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Dwight D. Opperman: A Life Lived Largely for the Law

On June 13, 2013, the Society lost its revered Chairman Emeritus, Dwight David Opperman.

In many ways, Dwight D. Opperman was the embodiment of the American dream: a man who rose from humble beginnings to build a legal publishing empire. Although he graduated from law school, he never tried a case or advised a client. Instead he became one of the most instrumental figures in American legal life in his role at the West Publishing Company, the eminent American legal publishing company. During his tenure as editor, Chief Executive Officer and Chairman of West, he led the company from its initial role as one of many textbook publishers to the point where it was a pioneer of electronic publishing for the legal profession. By the time the company was sold in 1996, West was not only publishing legal textbooks, it was also the publisher of the civil and criminal codes, the state supreme court decisions, and the intermediate appellate decisions of most of the states.

But it was in electronic publishing that his vision proved so important. "He was instrumental in leading West from a book publisher and moving [it] into electronic publishing," said Grant Nelson, former West executive. "Dwight had the vision that there was something else on the horizon. He

really felt in his core that West Publishing was providing a vital service to the courts, to the legal system and to the country, and he took great pride in that."

Born into modest circumstances in Perry, Iowa, Dwight

was a child of the Great Depression. His son Vance Opperman, recalled his father describing his life as a boy, saying that Dwight remembered walking the rail lines searching for stray coal to heat the family home. But there were also enjoyable things in his young life. As a young man he played the saxophone in bands, often with his first wife, Jeanice, performing as the lead singer. Although he had a great love for music throughout his life, it was eclipsed by his love of language, and that ultimately led him to the law, which became the



Mr. Opperman posed by his portrait on the day the portrait was unveiled at the Supreme Court. The painting was executed by noted portrait artist Ray Kintzler and hangs in the parlor of the Society's headquarters building, Opperman House.

overriding passion of his life.

Like so many veterans returning from World War II, Mr. Opperman took advantage of the GI Bill to attend Drake University where he studied law, graduating with a law degree in 1951. In the meantime, he had married Jeanice, and the couple and their two young sons moved to the Twin Cities. Mr. Opperman would later recall that at that point, only two opportunities were available to him for employment: one was in insurance, the other was to work

Continued on Page 3

A Letter from the President



Gregory P. Joseph

The fiscal year of the Society began on July 1, 2013. While the final audited report for FY 2013 is not yet complete, preliminary indications are that the year just-ended was extremely successful. I would like to thank all of you for your continuing participation, without which the Society would be unable to pursue its mission.

Financial performance for the Fiscal Year 2013 was boosted by the outstanding support shown for the Inaugural Gala, through the generosity of law firms, corporations and individuals. We have dedicated a large portion of the proceeds to funding the research and preparation of the manuscript for the Federal Judicial History volume and the Summer Institute for Teachers.

Research and writing of the Federal Judicial History volume has been moving forward at near lightning speed. The stellar team of notable scholars and authors — Peter Hoffer, N.E.H. Hull and William James Hoffer — has given this project top priority. They have conducted research in the archives throughout the country, including the National Archives and Records Administration (NARA), archives in suburban Maryland, and archives in Boston, St. Louis and Kansas City, focusing on case files and other original materials. Several draft chapters of the book are complete, well ahead of schedule. The Society is delighted with the progress and looks forward to an outstanding volume.

The Society's publications team has also become an occasional contributor to SCOTUSblog, the popular website about the Supreme Court. While the site focuses on current events, the Society is contributing items of historical interest as an additional element. In the note preceding the first entry in June, the editors wrote: "SCOTUSblog is delighted to partner with the Supreme Court Historical Society to provide a look back at important events in the Court's history." The first piece appearing in this partnership was written by Professor Timothy S. Huebner concerning the appointment of a tenth Justice to the Supreme Court in 1863.

Fall Society events include the two concluding programs in the 2013 Leon Silverman Lecture Series, which continues to focus on litigants in landmark 20th Century cases. The October 23, 2013 lecture considers *Bell v. Maryland* case, one of the civil rights sit-in cases of the 1960s. A group of approximately 15-20 African-American students sat down

in a restaurant in Baltimore, were refused service and were ordered to leave, solely on the basis of their race. Their conviction on charges of criminal trespass was appealed to the Supreme Court of the United States. The lead plaintiff, Robert Mack Bell, who recently retired as Chief Judge of the Maryland Court of Appeals, plans to attend the lecture by Harvard Law School Professor Kenneth Mack. Two weeks later, on November 6, Kelly Shackelford, President of Liberty Institute, will speak on *Tinker v. Des Moines*, so named for the two Tinker siblings who were expelled from public school for wearing black armbands to school in protest of the Vietnam War. Both lectures will be delivered in the Supreme Court.

On October 25, 2013 the Society will cosponsor a program in New York City, *Learned in the Law: The Office of the Solicitor General of the United States*. We are honored to have Justice Elena Kagan and former Solicitors General Drew Days and Paul Clement participate as panelists in a discussion to be moderated by Jeffrey Minear, Counselor to the Chief Justice of the United States. Professor John Q. Barrett will discuss the development of the office of the Solicitor General as seen through the prism of three famous individuals with significant New York connections: Benjamin Bristow, John W. Davis and Robert H. Jackson. Registration information for all of the programs is located on the Society's website, supremecourthistory.org.

The next two years' Silverman lectures will be devoted to equally thought-provoking topics. The 2014 Leon Silverman Lecture Series will focus on the Supreme Court and the Civil War, with a follow-up series in 2015 concerning the Supreme Court and Reconstruction. The Society is the principal sponsor of the National Heritage Lecture, which will be delivered on May 22, 2014, by noted author, James Swanson. Mr. Swanson will discuss Earl Warren and his role in the Warren Commission, which investigated the assassination of President John F. Kennedy.

The Officers and Trustees of the Society are very grateful for your continuing support of and enthusiasm for the activities and programs of the Society. Our primary objective is providing educational opportunities for Americans to learn about the history and contributions of the Supreme Court. As we strive to accomplish this goal, we are dependent on the generosity and support of dedicated individuals, law firms, corporations and other entities. As we embark on our Annual Fund campaign, I hope you will look favorably upon our request for support. Recognizing that many are facing financial challenges, we hope that you will share our conviction that this work is worth pursuing and that the fruits of the programs are of high quality, and that you will give to the extent that you are able.

A handwritten signature in blue ink that reads "Gregory P. Joseph". The signature is written in a cursive, flowing style.

Dwight D. Opperman continued from page 1

as an editor at West Publishing Co. which was based in St. Paul at that time. The career choice he made at that juncture shaped the rest of his life. He opted for a job as a legal editor at West, and the rest, as the saying goes, “is history.”

