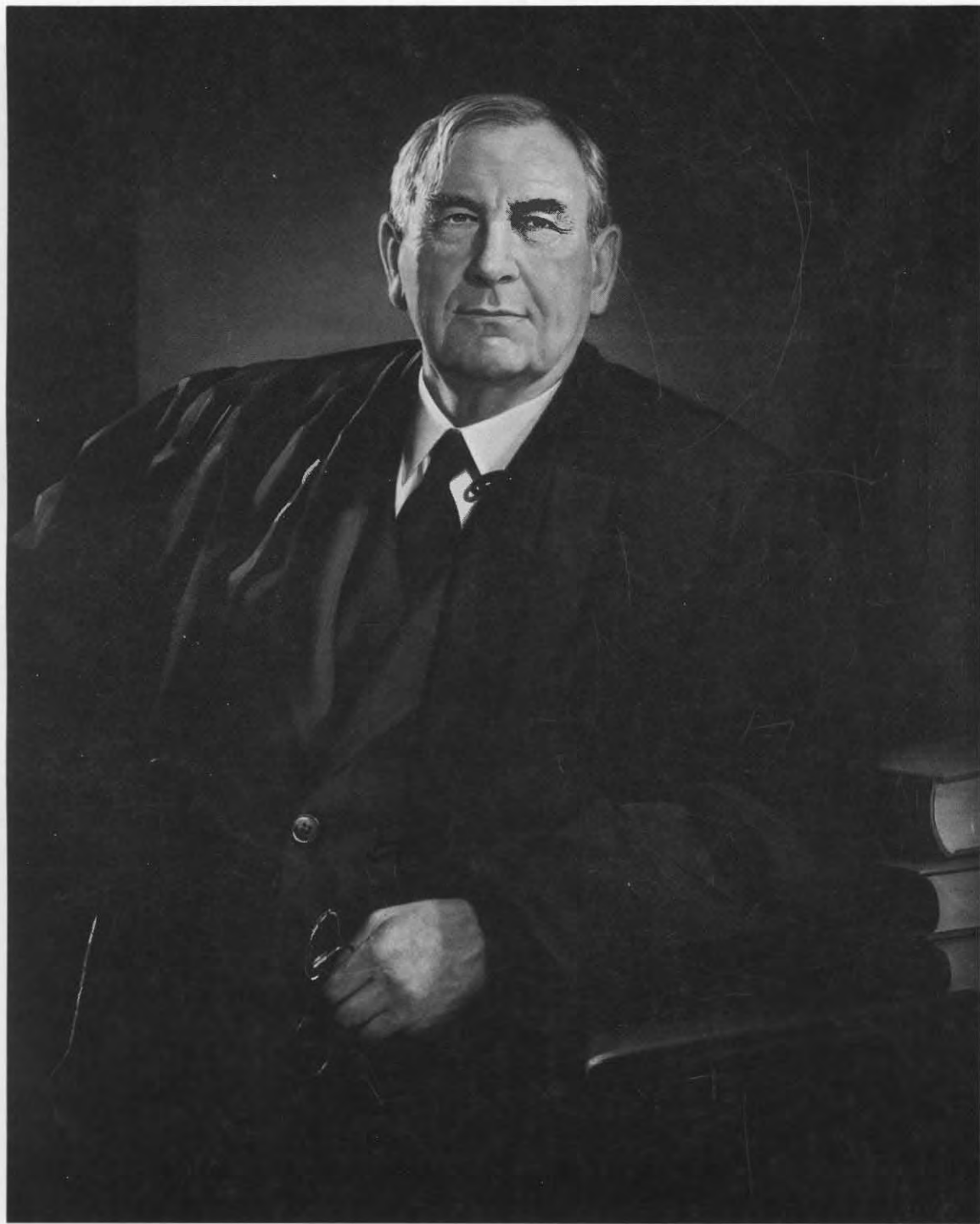
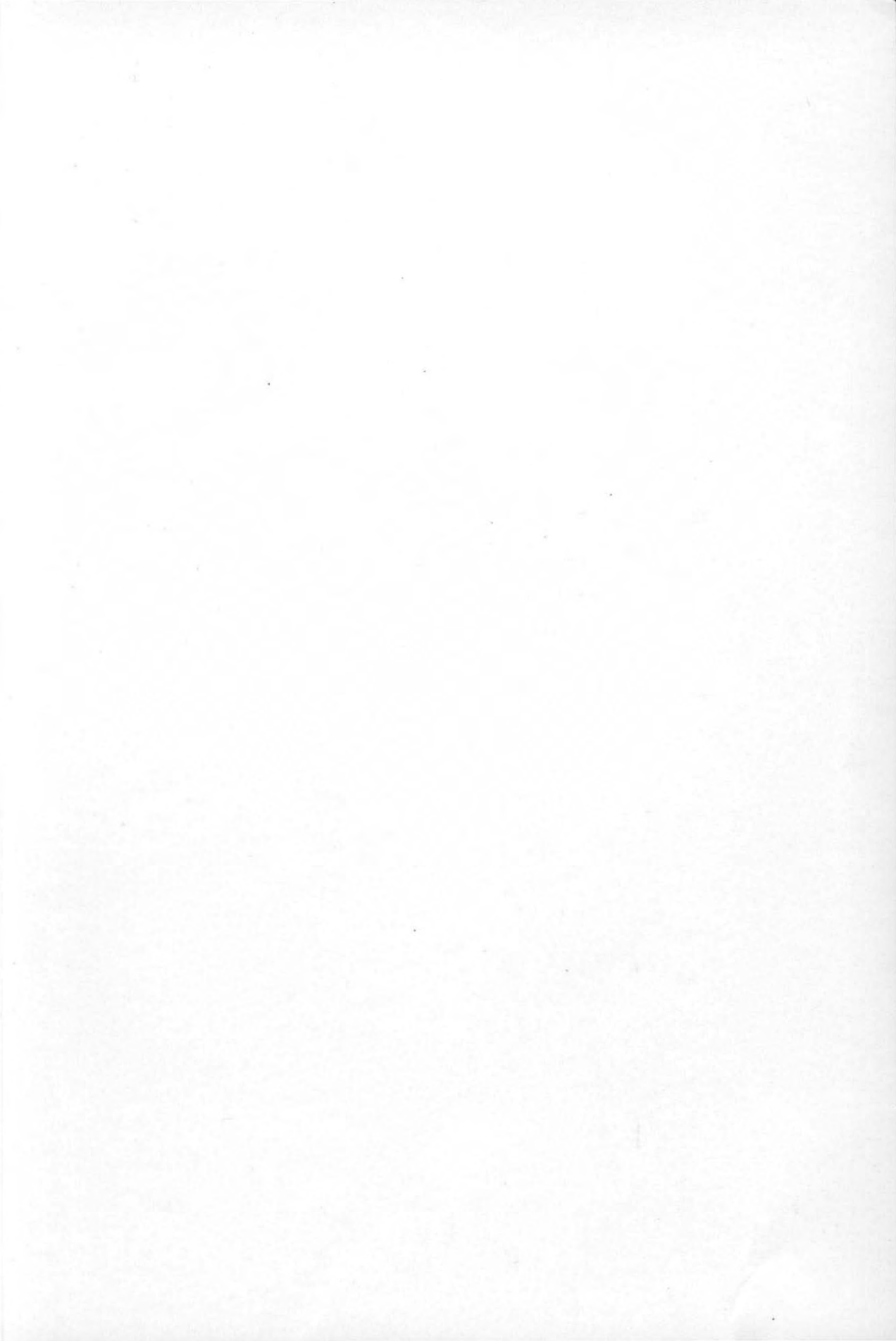


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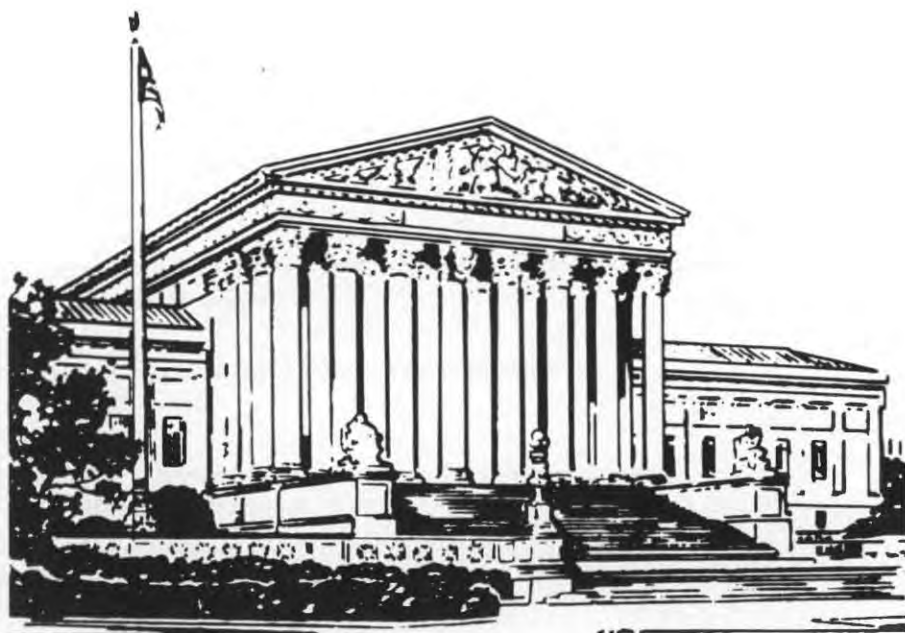


