different analysis. In his discussion of the death penalty, being unable to demonstrate deterrence statistically, Tucker turns to the "recent emergence of the 'serial murderer.'" "These are the murderers," he explains, "who were *previously* deterred by the death penalty." In this context, he prefers to have the blame fall elsewhere, and so delivers a blistering attack on those who assert family background plays a role in causing serial murders: "Once again the experts have tried to psychologize and sociologize the whole thing into oblivion. Searching for an explanation of the 'serial murderers,' *The New York Times* quoted one expert as saying: 'All of them had real difficulties with their mothers early on.'"

When writing about black mothers, he must have forgotten his rapier-like response to the "experts" at *The New York Times*:

> Has there ever been a time when a certain portion of the population didn't have difficulties with their mothers early on? And even if motherhood were the problem, how is it that this whole new breed of killers, ranging in age from their early twenties to their late fifties, should suddenly start expressing their hostilities right about 1972?

The causes of crime and the role of the criminal justice system in our society are both overripe for review. The appropriate method for vindication of the guarantees in the Bill of Rights is still in doubt. The probable gulf between the public perception and the reality of the criminal justice system needs consideration and attention. *Vigilante*, unfortunately offers nothing of value for any of the above.

JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT. Henry Abraham.[1] New York: Oxford University Press. 2d ed. 1985. Pp. xi, 430. Cloth, $24.95; paper, $9.95.

Kermit L. Hall[2]

"In every case," writes Gerald Nachman of the *San Francisco Examiner & Chronicle*, "Judge Wapner rules quickly, firmly, and fairly. Nothing escapes his flinty gaze. I can't imagine how he's been overlooked for appointment to the Supreme Court, for clearly here is a man you would trust to rule wisely on abortion and classroom prayer."[3] Familiar, benign, sensible, Joseph A. Wapner, the

1. James Hart Professor of Government, University of Virginia.
2. Professor of History and Law, University of Florida.
3. San Francisco Exam. & Chron., June 16, 1985, Sunday Datebook, at 17.

judge of the syndicated television program, "The People's Court," projects an image of moral force and pragmatic reckoning—of what it means to be a judge—to more than twenty-five million Americans each week. Members of the high Court in Washington have received him; *Time* has even reported that on some afternoons Justice Thurgood Marshall "can be found in his chambers chuckling" as he watches "The People's Court."[4] An Arizona woman has written to President Ronald Reagan from her mobile-home park, urging him to elevate Wapner to coequal status with Justice Marshall.[5]

The notion of appointing Wapner to the Supreme Court, as the second edition of Henry Abraham's *Justice and Presidents* makes clear, is not altogether fantastic. He has the appropriate credentials. Of the 106 persons appointed to the Court since 1789 (102 actually served), only about one-fifth have had as much judicial experience as Wapner, a California municipal and then superior court judge for twenty-one years before moving to the world of entertainment. Further, with both an undergraduate and a law degree, he is better educated than most Justices. The mainstay of "The People's Court" has the temperament as well. The president of the Philadelphia Municipal Court has declared as much by formal resolution. He "fulfills Socrates' classic qualities of a judge: 'To hear courteously, to answer wisely, to consider soberly, and to decide impartially.' "[6]

Could Judge Wapner be appointed to the Supreme Court? Probably not, at least by the present administration, since he's a Democrat. "There are just as many qualified Republicans," Abraham observes, "as there are Republicans." Experienced judges of the proper political persuasion are always available to fill the random vacancies that occur on the nine-person Court. Even with the proper partisan identification, the odds against Wapner reaching the bench are long indeed. Those persons who have succeeded have combined political (although not necessarily partisan) connections, professional merit, personal friendships, geographic and (sometimes) religious representativeness, ideological compatibility with an appointing President, and luck.

