



People & *Mountains*

A Publication of the West Virginia Humanities Council

Fall 2004

Strictly Speaking

A Flawed Theory of the Constitution

By Stanley I. Kutler

For each of the past two summers, we have sponsored Charleston appearances by Constitutional scholar Stanley I. Kutler of the University of Wisconsin Law School. Last year he spoke to lawyers and teachers at the federal courthouse, in an event hosted by Judge Joseph R. Goodwin. This summer we were very pleased to have him speak to a group of high school teachers at the Hubbard House, our historic home. Both lectures were made possible by the Teaching American History project of Concord University.

Professor Kutler speaks to the tough core issues of American governance, taking on the Watergate crisis in 2003 and the Constitutional doctrine of strict constructionism in 2004. The following is an excerpt from his 2004 lecture.

The use of history abounds in our age of “instant expert” commentary. But history is abused when used to shape historical events to serve current political agendas. “To control the present is to control the past,” George Orwell has written. “To control the past is to control the future.” The resurrection of the long-discredited concept of “strict construction” of the Constitution offers a striking example of twisting the past to serve present-day ideological needs.

President George W. Bush has insisted, “I’m going to put strict constructionists on the bench.” Of course, he wants “good, conservative judges” to support his agenda, but he covered his desire with the higher authority of a fashionable constitutional interpretation. Bush hardly is unique in seeking judges who share his political and philosophical views. George Washington, who appointed our first judges, was not about to place on the bench his opponents who, after all, had opposed the Constitution. That partisan attitude has served the nation with mixed results for more than two hundred years.

But our presidents would be more honest to us and

our traditions if they and their partisans abandoned the empty slogan of “strict construction.” It would be difficult to find a more discredited, irrelevant doctrine in the nation’s history; it belies our history, and its guiding principle of constitutional faith — namely, that ours is a “living constitution.” Furthermore, it has become code language legitimating our worst fears and prejudices.

The United States possesses the oldest, written constitution in the world. Its vitality and its survival resulted from the principles of the Constitution itself, and equally, because of its evolving interpretation for more than two hundred years.

History is not for the proponents of strict construction. They are happily oblivious to, or ignorant of, essential facts. Specifically, they are indifferent to the basic battles over constitutional construction waged by Alexander Hamilton, Thomas Jefferson, and John Marshall.

The Constitution has been political fighting ground since the founding of the nation. In George Washington’s first Administration, the President asked

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Company's Coming!

We expect important visitors soon after you receive this issue of *People & Mountains*. A team from the National Endowment for the Humanities will arrive in Charleston in late September and spend a couple of days looking us over, meeting with Council board, staff, and constituents.

The NEH is the single largest source of financial support for the West Virginia Humanities Council, supplying well over a third of our income in recent years — and at one time darn near all of it. You can bet we take their visit seriously.

Thus, we have worked nearly a year to prepare. The process calls for a thorough self-assessment, and we have compiled a voluminous report under the leadership of Robin Snyder of our board of directors and Pam LeRose of our staff.

While our alacrity has at least a little to do with knowing which side our bread is buttered on, we welcome the NEH for purely non-pecuniary reasons, as well. In addition to its support of humanities councils nationwide, the National Endowment carries the flag for the federal effort in behalf of the humanities, funding programs as diverse as document preservation and museum exhibits at institutions throughout America. The agency does heroic work on woefully inadequate resources, and we are proud to be associated with them.

These site visits come every five years, and we are gratified to be able to show solid progress since our last one. Though growth has slowed over the last couple of years, our annual budgets have increased nearly 50 percent since 1999. We have moved into a fine historic house, a permanent headquarters consistent with our mission, and our other assets have increased commensurately. Most importantly, Council programs and grants have also prospered, with just under a million dollars budgeted for those purposes this year. These are the services we provide to West Virginians, our whole reason for existence.

But even with a good record to stand on, we can't help feeling a little nervous. Company's coming, as we used to say down in the country, and we will be minding our manners until they are gone.