HARLAN FISKE STONE
TWELFTH CHIEF JUSTICE, 1941-1946



YEARBOOK 1985

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The 1926 Term: My Clerkship With Mr. Justice Stone <i>Milton Handler</i>	5
Why Are Some Supreme Court Justices Rated As "Failures?" <i>Robert W. Langran</i>	8
Lawyering in the Supreme Court: The Role of the Solicitor General <i>Rex. E. Lee</i>	15
Oral Argument in the Supreme Court: The Felt Necessities of the Time <i>Stephen M. Shapiro</i>	22
<i>Wheaton v. Peters</i> : The Untold Story of the Early Reporters <i>Craig Joyce</i>	35
Justice David J. Brewer: A Voice for Peace on the Supreme Court <i>Michael J. Brodhead</i>	93
Historical Anomalies in Administrative Law <i>Antonin Scalia</i>	103
<i>Toward 1987</i> : A Dramatic Change in Goals <i>Cornelius Bryant Kennedy</i>	112
A Consideration of Extra-Judicial Activities in the Pre-Marshall Era <i>David Eisenberg</i>	117
The Judicial Bookshelf <i>D. Grier Stephenson, Jr.</i>	128
Comparative Law: The Federal Constitutional Court of Germany and the Supreme Court of the United States <i>Karl-Heinz Millgramm</i>	146
Contributors	155

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The 1926 Term: My Clerkship With Mr. Justice Stone*

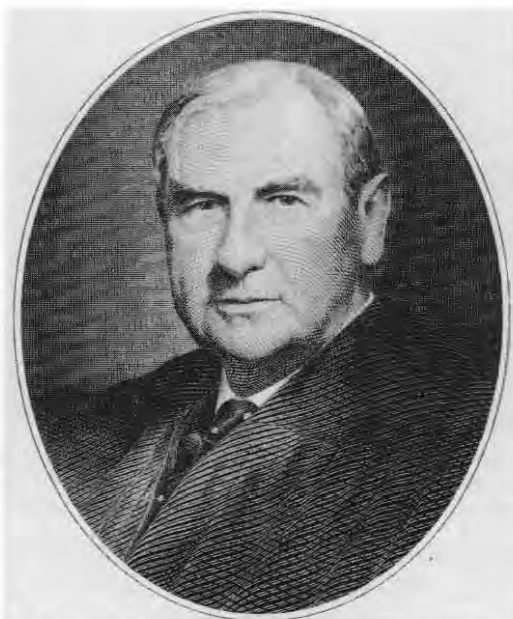
by Milton Handler

It is always pleasurable for a septuagenarian to reminisce about his early years, but this is especially the case when one can recount the delightful experiences of working with one of the titans of our law. There is an aspect of my clerkship which is quite unique, since my year with the Justice coincided with the construction of his beautiful home. The Justice rarely missed a day in visiting the building site. Every bit of material that went into the house was personally examined by him. Beside my usual duties, I was called upon to obtain literally hundreds of books from the Library of Congress on the design of fireplaces, mantle pieces, locks and hardware, paneling, trim and floors. The completion of the house formed an important part of the Justice's daily routine.

Let me describe that routine, bearing in mind that I was with him in 1926 during his second full term on the Court and that in later years the routine was doubtless drastically altered, especially as the work of the Court became more difficult and complex.

The Justice's temporary chambers were on the first floor of the Senate Office Building. On arrival, he would open all the windows, regardless of the weather, with the result that there was always a gale blowing through his room. When he buzzed Miss Jenkins, his secretary, she would don her heavy winter coat and take his dictation fully attired for the outdoors.

The first order of business, no matter how pressing his calendar, was the reading of his mail and the dictation of responses to the letters received that day. This he would even do on Saturdays, when he might not arrive until after 10:00, with the conference scheduled for 12:00 in the Capitol. Since the agenda normally included about 75 matters, it took a bit of effort to get the



Harlan Fiske Stone, Associate Justice 1926-1941, Chief Justice 1941-1946

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Justice organized for the conference. All of the briefs and records had to be assembled and transported to the Capitol. The Justice had to be given his locked docket book in which all votes were recorded. He never took any notes of the cases that had been argued; the only markings he made was a number sign (#) indicating that he had examined the papers. My certiorari memos were normally about one-page long; these would be read by him in about one-half hour or approximately one minute for each. Following the conference, I generally accompanied him on the walk homewards, during which time he would fill me in on what had happened, expressing his views of his colleagues with a frankness that was sometimes startling.

Beginning in October, the Court sat for two weeks of argument and then took a two-week recess. The Court session ran from 12:00 noon until 4:30, with a lunch break from 2:00 to 2:30. This was a period of Coolidge economy and the Senate

**Professor Handler's article is comprised of the text of his remarks at the Tenth Anniversary Dinner of the Harlan Fiske Stone Fellowship of Columbia University School of Law.*



Professor Milton Handler (left), served as Justice Stone's law clerk in the 1926 term. At right is Stone as he appeared in the 1935 term in this photo taken by McReynolds' clerk John Knox.

Restaurant was closed when Congress was not in session. This meant that the Justice had to bring his spartan luncheon from home in a lunchbox. Returning to chambers upon the conclusion of arguments, the Justice would sign his mail, leaf through some of the briefs and records and be ready for his afternoon walk at about 5:30. On these walks, he would talk about the issues before the Court, his years at Columbia, his deep antipathy for Nicholas Murray Butler, his reservations about some of the professors on the Law School faculty, his experiences as Attorney General and a member of the Coolidge Cabinet, his appraisal of his fellow Cabinet members and of the President of the United States.

Thus, as you can see, the Justice, like his former student and later colleague, Bill Douglas, was not, at that stage of his judicial career, overburdened by the job of judging. The Court was then a "cold" bench, with the Justices not seeing the briefs or records until a case was called for argument. There were very few blockbuster cases and the Justice found little difficulty in making up his mind on the basis of the oral argument, confirming his tentative judgment by glancing at the table of contents of the briefs and skimming those

pages that dealt with the issues that interested him.

The picture was radically different during recess, when the opinion-writing process was in swing. The Justice made a fetish of always being current with his work. Whether his assignment consisted of two, three or four opinions, he made every effort to complete all of these during the two-week recess. He would be at his desk well before 9 a.m. With his experience as an appellate lawyer, he could digest records and briefs with phenomenal speed. He tackled the hardest case first, leaving to the last the more simple ones. His first draft was written in pencil on yellow sheets of paper, in a scrawl notorious for illegibility. After he wrote two or three pages, he would summon Miss Jenkins and immediately dictate what he had written. If he waited too long, neither he nor any other human being could decipher his writing. At this stage, his sole objective was to get his thoughts on paper; he was not yet striving for literary perfection. While the clerk was responsible for extensive research, he was never asked to draft an opinion as such. His main role was to participate in the painstaking process of revision. We would deal first with structure and organization.

We would argue the validity and cogency of the reasoning. We might even fight about the result, although there was little chance that the Justice would go counter to the vote of the Court, although, to be sure, this sometimes happened. Then came a scissors and paste job, with the draft being cut up into various pieces and put together in a different sequence. It was not until the third or fourth draft that we began to pay attention to language. At this juncture, we pored over the text word-by-word, phrase-by-phrase and sentence-by-sentence to achieve maximum clarity. All of this would go on for as many as six to ten typed drafts, only to be continued again when we got page proofs, which themselves might go through an additional five or six drafts. Even at this late stage, the Justice would sometimes go home and come back in the morning with a totally rewritten opinion, explaining that he had been dissatisfied and felt that a briefer and better-integrated version was to be preferred. When he did this, the resulting opinions were the very best he published that year.

The workday during the opinion-writing period would run for ten hours, if not more. This was the time when the books would be piled ceiling high as the precedents were carefully studied, applied or distinguished. It might not have taken

the Justice very long to make up his mind; but it took endless hours to produce a document which met his Olympian standards.

A word before I close about our daily luncheons. During recess we had lunch together every day at the Methodist Building across the street from the Senate Office Building. These were working luncheons. I didn't have to watch my diet in those days, so I would have a full luncheon. The Justice loved food, a trait hardly belied by his 290 pounds. Nonetheless, he would order a pimento cheese sandwich on raisin bread, a glass of buttermilk and raw apple. He would sniff at my food, his salivary glands working overtime, and admonish me to remind him the next day to order what I had just had. However the next day, once so reminded, he would invariably order his usual luncheon, complaining sadly that Mrs. Stone would not permit him any more because they usually had a huge breakfast and generally were guests at a formal dinner.

I could go on and on. I have confined myself to the Justice's work habits, resisting the impulse to deal with the substance of his decisions, his juristic philosophy or the contributions that he made as Justice and Chief Justice. This I must leave for another day.

Why Are Some Supreme Court Justices Rated as "Failures"?

by Robert W. Langran

In a book that was published in 1978 entitled *The First One Hundred Justices: Statistical Studies on the Supreme Court of the United States* (Hamden, Conn.: Shoe String Press [Archon Books]), Albert P. Blaustein and Roy M. Mersky put forth a list of our justices who had served on the Court from 1789 until 1969. In so doing, they grouped them into five categories: great (12 justices), near great (15), average (55), below average (6), and failures (8). Their ratings were based upon evaluations supplied by sixty-five reputable academicians in the area of judicial process. Upon careful examination, it would seem that some of the eight rated as "failures" were dealt with more severely than they deserved, perhaps due, in part, to a bias on the part of some of the evaluators.

In point of time, the furthest that these eight go back is the early part of the twentieth century through the New Deal era, as three of the eight just happen to be three of the "Four Horsemen" who consistently voted against New Deal measures. Is that pure coincidence, or does it perhaps reflect some "liberal" bias on the part of some of the evaluators? A look at their records should help.

Willis Van Devanter served on the Court from 1910-1937. Such a long tenure would lead one to think that Van Devanter would have authored a fair amount of majority, concurring, and dissenting opinions. That he did not is probably one of the reasons he was rated as a failure. He only wrote one concurring opinion and four dissents, and even his majority opinions were sparse. He authored fewer of them than any of his contemporaries, only two of note. One was in the 1912 case entitled the *Second Employers' Liability Cases*, 223 U.S. 1, in which he upheld the 1908 Federal Employers' Liability Act, making common carriers in interstate commerce liable for the injuries of their workers while they were directly engaged



Were Justice Willis Van Devanter's contributions in conference overlooked by Blaustein and Mersky when assessing him as a "failure?"