Justices and Presidents examines how Presidents have applied these different qualifications. It is, in Henry Abraham's introductory words, "an attempt to analyze and evaluate the motivations that underlie the process of Presidential selection and appointment, the degree and kind of fulfillment of Presidential hopes or expecta-

4. TIME, Oct. 8, 1984, at 31.
5. Kahn, *Profiles (Judge Joseph A. Wapner)*, NEW YORKER, Mar. 31, 1986, at 46.
6. *Id.* at 58.

tions, and the professional performance of those entrusted with the responsibilities of the business of judging." The book is nothing less than a history of every appointment made to the Court from 1789 through that of Sandra Day O'Connor in 1981. Abraham begins by explaining the criteria used to evaluate the Justices, the mechanics of the process, and its impact as registered in the collective backgrounds of the Justices. Thereafter, he marches in chronological order through the appointment practices of each administration.

Presidents, Abraham shows, have dominated the undemocratic, subterranean, and open-ended selection process. Beyond the bare constitutional provision requiring the advice and consent of the Senate, chief executives have had a free hand in weighing the importance of age, nationality, education, prior judicial service, ideological commitment, and other attributes. Unlike lower federal judicial appointments, Supreme Court appointments engage a President's personal attention. Each of them, according to Abraham, has made "a reasonable effort to know *who* he is about to send to the Supreme Court, *why* he is doing so, and what he *expects* of his choice's performance once on the highest court."

The Constitution purposefully insures the appointees' independence once on the bench. This independence has permitted them to construct a virtual monopoly over constitutional interpretation,[7] a monopoly that has given the Justices significant influence over public affairs. "The Supreme Court of the United States," Abraham writes, "is, indeed, engaged in the political process." The Court, he argues, has been as much a forum for the resolution of constitutional politics as a temple of revealed constitutional truths.

The growth in the Court's political role has not been accompanied by any increase in judicial accountability. The framers originally intended the Court to operate on a narrow legal plane, with the great political questions left to the other branches. The Justices were to administer law; they were to have, in the words of Alexander Hamilton, neither "force nor will." The Court's political role nonetheless mushroomed, but the mechanisms of accountability did not keep pace. Proposals to elect Supreme Court Justices have appeared from time to time, but they have never received serious consideration.[8]

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7. K. HALL, THE SUPREME COURT AND JUDICIAL REVIEW IN AMERICAN HISTORY 37-49 (1985).

8. Hall, *Why We Don't Elect Federal Judges*, 10 THIS CONST. 20 (1986). The Court does operate in a setting that forces responsibility on it. "Judges are bound within walls, lines, and limits," Abraham notes, "that are often unseen by the laymen." They are limited by precedent and the ideal of judicial restraint—in brief, by the tradition of the rule of law. The Justices cannot act without a case and controversy, and once they do act they rely upon

The imbalance between independence and accountability has contributed to the brittle nature of our contemporary constitutional politics. While most Justices could stroll through main street America unnoticed, their constitutionally mandated distance from the public, coupled with their power, generates public frustration, even outrage.[9] It is these issues that make the new edition of *Justices and Presidents* timely reading. Abraham, a political scientist at the University of Virginia, argues that historically the selection process has offered the most important means of exercising prospective accountability over the Justices.

President Ronald Reagan certainly agrees. His Department of Justice has imposed tough ideological standards on would-be federal judges. Attorney General Edwin Meese summed up the administration's position in his July 1985 address before the American Bar Association Convention. He blasted the Court's liberal "activist" record and called for the appointment of Justices who would root their decisionmaking in the "Constitution's literal text and in history" rather than trying to become "political power-brokers" who transform the "courtroom into mini-legislatures in an attempt to make an end run around popular government."[10]

Abraham traces the genealogy of the Reagan administration's concerns to Nixon's abortive attempts to engineer a conservative majority to reverse the Warren Court's liberalism. Nixon vowed to the public that he would "strengthen the peace forces as against the criminal forces of the land." He promised to appoint federal judges who saw themselves as "caretakers" of the Constitution and not, to quote Nixon once again, as "super-legislator[s] with a free hand to impose . . . social and political viewpoints upon the American people." Nixon vowed to appoint only "strict constructionists" to the federal bench.

Nixon blundered badly in handling the first vacancy on the Court. According to Abraham, his selection policies embraced a "relentless pursuit of mediocrity" that threatened to undermine the Court's credibility. Nixon's decision to replace the disgraced Abe Fortas with first Clement F. Haynsworth and then G. Harold Carswell set the tone. (Judge Wapner, by the way, has credentials every bit as good.) It was Carswell of whom Senator Roman Hruska said, "Even if he were mediocre, there are a lot of mediocre judges and people and lawyers. They are entitled to a little repre-

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the other branches to enforce their decisions. The Supreme Court is not a constitutional free-for-all.