Vance also remembers accompanying his father to the office on Saturdays, watching him flip through large law books and classifying cases. “No one classified cases faster or more accurately than he did,” Vance recalled. “I’ve always carried that image of my dad.” That ability led Mr. Opperman to positions of greater responsibility within the company. Ultimately, he came to lead the company. It was his foresight that led to the creation of Westlaw, opening the way for the company to become one of the pioneers of electronic media in legal research. After a year of experimentation, some of his closest advisors suggested that the expense and effort was not warranted, and some even suggested that the whole project be eliminated. But Mr. Opperman had an instinct that told him to continue with the work, and he directed that it be brought to conclusion with no diminution of effort or expense. Westlaw became one of the most widely used electronic systems in the legal community, offering users ready access to a wide array of legal materials.

Vance Opperman succeeded his father as Chief Executive Officer of West Publishing. In 1996, West was sold to the Toronto-based Thomson Corp. Now known as Thomson Reuters, the company maintains a major operation in Eagan, Minnesota, where it employs some 7,000 people.

Following his retirement from the operations of West, Mr. Opperman the elder focused his efforts on recognizing and promoting legal achievement. He turned his time and funds to philanthropy, primarily in legal causes. Even prior to his retirement, he had been giving back to the legal world that was his great love. He became a Trustee of the Society in 1982, and subsequently served as Vice President, Chairman of the Board, and finally Chairman of the Board Emeritus. He provided sage counsel and much-needed financial support for every undertaking.

Mr. Opperman remained actively involved in each important project the Society undertook for more than 30 years. His commitment to the Society was recognized by his election as Chairman of the Board of Trustees in 1997, and memorialized by naming the permanent headquarters building that houses the offices of the Society in his honor. A beautiful oil portrait of Mr. Opperman by noted artist Ray Kinstler, hangs over the mantle in the parlor on the main floor of the building which bears his name. Significant of the humble nature of the man, neither was an honor he asked for or expected, but rather were actions taken by the Society’s Board of Trustees as an expression of sincere gratitude for Mr. Opperman’s generous and selfless support to the Society and to the Supreme Court.

Mr. Opperman’s commitments to the betterment of legal education and the American judicial system extended broadly

beyond the Society as well. He established scholarships at his alma mater Drake University Law School. He also sponsored scholarships at New York University School



Justice Scalia was photographed with Mr. Opperman (right) at a past Annual Dinner of the Historical Society.

of Law, and William & Mary School of Law. Seeking to recognize outstanding achievement by federal judges, he created the Edward J. Devitt Distinguished Service to Justice Award. “The Devitt Award was established in 1982...in order to honor a respected member of the federal bench, who possessed a distinguished lifelong career characterized by decisions that, through his/her wisdom, humanity and commitment to the rule of law, make clear that bench, bar and community alike would willingly entrust the judge with the most complex cases of the most far-reaching importance.” Mr. Opperman named the award for the highly regarded late Edward J. Devitt, longtime chief judge of the U.S. District Court of the District of Minnesota, and a personal acquaintance of Mr. Opperman. Justice Alito has described the Devitt Award as “like the Nobel Prize for judging.”

Mr. Opperman’s support extended even to the Supreme Court of the United States itself. He supported the Supreme Court Fellows Program, a program that offers an annual opportunity for four talented individuals “to engage for one year in the work of the Supreme Court of the United States,

Continued on Page 4

Quarterly

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Dwight D. Opperman continued from page 3

the Administrative Office of the United States Courts, the Federal Judicial Center, or the United States Sentencing Commission. The program provides fellows with practical exposure to judicial administration, policy development and education, and to contribute to the improved administration of justice in the United States.” This program just celebrated its 40th anniversary and many important contributions to the administration of justice can be attributed to it. In the early years of the program, much of the expense was covered



Photo by Steve Peltaway, Collection of the Supreme Court of the US

Mr. Opperman greeted Justice O'Connor and her husband, the late John O'Connor, at an awards dinner. Like Justice O'Connor, Mr. Opperman was a champion of law-related education and causes.

through private donations, and Mr. Opperman was among the key contributors.

In addition to supporting this program, Mr. Opperman funded and established the Society's Supreme Court Clerks Portrait Fund. Through this fund paintings of past Clerks of the Court were commissioned. As each was completed, a small ceremony was held and the portrait was then displayed in the building. The collection was brought current in the spring of 2013 when the portrait of William Suter was unveiled prior to his retirement.

Dwight Opperman touched many people throughout his lifetime, often very deeply. Tony Welters came to know Mr. Opperman through their association as members of the Board of Trustees for New York University Law School. In remarks Mr. Welters made at Mr. Opperman's funeral in June, he encapsulated the essence of his friend and colleague's personality and ethic, characterizing him as “. . . so consistent; always very balanced, thoughtful, with measured cadence, helping to guide discussions among the trustees. His contributions were immeasurable, his influence far-reaching. But it was influence grounded not in any

ego-driven need to impose his vision, but rather in a deep-rooted belief in the cause itself, the cause of education and the law—of Justice for all Americans—and in a life spent acting on that belief.” While Welters spoke of his own association with Mr. Opperman in particular circumstances, this description describes his relationship with the Supreme Court Historical Society and all the organizations with which Mr. Opperman worked and for which he cared. Mr. Welters observed that one of the important lessons he learned from Mr. Opperman was “. . . that generosity isn't just a trait, it is a choice. Dwight chose to be generous every day of his life. He didn't have to be. He made that choice. And I am not talking about being generous in pulling out his checkbook, which heaven knows he did a lot. That's actually the easy part. The harder part is what Dwight did on a daily basis: being generous with his heart, his soul and his life.”

The Supreme Court Historical Society was the recipient of this generosity of financial support, but above that, also of his generosity of friendship, wisdom and concern. A champion of the rule of law and the potent force for good and justice that law can be, Dwight will long be remembered as an extraordinary leader with extraordinary ability and nobility of character. Chief Justice Roberts expressed the feelings of the Court on learning of Dwight's death in these words: “Dwight has long been a committed friend and supporter not only of the Supreme Court but of the Federal Judiciary as a whole. He demonstrated his deep commitment to the American system of justice, and in particular the role of the judge in that system, in countless other ways as well.”

After the death of his first wife, Dwight found great happiness in a second marriage to the former Julie Chrystyn, who shared his avid interest in publishing and charitable endeavors. Although in declining health recently, Mr. Opperman maintained a lively interest in everything legal. He followed closely the decisions of the Supreme Court, occasionally disagreeing, but always in a friendly and respectful manner. He maintained his interest in legal publishing, both in print and electronic formats. He even invested in new publishing ventures and was captivated by electronic video possibilities.