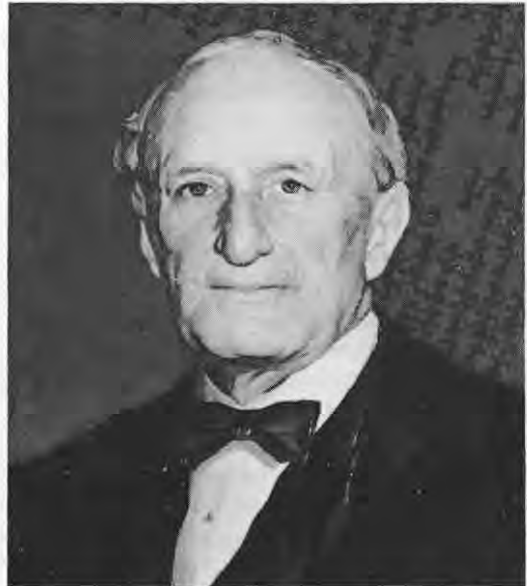
in interstate commerce (an earlier law had been struck down for not making that distinction). The other was in the 1927 case of *McGrain v. Daugherty*, 273 U.S. 135, in which he upheld the right of the Senate to arrest a person who had failed to honor a subpoena to testify concerning an investigation of the Department of Justice. Van Devanter concluded that the investigation was for a legitimate legislative purpose and, therefore, the Senate had acted properly. If measured by opinions authored, the evaluators of Justice Van Devanter would be correct. However, it seems that Justice Van Devanter was strong during the conferences when the justices discuss and vote on the cases. He allied himself with Taft when Taft became Chief Justice (Taft had appointed Van Devanter to the Court), and he left a lot of the opinion writing to Justice Sutherland, who was

the intellectual leader of the conservatives and the only one of the "Four Horsemen" not to be rated a failure (he was rated a "near great"). Therefore, when one looks at total contribution to the Court, it would seem that Van Devanter should not have been rated a failure.

The second of the "Four Horsemen" to be called a failure was James C. McReynolds, who served from 1914-1941. McReynolds did author numerous opinions and dissents, so his rating seems to have been based on the fact that he was the Court's ultra-conservative and on his anti-Semitic feelings which he openly displayed to his Jewish colleagues Brandeis, Cardozo, and Frankfurter. Among his noteworthy opinions were *Adams v. Tanner*, 244 U.S. 590 (1917), in which he threw out a Washington law which made it illegal to charge someone a fee for helping them get employment. He felt this would put employment agencies out of business without the social justification for it. In *Federal Trade Commission v. Gratz*, 253 U.S. 421 (1920), McReynolds overturned an F. T. C. order against an unfair trade practice, stating that it was the Court which had the final say in these matters and that he did not find an unfair trade practice in this instance. Similarly, in *Federal Trade Commission v. Curtis Publishing Company*, 260 U.S. 568 (1923), he again overturned the Commission, finding that the facts as presented by the F. T. C. were not supported by evidence. Also in 1923, in *Meyer v. Nebraska*, 262 U.S. 390, he overturned a Nebraska law which forbade the teaching of modern foreign languages in their elementary schools. He felt the law took away the liberty of parents to educate their children as they saw fit. Likewise, in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), he overturned an Oregon law which required all children between eight and sixteen years of age to attend public schools. He used the same reasoning as in the *Meyer* case as well as the related reason that the law took away the property rights of the private schools. In *Ashton v. Cameron County Water District*, 298 U.S. 513 (1936), he threw out the federal Municipal Bankruptcy Act of 1934 which had allowed subdivisions of states to file voluntary bankruptcy petitions. Although the state had the final say, he still felt the law invaded state finances and state sovereignty. His last notable opinion was in *McCarroll v. Dixie Greyhound Lines*, 309 U.S. 176 (1940), and he threw out an Arkansas law which said that any vehicle coming

into the state with more than twenty gallons of gasoline had to pay the state gas tax on the excess. He said this was a tax on interstate commerce.

Among McReynolds' more notable dissents were, first of all, the one in *Myers v. United States*, 272 U.S. 52, (1926), in which the Court upheld the right of a President to remove a postmaster without the approval of Congress. McReynolds felt that subordinate executive officials could be subject to Congress for their removal, an opinion also expressed by Brandeis in a separate dissent. In *Nebbia v. New York*, 291 U.S. 502 (1934), McReynolds wrote the dissent for the four conservatives from a decision which allowed a state to set up a milk control board with the power to fix maximum and minimum prices. He felt the majority was changing the concept of due process of law due to emergency situations. That was not his concept of how the Constitution should evolve. His most scathing dissent, however, came the following year in which he again spoke for the four conservatives in the so-called Gold Cases: *Norman v. Baltimore and Ohio Railroad Co.* and *United States v. Bankers Trust Co.*, 294 U.S. 240, *Nortz v. United States*, 294 U.S. 317, and *Perry v. United States*, 294 U.S. 330. In these cases, the Court upheld the government nullifying the gold clause in private and public con-



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"Shame and humiliation are upon us," reproached Justice James C. McReynolds in his fiery *Gold Clause* dissent of 1935. McReynolds' rebuke illustrated the growing philosophical gap between himself and his brethren in the late 1930's which undermined his effectiveness on the high bench.

tracts except for government bonds, but even in the latter case there could be no suit as the damages were only nominal. McReynolds felt this went far beyond the scope of congressional power. Finally, in *N. L. R. B. v. Friedman-Harry Marks Clothing Company*, 301 U.S. 58 (1937), McReynolds disagreed with the Court's holding that a small manufacturer fell under the federal government's jurisdiction because it belonged to an industry which was interstate in character. He felt the Court was allowing the government to invade the powers of the states.

From the above sample of cases, it is clear that Justice McReynolds authored some important opinions and dissents, all of them conservative in nature. That alone should not label him a failure. The verdict just might be proper if considering this ultra-conservativeness with his inability to blend with the other justices in a body which is supposed to be collegial (reasonable people can differ reasonably, but an unreasonable person cannot) was the cause of his being rated a failure.

The third of the "Four Horsemen" to be called a failure was Pierce Butler, who served from 1922-1939. Butler, like McReynolds, was the epitome of ultra-conservatism, and that alone seems to be the reason for his rating. He did not author too many significant majority opinions, but he did write several dissents. Among his majority opinions was *Terrace v. Thompson*, 263 U.S. 197 (1923), in which he upheld a state law prohibiting aliens who were ineligible for citizenship (mostly Japanese farmers, as these laws were passed by a number of Western states) from owning or leasing farmland. Another was *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504 (1924), in which he threw out a Nebraska law which had set standard weights for bread. Butler felt that since the law was a difficult one with which to practically comply, it was a violation of due process of law. Finally, in *Weaver v. Palmer Bros. Co.*, 270 U.S. 402 (1926), he threw out a Pennsylvania law which forbade the use of a mix of old and new wool in the making of mattresses. Butler felt that the mixture could be disinfected and thus would not be unhealthy, making the law an arbitrary one and therefore a denial of due process of law.

Of more import were several of Justice Butler's dissents. In *Olmstead v. United States*, 279 U.S. 849 (1928), the Court ruled wiretapping constitutional since it was neither a search nor a seizure. The normally conservative Butler felt the majority guilty of misreading the Fourth Amendment,

thinking that, had there been telephones at the time of its writing, wiretapping would have been included in the Fourth Amendment's restriction. In *Near v. Minnesota*, 283 U.S. 697 (1931), Butler led the Four Horsemen in dissent from a decision which threw out a law that allowed a state to stop the publication of newspapers printing items considered scandalous, malicious, defamatory, or obscene. Butler felt that such items did not deserve the protection of freedom of the press. In *Powell v. Alabama*, 287 U.S. 45 (1932), the Court held that a state must allow a person counsel in criminal cases (this was one of the famous Scottsboro cases), but Butler, speaking for himself and McReynolds, did not see any due process of law violation in this case. In *Senn v. Tile Layers Union*, 301 U.S. 468 (1937), Butler again spoke for the Four Horsemen in their dissent from a decision upholding a Wisconsin law legalizing peaceful picketing. Although agreeing that picketing sometimes might be constitutional, Butler looked at the facts in this particular case and decided otherwise, for in this case the union had tried to stop the employer from laying tile in his own place. This, he concluded, was a denial of due process of law. Butler's final notable dissent was in *Coleman v. Miller*, 307 U.S. 433 (1939), in which the Court held that it is up to Congress as to what is a reasonable time for a state to ratify an



Justice Pierce Butler's conservative jurisprudence and narrow interpretation of civil liberties were probably the cause for his evaluation by Blaustein and Mersky as weak.

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If Justice James F. Byrnes' one year tenure (1941-42) was too short to establish him as one of the Court's "greats," it should have been also too short to categorize him as a failure.

amendment to the United States Constitution. Butler, speaking for himself and McReynolds, thought that the question was one that the courts could answer, and in this case he would have disallowed Kansas' ratification of the Child Labor Amendment (which never did get the requisite number of votes to be adopted as part of the Constitution).

It seems as if Justice Butler's rating as a failure was based entirely upon his conservative approach to cases before the Court. Perhaps he was insensitive to matters of civil liberties, but one wonders if that alone should be enough to brand him a failure as a justice.

After these three conservatives, the fourth justice in point of time to be called a failure was James F. Byrnes. However, the one reason for that rating would seem to be the fact that Byrnes only served on the Court from 1941-42. It would be highly unlikely that anyone could make a mark on the Court in so brief a time. Surprisingly, he did manage to author one noteworthy opinion for the Court, and that was in the case of *Edwards v. California*, 314 U.S. 160 (1940). In it, a unanimous Court threw out a law which made it illegal to transport a person without money into the state. It was designed to halt the flow of "Okies" from the dust bowl, but Byrnes held the law to be an invas-

Library of Congress



Justice Harold H. Burton was a conservative Truman appointee. Was the rationale for giving him a poor rating his generally conservative judicial philosophy or the small number of written opinions he authored?

ion of the federal government's power over interstate commerce. Although unanimous, four of the justices preferred a reason other than the one given by Byrnes. They felt the law abridged the privileges and immunities of United States citizenship, a violation of the Fourteenth Amendment.

Justice Byrnes, a close friend of President Franklin Roosevelt, accepted the position on the Court as a favor to him, and left in a year to take another job, also as a favor to Roosevelt. That he did not particularly like to be on the Court was known to many, but to call him a failure simply because of his short time on the Court seems quite unreasonable.