Ken Sullivan

People & Mountains is published quarterly by the West Virginia Humanities Council.

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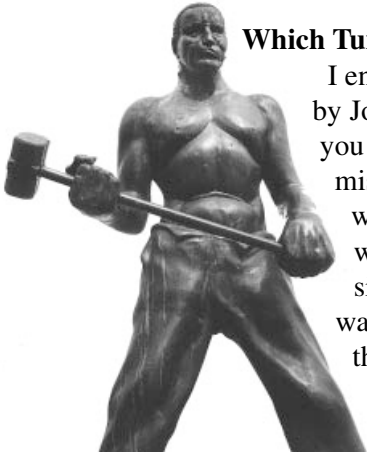
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We welcome reader letters, freelance manuscripts, and financial contributions. Address all correspondence to Beth Chiparo West Virginia Humanities Council 1310 Kanawha Blvd., E. Charleston, WV 25301 or e-mail to chiparo@wvhumanities.org.

The West Virginia Humanities Council, a state affiliate of the National Endowment for the Humanities, serves West Virginia through grants and direct programs in the humanities.

Your Letters



Which Tunnel?

I enjoyed the article on John Henry by John Douglas. However, I hope you will consider correcting the mistaken location of John Henry's work. John Henry could not have worked on the Big Bend Tunnel since construction of that tunnel wasn't even begun until 1930. As the article pointed out, John Henry "...was first noted in folk-song scholarship in 1909..." So which tunnel did John Henry work on? The Great Bend Tunnel, which was begun in 1870 and is located beside the more recent Big Bend Tunnel.

The bend in Greenbrier River for which the tunnels are named was originally called "Great Bend" in John Henry's day and later "Big Bend." This is because the use of the word "great" to describe large size diminished between the 19th and 20th centuries. Now the word is usually taken to mean "well made" or "truly enjoyable."

Thanks for the "great" newsletter.

Douglas McClure Wood

Thanks for writing. We know of the difference between the Great Bend Tunnel and the adjacent Big Bend Tunnel which replaced it. We are inclined to use Big Bend in referring to John Henry, however, because to our knowledge versions of the ballad invariably refer to Big Bend when they name a tunnel at all. This includes versions collected before the construction of the Big Bend Tunnel proper, and suggests to us that from early times the Great Bend was probably referred to as Big Bend in common usage. We are happy to note for the record the distinction in the names and further note that the present Big Bend Tunnel came into existence long after John Henry's demise. — ed.

Thanks for the Recognition

Many thanks for your gracious articles in the summer edition of *People & Mountains*. My children and grandchildren have also made expressions of your thoughtfulness in recognizing the donation in print.

We send our best wishes for continued success in the Council's endeavors along with my personal thanks for the kind hospitality extended during my visits.

C. Rand Burdette

West Virginia Encyclopedia Honor Roll

As the new *West Virginia Encyclopedia* nears completion, everyone admits it has been a bigger undertaking than anticipated.

"In fact, it has been a bigger job every step of the way," says Ken Sullivan, editor of the *Encyclopedia* and executive director of the Humanities Council. He stresses the scale of the project, which has now involved nearly 700 writers and over 2,000 articles.

"Thankfully, it is now largely done," Sullivan said. "The alphabetical entries are mostly typeset, and we have just put our indexer to work."

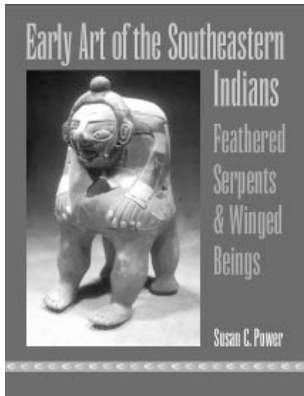
It seems a good time to thank the honor roll of supporters who have committed nearly \$455,000 to the *Encyclopedia*:

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"We especially appreciate those who have increased their support," Sullivan noted, citing the Bernard McDonough Foundation as a recent example. "Their vote of confidence is a real encouragement to us."