9. The predicament of Justice Harry Blackmun reveals as much. The author of *Roe v. Wade* takes his meals in the Supreme Court's public cafeteria accompanied by a bodyguard.

10. N.Y. Times, July 18, 1985, at 7, col. 1.

sentation aren't they, and a little chance? We can't have all Brandeises and Frankfurters and Cardozos and stuff like that there."[11] So far, however, the big prize—the Supreme Court—has largely eluded President Reagan. He has made only one appointment, that of Sandra Day O'Connor to replace the retiring Potter Stewart. But new opportunities may come shortly; the Court is long in the tooth.[12] There is an air of anticipation about the future direction of the high court not present since the waning days of the "Nine Old Men" of the late 1930's. Indeed, Professor Tribe has warned that Reagan may well have an opportunity to "pack the Court" with ideological favorites such as those he has already placed on the lower federal courts.[13]

Abraham suggests that there would be nothing unusual should Reagan do so. These are interesting but not unique times in the political history of federal judicial selections. "All Presidents have tried to pack the Court," Abraham writes, "to mold it in their images. . . . There is, of course, nothing wrong in a President's attempt to staff the Court with jurists who read the Constitution his way."

Abraham does find troubling, however, the present generation's invocation of labels such as "strict constructionist" and "liberal," when the issue should be whether the "nominees are professionally, intellectually, and morally qualified to serve." These labels mean little, both before and after appointment. As Justice Frankfurter once responded when questioned about whether an appointee changes once on the Court: "If he is any good, he does." Furthermore, given the value-laden quality of our constitutional lawmaking, categorizing a particular ruling by the Court is likely to be highly subjective. A "good" decision is one that pleases us; a "poor" decision is "one that does not." Abraham, although his political sensibilities favor protection of minority interests, accepts that "the Constitution . . . was simply not designed to provide judicial remedies for every social or political ill." Since the Justices cannot be everything to all persons, he argues, then the measure of success in the appointment process is whether it provides Justices of sufficient talent and discretion to accomplish those things appropriate to the proper sphere of authority granted to them.

Abraham leaves no doubt that he believes the process has done

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11. *Quoted in* R. HARRIS, DECISION 110 (1971).

12. When this review went to press, President Reagan's nominations of Justice William Rehnquist to replace retiring Chief Justice Warren Burger and of Judge Antonin Scalia for the office of Associate Justice had just been confirmed by the Senate. —EDS.

13. McHugh, *Senate is Key to Blocking Court-Packing Attempt (Laurence Tribe)*, Chi. Daily L. Bull., Nov. 25, 1985, at 1, col. 2.

precisely that. "In general, if not unfailingly, the Supreme Court . . . has evinced a remarkable degree of common constitutional sense in its striving to maintain the blend of continuity and change that constitute the sine qua non for desirable stability in the basic governmental processes of a democracy."

Like the first, the second edition of *Justices and Presidents* is a mixed success, largely because Abraham's command of the primary sources and his research design do not match the scope of his ambitions. Make no mistake, however; this is a fine book in many ways. Abraham provides in one volume an unvarnished historical discussion of the selection of Supreme Court Justices. Reviewers of the first edition, although skeptical of the book's heavily anecdotal quality, praised Abraham for bringing so much detail to bear so lucidly on such a long-neglected topic.[14] The second edition deserves similar praise. It is even more comprehensive, with a new chapter added on appointments to the Burger Court, a significant revision of the chapters treating developments from Franklin Roosevelt to Lyndon Johnson, and only a slightly less thorough revision of the chapter covering appointments from Theodore Roosevelt through Herbert Hoover. Abraham, as these revisions indicate, is clearly most at home in the twentieth century. He covers the years from 1789 to 1901, when fifty-eight Justices were appointed, in eighty-two pages; he takes more than twice that number for the twentieth century, when forty-eight were appointed. Abraham has also attempted to respond to earlier criticism that he relied on inappropriate and subjective guides in rating the Justices[15] by adding a new introductory chapter that explains his standards. There is no doubt that anyone interested in learning about the selection of Supreme Court Justices can turn with great profit to *Justices and Presidents*.