The next justice to be called a failure was Harold H. Burton, who was President Truman's first appointee and who served from 1945-1958. The only apparent reason for his rating seems to be his mostly conservative stance and his small amount of opinions. His majority opinions included *Henderson v. United States*, 339 U.S. 816 (1950), in which he invalidated the practice of some Southern states of curtaining off a section of the dining car on railroads for the use of black persons. Burton found this to be in violation of the 1887 Interstate Commerce Act. Then came *Joint Anti-Fascist Refugee Committee v. McGrath*, 341

U.S. 123 (1951), in which Burton struck down the Attorney General branding an organization as subversive in an arbitrary fashion. Justice Burton, being basically a conservative, did not invalidate President Truman's loyalty program. He merely felt that Truman's Executive Order did not authorize such an action. In *Public Utilities Commission v. Pollak*, 343 U.S. 451 (1952), Burton upheld the right of bus companies in the District of Columbia to play radio programs on their buses over the objection that it was an invasion of privacy and that it forced people to hear things against their will. (Burton's one exception here was if the companies were broadcasting government propaganda; that, he felt, would be a First Amendment violation). His other notable opinion was in *Beilan v. Board of Education*, 357 U.S. 399 (1958), in which he upheld the firing of a Philadelphia teacher who had refused to answer questions both from his superintendent and before the House Un-American Activities Committee about Communist Party possible affiliation. Rather than being fired for disloyalty, he was fired for incompetence. Burton felt that the Board was justified in what it did and thus there was no violation of due process of law. Burton's only dissent of note came in *Morgan v. Virginia*, 328 U.S. 373 (1946), in which the Court threw out a Virginia law which mandated segregated interstate commerce buses. He felt that the states were best equipped to handle this issue, and that the majority opinion should also mean that all state laws which prohibited segregation by race in interstate commerce should also be invalidated due to the need for uniformity in interstate commerce.

It can be seen, therefore, that Justice Burton did not author a large number of formidable opinions, and that most, but not all, of those he did were conservative in nature, but that hardly calls for a rating of failure for his tenure on the Court.

The next justice to be called a failure was Chief Justice Fred M. Vinson, who served from 1946-1953. He is the only Chief Justice to be rated as such, and it seems to be based, once again, on his conservative opinions as well as his inability to unify his Court (a large number of 5-4 opinions occurred; these opinions, however, were on divisive issues and there were individuals on the Court who did not get along no matter who was Chief — Jackson and Black, for example).

Vinson's first major opinion was in *Shelley v. Kraemer*, 334 U.S. 1 (1948), in which he held that restrictive housing covenants, by which prop-

erty owners (white) in a neighborhood would sign an agreement not to sell to blacks, were unenforceable in court, because if a court (being an arm of the state) upheld one of these covenants, it would mean that a state was giving blacks unequal protection of the laws, a violation of the Fourteenth Amendment. In *American Communications Association v. Douds*, 339 U.S. 94 (1950), Vinson upheld a section of the Taft-Hartley Act which made officers of labor unions swear that they were not members of the Communist Party. He felt it a legitimate use of the federal power over interstate commerce to guard against strikes. Next came *Sweatt v. Painter*, 339 U.S. 629 (1950), in which Vinson, speaking for a unanimous Court, ruled that a hastily created law school for blacks in Texas was not close to being equivalent to the University of Texas law school which would not allow blacks due to state law. Therefore, the state was guilty of a denial of equal protection of the laws. A similar case was *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950), and here Vinson ruled against Oklahoma's treatment of a black student who was in graduate school at the state university but was treated separately in that he had to sit in a special section of the class, have his own desk in the library and his own table in the dining hall, etc.



Chief Justice Fred M. Vinson's difficulties in massing the Court on the many divisive issues facing it in the early 1950's may be the reason for the low performance rating he received in *The First One Hundred Justices*.



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The American Communist Party leaders being taken to jail in this 1951 photograph were imprisoned upon losing their appeal to the Vinson Court in *Dennis v. United States* (1951). Vinson's acquiescence to the government's anti-communist campaign of the early 1950's may have influenced those surveyed to assess his judicial career.

Once more Vinson held this to be a denial of equal protection of the laws. In *Feiner v. New York*, 340 U.S. 315 (1951), Vinson upheld a breach of the peace conviction against a person who was addressing a crowd on the street and what he said disturbed the people (he was urging the blacks to stand up for their rights). Vinson felt that the police had acted properly to avoid an outbreak. In what was to be his last major opinion, and his most famous, Vinson upheld the Smith Act conviction of eleven leading members of the American Communist Party in *Dennis v. United States*, 341 U.S. 494 (1951). Vinson felt that the government had the right to move against subversive elements before it was too late and they had already begun their attempted takeover. Vinson's only dissent of note occurred towards the end of his tenure, but it was an important one. The case was *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952), and in it the majority, including President Truman's appointees Burton and Tom Clark, ruled against the President's seizure of the steel industry to prevent a nationwide steel strike, holding that he did not possess the power to do so. Vinson disagreed, and in a dissent in which he was joined by another Truman appointee Sher-

man Minton as well as by Justice Reed, he argued that the president has the right to act when the country faces times of great crises, and with the conflict in Korea going on that was one of those times.

It would seem that the "experts" erred in ranking Fred Vinson as a failure. His decisions might have been on the conservative side except in the area of civil rights for blacks, and his Court was usually divided, but their ranking for him is not supported by the facts.

The next justice to be called a failure was the above-mentioned Sherman Minton, who served from 1949-1956. He joins Burton and Vinson in being Truman-appointed justices ranked as failures (only Clark escaped that fate — he was rated as "average"). Minton's ranking might have more merit, as he wrote only one major opinion during his time on the Court, and even that was reversed fifteen years later. The case was *Adler v. Board of Education*, 342 U.S. 485 (1952), and in it Minton upheld a New York law as constitutional which required the Board of Regents to publish a list, after due notice and hearing, of subversive organizations. Membership in any of those organizations afterwards meant disbarment of that per-



Justice Sherman Minton wrote only one significant opinion during his seven year tenure, *Adler v. Board of Education* (1952). It was later reversed.



Uncomfortable on the Court, and exhausted from overwork, Justice Charles E. Whittaker resigned to return to private practice in 1962, ending his five year tenure.

son from teaching. Minton felt that there is no constitutional right to public employment, and that public school authorities must see to it that teachers are fit.

It would seem that Sherman Minton did little during his time on the Court, and he seemed to like practical politics more than he liked his time on the Court (he basically took the job as a favor to Truman, much like Byrnes and Roosevelt).

The last justice in point of time to be called a failure was Charles E. Whittaker, an Eisenhower appointee who served from 1957-1962. Unfortunately, he was never very comfortable on the Court, averaged even fewer opinions than had Van Devanter (and none of note), and retired to return to the corporate world.

In retrospect, it is harsh to label any one as a failure, and labeling anyone as anything is always subjective and arbitrary. When one looks at the record of these eight justices called failures, one must wonder at the criteria used by the evaluators. All were in this century, all were conservative. Does this, perhaps, show a liberal bias on the part of the evaluators, especially in behalf of both the New Deal and civil liberties? One must be careful when evaluating others not to inject one's own personal biases into the evaluation. However, since that is difficult to do (even the Justices themselves do it in deciding cases), perhaps the evaluation of justices by way of a rating system ought to be looked at with a jaundiced eye.

Lawyering in the Supreme Court: The Role of the Solicitor General

by Rex E. Lee

The history of the Office of Solicitor General of the United States actually begins at least eight decades before that office came into existence. It begins with the solicitor general's boss, the attorney general. The attorney general was one of the first four cabinet offices established by the first Congress. But the attorney general differed from the other three cabinet officers in several respects that are germane to this discussion. First, his office was created by the Judiciary Act of 1789. Thus, while the attorney general is beyond question a member of the executive branch of government, from the very beginning, the closeness of his office and his function to the Article III branch have been reflected in our statutes. A second difference, of lesser relevance, but nonetheless interesting, is that the attorney general's annual salary, \$1500, was half that of the other cabinet officers. The assumption was that this was appropriate because he would continue to carry on a private practice.

The Judiciary Act of 1789 required that the attorney general be "[a] meet person, learned in the law," whose statutory duties were: "(1) to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and (2) to give his advice and opinion upon questions of law when required by the president of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments." [1 Stat. 93.]

Thus, from the beginning, the attorney general's first responsibility, identified by statute, was to represent the United States in the Supreme Court. In those early years that was not quite the demanding task that it is today. *Hayburn's Case*, 2 Dall. 409 (1792) appears to be only the second substantive decision by the Court.

"The very first case of very great importance to come before the Supreme Court"¹ was *Chis olm v. Georgia*, 2 Dall. 419 (1793). That case, appropriately enough, was argued by the very first Attorney General, Edmund Randolph. But he ar-

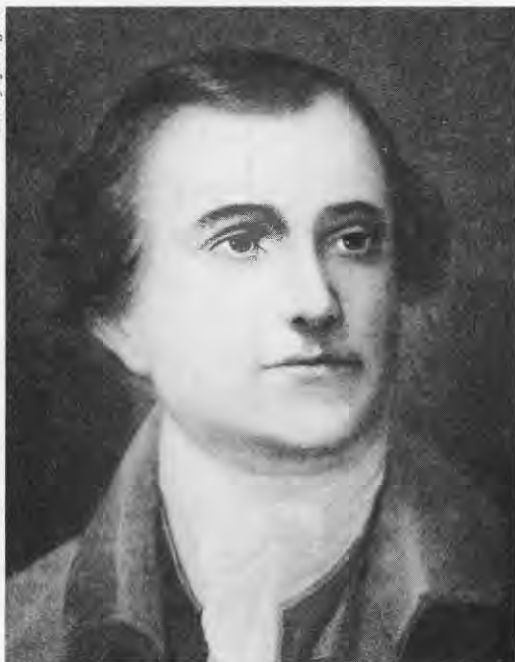


Rex Lee

Rex E. Lee, the author, served as Solicitor General of the United States from 1981 to 1985.

gued it in his private capacity, and not as Attorney General. Indeed, he represented the non-governmental client, *Chis olm*, and "helped convince the Justices the states could be sued in the federal courts—a point which the people reversed by the Eleventh Amendment to the Constitution."² Easby-Smith, in *Edmund Randolph, Trail Blazer, supra*, at 426 wrote that:

Randolph made a brilliant argument in support of his motion [to enter a default judgment against Georgia, which did not appear] and the Supreme Court sustained all his contentions, holding that under the second section of Article III of the Constitution a State might be sued by an individual citizen of any other State, and in such suit judgment might be entered in default of an appearance. The argument of Randolph and the decision of the court brought down upon both a shower of abuse from the anti-federalists throughout the country, and in answer to popular clamor the Congress, on December 2nd, 1793, adopted the Eleventh Amendment to the Constitution, which was subsequently ratified.³



Edmund Randolph (left) was both the first attorney general and the first to conclude he needed an assistant. Attorney General William Wirt (right), found able assistance in preparing the government's case in *McCulloch v. Maryland* from Daniel Webster.