Dwight is survived by his wife Julie; his two sons, Vance and Fane; his sister Doris Morris and by his nine grandchildren and 13 great-grandchildren. His legacy to the Society and to the legal world will endure and will serve as a memorial of his commitment to the American judiciary and its goal of providing equal justice to all. The Supreme Court Historical Society, its officers, trustees and staff will remember this great man with respect, affection and gratitude.

The Reenactment of *Flood v. Kuhn*

On May 22, 2013, Justice Sonia Sotomayor presided over a reenactment of the landmark Supreme Court case *Flood v. Kuhn*, a suit brought by Curt Flood of the St. Louis Cardinals, in hopes of overturning baseball's antitrust exemption. In the words of reporter Nina Totenberg, "Supreme Court Justice Sonia Sotomayor's wicked, waggish sense of humor—and knowledge of baseball—were on full display . . . when she presided over the re-enactment. . . ."

Flood brought a suit to protest his treatment by the baseball team owners. He challenged the existing policy that allowed teams not only to set the salaries without consultation with the players, but also allowed them to conduct trades of players without their input or permission. Flood challenged this policy in a letter written to the Commissioner of Baseball, Bowie Kuhn. In it, he demanded the right to negotiate on his own behalf. Kuhn denied the request laying the ground for what became a landmark case.

The reenactment was part of the Frank C. Jones Reenactment Series, named for the late President of the Society under whose leadership these programs became a regular activity of the Society. The principal "players" in the 2013 reenactment are all avid baseball fans, starting with the Justice herself and including the two extremely capable advocates, Pamela S. Karlan and Roy Englert who argued the case. Professor Karlan is the Kenneth and Harle Montgomery Professor of Public Interest Law at Stanford. She is also the co-director of the school's Supreme Court Litigation Clinic. The clinic trains students to litigate live cases before the Court. In addition to her impressive academic and professional credentials, Ms. Karlan has another association with the case, because she had clerked for Justice Harry A. Blackmun, the author of the majority opinion for the Court in 1972. The other counsel, Roy Englert, is an appellate litigator and antitrust lawyer at Robbins Russell in Washington D.C. of which he is a co-founder. This year he argued before the Supreme Court in his twenty-first appearance. He has briefed many other cases in the Court, in addition to his extensive litigation in lower courts.

Ms. Totenberg's report outlined the basic facts of the case: ". . . [T]he case was brought by St. Louis Cardinals great Curt Flood, who challenged baseball's reserve clause—the provision that allowed teams to virtually own players, set salaries and conduct trades, with the players for all practical purposes never able to negotiate freely with other teams. That meant that at the time Flood brought his challenge in 1970, he was earning what was then considered a top salary of \$90,000. This, for a player who had signed with the Cards at age 18 with no agent or lawyer, and who in six of the next 12 seasons batted .300 and won seven Golden Glove awards. So, when he was traded to the Philadelphia Phillies, a definitely lesser team at the time, he refused to go, and

could not play for any[other] team."

At this point, Flood wrote his letter to the Baseball Commissioner stating that he was "not a piece of property to be bought and sold." Kuhn's refusal of Flood's demand was ultimately appealed to the Supreme Court.

The decision was handed down in 1972. The Court ruled against Flood by a vote of 5 to 3. Justice Harry Blackmun wrote the decision. Although the Court found against Flood, Blackmun's opinion acknowledged that the Court's previous rulings upholding baseball's antitrust exemption were too sweeping. He thus provided an opening for future challenge and change, which would lead to the eventual creation of the free agency system which baseball now has.

On the day of the reenactment, Professor Brad Snyder, an Assistant Professor of Law at the University of Wisconsin School of Law, provided a more detailed overview of the circumstances surrounding the case. Snyder is the author of a number of law review articles and other similar academic publications, and two critically acclaimed books about baseball including one about this specific case: **A Well-Paid Slave: Curt Flood's Fight for Free Agency in Professional Sports**. The text of his remarks follows this article and starts



The two oral advocates, for the reenactment, Pamela Karlan and Roy Englert, presented stimulating and sometimes entertaining arguments in the case.

on page 8 of this magazine.

With that background, the stage was set for the oral argument with Professor Karlan and Mr. Englert as advocates, and Justice Sotomayor acting as "the Court." In an interesting historical coincidence, the reenactment was not the first time that Justice Sotomayor "considered" a lawsuit concerning professional baseball. Indeed, her previous participation earned Justice Sotomayor the nickname "the judge who saved baseball" in 1994. At the time, Sotomayor was serving on the United States District Court of the Southern District of New York. A controversy

Continued on Page 6



At the conclusion of the “oral argument”, Justice Sotomayor applauded the two advocates for their presentations.

came before her in which team owners were accused of colluding illegally to fix the salaries of baseball players. The dispute threatened to delay the opening of the season that year. In her decision on the case, then-judge Sotomayor agreed that the team owners were colluding, and she granted a temporary injunction that barred them from the practice, opening the way for the season to begin on schedule. Her timely action not only earned her the nickname, but also the good will of millions of baseball fans.

The audience enjoyed a wonderful performance from all three of the principals on May 22. Oral arguments were interspersed with references to great baseball players, the recital of statistics, and baseball terminology. The attorneys and the Justice all engaged in some light-hearted banter and good-natured jokes. Professor Karlan represented Flood that evening. Roy Englert represented Major League Baseball and Bowie Kuhn.

Karlan opened her argument asserting that the 1922 and 1953 decisions by the Supreme Court that upheld baseball’s antitrust exemption were outliers and that no other professional sport enjoyed such protection. Sotomayor inquired why the Court should consider breaking with its past traditions at this time, thus depriving the owners of their “reliance” on previous decisions. Karlan said that if the Court ruled in favor of the owners for a third time, “it would amount to something done in baseball only once before—three errors on a single play.” Sotomayor countered by saying that the Court could apply another baseball rule: “three strikes and you’re out.” Karlan’s reply was, “I’m swinging for the fences here, your honor.”

Sotomayor suggested that if players became empowered to act as free agents, that they would move about freely seeking better terms, displaying little loyalty to a team. She suggested that such an inconsistency might inhibit fans from developing strong loyalty to the teams and would jeopardize revenue to the team owners. Karlan said that if the exemption was repealed that team owners would have to pay the players what they were worth to keep them, rather than relying on the unfair advantages team owners had under the existing system. Feigning horror and surprise, Sotomayor said that if

that policy was implemented, that the Yankees “might have to pay Reggie Jackson \$1 million a year!” Karlan countered that it could be even worse, the Yankees might have to pay “Alex Rodriguez a quarter of a billion dollars not to play!” Sotomayor responded saying, “I can’t imagine such a thing.”