Even after these substantial revisions, problems still plague the second edition, and their presence suggests the inherent weakness of Abraham's approach. Reviewers of the first edition registered three complaints against *Justices and Presidents*. First, that for a scholarly work, Abraham had failed to document his work with sufficient care. Second, and related to the first, that he had not extended his research net broadly enough. And third, that he applied inappro-

14. For a sampling of the major reviews see Book Review, 11 CHOICE 1210 (1974); Duram, Book Review, 61 J. AM. HIST. 1093 (1975); ECONOMIST, July 20, 1974, at 104; Kahn, Book Review, 63 CAL. L. REV. 827 (1975); Miller, Book Review, 24 AM. U. L. REV. 527 (1975); Pape, Book Review, NEW REPUBLIC, Aug. 10, 1974, at 21; Schmidhauser, Book Review, 89 POL. SCI. Q. 859 (1974); Volkomer, Book Review, 21 N.Y.L.F. 696 (1976).

15. *See, e.g.*, Kahn, *supra* note 14.

priate measures to evaluate the quality of Justices and Presidents. The same shortcomings persist in the new edition.

Abraham often leaves his reader guessing about where the evidence to back an argument comes from. Any author attempting to synthesize large amounts of material over broad periods of time confronts an unenviable task. The principals in the judicial selection process, even of Supreme Court Justices, often have differing views of how that process has operated for the simple reason that they sometimes supported different candidates. Furthermore, they often leave only fragmentary records, a problem compounded in dealing with nineteenth-century appointments.

Abraham is sensitive to these matters, and he has responded to earlier complaints about inadequate documentation. The new edition sports a bibliography arranged, in part, by name of Supreme Court Justice. The materials applicable to a Justice's appointment now appear under his or her name.

Still, scholars will have difficulty reconstructing from Abraham's notes and bibliography the precise authority he invokes. Take, for example, the criteria that George Washington used. Abraham claims that "probably more than any other President," Washington "not only had a clear set of criteria for Court candidacy, but adhered to them predictably and religiously." But how does Abraham know what these were? The reader will search the notes in vain for an answer. There is, of course, a huge secondary literature on Washington's patronage practices, and it does reveal the concern with quality, morality, patriotism, and geographic balance that Abraham attributes to Washington.[16] A close reading of these secondary sources makes clear that Washington never specifically articulated these criteria for the federal bench; rather, Abraham and others have arrived at them by inference.

But does the skimping on citations make any difference? The answer is that it surely does. When measured by the evidence that Abraham does present, he may not have, especially for the eighteenth and nineteenth centuries, full command of the events surrounding particular appointments. It is, of course, impossible to rewrite Abraham's book, but a single example will illustrate the problem.

Washington, in 1789, appointed John Rutledge, of South Carolina, Associate Justice of the Court. Washington had great faith in Rutledge, regarding his contribution at Philadelphia as seminal. Abraham correctly indicates that Washington's opinion of the

16. For a discussion of this literature, see Perry, *Supreme Court Appointments, 1789-1801: Criteria, Presidential Style, and the Press of Event*, J. EARLY REPUBLIC (forthcoming).

South Carolinian was so high that he contemplated appointing him Chief Justice, a position that ultimately went to John Jay. Rutledge, however, never heard a case, stepping down in 1791 to become chief justice of South Carolina.

The Rutledge story did not end there. When Chief Justice Jay resigned in 1795 to become governor of New York, President Washington turned again to Rutledge, who (Abraham correctly surmises) had wanted the top post all along. The Senate, however, rejected the nomination, making Rutledge the only recess appointee in the Supreme Court's history not to receive subsequent Senate confirmation.

The question is, why? Abraham concludes that it was because of Rutledge's "pronounced opposition to the Jay Treaty." Rutledge was unhappy with the Jay Treaty, and Federalists were equally incensed over a vituperative harangue he gave in Charleston denouncing it. So far, so good. Although Abraham does not document these developments in the notes, the secondary sources listed in the bibliography sustain his conclusion. But Abraham did not search widely enough in the available primary sources to realize that far more was involved in the abortive Rutledge nomination.