Perhaps the foremost government case from the early years is *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). That case, argued by Attorney General William Wirt⁴, with assistance from Daniel Webster, established the fundamental proposition that the powers of Congress are not to be construed narrowly. Chief Justice Marshall wrote for the Court that "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, and which are not prohibited . . . are constitutional."⁵

To those of us whose personal acquaintance with the Justice Department is limited to this century, it is positively astounding to learn that for the first twenty-seven years, those early attorneys general performed their tasks with no help of any kind. Not even a clerk. Randolph described himself in 1790 as "a sort of mongrel between the State and U.S.; called an officer of some rank under the latter, and yet thrust out to get a livelihood in the former."⁶ Apparently the first request for a clerk came from Randolph in a letter to President Washington dated December 26, 1791:

I might . . . add, that the opinions which the Attorney General gives are many in number and often lengthy. From this consideration, united with the foregoing, the reasonableness of allowing him a transcribing clerk will, I hope, be obvious.⁷

President Washington sent Randolph's letter to Congress, but to no avail: "Congress took no action. Twenty-seven years elapsed before any allowance was made for a clerk."⁷ The difficulties faced by the early attorneys general have been summarized as follows:

No quarters were provided for the Attorney General, and he was expected to furnish his own quarters, fuel, stationery and clerk. For this reason the Attorneys General after [Charles] Lee [who succeeded William Bradford, Randolph's successor who died in 1795] and until 1814 did not reside permanently in Washington, but remained at their homes and transmitted their advice and opinions by mail, going to Washington only when it became necessary to appear before the Supreme Court.⁸

Not quite so surprising — but nevertheless surprising — is the fact that it was not until 1853 that Congress finally established a salary for the Attorney General equivalent to that of the other cabinet officers, thereby bringing to an end the tradition of part-time attorneys general who kept up a private law practice.⁹

What is not surprising at all is that at the end of the Civil War, the nation's legal business, and consequently the demands of the Attorney General, increased manifold. The aftermath of the Civil War marks the single point in our nation's history when the place of federal law vis-a-vis the laws of the states experienced its greatest expansion. Homer Cummings and Carl McFarland, in their book *Federal Justice*, describe the situation as follows:

As the war came to a close and reconstruction began, the legal business of the government increased. In April 1866, James Speed, who had been Attorney General less than a year and a half, had written nearly as many opinions as his predecessor had written during three years. For many months the employees in his office worked more than double the official number of hours, and Sundays and holidays were unknown to them.¹⁰

In December 1867, Attorney General Stanberry was asked by the Senate to report on the affairs of his office, and he responded:

As to the mere administrative business of the office, the present force is sufficient, but as to the proper duties of the Attorney General, especially in the preparation and argument of cases before the Supreme Court of the United States and the preparation of opinions on questions of law referred to him some provision is absolutely necessary to enable him properly to discharge his duties. After much reflection, it seems to me that this want may best be supplied by the appointment of a Solicitor General. With such an assistant, the necessity of appointing special counsel in the argument of cases in the Supreme Court of the United States, would be, in a great measure, if not altogether dispensed with.¹¹



In 1867, Attorney General Henry Stanberry made the first formal request for appointment of a solicitor general.

Stanberry's letter appears to contain the first mention of the term "solicitor general." The name, like so much else in our American system is of English origin. At first glance, that seems strange, given the well-known distinction between English barristers and solicitors, and the equally well-known fact that the dominant characteristic of the solicitor is that he is the fellow who does not appear in court. Further research discloses, however, that the phrase is of ancient origin, and that for at least two reasons, it fairly aptly describes the relationship that Stanberry envisioned the American solicitor general would bear to the attorney general.

In the early common law, the parties prosecuted their own suits and had to be present at all legal proceedings. "The idea that one man can represent another is foreign to early law. When first it is introduced it is regarded as an exceptional privilege, and the first representative must be solemnly appointed."¹² It was only gradually that agents were allowed to appear for the parties to represent their interests in litigation.¹³ These were "attorneys."

A "solicitor," as Holdsworth explains, was a legal practitioner, similar to an attorney, whose earliest function appears to have been to assist the attorney in the preparation of cases for litigation. "Solicitors" were defined in 1589 as persons who, "being learned in the Laws, and informed of their Masters Cause, do inform and instruct the Counsellors in the same."¹⁴ Originally nothing more than a servant or agent of the attorney or his client, the solicitor came into his own, professionally speaking, with the rise of non-common-law courts, especially the Court of Chancery where attorneys, who were authorized to practice only in common-law courts, could not appear.¹⁵ Given their humble origins as attorneys' assistants, solicitors were long regarded as "but ministerial persons and of an inferior nature."¹⁶ In 1750, solicitors were finally given admission as attorneys, and "[f]rom that time onwards we can say that this new class of practitioners has become substantially amalgamated with the attorneys."¹⁷

Similarly, the English solicitor general, both originally and also today, was and is one who assists the attorney general in the discharge of his responsibilities. In the English system, which is a Parliamentary system, both are members of Parliament and are "law officer" members of the Cabinet. Thus, while there are necessarily differences in their functions, owing principally to

the differences between parliamentary and separation of powers systems of government, the significant similarity is that on both sides of the Atlantic, the attorney general was and is the nation's chief legal officer, and the Office of Solicitor General was created to assist him in that task.

As Stanberry's letter suggests, the practice of hiring private counsel to argue the government's cases had been growing in the post-war years. In 1867 alone, the Attorney General reported, the government had spent more than \$6000 for such services.¹⁸ Thus, it was partly out of frugality,¹⁹ and not entirely out of concern for the effectiveness of the attorney general's operations that Congress in 1870 enacted legislation establishing the Department of Justice and creating the Office of Solicitor General. The Act provided in part that:

there shall be in said Department an officer learned in the law, to assist the Attorney General in the performance of his duties, to be called the Solicitor General, and who in case of a vacancy in the office of the Attorney General, or in his absence or disability, shall have power to exercise all the duties of that office.

My reading of what happened during the early years of the solicitor general's office leads me to conclude that the distinction between the responsibilities of the attorney general and the solicitor general was not as cleanly defined as it is today. The evidence is strong that the first two solicitors general — Benjamin Bristow who served from

1870 to 1872, and Samuel Phillips, who served from 1872 to 1885 (longer than any other solicitor general) — probably functioned mainly as the attorney general's chief deputy, with no particular responsibility for any one phase of the attorney general's work. His duties were not narrowly defined, as they are today, as the chief, or indeed (acting under supervision of the attorney general) exclusive Supreme Court litigator for the United States. Several facts support this general conclusion.

First, far from having the near monopoly enjoyed by their modern counterparts over Supreme Court litigation, early solicitors general shared this responsibility in about equal portions with the attorneys general and with the assistant attorneys general.

These early trends — and the extent to which special counsel were displaced by regular government counsel after the creation of the Office of Solicitor General — can be seen, I think, from the following statistics. In the Supreme Court's unusually heavy December 1866 term (71 U.S. and 72 U.S.) (volumes 5 and 6 of Wallace's Reports), some 24 cases were argued by the attorney general, either alone or with the help of an assistant, and roughly five cases by the attorney general with the help of what appears to have been outside counsel. Another 16 cases were argued alone by assistants to the attorney general and two by special counsel, also arguing alone.²⁰ In the 1867 term [73 U.S. (7 Wall.)], there were about 13 cases argued by the attorney general, some with help from assistants; and, as it appears from the reports, another 4 with help from special counsel. Nine additional cases were argued by the attorney general's assistants, and two by special counsel arguing alone. The December 1868 term showed a similar pattern: 18 cases argued by the attorney general and/or his assistants, four by special counsel (two with the attorney general and two without). There was an apparent increase in the use of special counsel in the 1869 term [76 U.S. and part of 77 U.S. (9 and 10 Wall.)], when 18 cases were argued by the attorney general and/or his assistants, and 15 with some apparent involvement of outside counsel.

The picture begins to change a bit in the December 1870 term [the latter portion of 77 U.S. and all of 78 U.S. (11 Wall.)], when the solicitor general first appeared on the scene.

The nature of the change can be best understood against the background of a fundamental



Library of Congress

His post created in part to reduce the attorney general's expenditures on special counsel, Benjamin Bristow became the nation's first solicitor general in 1870.



Attorney General Amos T. Ackerman began turning cases over to the newly appointed solicitor general almost immediately — 13 in 1870, and 26 the following year.

difference between 19th century oral arguments and today's experience. Today the sharing of arguments by several lawyers representing the same client is virtually non-existent. I cannot recall a single occasion when that ever happened during my four years as solicitor general. A hundred years ago, however, arguments lasted for many hours, sometimes days, and dividing the oral presentation for a single client was common. (The Court still hears divided arguments, but the oral advocates represent different clients.) I count only two cases during the 1870 term where special counsel assisted, as compared with 13 cases argued by the new solicitor general, Mr. Bristow (three by Bristow alone, five shared with Attorney General Ackerman, and five shared with Assistant Attorneys General). Another seven cases were argued by the Attorney General and/or the assistant attorneys general without the solicitor general's involvement. In the December 1871 term [80-81 U.S. (13-14 Wall.)], Mr. Bristow came more into his own, arguing some 26 cases [7 solo, 5 with the attorney general and 15 with the assistant attorneys general]. Special counsel was used only once that term. In the December 1872 term [82 through part of 84 U.S. (15-17 Wall.)], (the last of the December term, 1873 being the first of the October terms), there is no trace of special counsel in

the reports, but Bristow, too, was gone, and his successor, Samuel F. Phillips had been in office only long enough to argue some 7 cases. The attorney general and his assistants carried the load that term, with some 30 arguments among them.

