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In the Shadow of Court-Clearing: The New Hampshire Supreme Court's Struggle for Autonomy

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Research Articles

In the Shadow of Court-Clearing: The New Hampshire Supreme Court's Struggle for Autonomy

—Cory McKenzie (Editor: Katy Sternberger)

I delicately turned the page in the decrepit two-hundred-year-old tome. What I found on the next page startled me. I hardly expected to find a horrific massacre in the dull annals of the New Hampshire legislature, but here before my very eyes were strewn the bodies of dozens of deceased insects: silverfish, eaters of books! These pests were hunting for a treasure that is buried deep within the University of New Hampshire's Dimond Library—a treasure that few students are aware of and one that few historians have explored. The library's lowest level is home to the Milne Special Collections, a veritable trove of documents relating to New Hampshire history. During the summer of 2012, I spent many mornings in Milne Special Collections, sifting through early nineteenth-century government records in search of that treasure: the journals documenting the New Hampshire legislature's history of *court-clearing*. When the sun rose on the first day of my quest, I could hardly have imagined that the obscure old tale of court-clearing would still affect New Hampshire's judicial system today.

A Clever Legal Gambit

The New Hampshire constitution guarantees lifetime tenure to judges until the age of seventy. To work around this provision, state lawmakers in the nineteenth century devised a clever means of removing undesirable judges from the bench: since it was unconstitutional to make judges leave their seats, lawmakers simply pulled the chairs out from beneath judges by passing a law that declared the court to no longer exist. They would then create a new court with a different name, to which they could appoint judges from their own political party. The state legislature used this tactic to reorganize the Supreme Court five times during the nineteenth century.

This legal maneuver closely parallels President Franklin Roosevelt's well-known *court-packing* proposal of 1937. The United States Supreme Court had ruled several of Roosevelt's New Deal policies unconstitutional; the court-packing plan, if it had passed, would have expanded the size of the court's membership, allowing Roosevelt to create a New Deal-friendly majority to approve his legislation. To emphasize their parallel with President Roosevelt's court-packing, I created a new term to describe the New Hampshire legislature's attempts to manipulate the court: *court-clearing*.

In some sense, I began this project while still in high school. While fulfilling my state history requirement, I stumbled across Leon Anderson's book, *To This Day: The Three Hundred Years of the New Hampshire Legislature*. Of all the intriguing stories in Anderson's history, my favorite was that of the first court-clearing, which occurred two hundred years ago in 1813. During my second year at the University of New Hampshire, I chose the 1813 court-clearing as the topic of a research paper for Assistant Professor of history Jessica Lepler's early American republic class. Recognizing that court-clearing continued to threaten the New Hampshire Supreme Court throughout the nineteenth century, I applied for a Summer Undergraduate Research Fellowship (SURF) to further investigate this trend and its



The author standing with John T. Broderick, former chief justice of the New Hampshire Supreme Court, at the UNH School of Law.

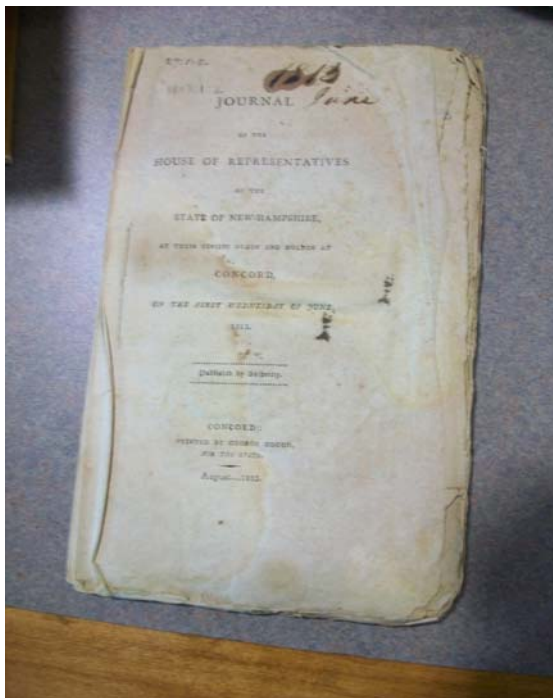
significance.