After this exchange, Karlan addressed the underlying legal questions to conclude her presentation. She observed that during the late 1800s and early 1900s baseball had operated on a competitive basis, including independent leagues. This all changed when the Court ruled in 1922 that baseball was exempt from antitrust law. She characterized that ruling as ridiculous. She said the Court’s assertion in that same ruling that the sport did not involve interstate commerce, was also ridiculous.

Speaking for Major League Baseball, Roy Englert observed that some 50 bills had been introduced in Congress over the ensuing years seeking to eliminate the antitrust exemption for baseball. But none had passed. He suggested that given that history, the Court should leave the regulation of the sport to Congress to determine.

Sotomayor inquired of Englert, “Where are the rights of the players?” Quoting Flood himself, she said that the current system of baseball was a form of “involuntary servitude” which did not exist in any other industry.

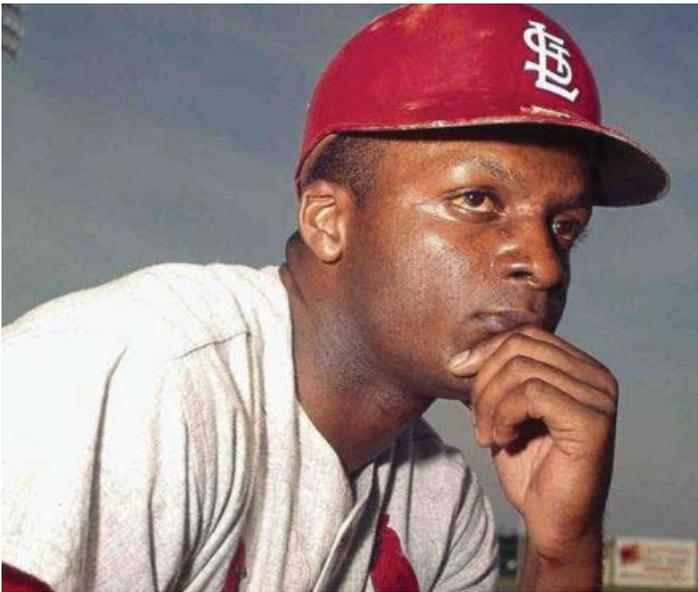
Englert countered by informing the Justice that “these young men are making on average \$28,000 [a year] . . . as much as Supreme Court Justices.” (These figures are of course for 1974.) Moreover, unlike other sports, baseball involved an enormous investment in training players in the minor leagues, thereby increasing significantly the costs to the owners.

The Justice inquired how the integrity of the Court is affected when it lets “clearly erroneous decision[s] stand?” A further question, is how long should the Court let erroneous decisions stand before seeking to correct the problems.

At the conclusion of argument, the Justice summarized the opinion written by Justice Blackmun saying that it was “notorious” for the “seven-page sentimental opening.” This



Annie Jones Blattner, daughter of the late Frank C. Jones for whom the series is named, is shown with Justice Sotomayor during the reception following the reenactment.



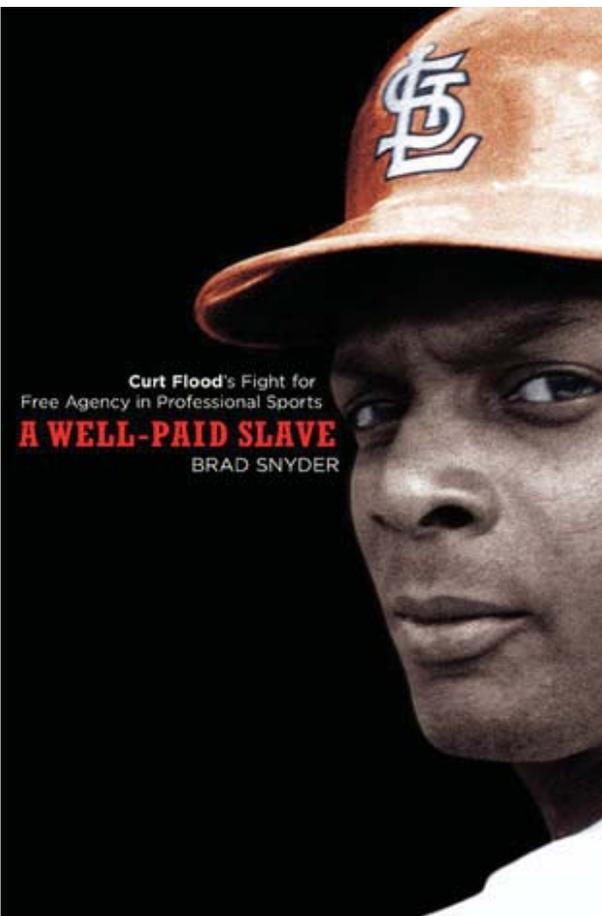
Wikipedia / public domain

sections in which the antitrust exemption and the reserve clause were upheld. The judgment was based entirely on the doctrine of *stare decisis*, respect for precedent. Blackmun acknowledged in the opinion that the Court had been wrong when it determined baseball did not involve interstate commerce. In spite of that, he concluded that the exemption should continue because the Court had previously upheld the principle, and because Congress had not acted to overrule the Court.

When commenting what she would have done, the Justice responded that “first of all, she would have insisted that Joe DiMaggio be added to the list of baseball greats,” and on that condition she would have joined the opening section of the opinion. But she continued, “[t]here are Supreme Court decisions that are wrong.” The Court’s 1896 decision upholding segregation was wrong, and the Supreme Court was right to reverse it in 1954. But sometimes, the question is not whether the decision was wrong, but whether this was the right time to overrule it.” In conclusion, she said that from today’s perspective we view the reserve clause that deprived players of any real negotiating power as a horrible thing. But putting it into historical perspective, at the time the case was argued, both sides saw themselves as “fighting for the very survival of baseball.”

After an outstanding career with the St. Louis Cardinals, Curt Flood protested against being traded against his will to the Philadelphia Phillies. His protest was the genesis of the case *Flood v. Kuhn*.

preamble included a recitation of the history of the game, and listed some 88 best players of all time. She commented that it “was so un-judgelike” and observed that Chief Justice Burger and Justice Byron White had refused to sign onto that section of the opinion. However, they did join the



Copies autographed by the author of *A Well-Paid Slave: Curt Flood's Fight for Free Agency in Professional Sports* are available in limited quantities in our Giftshop at the Supreme Court or available online at www.supremecourtgifts.org

A Well-Paid Slave: Curt Flood's Fight for Free Agency in Professional Sports
Price: \$16.00

After the 1969 season, the St. Louis Cardinals traded their star centerfielder, Curt Flood, to the Philadelphia Phillies, setting off a chain of events that would change professional sports forever. At the time there were no free agents, no no-trade clauses. When a player was traded, he had to report to his new team or retire. Unwilling to leave St. Louis and influenced by the civil rights movement, Flood chose to sue Major League Baseball for his freedom. His case reached the Supreme Court, where Flood ultimately lost. But by challenging the system, he created an atmosphere in which, just three years later, free agency became a reality. Flood's decision cost him his career, but as this dramatic chronicle makes clear, his influence on sports history puts him in a league with Jackie Robinson and Muhammad Ali.