These numbers seem to show that at least in these very early days the solicitor general, while an actor of some importance in the Supreme Court, shared the honors to a greater degree than we have come to expect today with the attorney general and the assistant attorneys general. Moreover, a quick spot-check of the records of the government's briefs and motions in the Supreme Court in the late 1800's and early 1900's reveals a surprising number of submissions bearing the names of attorneys general or assistant attorneys general and *not* the Solicitors General. It appears not to have been standard practice to stamp the imprimatur of the solicitor general on all submissions until roughly the 1920's, judging by a very unscientific survey of the old, dusty books in the Justice Department's attic.

The different relationship of attorney general to Solicitor General is also reflected, I believe, in the \$7500 salary. During the term immediately preceding Bristow's appointment, the government paid \$6000 for outside counsel. Thus, it is fair to infer a congressional anticipation that this new man at the Justice Department would have responsibilities other than Supreme Court litigation. And thus it came to pass. In 1871, Bristow went to Oxford, Mississippi, to help prosecute Klu Klux Klan members under the Enforcement Act of 1870.²¹ These prosecutions were apparently very important in combating the terrorism of the Klan at a time when state authorities in the South were powerless to do so, as is reflected by the fact that the task was vested personally in the Justice Department's second ranking law officer.

Today, the distinction between the attorney general and the solicitor general is much more cleanly defined. It has been defined by 115 years of history, and also by formal Department of Justice regulation. Neither in 1870, nor in any subsequent enactment, has Congress ever specified any Supreme Court litigation responsibilities — nor any other responsibilities — for the solicitor general. Then as now, he is required to be learned in the law²² and has the general responsibility to assist the attorney general but is given no statutory responsibility.

One hundred and fifteen years of history have pretty well taken the attorney general out of the business of arguing cases for the United States in the Supreme Court, and have vested that responsibility exclusively in the solicitor general, subject to whatever supervision the attorney general wants to assert. But those same 115 years have also preserved the original basic relationship be-

tween the two. The solicitor general does what he does in the context of assisting the attorney general, who has the statutory responsibility for all litigation on behalf of the United States, and who was arguing cases in the Supreme Court eight decades before there was a solicitor general of the United States.

Footnotes

¹ Easby-Smith, "Edmund Randolph Trail Blazer," 12 *Journal of the Bar Association of the District of Columbia*, 415,426 (1945).

² Cummings & McFarland, *Federal Justice: Chapters in the History of Justice and The Federal Executive*, 31 (1937). Another landmark early case argued by an Attorney General in his private capacity was *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), in which William Wirt appeared for the College along with Daniel Webster. The Court in that case, again by Chief Justice Marshall, held that an act of the New Hampshire legislature purporting to make the College a state institution materially changed the charter of the College, impaired the obligation of the charter and thus was unconstitutional and void.

³ Easby-Smith, in "Edmund Randolph, Trail Blazer," *supra*, at 416, wrote that Randolph "ignored personal abuse and quietly accepted an amendment to the Constitution which was aimed at him and nullified one of his greatest victories in the Supreme Court."

⁴ Wirt, himself a Marylander by birth, was "[p]robably the most active of the early Attorneys General, one who held the office for a longer period than any other in the history of the Government." "Origin and Development of the Office of the Attorney General," *H. Doc.* 510, 70th Cong., 2d Sess. 14 (1929). He was our ninth Attorney General, appointed by President Monroe in 1817 and served until 1829. See Easby-Smith, *The Department of Justice: Its History and Functions* 45 (1904). It was Wirt who first began the practice of keeping a record of the Attorney General's opinions and who decided that the Attorney General's opinions should not be given to all who asked, but only to the President and other Cabinet-level officers. See *Id.* at 10-11; Cummings & McFarland, *Federal Justice: Chapters in the History of Justice and the Federal Executive*, 78-92 (1937). After Wirt's death, John Quincy Adams remarked that "the duties of the Attorney General of the United States . . . were never more ably or more faithfully discharged than by Mr. Wirt." *Federal Justice*, *supra*, at 78.

⁵ 17 U.S. at 421.

⁶ Quoted in Learned, *The President's Cabinet Studies in the Origin, Formation, and Structure of an American Institution*, 159 (1912). Randolph, it should be pointed out, after leaving the government (having served as both Attorney General and Secretary of State) was Aaron Burr's chief defense counsel in Burr's

1807 treason trial, over which Chief Justice Marshall presided as Circuit Justice. Easby-Smith, in "Edmund Randolph, Trail Blazer," *supra*, at 429, wrote:

What a scene this trial presented, the most famous in the annals of American criminal jurisprudence! A former Vice President of the United States on trial for his life, charged with treason; the great Chief Justice presiding; and [Caesar A.] Rodney and [William] Wirt, present and future Attorneys General, pitted against Randolph, former Attorney General; all the chief actors including the defendant himself, who took part in the arguments, being among the greatest lawyers of their day.

⁷ Easby-Smith, *supra*, at 424.

⁸ *Supra*, at 8.

⁹ A major preoccupation of the attorneys general in the years leading up to the Civil War was "[t]he task of supervising appeals in public litigation over the three great bodies of private land claims, in the Louisiana Territory, the Floridas, and California." Cummings & McFarland, *supra*, at 120. Large parcels of land in these territories, which were acquired from France, Spain, and Mexico, respectively, were claimed by settlers under grants purportedly given by the French, Spanish and Mexican governments. Documentation was scarce and many extravagant and fraudulent claims were made. Among these were some eight claims filed by a Frenchman named Limantour covering a thousand square miles of California, including the entire city of San Francisco. Limantour's claims were later exposed as frauds through the combined efforts of Attorney General Jeremiah Sullivan Black and Edwin M. Stanton, a "[b]rilliant, industrious, painfully thorough and precise" lawyer, *Id.* at 135-136, who was hired by Black as special counsel in the California case and later succeeded Black as Attorney General. These land cases, a number of which reached the Supreme Court, are described in detail in Cummings & McFarland, *supra*, at 120-141.

¹⁰ *Supra*, at 220. The *New York Tribune* and *Harper's Weekly* said of Jeremiah Black that "though you never meet the Attorney General at a ball or soiree, you can find him all day in the Supreme Court, and nearly all night at his office." Quoted in Cummings & McFarland, *supra*, at 159-160.

¹¹ Cummings & McFarland, *Federal Justice*, *supra*,

at 222-223.

¹² Holdsworth, *History of English Law VI*, 432.

¹³ See Bellot, *The Origin of the Attorney General*, 25 *Law Q. Rev.*, 400-401; Holdsworth, *supra*, at 432-433.

¹⁴ Quoted in Holdsworth, *supra*, at 449-450.

¹⁵ *Id.* at 449-451. (Attorneys eventually did gain access to the Court of Chancery as well. See *Id.* at 455-456.) The other two courts where solicitors practiced were the Court of Requests and the Star Chamber. Holdsworth described how the solicitors came to prominence in the Court of Chancery, and noted that "[n]o doubt we should have seen a similar phenomenon in the case of the Court of Requests and the Star Chamber if those courts had survived. But they did not survive. Therefore the solicitor came to be associated mainly with the Court of Chancery." *Id.* at 455-456.

¹⁶ Quoted in Holdsworth, *supra*, at 440.

¹⁷ *Id.* at 457.

¹⁸ *Cong. Globe*, 40th Cong., 2d Sess. 3038 (April 27, 1870).

¹⁹ Congress' fiscal motivation is reflected in the fact that the legislation establishing the Department of Justice originated in the Committee on Retrenchment, "a joint committee of the two houses to find ways of reducing government expenditures." Cummings & McFarland, *Federal Justice, supra*, at 223.

²⁰ These statistics are somewhat debatable because it is not always possible to tell from either the U.S. Reports or the Lawyers' Edition Reports whether cer-

tain individuals were arguing as special counsel or as assistants to the Attorney General.

²¹ See Cummings & McFarland, *Federal Justice, supra*, at 235-236. Bristow apparently undertook this task at some personal risk. Drawing upon his experience there, he later advised the United States Attorney in North Carolina that "[t]he higher the social standing and character of the convicted party, the more important is a vigorous prosecution and prompt execution of judgment." *Id.* at 237.

²² "You will note that the Solicitor General is required by statute to be learned in the law. This was true of the Attorney General as well under the Act of 1789 creating that office; but curiously enough when the Solicitor General came into being in 1870, the requirement of legal learning on the part of the Attorney General was dispensed with, and no longer appeared in the statutes. It is reassuring, however, that the impetus of earlier statutory law has prevailed and the Attorneys General have remained learned in the law regardless of statute." Fahy, "The Office of the Solicitor General," 28 *American Bar Assn. Journal* 20 (1942).

Judge Fahy, who was the Solicitor General from 1941-45, also remarked that the great variety of legal questions that come to the Solicitor General "should insure that, regardless of his legal learning at the time of entry upon his duties, a reasonably attentive Solicitor General should be 'learned in the law' if he remains very long in office." *Id.* at 22.