Planners continue to raise funds for the *Encyclopedia*, noting that printing and binding the 1,000-page book still lie ahead. Contact Development Director Beth Chiparo to help with this important project.

What's New in the Humanities



Indian Art

The Humanities Council is pleased to showcase the publication of *Early Art of the Southeastern Indians: Feathered Serpents and Winged Beings* by Susan C. Power. The beautiful new book, published by the University of Georgia Press,

highlights an assortment of ancient native North American creative art. Many of the objects pictured are in full color. Power, a professor of art at Marshall University, is the recipient of two Council fellowship grants in support of her extensive research. To order a copy visit www.ugapress.org or call 1-800-266-5842.

Call for Program Committee Nominations

The Council seeks new citizen members for its program committee, which oversees Council-conducted programs and recommends grants decisions to the board of directors. The program committee is composed of equal numbers of citizen members and members of the Council's board. Citizen members are elected to three-year terms with the possibility of reelection for a second term.

Four citizen members will be elected, two from higher education, and two from the general public. Members participate in two meetings annually to review major grant applications, two conference calls annually to review minigrant applications, and one planning meeting.

Nominations must include the nominee's name, address and telephone numbers, and a brief statement about his or her interest in the humanities. Deadline - November 1, 2004. Send nominations to Pam LeRose, West Virginia Humanities Council, 1310 Kanawha Blvd., East, Charleston, WV 25301. Or email lerose@wvhumanities.org.

Library of America Offer

The Library of America, a nonprofit publisher established to preserve the nation's literary heritage by publishing authoritative editions of America's most significant writing, has received a grant to place volumes in public and school libraries in West Virginia. The grant, made by the Bay Foundation in New York, enables 15 libraries to receive 40-volume sets of books. The total amount for each set is \$950, and each library pays \$300 of their own funds to receive the grant.

For an application and list of titles, please contact Megan Barrett at 212-308-3360, ext 231 or email mbarrett@loa.org. More information is also available through the Council website, www.wvhumanities.org.

Book Festival

The Council is again a primary sponsor of the West Virginia Book Festival, along with Charleston Newspapers and the Kanawha County Public Library. Held at the Charleston Civic Center on October 16 and 17, this year's festival will also include the annual Read Aloud Conference, a program of the Education Alliance.

The festival offers activities for all ages, including children, and features the popular Kanawha County Public Library book sale. Workshops, panel discussions, and reading programs are offered. Book publishers, vendors and rare book appraisers will be on hand.

Dozens of authors will present programs and readings. Featured authors include Rita Mae Brown, David Baldacci, Silas House, Marie Bradby and Naomi Shihab Hye. Visit the festival link on our website at www.wvhumanities.org or call the Kanawha County Public Library at 304-343-4646.

2004 Food For Thought Dinner

California wine country cuisine will be featured at the annual Food For Thought Dinner on Sunday, November 7, 2004, at the Tarragon Room in the Charleston Marriott. The executive culinary team led by chef Darren Phipps will prepare the elegant menu. Wine expert John Brown will be on hand as we savor the area's fine wines. Tickets for this annual fundraiser are \$125 per person. For advance reservations, or to help sponsor this event, please call 304-346-8500. Proceeds support Humanities Council programs statewide.

Ogletree To Deliver McCreight Lecture

Civil rights attorney, educator and author Charles Ogletree will deliver the 2004 Betsy K. McCreight Lecture in the Humanities on Thursday, October 28, at 8:00 p.m. The event, held at the P.A. Williams Auditorium in Ferrell Hall at West Virginia State University in Institute, culminates the Council's *Brown v. Board* 50th Anniversary programs. A reception and book signing will follow. The public event is free.

Ogletree is the Jesse Climenko Professor of Law at Harvard Law School. His new book, *All Deliberate Speed: Reflections on the First Half-Century of Brown v. Board of Education*, compellingly traces the history of race and integration in American society along with his personal experiences as a "Brown baby." The lecture is made possible

through the generous support of



Verizon. For more information, call 304-346-8500.