Flood v. Kuhn: An Historical Overview

By: Brad Snyder*

On October 7, 1969, St. Louis Cardinals center fielder Curt Flood received an early morning phone call that he had been traded to the Philadelphia Phillies.

Flood's contract contained a provision known as the reserve clause. The reserve clause says that we own you for this year and next year, too. And next year, you can only resign with us – unless we trade you, then your new team owns you for this year and next year, too. In short, the reserve clause is a perpetual option that results in lifetime ownership.

Curt refused to go to Philadelphia. Instead, he met with Marvin Miller, the head of the MLB players association, about challenging the legality of the reserve clause.

"It's a million-to-one shot," Miller said, "and even if that million-to-one shot comes home, you'll never see a dime."



Professor Brad Snyder presented the background of the case *Flood v. Kuhn* on the evening of the reenactment. He is the author of a book based on the case, *A Well-Paid Slave: Curt Flood's Fight for Free Agency in Professional Sports*.

The reason why Miller said it was a million-to-one shot is that the U.S. Supreme Court had twice ruled that the Sherman Anti-Trust Act did not apply to MLB.

In a 1922 case known as *Federal Baseball*, Justice Oliver Wendell Holmes ruled in a unanimous opinion that professional baseball was not interstate commerce for the purposes for the Sherman Act. He analogized the case to the Chautauqua lecture circuit, a series of exhibitions in which the travel was incidental to the commercial activity itself.

Judge Henry Friendly later wrote that *Federal Baseball* was "not one of Mr. Justice Holmes's happiest days." But as Kevin McDonald has pointed out in the *Journal of Supreme Court History*, *Federal Baseball* was consistent with the Court's antitrust jurisprudence at the time.

Since writing my book, *A Well-Paid Slave*, I've learned two interesting facts about Holmes & *Federal Baseball*:

1) Holmes knew nothing about baseball. He once tried to borrow one of Justice Day's baseball analogies and wrote a female friend: "I sneaked a base."

2) *Federal Baseball* was probably one of five opinions that Holmes wrote during a six-day period.

In 1953, the Supreme Court reaffirmed baseball's "antitrust exemption" in a case brought by New York Yankees minor league pitcher George Toolson. *Toolson* was not one of the Supreme Court's happiest days. The Court was in transition. Chief Justice Earl Warren was a recess appointment to the Court. Justice Black was acting as Chief Justice and running the Conference.

In *Toolson*, the Court refused to reconsider *Federal Baseball's* reasoning yet completely changed its meaning. At the end of the one-paragraph per curiam opinion written by Justice Black, Chief Justice Warren added a sentence claiming that in 1890 Congress had intended to exempt professional baseball from the Sherman Act. This sentence attempted to spur congressional action, yet completely misconstrued the Court's antitrust jurisprudence as well as *Federal Baseball*.

There was some hope after *Toolson*. Between 1953 and 1970, the Supreme Court refused to exempt professional football, boxing, or basketball from the antitrust laws because these other sports were engaged in interstate commerce. Baseball was the outlier.

Nonetheless, Marvin Miller still saw the case as a million-to-one shot and one that would ruin Curt Flood's playing career and any possible future coaching or management career in the game.

Flood asked Miller if the lawsuit would benefit future players.

Miller said it would.

Flood said that was good enough for him.

Why did Curt Flood litigate a case in which he would sacrifice everything for the benefit of others? Well, you'll have to read my book for the complete answer.

But, for anyone who knew his personal story of protesting Jim Crow segregation alongside Jackie Robinson and Medgar Evers among others, it was no surprise that Curt Flood was willing to stand up to MLB.

On December 24, 1969, Curt wrote a letter to baseball commissioner Bowie Kuhn. "After 12 years in the major leagues," Flood wrote, "I do not feel that I am a piece of property to be bought and sold irrespective of my wishes" and asked to be declared a free agent so that he could negotiate with the team of his choice. Kuhn, not surprisingly, denied Flood's request.

A week or so later, Flood went on ABC Sports where Howard Cosell asked him what's wrong with a baseball player making \$90,000 a year (superstars made \$100,000 in those days) being traded from one team to another. Flood replied: "A well-paid slave is nonetheless a slave."

Curt sat out the entire 1970 season while his case went to trial in the Southern District of New York. At his trial, former

owner Bill Veeck and former players Jackie Robinson, Hank Greenberg, and Jim Brosnan testified for Flood.

Flood's legal team brought federal antitrust claims, state antitrust claims, as well as a 13th Amendment claim. Flood's legal team argued that if baseball was not interstate commerce, then it was intrastate commerce subject to state antitrust law.

The owners argued that the federal trial court lacked jurisdiction because of *Toolson's* antitrust exemption as well as a second exemption. Unions, based on a divided opinion in the *Jewel Tea* case, should not be able to create monopolistic entities and then turn around and sue for monopoly. A concurring opinion by Arthur Goldberg, now Flood's counsel, advocated an exception for collective bargaining. Flood's lawsuit, the owners argued, should be decided at the negotiating table through collective bargaining.

By the time the trial court dismissed the case and it was appealed to the Second Circuit, Flood was living in exile in Denmark.

Before the 1971 season, the Phillies sold Curt's rights to the Washington Senators. Both parties to the litigation agreed that signing with the Senators would not moot Curt's case. Curt tried to make a comeback with the Senators in 1971, but the season off had sapped him of his skills, and financial problems and alcoholism drove him to distraction. He played in only 13 games before exiling himself to Mallorca, Spain.

Flood was in Spain on March 20, 1972, when the Supreme Court heard his case.

A young Willkie Farr partner, 36-year-old Louis Hoynes, represented the owners, and the legendary Washington attorney Paul Porter represented Commissioner Kuhn.

Before the argument, Hoynes and Porter were mooted at Porter's firm, Arnold & Porter, where former Justice Abe Fortas made a rare appearance at his old law firm to serve as a mock chief justice. Fortas also wrote a memo handicapping the case.

As he did at trial and on appeal, former Justice Arthur Goldberg represented Flood. Goldberg denied the offers of several former clerks to moot the case. The argument was not one of Justice Goldberg's happiest days.

I can't wait to hear the do-over.

Professor Snyders' Comments after the Re-enactment

Curt Flood was not baseball's first free agent.