As I followed the trail of court-clearing to the end of the nineteenth century through my SURF project, I began to realize that I had yet to discover an end to the story. I soon learned that the legacy of court-clearing pursued the New Hampshire Supreme Court not only throughout the twentieth century, but even into the new millennium. I moved from the silverfish-infested, tattered pages of two-hundred-year-old manuscripts to books published during my parents' lifetimes. More importantly, I realized that people who were involved with the end of my court-clearing story are still alive, and I concluded my research by interviewing John T. Broderick, the former chief justice of the New Hampshire Supreme Court and current dean of the UNH School of Law. New Hampshire's nineteenth-century tradition of court-clearing is not dead. It continues to have a role in New Hampshire politics today.

The Constitutionality of Court-Clearing

When the summer sun arrived and the temperature soared, I took refuge in the cool, cozy basement of Dimond Library and began my SURF experience by leafing through two-hundred-year-old state government records in Milne Special Collections. I jittered with excitement as I handled books once held by the very people whom I was studying. The hours of navigating dull legislative jargon were occasionally rewarded by the discovery of signatures and notes in quill pen. I felt like I was not simply studying history, but was myself a part of it. I was the latest chapter in a long line of individuals who had studied these great books.

After winning the 1813 elections, Governor John Taylor Gilman and the Federalist Party (one of the two major parties in early nineteenth-century American politics) passed a law that eradicated New Hampshire's highest court, the Superior Court of Judicature, and established a new court to replace it: the Supreme Court of Judicature. In addition to a new name, this court had a new set of judges. The Republican Party (the precursor of the modern Democratic Party) was outraged by the Federalist move and complained that it was unconstitutional to abolish the Superior Court. They defeated the Federalists in the 1816 elections and immediately did away with the Federalist-sponsored Supreme Court and revived the old Superior Court. Interestingly, however, despite their criticism of the Federalist political maneuver to control the judicial system, the Republicans did not return the pre-1813 judges to the bench, but installed an entirely new set of justices. By reorganizing the courts after each election, New Hampshire's first two political parties were able to fill the judiciary with their allies. They set a precedent that would be followed three more times in the nineteenth century.



The cover page of the 1813 journal of the New Hampshire House of Representatives. In 1813, the legislature voted to abolish New Hampshire's Superior Court.

In the early days of my research, I simply assumed that dissolving the state's highest court was indeed an unconstitutional act. After all, every American knows that judges have lifetime tenure so that they can be protected from politics. It is one of the cornerstones of the "separation of powers" that makes our government possible. If the court could be abolished at the whim of the legislature, how could it be an independent branch of government? I never imagined that an American constitution would actually allow a legislature to eliminate a court. I was mistaken.

While reading an 1813 legislative journal, I discovered a Federalist committee's lengthy defense of court-clearing in response to petitions claiming the court-clearing law to be unconstitutional. The committee points out that all courts in New Hampshire were created by legislative act, *not by the constitution*. This meant that New Hampshire's Superior Court was fundamentally different than the federal Supreme Court. Although the federal court could only be destroyed by a constitutional amendment, destroying the New Hampshire court merely required an act of the legislature. What I found next was even more startling: the New Hampshire Supreme Court did not become a constitutional court until 1966, less than fifty years ago. My project, which began as a survey of five events in the nineteenth century, had suddenly entered the modern era.

Living History

Early in my research, I corresponded with UNH Professor Emeritus of political science Robert Dishman, who used to teach about the

nineteenth-century court-clearings in his classes on New Hampshire constitutional history. I was excited to learn that he was personally involved with the passage of the 1966 amendment. The constitutional convention that proposed the amendment consulted Professor Dishman on the history of the constitution, and in his reports to the convention, he argued for an amendment that would protect the Supreme Court from being abolished again. Reading Professor Dishman's reports was the turning point in my research. I realized that court-clearing was not a nineteenth-century relic, but a reality that the people of New Hampshire have faced in recent decades.

