge, were also given authority to review certain decisions of the district courts.[5] The jurisdictional provisions of the Judiciary Act of 1789 reveal the extent to which Congress refrained from placing the full judicial power authorized by the Constitution within the exclusive jurisdiction of the federal courts. With the exception of admiralty and criminal jurisdiction,[6] significant areas of jurisdiction at both district and circuit levels were designed on a basis of concurrency with the state courts, and the powers of the Supreme Court were limited.[7] The federal courts had only concurrent jurisdiction over much civil litigation and then only on carefully defined terms.

[2] Max Farrand, ed., *The Records of the Federal Convention of 1787* (New Haven, 1911), I, 21, 124, 125, 127, 244–245, 292, 317, 341; II, 45–46, 136, 433.

[3] Jonathan Elliot, ed., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* . . . , 2d ed. (Philadelphia, 1863), II, 109–110, 112–114, 469, 480, 486–494, 517, 518; III, 57, 66–67, 443, 446, 468, 517, 521–562, 570–572; IV, 136–138, 140–147, 150–159, 162–169, 170–172, 257–258, 260, 265–266, 294–295, 306–308. See also the remarks of Luther Martin before the Maryland House of Delegates in Farrand, ed., *Records*, III, 152, 156, 204, 220–222, 273, 287.

[4] Charles Warren, "New Light on the History of the Federal Judiciary Act of 1789," *Harvard Law Review*, XXXVII (1923–24), 49–132, especially 49–65.

[5] Richard Peters, ed., *The Public Statutes at Large of the United States of America* . . . (Boston, 1845 –), I, 73 (Sept. 24, 1789), sec. 2, 3, 4, 21, 22.

[6] *Ibid.*, sec. 9, II.

[7] *Ibid.*, sec. 13, 25.