On June 20, 1972, he lost his case 5-3. The Conference vote was initially 5-4 in MLB's favor. Then Justice Powell, a vote for Flood, recused himself because he owned Anheuser Busch stock and the beer company owned the Cardinals. Then Justice Thurgood Marshall switched his vote from MLB to Flood creating a 4-4 tie. At the 11th hour, Chief

Justice Warren Burger switched his vote from Flood to MLB. Justice Harry Blackmun's opinion became the opinion of the Court. Part I of Blackmun's opinion included an ode to baseball and a list of 88 baseball greats. Both Chief Justice Burger and Justice Byron White refused to join Part I. The rest of Blackmun's opinion conceded that baseball was interstate commerce, yet allowed the trial court's decision to stand based on *Federal Baseball* as well as congressional inaction in response to *Toolson*.

Flood's defeat, however, led to victory. By consistently arguing that these issues should be resolved at the negotiating table, the owners were forced to make concessions – including independent grievance arbitration as part of the 1970 collective bargaining agreement negotiated on the eve of Curt's trial.

Using the new grievance procedure, Catfish Hunter became baseball's first free agent after the 1974 season when an arbitrator ruled that Oakland A's owner Charley Finley had breached Hunter's contract by refusing to set up a lifetime annuity. Hunter signed with the Yankees for \$3.75 million. The following year, Andy Messersmith and Dave McNally played an entire season without new contracts (in an attempt to "play out" their options), and arbitrator Peter Seitz declared them free agents. Messersmith and McNally opened the floodgates.

At the dawning of free agency, Flood remained in Spain in the throes of alcoholism and poverty. He returned to Oakland in 1975, sobered up after a decade, and married the love of his life, actress Judy Pace. During the 1994 baseball strike, Flood spoke to a gathering of striking players in Atlanta and was given a standing ovation. Thankfully, then-Judge Sonia Sotomayor saved baseball fans everywhere by issuing a temporary injunction for the players and ending the strike.

In 1996, Flood starred in Ken Burns's *Baseball* documentary and met then-President and Mrs. Clinton during a media reception at the White House. Flood died of throat cancer in January 1997.

**Brad Snyder, is an assistant professor at the University of Wisconsin Law School, and the author of A Well-Paid Slave: Curt Flood's Fight for Free Agency in Professional Sports (Viking/Penguin 2006. Professor Snyder currently is working on a book about a progressive political salon in Dupont Circle known as the House of Truth.*

The Mayor and the President: A Re-examination of *Merryman*

By: George W. Liebmann*

This article has unlikely origins. They are in some measure prompted by a talk given a few years ago as part of the Leon Silverman Lecture Series*. The speaker contended that the *Merryman* and *Milligan* cases as they related to detention and interrogation in times of war were aberrations; what Justice Frankfurter called in another context, “derelicts on the waters of the law.” He alleged that *Merryman* remains unknown to almost all but those scholars who toil in the academic fields of the separation of powers or the early days of the Civil War.

Merryman is better known than that. It was the subject of a centennial symposium in the federal district court for Maryland in 1961, addressed by William L. Marbury, Chief Judge Roszel C. Thomsen and Taney’s biographer H.H. Walker Lewis. It figures prominently in a number of books on executive power in wartime by such as Carl Brent Swisher (1974), Clinton Rossiter (1945), Frederick Bernays Wiener (1940) and Charles Warren (1935), as well as in Chief Justice Rehnquist’s book on the subject.

In 1861, executive detention without trial was not a burning issue. It is now. There is a vast literature, and there is therefore no excuse for another redundant discussion. I shall therefore focus on unpublished documents by or about the contending protagonists.

John Merryman is frequently depicted as a rogue Confederate, a quasi-terrorist; his imprisonment as a vindication of law and order; “shall all the laws but one go un-executed?”, Lincoln famously inquired. Despite this wonderful rhetoric, it is not clear what “other laws” Lincoln was talking about. There were no federal laws against slavery in Maryland, and few federal laws at all, unless one counts the protective tariff.

Merryman’s initial deed was not a rogue act but an act of policy, conceived by the Mayor of Baltimore, George William Brown; acquiesced in, however reluctantly, by the Governor of Maryland, Thomas Halliday Hicks; having as its immediate object the suppression of further riots and the probable ensuing secession of Maryland and as its further possible consequence the forestalling of civil war. An understanding of what the *Merryman* case was about requires an understanding not of Merryman but of the real author of his deed, George William Brown, then the Mayor of Baltimore.

Brown was born in 1812, the son of a doctor; contrary to the allegations of one historian, he had no connection with the investment banking family. He was educated at Dartmouth and Rutgers, conceiving a dislike of American

college life, later decrying college dormitories as seats of dissipation and vice and urging emulation of the European practice in which students live in the town and in Emerson’s words “do not postpone life, but live already.” In 1835 in his early twenties, he organized a militia which under the command of General Sam Smith, the hero of the Battle of North Point, suppressed the Bank of Maryland riots.

Thereafter he played a notable role in curbing the excesses of the Know-Nothing movement (of which Governor Hicks was an adherent) serving as a poll-watcher at considerable risk to life and limb in the murderous 1859 election and thereafter becoming a reform candidate for Mayor in 1860. He was the draftsman of legislation removing the corrupt and violent Baltimore police from municipal to state control. He had also been a participant in controversies over slavery and the position of free blacks.

In 1842, he had declared: “The policy of the State has been, and its true policy still is, to encourage manumissions; it has not ceased to look forward to the day when, by the voluntary acts of its own citizens, it would be emphatically and without exception a free State, and the harsh measures now proposed against the people of color who are already free are as inconsistent with the real welfare of this Commonwealth as they are at variance with the feelings of humanity.”

In 1842, a series of bills directed against the 25,000 free blacks in Baltimore, which would have limited further manumissions, prohibited blacks from owning real estate, required them to register annually, and banished any convicted of non-capital offenses, was defeated by a vote of 15 to 6 in the Maryland Senate after opposition from Brown and others. In 1846 Brown, together with his brother-in-law and law partner Frederick Brune launched an effort to promote gradual emancipation in Maryland. By the time of the outbreak of the Civil War, about half of Maryland blacks were free blacks, as were 80% of Delaware blacks and 20% of Virginia blacks. In 1859, Brown again opposed a group of bills, the so-called “Jacobs bills,” directed at worsening the status of free blacks.