If the court has only been safe from court-clearing since 1966, I speculated, the past fifty years must form a unique era in New Hampshire legal history. I decided that it would be useful to try arranging meetings with individuals who have served on the court in recent decades to gain an insider's perspective on the modern court's role in state government. This new angle of research brought me to the UNH School of Law in Concord, where I interviewed Dean John T. Broderick, who retired from the post of Supreme Court chief justice in 2010.

Although Dean Broderick agreed that the 1966 amendment strengthened the New Hampshire Supreme Court, he does not think that New Hampshire has heard the last of court-clearing. "There are people today in the legislature, who, if they had a chance, would not make the courts permanent," the former chief justice said early in our conversation. Suggesting that court-clearing was rooted in the American Revolution's goal of eliminating tyranny, he observed, "When you consider the history of the colonists and what they did to break away from the absolute power of the king, to then create an absolute power, particularly an unelected one, was something I think they had a healthy suspicion of." In New Hampshire, he continued, this suspicion has always been particularly healthy, and we have the opportunity to elect new representatives, senators, and even governors every two years. Why would such a suspicious state give its judges a lifetime job? Dean Broderick argued that lifetime tenure insulates judges from the election season and the temptation to make poor but popular judicial decisions in order to secure re-election. The more a court's structure is influenced by political forces, the less it can be a reliable interpreter of law. "Right now, people can like or dislike the court system, but most respect it, in part because they believe it is encased. Not perfect, but encased," he explained.

Dean Broderick's message was that court-clearing should be remembered not merely as an isolated incident in nineteenth-century New Hampshire but as a manifestation of something much larger: a paradox in the American system of government. After the revolution, New Hampshire recognized the importance of an independent judicial branch and granted lifetime tenure to its judges. Unelected officials with lifetime tenure, however, were precisely what Americans revolted against in 1776, and the tradition of court-clearing that began in 1813 represented people's frustration with their lack of control over judges.

Frustration over this paradox of lifetime tenure in the midst of democracy was not limited to the nineteenth century. While I was following the debates over the constitutional amendment in 1966 newspapers on microfilm at the State Library in Concord, lawmakers across the street in the State House were proposing to repeal the very amendment I was studying so that the legislature would once again have authority to abolish the court. Although the House of Representatives overwhelmingly opposed repealing it, another proposed amendment that would give the legislature power over the administration of the courts made it all the way to the November 2012 ballot, where it was soundly defeated by voters. This "public oversight" amendment would have allowed the legislature to override administrative decisions of the Supreme Court. Dean Broderick referred to the amendment as a "wolf in sheep's clothing" and believes it is part of the same tradition as court-clearing. At the root of the issue is the friction between New Hampshire's deeply democratic legislature and its tenured Supreme Court. Is it undemocratic that a branch of our government lies outside of the public's direct control?

The Future of the Court

Finally, I asked Dean Broderick which justice in New Hampshire history he admired most. He was thoughtfully silent for several moments before responding that, although there were several judges he admired for one reason or another, Chief Justice Frank Kenison was the one with whom he was best acquainted. "He was chief for twenty-five years," the dean mused. "I was chief for six and a half, and I was exhausted." We both chuckled, but then he became serious. "It tells me that the times were different. The relationship between the courts and the legislature was better, in part because the court used to be over here in the old State Library, so we were across the street from the State House." Legislators and judges would see one another every day, chat about their families, and were generally on friendly terms. "And then we moved up to the hill," Dean Broderick continued. In 1970, under Chief Justice Kenison, the New Hampshire Supreme Court finally moved into its own building on the other side of the Merrimack River. It stands upon a serene hill more than a mile away from the boisterous capitol. "It's beautiful, but it may have been in some ways a mistake because when you're up on the hill and you don't casually run into people, they think you're aloof."