Secretary of the Treasury Alexander Hamilton on December 14, 1795 wrote to New York Senator Rufus King with advice about how to proceed with the Rutledge nomination. "If there was nothing in the case but his imprudent sally upon a certain occasion [the Charleston speech]," Hamilton wrote,

> I should think the reasons for letting him pass would outweigh those for opposing his passage. But if it be really true, that he is sottish or that his mind is otherwise deranged, or that he exposed himself by improper conduct in pecuniary transactions, the byass [sic] of my judgment would be too negative.[17]

Hamilton's letter raised concerns far different from those that Abraham attributes to the defeat of Rutledge. The Senate rejected the South Carolinian less because he was a political liability than because he was mentally unstable. Rutledge had three years earlier suffered the loss of his wife, and he reacted in bizarre ways—excessive drinking, gambling, and public tirades. So serious were Rutledge's problems that on December 26, well before he learned of the Senate's action (remember, this was the eighteenth century), he tried to kill himself. Two days later he wrote to the President resigning his position because of "ill Health."[18] The reader would

17. Letter from Alexander Hamilton to Rufus King (Dec. 14, 1795) (Rufus King Papers, New York Historical Society).

18. Letter from John Rutledge to George Washington (Dec. 28, 1795) (Record Group 59, National Archives).

never learn of these events from Abraham's clipped discussion of the Rutledge rejection.

Are the explanations of other appointments similarly flawed? Perhaps, particularly for the nineteenth century. The reason is that Abraham has simply relied too fully on the secondary literature. In a paragraph introducing the bibliography, he observes that

> The sources . . . for a book of this type are numerous, eclectic, and sometimes elusive. *Primary* information, which consists largely of personal and official papers of the principals, can be especially elusive. A good many of those documents are not readily available because some Justices have provided for the deliberate destruction or partial sealing off from publication of sundry notes and papers. (Emphasis in original.)

Fair enough, as far as it goes.

Abraham gives no sign of having examined any major eighteenth- and nineteenth-century manuscript and archival collections. Would it not make sense, given the topic, to have at least combed the papers of such "principals" as Washington, John Marshall, James K. Polk, Abraham Lincoln, Ulysses S. Grant, and William McKinley? If Abraham searched even the most basic of primary sources (not to mention the papers of senators and other political notables), his bibliography and notes give no hint of it.

The book's superficiality appears in another way. Abraham attempts in this new edition to combat the charge that he previously relied on inappropriate sources to weigh the significance of each Justice. He does so through an introductory chapter that clarifies the assumptions that underlie the ranking of the Justices. Yet, since the research design remains the same, the clarification only makes the weaknesses of the model more apparent.

He proposes to assess the quality of the Justices by invoking academic surveys of their abilities. The most important of these was the poll conducted by Albert P. Blaustein and Roy M. Mersky in 1970. They asked sixty-five "qualified observers," composed of law deans and professors of law, history, and political science, to place each Justice in one of five categories: "great," "near great," "average," "below average," and "failure."[19] No other criteria, yardsticks, or measuring rods were provided. Abraham in the second edition has added to the findings of Blaustein and Mersky results from other polls commissioned between 1978 and 1983, although his appendices list only the results of the 1970 poll. Members of the Court sitting since that date are not included. In the text, however, Abraham does produce an "all star" list of nine

19. A. BLAUSTEIN & R. MERSKY, THE FIRST ONE HUNDRED JUSTICES: STATISTICAL STUDIES ON THE SUPREME COURT OF THE UNITED STATES (1978).

"great" Justices—Marshall, Story, Taney, Holmes, Hughes, Brandeis, Cardozo, Black, and Warren.[20]

Reviewers of the first edition greeted this categorization with skepticism. One critic complained that "[t]he book would have been far better had the enterprise of making impressionistic evaluations of Justices and Presidents been abandoned completely."[21] Abraham's technique has the heuristic value of providing a convenient pigeonhole for each Justice. That these categories have anything to do with the quality of the selection process is another matter. Still, if reputation among "qualified observers" of the Court is any measure, some Justices—and some Presidents—have performed better than others. One would be hard pressed to argue that Justice James Byrnes (who was ranked a "failure") was a greater figure in the Court's history than John Marshall. But it is meaningless to rank Byrnes with Justice Willis Van Devanter (also ranked a "failure"), who served on the bench for over 30 years. Justice Byrnes spent little over a year on the bench during World War II—hardly time to succeed, let alone fail.