George William Brown was elected Mayor of Baltimore on a reform ticket at the 1860 election, defeating a Know-Nothing candidate. In the Presidential election, most of Brown’s supporters backed Breckinridge, the Southern Democrat, while most of the Know-Nothings supported the Constitutional Union ticket of Bell and Everett. “My present inclination is to vote for Bell and Everett tho’ I dislike the company in which it will place me. Breckinridge and Walker



In April 1861, Mayor Brown met with President Lincoln and his cabinet and the Union Commander Lt Gen. Scott at the White House to protest the movement of federal troops through Baltimore. The drawing above portrays Lincoln, his Cabinet and Gen. Scott.

seem to me to be only better than Lincoln and Hamlin, inasmuch as if I must choose between a southern sectional party and a northern one I should prefer the former. And Douglas has no charm for me whatever.” On his inauguration, Brown declared “The election of a President, however unacceptable he may be to any portion of the republic, can afford no justification for its disruption.” Brown took a dim view of Lincoln’s oft-delivered ‘house divided’ speech: “The founders of the Constitution of the United States had built a house which was divided against itself from the beginning... Here was an irreconcilable conflict between the Constitution and the future President...It matters not that Mr. Lincoln, after his election...held out the olive branch to the nation... [he] was not known then as he is known now, and, moreover, his term of office would be but four years.” The conduct of the war redeemed Lincoln’s prophecy that “every drop of blood drawn by the lash shall be paid by another drawn by the sword.”

Lincoln went through Baltimore on a night train on his way to his inauguration, leaving Brown waiting in vain at the station, an act “which helped to feed the flame of excitement which...was burning too high all over the land.” Two months later, after the bombardment of Fort Sumter, a Baltimore mob attacked federal troops en route between the President and Camden Street stations. Brown marched at the head of the column for several minutes “holding high an umbrella to identify himself and to protect the soldiers with his person.” A northern captain declared that “Mayor Brown attested the sincerity of his desire to preserve the peace.” He then sent a telegram to the President requesting “that no more troops be permitted or ordered by the Government to pass through the city.” That evening, upon his order and that of the Governor, the Canton, Gunpowder and Back River bridges were destroyed, together with the Melville and Relay House bridges on the Harrisburg line and two wooden bridges at Cockeysville, an act which almost ended the Civil

War before it began. On the following day, a message from Lincoln declared “For the future troops must be brought here, but I make no point of bringing them through Baltimore.”

On April 21, Brown and three other Baltimoreans met with Lincoln, his cabinet and the Union Commander, Gen. Winfield Scott, at the White House. Lincoln declared that the troops were for defensive purposes and not for use against Maryland or the South. The historian Matthew Page Andrews declared: “President Lincoln’s promises on behalf of the Federal government, and their contrary fulfilment when the government was in a position to force its will, left an unfavorable opinion [which] persisted in Maryland for more than half a century.” Brown according to his memoir told the President that his call for troops was regarded as “an act of war upon the South and a violation of its constitutional rights. . . Mr. Lincoln was greatly moved, and springing up from his chair walked backward and forward throughout his apartment. He said with great feeling, ‘Mr. Brown, I am not a learned man!’ that his proclamation had not been correctly understood; that he had no intention of bringing on war, but that his purpose was to defend the capital.” Brown agreed not to interfere with troops marching around Baltimore, and Lincoln after another meeting later in the day withdrew troops about to march through it, later telling Sen. Reverdy Johnson: “Our men are not moles, and cannot dig under the earth; they are not birds, and cannot fly through the air.” The historian Allan Nevins observed: “It was an extraordinary spectacle, this of the President of the United States and the general of its armies parleying with a mayor and suspending the right of national troops to march through his city to save Washington.” In the confusion prevailing in Washington, Treasury Secretary Chase urged that secession be permitted and Governor Hicks unsuccessfully proposed mediation by the British minister, Lord Lyons. It is generally agreed that had Brown and Hicks urged Maryland’s secession, it would have taken place.

A month later, John Merryman, a participant in the blowing of the railroad bridges, was detained by federal troops, leading to the issuance of a writ of habeas corpus. Brown was in the courtroom and congratulated Chief Justice Taney. “He then told me that he knew that his own imprisonment had been a matter of consultation, but that the danger had passed, and he warned me, from information that he had received, that my time would come.” On May 12, federal troops occupied Baltimore. Brown refused to oust the police commissioners and on September 11 declared “I recognize in the action of the Government of the United States in the matter in question nothing but the assertion of superior force.” On the following day, he was arrested by federal troops after vainly demanding to see a warrant. On September 15, Lincoln issued a statement to the Baltimore

Continued on Page 12

Advertiser: "in all cases the Government is in possession of tangible and unmistakable evidence which will, when made public, be satisfactory to every loyal citizen." This promise was never kept.

Brown's detention became an almost immediate embarrassment to the administration. Within two weeks, Secretary Seward offered to release him if he would take the oath of allegiance, resign as Mayor, and agree to reside in a Northern city. On January 10, 1862, Brown responded: "I cannot consistently with my ideas of propriety by accepting a renewal of the parole place myself in the position of seeming to acquiesce in a prolonged and illegal banishment from my home and duties." These conditions, and milder ones later offered were rejected by Brown on February 15, 1862 as constituting a confession of guilt. "I have committed no offense. I want no pardon. When I go out, I want to go out honorable." Petitions on his behalf were signed by members of the Sixth Massachusetts Regiment. The Mayor was given a thirty-day parole to attend to business matters, but at the end of the thirty days he reappeared and demanded to be put back in his cell. A general amnesty was proclaimed in February 1862, but he was refused release, having again declined to resign his office. "There probably never will be a period in which it will be as important bravely to maintain the principles of constitutional liberty as it is now, where these principles are assailed by the military and civil power of the government of the U.S. backed, I am ashamed to say, by the influence of those who have been eminent for learning, wisdom, and patriotism."

The detention of the Fort Warren prisoners was an issue in the 1862 elections, in which the Democrats gained 31 seats. Following the expiration of his Mayoral term, and after 15 months of incarceration, Brown and the remaining Maryland prisoners were released without conditions, leading the New York lawyer David Dudley Field to declare that the electorate had executed Justice Taney's writ. In 1863, in a case argued by Brown, the Maryland Court of Appeals declared that the militarily displaced police commissioners retained their rights under State law. Brown, and some of his imprisoned compatriots, an historian of the Civil War has noted, "were guilty of little more than Southern sympathies or lukewarm unionism. They were victims of the obsessive quest for security that arises in time of war, especially civil war." Twenty members of the Maryland legislature were arrested; and the November 1861 state elections were rigged by the military. Marylanders can not be heard to proclaim about the prospects of dictatorship in the United States: "It can't happen here." It already has.

Lincoln had been elected by a plurality, but less than 40%, of the national vote, and had a minuscule share of the vote in Baltimore (3%) and Maryland (2%). Even his most

ardent apologists concede his vacillation during the four-month interregnum preceding his inauguration, in which he effectively sabotaged the so-called Crittenden compromise which would have constitutionally guaranteed slavery where it existed and permitted some expansion.