I left the interview brimming with new questions. I wondered whether the autonomy attained by the court in 1966

was fading and if New Hampshire was destined to return to the era of court-clearing—of a Supreme Court embroiled in the realm of politics. I stepped outside of the law school into a dreary, drizzly Concord. The sun, invisible behind the thick gray clouds, was setting. Carefully sidestepping the deep puddles that checkered the sidewalks, I began my walk back to the car, and it was not long before I reached the State House lawn. Since I first set foot on that lawn during a fourth-grade field trip, the edifice has always seemed to command me to stop for a moment and stare, perhaps out of respect for its simple grandeur or for the history that has been made within its walls. As always, my feet obeyed. The golden dome forced my eyes upward, but I soon tore them away to look across the street at the State Library. I smiled at the irony of the Supreme Court moving back into the shadow of the State House to escape the shadow of court-clearing, that old specter that has chased it down through the centuries. Although I cannot guess what the future has in store for the New Hampshire Supreme Court, my summer research has convinced me that the events of the nineteenth century are as important to understanding it as the politics of the twenty-first century.



The New Hampshire State House on a cloudy summer afternoon. The legislative and executive branches of government meet here, but the judicial branch has its own building on the other side of town.

I would like to thank my parents for our annual trips to all corners of New England since infancy, which fostered a zeal for local history at a young age, and Professor Jessica Lepler for mentoring this project and guiding me through the vast maze of scholarship on nineteenth-century American legal history. The most important lesson of this research was unquestionably the importance of collaboration in the field of history. My research benefited enormously through discussion with John Philip Reid, Robert Dishman, numerous professors and graduate students at the University of New Hampshire, and, of course, John T. Broderick. I cannot thank them enough for their insights and for reminding me that historical research involves much more than reading books in the library. This is not to imply that libraries were unimportant to the study of court-clearing. I am deeply grateful to the staff at Milne Special Collections, the New Hampshire Historical Society Library, and the State Library, for helping me locate the documents that formed the backbone of my research. Finally, I would like to express my gratitude to the Hamel Center for Undergraduate Research for making this project possible.

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Author and Mentor Bios

Junior **Cory McKenzie**, of Hampstead, New Hampshire, has seized many of the research opportunities available to him at the University of New Hampshire. He is a history and philosophy double major, but feels he still has so much to learn that he plans to add a classics major and remain at UNH for a fifth year. A member of the University Honors Program, Cory has studied the Greek and Japanese languages and has practiced Uechi-ryu karate. In the summer of 2011, Cory studied Russian Orthodoxy through a Research Experience and Apprenticeship Program (REAP) grant and published his research experience in the 2012 edition of *Inquiry*. For the summer of 2012, Cory received a Summer Undergraduate Research Fellowship (SURF) grant that allowed him delve into the archives to study New Hampshire

constitutional history. He has been interested in New Hampshire history since high school and, after completing an early American history class with Dr. Jessica Lepler, his research led him to unexpected interviews with exciting people, including John T. Broderick, the former chief justice of the New Hampshire Supreme Court. He learned that the “endless” research process keeps bringing him into contact with more and more scholars and ideas. In addition to writing for *Inquiry* a second time, Cory joined the journal’s student editorial board in the fall of 2012. After graduation, Cory would like to conduct research in Japan. “My plan is simply to follow my research projects and interests where they take me,” he says.

Jessica M. Lepler, assistant professor of history, specializes in the study of the early American republic and in the culture of capitalism. Since she came to the University of New Hampshire in the fall of 2008, Dr. Lepler has taught courses on the industrialization of America during the nineteenth century and on the intellectual and cultural history of early America. She has mentored many students but had not served as either a Summer Undergraduate Research Fellowship (SURF) or *Inquiry* mentor until she began working with Cory McKenzie. At first, she helped Cory look through primary sources and sharpen his research skills, but when he unexpectedly discovered that nineteenth-century “court clearings” remained an issue of legislation into the twentieth century, Dr. Lepler supported him in applying for an extension to his SURF grant so that he could conduct interviews. This was the first time that one of her students had the opportunity to work with living subjects, and she says that she was impressed with the way Cory bravely interacted with living history. Cory’s research project has allowed Dr. Lepler to “see the power of the Hamel Center’s support for undergraduate research” while writing for *Inquiry*’s broad audience proved to be “great practice” for a student like Cory, who plans to pursue a career of historical research and writing.

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