Women and Creativity 2004

West Virginia University, with funding from the Humanities Council, is hosting a national conference, "Women and Creativity 2004: Examining the Past, Composing the Future," on October 13 - 15 at Morgantown's Radisson Hotel. For more details on this event featuring women writers and artists call 304-293-2339, ext 1155 or visit the conference website at <http://www.as.wvu.edu/wmst/wvuwomenandcreativity.htm>.

Grant Guidelines

Major Grants

Major grants have a budget over \$1,500. Applicants should allow ten weeks between the deadline and the start of the project. Maximum award: \$20,000.

Deadlines: September 1, 2004
and February 1, 2005
Number of Copies: 24

Minigrants

Minigrants have a budget of \$1,500 or less. Proposals in this category generally are for smaller projects, single events, consultation needs, and planning for more complex projects. Applicants should allow six weeks between the deadline and the start of the project. Requests from schools for grants under \$500 will be referred to the West Virginia Education Alliance.

Deadlines: August 1, October 1,
December 1, February 1, April 1,
June 1
Number of Copies: 6

Media Grants

Media grants have a budget over \$1,500 and support the planning, scripting, and production of projects intended to produce electronic or film materials, or a newspaper series. Maximum award: \$20,000.

Deadline: September 1
Number of Copies: 24

Publication Grants

Publication grants have a budget over \$1,500. This category is available only to nonprofit presses and recognized academic presses and supports only the production phase of a completed manuscript. Maximum award: \$20,000.

Deadline: September 1
Number of Copies: 24

Fellowships

Fellowships of \$2,500 are awarded once annually to college faculty and independent scholars to support research and writing projects within a humanities discipline.

Deadline: February 1, 2005*
Number of Copies: 12

Teacher Institute Grants

This category is available to college and university faculty and supports a two-week summer teacher seminar on a humanities topic suited to the teaching needs of elementary or secondary teachers. Maximum award: \$20,000.

Deadline: September 1
Number of Copies: 24

All grants categories have supplemental guidelines and applications. Call the Humanities Council at (304) 346-8500. These materials can also be found online at www.wvhumanities.org.

*Call For 2005 Fellowship Proposals

The Council invites proposals for its 2005 fellowship awards of \$2,500. Every year the Council offers West Virginia college faculty and independent scholars monetary support for research and writing projects within a humanities discipline.

Applicants must demonstrate interest and accomplishment in a humanities field; reside or be employed in West Virginia; not have received a Council fellowship within the preceding two years; and not be seeking support for degree work or to fund routine teaching preparations.

Staff are always available to assist with your proposal. Call Pam LeRose, Grants Administrator, at the Council or e-mail lerose@wvhumanities.org.

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his leading cabinet members, Secretary of State Thomas Jefferson and Treasury Secretary Hamilton, to advise him on the “constitutionality” of chartering a national bank.

Jefferson viewed the proposed bank as potentially an “engine of corruption.” His argument, however, largely rested on constitutional construction, denying that incorporating a bank belonged to any enumerated powers of Congress. He rejected any notion of “implied powers” resulting from either the “general welfare” or “necessary and proper” clauses of the Constitution.

Hamilton knew his audience. He offered the President a practical, informed argument for the bank as a necessary instrument for national policy. George Washington had not risked his fortune and sacred honor for a weak republic, ripe for reconquest by a sulking Empire. He also recognized common sense when he saw it. Hamilton laid down a bold doctrine of both enumerated and resultant or implied powers. Implied powers, he said, derived from the “necessary and proper” clause. “Necessary,” to him meant “needful, requisite, incidental, useful, or conducive to.” The practical-minded President undoubtedly welcomed Hamilton’s assertion that a measure’s necessity could “never be a test of the legal right to adopt it; that must be a matter of opinion, and can only be a test of expediency.”

Hamilton provided the parameters of “broad construction” to the Constitution, holding that the “necessary and proper” clause had an elastic quality to enable government to get on with the task of governing, provided it did not specifically violate the Constitution. Hamilton’s bold policies and views set the nation on a course of economic self-dependency,

certainly a prerequisite for George Washington’s national security concerns.