Oral Argument in the Supreme Court: The Felt Necessities of the Time

by Stephen M. Shapiro¹

Oral Argument In The Age Of Discovery

It is interesting to return, through review of the historical record, to the early years of Supreme Court advocacy. One must begin by envisioning a Supreme Court that changed locations eight times during its first thirty years. The Court held its first session in the Exchange Building in New York in 1790. It then moved to Philadelphia, and from Philadelphia to Washington, where it heard argument in several different places, including Long's Tavern, the Bell Tavern, and a basement room of the Capitol which one observer described as "little better than a dungeon."²

Lawyers appearing before the Court in its early years had no substantial procedural guidance. The Court's first rule of practice stated only that it

would "consider the practice of the Court of King's Bench and of Chancery, in England, as affording outlines for the practice of this Court" — curious standards for a Court intended to be predominantly an appellate tribunal.³ The Court did, of course, have a trial function as well. And it conducted jury trials on at least three occasions.⁴

In the days of Chief Justice Marshall, the Court sat for as little as six weeks and handed down only a third of the number of opinions rendered by the modern Court. But the justices worked at a rapid pace, announcing many decisions within a few days of argument and seldom more than two or three weeks later.⁵ Those same justices also were obliged to "ride circuit," some travelling by horseback, stagecoach, and riverboat as many as 10,000 miles per year.⁶



Justices in the Marshall era were obliged to ride circuit, some travelling as much as 10,000 miles a year by stage, horseback or riverboat.

The Supreme Court bar, both when the Court sat in Philadelphia and in Washington, was a club-like group of local counsel who handled cases in the Court upon referral from counsel elsewhere.⁷ Many of these advocates also were members of Congress and therefore were present in Washington when the Supreme Court sat.⁸ These Congressmen, of course, represented private litigants and not the federal government.⁹

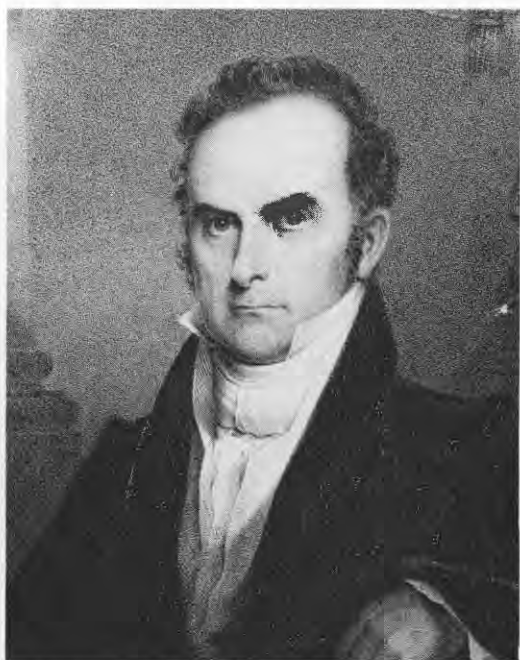
In contrast to their rather bleak surroundings, the Court's first advocates cut charismatic figures. It was the golden age of American Oratory, and lawyers such as Daniel Webster and William Pinkney delivered their arguments without any limitation on time. Arguments in the Supreme Court sometimes lasted as long as ten days.¹⁰

Advocates like Webster and Pinkney directed their arguments as much to the public as to the bench. The spectacle surrounding their debates often attracted crowds to the courtroom where members of high society sat in attendance. As Charles Warren relates, "the social season of Washington began with the opening of the Supreme Court term."¹¹ Webster once stopped in the middle of a phrase to start his argument anew upon spotting a group of late-arriving ladies.¹² Pinkney was even more affected by the presence of ladies of fashion. In one case, devoid of any dramatic interest, he adopted "his tragical tone in

discussing the construction of an Act of Congress." Upon closing his speech in a solemn manner, he took his seat, reporting with a smile: "that will do for the ladies."¹³ On at least two occasions, the emotional rhetoric of counsel brought tears to the eyes of the Great Chief Justice.¹⁴

The Supreme Court entertained these orations not only without limitation upon time but also without interruption. Quoting from a contemporary observer, Charles Warren describes the relationship between counsel and the Court as follows: "Counsel are heard in silence for hours, without being stopped or interrupted. . . . The Judges of the Court say nothing."¹⁵ "It mattered not by whom the Court was addressed — Mr. Pinkney, Mr. Wirt, . . . [or] Mr. Webster — received the same and no greater apparent attention than any second or third rate lawyer arguing his first case."¹⁶

With this seemingly limitless indulgence from the bench, with no questioning to confine counsel to the bounds of the record or jurisdictional limits,¹⁷ and with little precedent that could be viewed as binding, the oral arguments of counsel assumed an exuberant originality and variety.¹⁸ To the extent that English common law held sway, counsel looked to the precedents of Lord Mansfield and his "joyous acceptance of the idea that judges are supposed to make law — the more law



Oral argument could extend to as long as ten days when brilliant orators like William Wirt (left) and Daniel Webster (right) were unconstrained by time limits in presenting their cases before the Court.

the better."¹⁹ The Supreme Court and its bar pursued their joint venture in search of American law through far-ranging exercises in logic and excursions through legal history and political theory. This adventurous spirit evidenced itself in the words of Justice Story in *Swift v. Tyson*, 16 Peters (41 U.S.) 1, 19 (1842): "The law respecting negotiable instruments may be truly declared in the language of Cicero, adopted by Lord Mansfield . . . to be in great measure, not the law of a single country only [—let alone the law of a single state—], but of the commercial world."

The Orations of Daniel Webster

We catch a fascinating glimpse of Supreme Court argument in the age of Marshall and Taney from the recorded orations of Daniel Webster, who argued some 200 cases before the Court and participated in many of the major constitutional debates of the day. Webster adopted an eclectic style in Court. He gilded his arguments with classical allusions and rhetorical flourishes.²⁰ But he also supported them solidly with logic, history, and precedent. Webster typically stated his case concisely, summarized the issues, gave his view of the issues, brushed aside his opponent's theory, and then returned to his own contentions.²¹ It is reported that Webster sketched his arguments in skeletal form, relying on his ability to make extemporaneous presentations in Court.²²

Webster's style of argument appears from the records of his speech in *Trustees of Dartmouth College v. Woodward*, 4 Wheaton (17 U.S.) 518 (1819). In that 4 hour argument, Webster challenged a New Hampshire statute which altered the charter and governance of his Alma Mater. Despite the limitation of the Supreme Court's jurisdiction on writ of error to federal constitutional issues, Webster argued that the New Hampshire statute infringed both state and federal constitutions. After briefly stating the case and the constitutional questions, he presented an argument woven from a multitude of separate strands, including the following: invocation of English tradition,²³ citation of English common law,²⁴ textual analysis of the provisions of the Constitution,²⁵ logical reasoning,²⁶ extended quotation from legal treatises,²⁷ reference to common understanding in the United States,²⁸ citation of lower court decisions in America,²⁹ citation of past Supreme Court decisions,³⁰ reference to Roman law,³¹ recollection of abusive practices of English monarchs,³² reference to the *Federalist* papers,³³ prediction of grave dangers to society from acceptance of the lower court's decision,³⁴ emotional appeals to sympathy,³⁵ interjection of fiery rhetoric,³⁶ and recital of a famous peroration:

It is Sir, as I have said, a small college. And yet *there are those who love it* . . . Sir, I know not how others may feel, but, for myself, and when I see my Alma Mater sur-



As Daniel Webster described it in *Trustees of Dartmouth College v. Woodward* "It is Sir, as I have said, a small college. And yet there are those who love it."



The period allotted for oral argument rose from 43 days when John Marshall (left) sat as chief justice in 1825 to 99 days by midway through Chief Justice Roger Brooke Taney's (right) tenure in 1845.

rounded, like Caesar in the Senate-House, by those who are reiterating stab upon stab, I would not, for this right hand, have her turn to me, and say, *Et tu quoque mi fili!* And thou too, my son!³⁷

If Webster showed great freedom in choosing among a multitude of different arguments, the Court showed still greater freedom. The opinion of the Court announced by Chief Justice Marshall ruled in favor of Webster's clients without citation to a single authority. Chief Justice Marshall proceeded, as was his custom in constitutional cases, as if the problem was one of pure logic. He adopted premises which he said were incontrovertible, and then reasoned from them to the conclusions that he wished to prove.³⁸

Rising Caseloads and the Curtailment of Oratory

While the spectacular arguments of advocates such as Webster and Pinkney were stimulating to both the public and the bench,³⁹ the tradition of unlimited argument placed a growing strain on the justices. Attendance at lengthy oral arguments without any relief from circuit-riding duty became even more burdensome as the Supreme Court's appellate docket expanded in the middle of the nineteenth century. To accommodate these new cases, the length of the Supreme Court's term

rose from 43 days in 1825 to 99 days by 1845.⁴⁰ The number of cases on the Court's docket rose from 98 in 1810 to 253 by 1850, and most of those cases were subject to the Court's obligatory jurisdiction.⁴¹

Under these mounting case-load pressures, the justices understandably grew impatient. According to John Marshall's biographer, Senator Beveridge, Marshall complained of simple boredom, quipping that the "acme of judicial distinction" consists in "the ability to look a lawyer straight in the eyes for two hours and not hear a damned word he says."⁴² Story also found the arguments "excessively prolix and tedious."⁴³

Marshall's successor, Chief Justice Roger Taney, complained of long arguments and long speeches, "which of course must combine much reflection and still more irrelevant matter."⁴⁴ Off the bench, Story exhorted members of the bar to curtail their oral presentations,⁴⁵ but "in the Supreme Court not the slightest control was exercised or even claimed."⁴⁶ Taney believed that curtailment would run counter to the tradition of oratory that still characterized public functions in American government.⁴⁷

Ultimately, however, the Court exercised "self help" through its control over practice before it.⁴⁸ In 1849, over the dissent of two justices, the Supreme Court adopted its Rule 53, whereby it ordered that no counsel should be permitted to

speaking for more than two hours without special leave of Court.⁴⁹ Simultaneously, the Court required counsel to submit in advance a printed abstract of points and authorities.⁵⁰

This procedural innovation did not drain oral argument of eloquence, as the presentation in the *Dred Scott* case demonstrated.⁵¹ Nor did long arguments entirely disappear. For example, in *Ex parte McCordle*, 7 Wallace (74 U.S.) 506, 514 (1868), the Court heard arguments extending over four days which encompassed a total of twelve hours—all, apparently, without question or interruption from the bench.⁵²