The critical event in the rush to war was Lincoln's call for Northern troops on April 15, the day following the surrender of Fort Sumter "to redress wrongs long enough endured." "What these wrongs were", Brown dryly observed in his memoir, "is not stated." This was the event that propelled Virginia, North Carolina, Arkansas and Tennessee out of the Union, and that provoked the April 19 Baltimore riot. South



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This drawing shows the sixth regiment of the Massachusetts volunteers firing into the crowds in Pratt Street as they attempted to move through the city of Baltimore after troops had fired on Fort Sumter.

Carolina had seceded on December 20, but until April there was no rush of Upper South states to join her.

Brown's view as to the result of the war was expressed in his memoir: "I feel that I am living in a different land from that in which I was born and under a different Constitution, and that new perils have arisen sufficient to cause great anxiety. . . Vast fortunes, which astonish the world, have suddenly been acquired, very many by means of more than doubtful honesty, while the fortunes themselves are so used as to benefit neither the possessors nor the country. Republican simplicity has ceased to be a reality, except where it exists as a survival in rural districts, and is hardly now mentioned even as a phrase. It has been superseded by republican luxury and ostentation. The mass of the people, who cannot afford to indulge in either, are sorely tempted to covet both. The individual man does not rely, as he formerly did, on his own strength and manhood. . . In combinations, the individual counts for little, and is but little concerned with his own moral responsibility. . . In many ways there is a dangerous tendency toward the centralization of power in the National Government, with little opposition on the part of the people. . . The administration of cities has grown more and more extravagant and corrupt." Brown's last

venture into politics in 1885 at the age of 73 was an effort to break the power of the Gorman-Rasin ring which dominated Baltimore well into the 20th century; the mayoral election was widely judged to have been stolen from him, and gave rise to the adoption of the Australian ballot in Maryland.

The Civil War, like all wars, was, in the words of the Italian diplomat Carlo Sforza, “a school of hatreds and calumnies”; ‘waving the bloody shirt’ infects American politics still. The overheated rhetoric and social utopianism of both sides is summarized in Edmund Wilson’s *Patriotic Gore*. In its aftermath, Judge Brown remained the constructive reformer. He was convinced that “the seceding states should have been allowed to depart in peace and. . . believed that afterwards the necessities of the situation and their own interest would induce them to return, severally perhaps, to the old Union, but with slavery peacefully abolished, for, in the nature of things, I knew that slavery could not last forever.” He restrained Maryland’s 1867 Constitutional Convention from abolishing the new public education system and successfully protested against a proposal to disqualify blacks as witnesses: “are they to be deprived of the only way of maintaining rights? Is this not monstrous?” He helped frame the founding documents of the Peabody Library, the Enoch Pratt Free Library and the Johns Hopkins University, where his influence as trustee gave rise to the emulation of German research universities, no part of the design that Daniel Coit Gilman followed at the University of California before coming to Baltimore and falling under the influence of Brown. He also was a founder of the Library Company of the Baltimore Bar and of the Maryland Historical Society. As a judge he was instrumental in the admission to the Maryland bar of Everett Waring, Maryland’s first black lawyer, and he opposed the exclusion of blacks from the Maryland Law School. When the late Vice President Henry Wilson lay in state at the Baltimore City Hall in 1875 and the black leader Frederick Douglass came as one of the official guests, “Judge Brown was quick to note that he was ignored, and taking his arm took him to the refreshment tables and presented him to the other Maryland officials.” He urged reform of the Baltimore school board to eliminate election by wards, a reform adopted ten years after his death.

Brown’s voluntary imprisonment for fourteen months in the so-called Northern Bastilles was an act of high principle, whose sole purpose was the vindication of the principles of *Merryman*. He had no great faith in the forcible

or revolutionary transformation of the social system, but a passionate belief in three propositions later asserted by Justice Jackson which resonate in our own time: “men have discovered no technique for long preserving free government save that the executive be under the law, and that the law be made by parliamentary deliberations.” “Emergency powers are consistent with free government only where their control is lodged elsewhere than in the Executive that authorizes them.” “Procedural due process must be a specialized function within the competence of the judiciary on which they do not bend before political branches of the government, as they should on matters of policy.” The barons at Runnymede were not apportioned according to the principles of *Reynolds v. Sims*, and the ban on imprisonment “but by lawful judgment of peers or by the law of the land” did not encompass the rules of *Miranda* and *Escobedo*, but the rights they won are the vital rights, as Brown and Taney saw quite clearly. Without freedom from fear for political actors, democracy is impossible and social justice unlikely. Brown’s faith can be summarized in the words of another constructive reformer Charles Evans Hughes “There is no lack of schemes for the regeneration of society, schemes not infrequently of a sort which would not be needed by a society capable of freely adopting them. The construction of a theoretical paradise is the easiest of human efforts. The familiar method is to establish the perfect or almost perfect state, and then to fashion human beings to fit it. This is a far lighter undertaking than the necessary and unspectacular task, taking human nature as it is and is likely to remain, of contriving improvements that are workable.”

Mr. Liebmann delivered this paper at a Sesquicentennial Commemoration of *Ex Parte Merryman* held on June 1, 2011 at the Library Company of the Baltimore Bar.

**Lecture given by John Woo*

The text of this article with accompanying footnotes appears on our website www.supremecourthistory.org

The author, a principal in Liebmann and Shively, P.A. and a Visiting Fellow of Wolfson College, Cambridge is President of the Library Company of the Baltimore Bar and the author of **The Common Law Tradition: A Collective Portrait of Five Legal Scholars (Transaction Books, 2004).*

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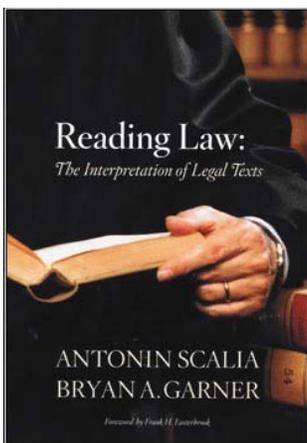
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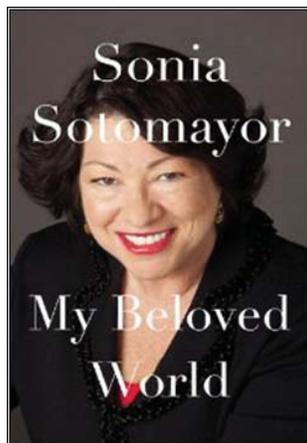
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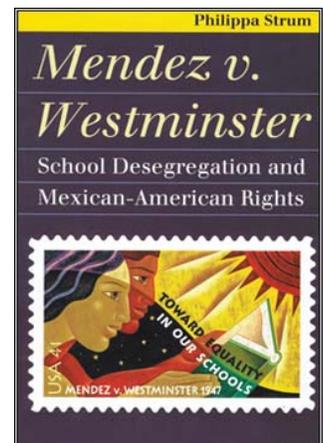
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