Hamilton’s arguments formed the basis for *McCulloch v. Maryland* (1819), one of the finest, most powerful of Chief Justice John Marshall’s great constitutional opinions. He adopted Hamilton’s implied powers concepts, and used them to sustain the constitutionality of the national bank. Marshall’s elucidation of the “necessary and proper” clause has been one of the most widely cited and quoted lines of his many contributions to Ameri-

“Strict constructionists are happily oblivious to essential facts. They are indifferent to the battles waged by Alexander Hamilton, Thomas Jefferson and John Marshall.”

can constitutional thought. “Let the end be legitimate,” Marshall wrote, “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.”

Jefferson’s views requiring specific constitutional authorization offered a formula for government paralysis, whether it involved internal improvements projects, re-chartering the Bank of the United States, or halting the expansion of slavery into the western territories. Jefferson, of course, knew better. If nothing else, he taught us how to rationalize in behalf of political expediency. As President of the United States, he brushed aside the “strict construction” arguments of those opposed to national expansion, and he urged ratification of the Louisiana Purchase.

Strict construction lacks history and practical experience. Its only history derives from the interests of groups consistently on the losing side of history, a history theoretically, morally, politically and practically empty. Strict construction reaches its apogee in defense of slavery and as a rationalization for secession. Is that our lodestar?

Philosophical views protecting slavery are not worthy of our support. It is a deceit now, as it was then, to curry favor among an uninformed mass, ever eager to vent their suspicions of energetic government. The history underpinning “strict construction” is a narrative for disunion, weakness, and fragmentation; instead the contributions of such figures as Hamilton and Marshall, and the outcome of the Civil War, offer the true history of constitutional construction.

Strict construction is disingenuous; it is not at all about a school of constitutional thought. The issues surrounding future opinions involve real constitutional clauses, to be sure — equal protection of the laws, due process, life, liberty, property. The question always is “for whom?” George W. Bush admires Justices Scalia and Thomas; is it then fair to conclude that he prefers justices who will reverse decades of decisions that have expanded freedom and liberty, irrespective of their race, gender, sexual preference, or social standing?

Strict construction is meaningless for our history and our governance. It is, as Chief Justice Marshall so wisely said, “a Constitution we are expounding.” It is not a statute or legal code; it provides the necessary authority and energy essential for government to maintain society. The history of constitutional interpretation in the 20th century, by both liberal and conservative (slippery terms, of course) Justices alike, has been to emphatically reject strict construction.

Thank You, New and Renewing Members!

This list represents new and renewed memberships and other donations received April 13, 2004 through August 18, 2004.

A complete list of members and donors is published each year in the Humanities Council's annual report.

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A Timely Gift

As a citizen member of the Humanities Council's program committee and a dedicated supporter of the humanities, Betty Sweet Ness is often present at events and meetings at the Council's home, the historic MacFarland-Hubbard House in Charleston. She is well aware of our attempts to acquire suitable furnishings for the formal rooms of the house, so we perked up when she said she had a clock for us to see.

And what a clock it was! When Executive Director Ken Sullivan and Development Director Beth Chiparo accepted Ms. Ness's invitation to "come see," she showed them a lovely Seth Thomas mantel clock, dated 1852. "It chimes every hour," she said. Then came the wonderful news that she indeed wanted to donate the clock to the Council for the historic house.

The clock now sits on the mantel in the library of the 1836 MacFarland-Hubbard House. It fits perfectly — and after 152 years, it runs perfectly. The hourly chimes can be heard echoing throughout the rooms of this old place. And with each chime, Council staff and visitors to the house are reminded of a true friend and all she has done for the humanities in West Virginia.

We thank Betty Sweet Ness for a truly timely gift.



Photo by Michael Keller.

The West Virginia Humanities Council gratefully acknowledges support from the National Endowment for the Humanities; the Office of the West Virginia Secretary for Education and the Arts; and foundations, corporations, and individuals throughout the Mountain State and beyond.

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