Abraham acknowledges the difficulties but he does not solve them. He argues that, while " 'greatness' is not quantifiable, yet the evidence is persuasive that the term or concept is not only a meaningful one in the eyes of qualified observers of the judicial function at its apex, but that there is something closely akin to consensus among them." Even granting the existence of a consensus (which seems debatable since one-quarter of the original Blaustein and Mersky "all stars" sank into the ranks of the "near great" in the 1978 to 1983 surveys), problems remain.

The research design yields little analytical payoff. One would expect that the purpose of such a qualitative scaling, in a book devoted to judicial selection, would be to determine which Presidents have been most successful in terms of the quality of the appointees. Have great Presidents appointed great Justices? Abraham does not answer this question, and the data suggest the absence of any relationship. James Madison, only an "average" President, appointed Joseph Story, one of the consensual "great" Justices; Franklin D. Roosevelt, a "great" President, selected James F. Byrnes, a consensual "failure."

It is amazing that in a discipline such as political science, where there is a long history of seeking definitional exactness, terms

20. The Blaustein and Mersky list was composed of twelve Justices. The three Justices dropped in subsequent polls were: Felix Frankfurter, Harlan Fiske Stone, and John Marshall Harlan I. The appendix lists only the results of the Blaustein and Mersky poll of 1970.

21. Kahn, *supra* note 14.

such as "great" and "failure" are so carelessly tossed about. That Abraham in the early chapters qualifies them more than he did in the first edition does little to rectify the damage done in undermining the historical richness of the selection process and the life of the Court itself.[22]

This judgment, however, may be too harsh. It assumes that *Justices and Presidents* intended to build theory, that it aimed to be scholarly, and that it sought to explain in comprehensive terms the interaction of politics, the legal culture, and constitutional development. Despite the scholarly trappings this is essentially a popular book, a kind of pseudo-social scientific history of appointments to the Supreme Court done up for students and the public.

Justices and Presidents popularizes a stereotypical view of the judicial process similar to that cultivated by the image of Judge Wapner and "The People's Court." It is sprightly, anecdotal, and superficial. Abraham renders the complex simple by dividing the world of judicial selection into good and bad Justices, skilled and failed Presidents. As with Judge Wapner, what you get is what you see. Only an effort that plumbs the existing primary materials fully and that develops a more theoretically sound research design is likely to reveal fully the process by which Justices have been placed on the world's most powerful Court. Even if Abraham successfully mastered the sources and eliminated the stereotypes, he would still be left to explain that most elusive of relationships—what the method of judicial accountability marked out by the selection process has to do with the exercise of independent behavior by the Justices once they reach the bench. As Alexander Bickel once observed, and as Abraham understands, in the appointment process, "you shoot an arrow into a far-distant future when you appoint a Justice . . . and not the man himself can tell you what he will think about some of the problems that he will face."[23] Ultimately, Abraham is trying to connect the unconnectable.

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22. The Abraham evaluation scheme also places too much faith in experts. The operative words in Abraham's introductory chapter are "qualified observers." No doubt the law deans and other respondents were well informed about the Court and the Justices, but whether they were equally well-informed about all phases of the Justices' careers is less clear. For example, in the Mersky and Blaustein poll, every Justice designated a "failure" served in the twentieth century and all of them occupied a place on the bench within the living memory of the respondents. Were there no "failures" on the Court before the "Four Horsemen" of the 1930's?

The poll raises still other questions. The largest body of Justices are ranked "average." What does that mean? Are they "average" in relationship to fulfilling the criteria that Abraham has developed for the selection process? Or, are they "average" in the sense that they were less able than the "great" but more able than the "failures"?

23. *Quoted in* TIME, May 23, 1969, at 24.