The Court did, however, exercise firm control over argument time in most cases.⁵³ In addition, after the Civil War there is evidence that the Court began to closely question counsel during argument. In the words of former Attorney General Garland, who appeared before the Court frequently after the Civil War:

Very often I have seen lawyers high up in their profession, but not used to the ways and manners of this court in this respect, frightened, so to speak, out of their wits into forgetfulness of the entire case, when suddenly pulled up by the court to know this or that before they had time to tell anything of it, and when they were getting ready to tell it. This is probably due, to a great extent, to the heretofore over-choked and charged condition of the business of the court.⁵⁴

While Garland opposed excessive questioning, he clearly believed that the new practice served a vital purpose: "this sort of colloquy with the judges and lawyers is the shortest and best way to reach the very heart of the case."⁵⁵ Garland also confirms that, in the period following the Civil War, the Court strictly enforced the two-hour time limit in most cases.⁵⁶

Garland further remarked that in his time there was some diminution in attention paid to counsel's arguments. Particularly during the lunch hour, he reported, "we do find some of the judges unavoidably 'napping, napping, only this and nothing more.'"⁵⁷ The justices also left the bench in the midst of argument for refreshment: "Behind their seats, where persons are passing to and fro, a sort of *ad interim* or *pro tempore* restaurant is in progress, and counsel is arguing in front and hears the rattle of dishes, knives and forks . . ."⁵⁸

Following the turn of the century, the Court's steadily-increasing workload placed new pressures on it to limit argument. According to Charles Butler, a former Reporter of Decisions of the Supreme Court, Justice Holmes, among oth-



Attorney General Augustus Garland observed that the increase in questions put to counsel from the bench following the Civil War was "... the shortest and best way to reach the very heart of the case."

ers, "was all for cutting the time down."⁵⁹ In addition, the practice of questioning counsel acquired new vigor. Some justices began interrogation of counsel at "the very threshold of his argument."⁶⁰

When Justice White became Chief Justice in 1910, he instituted the so-called "summary docket" to which cases of lesser difficulty were relegated. Only thirty minutes per side were allotted for argument of cases on the summary docket.⁶¹ In order to further confine the time devoted to argument in insubstantial cases, the Court adopted the practice of announcing, after hearing argument from the appellant, that it would not hear from the appellee. Although this announcement may have deflated the ego of counsel for the appellee—who wished to present argument—that impression was a transitory one, for it signalled that he had just won his case.⁶²

In face of its heavy workload, the Supreme Court successfully urged Congress to pass the Judiciary Act of 1925, which converted most cases into certiorari cases subject to discretionary review.⁶³ The Court's revised rules, adopted that same year, limited the amount of time available for argument to "one hour on each side." Cases on the "summary docket" received only one-half hour per side.⁶⁴

Chief Justice Hughes explained that "this restriction is due to the crowded calendar of the Court." He added, however, that curtailment of argument would not detract from substance: "The progress of civilization is but little reflected in the processes of argumentation and a vast amount of time is unavoidably wasted in the Supreme Court in listening to futile discussion . . ." ⁶⁵ The Chief Justice also explained that "the judges of the Supreme Court are quite free in addressing questions to counsel during argument . . . From the standpoint of the bench, the desirability of questions is quite obvious as the judges are not there to listen to speeches but to decide the case." ⁶⁶

During the tenure of Chief Justice Hughes, the Court favored questions designed "to bring out the weak points of an argument." ⁶⁷ Hughes, according to Justice Frankfurter, knew just as much, if not more, about the case than counsel, and it was not uncommon to hear him state the case, argue both sides of it, and then indicate his opinion in subtle fashion, all through a series of genial questions from the bench. He also held a firm rein on the length of argument. "[A]s counsel opened his mouth, he would be clocked. And come the end of the allotted time, he would inform counsel courteously but nonetheless firmly that it was time to sit down. It has been reported that on one occasion that he called time on a leader of the New York Bar in the middle of the word 'if.' " ⁶⁸



Chief Justice Charles Evans Hughes was noted for his use of questions to reveal the weaknesses of counsel's argument as well as for his strict enforcement of time limits on oral argument. He once reportedly interrupted an attorney to call time in the middle of the word "if."

Justice Frankfurter proved a true disciple of Chief Justice Hughes in this respect. It is reported that in one case alone, he propounded 93 questions during oral argument. ⁶⁹ This prompted one advocate who frequently appeared before the Court to comment that "[c]ontemporary argument is closer in format to the quiz programs on television than to the magnificent speeches of a hundred years ago." ⁷⁰

Oral argument in the Supreme Court reached its present form as a result of the 1970 rules revisions which reduced the length of argument to one-half hour per side. ⁷¹ The Court today hears approximately 160 hours of argument per term and only occasionally grants additional time to any litigant. Questioning from the bench varies from case to case. In my own experience, the colloquy has ranged from almost no questions to intense questioning throughout the entire thirty-minute period. In the latter situation, which is not uncommon, counsel cannot give a prepared presentation at all unless affirmative points are incorporated in answers to questions from the bench.

The Court has thus evolved in its nearly two-hundred year history from a tribunal which entertains unlimited argument with no questions from the bench, to a tribunal which permits only one-half hour of argument per side with intense questioning from the bench. ⁷²

Reasons for Curtailment of Argument

At first blush, it may appear surprising that the same Supreme Court, deciding cases of equal importance to the Nation throughout its two hundred year history, would adopt such fundamentally different procedures for resolving the issues that come before it. A number of explanations for the change in attitude toward oral argument can be advanced.

The traditional explanation for curtailment of argument has been the increase in the Court's workload, and certainly that is the predominant factor. ⁷³ The Court today hears argument in approximately 180 cases and processes more than 4000 applications for review every term. It would therefore be impossible to hear counsel argue for days on end, even if the Court were disposed to do so.

Changes in the volume of work do not, however, appear to be the sole factor bearing on the Court's evolving attitude toward argument. For example, during the eras of Marshall and Taney,

the justices were severely burdened with growing circuit riding duties and frequently complained about long orations. Yet for almost sixty years, the Court granted counsel unlimited time. Today, by contrast, the Court is reluctant to extend argument time beyond one-half hour per side even in the most important cases, and will do so only when counsel demonstrates "with specificity . . . why the case cannot be presented within the half-hour limitation." [Rule 38.3]

It is tempting to speculate about the reasons for this difference in attitude apart from changes in the Court's workload. Let me focus first on the early years of the Court's history. As previously described, Chief Justice Taney believed that curtailment of argument would be inconsistent with oratorical traditions of American government. In the days of Marshall and Taney, the dual role of lawyers at the bar and in politics made oratory as significant as legal scholarship.⁷⁴ Broad questions of constitutional theory or commercial policy, unilluminated by past precedents of the Supreme Court or by declarations of Congress, invited the kind of far-ranging exposition customary in contemporary political debate.⁷⁵

The Court's toleration of extended argument also may have been a consequence of the high quality and specialization of the bar. In the days of Marshall and Taney, transportation was difficult, and lawyers around the country referred their cases to a small group of local counsel with special knowledge about the Court and its proceedings. There is reason to believe that this group provided valuable assistance to the Court.⁷⁶ As Robert Jackson explained, "[d]uring its early days [the Court] had the aid of counsel who expounded the Constitution from intimate and personal experience in its making."⁷⁷ The justices had no library and no law clerks, so extended presentations by capable attorneys, gifted in the verbal arts, provided an especially important source of information.⁷⁸

Finally, there are indications that — despite repeated complaints — the justices were able to use periods of long argument with efficiency. In contrast to the present practice of hearing twelve cases in every weekly session and issuing opinions from one to eight months later, the justices in the era of Chief Justice Marshall heard extended arguments in a single case, deliberated among themselves simultaneously, and produced their opinion in a few days. While a case was being argued, the Court would begin its deliberations: "We moot every



Justice Robert Jackson felt that the extended oral presentations of previous eras had been useful to the Court at a time when its own resources and the assistance it had available to conduct research were limited.

question as we proceed, and my familiar conferences at our lodgings often come to a very quick, and, I trust, a very accurate opinion . . ."

⁷⁹ Such interim conferences were facilitated by the fact that the justices, from 1815 to 1830, lived together in a single boardinghouse.⁸⁰ By deliberating in this concentrated fashion during argument, the Court was able to announce its opinions in a period of time that was astonishingly short.⁸¹ The Marshall Court handed down a substantial number of opinions in major constitutional cases in five days or less.⁸²

The Court today, of course, does not have time to entertain extended argument in any appreciable number of cases. Moreover, even if it could, such a mode of proceeding would not ordinarily be useful. This is true for several reasons.

In contrast to the early days of the Supreme Court, the Court today has abundant sources of information about the issues which come before it. It now has ample judicial precedents, policy prescriptions from Congress and administrative agencies, and voluminous commentary from legal scholars. It also has a large library and a staff of law clerks. It receives printed briefs not only from the parties, but also, in cases of major consequence, from *amici curiae*. And since, in most cases, it defers granting review until a conflict among the circuits has developed, it has the benefit of conflicting opinions of lower courts to illuminate the competing considerations of law and policy. The importance of oral argument in fur-

nishing information is reduced by the plenitude of relevant written material and the assistance the Court receives in analyzing that material.

In addition, through the modern practice of questioning counsel, the Court is able to get the substance of argument with greater speed. If a point is obvious or repetitious, the Court can move the discussion ahead without loss of time. If a point is irrelevant, it can be cut off. If weaknesses have been obscured by a mass of detail in the briefs, the Court can expose those weaknesses through questions and answers. The Court can, in short, break down problems into manageable components and focus light where it is most needed through the questioning process. And since counsel realizes that time is fleeting, he must come to the essential points with dispatch.

Moreover, it is fair to say that the complexity of modern cases limits the utility of extended oral presentation and maximizes the need for reading. Many of the cases which reach the Court today turn on complicated statutory codes such as the Internal Revenue Code or the Social Security Act. Other cases involve technological issues arising from administrative agencies and these are surrounded by a labyrinth of regulations. Such cases do not lend themselves to extended oral presentation. Cases arising in our modern age of bureaucratic regulation and sophisticated technology place a premium on written advocacy and library research, with a lesser role for oral exposi-

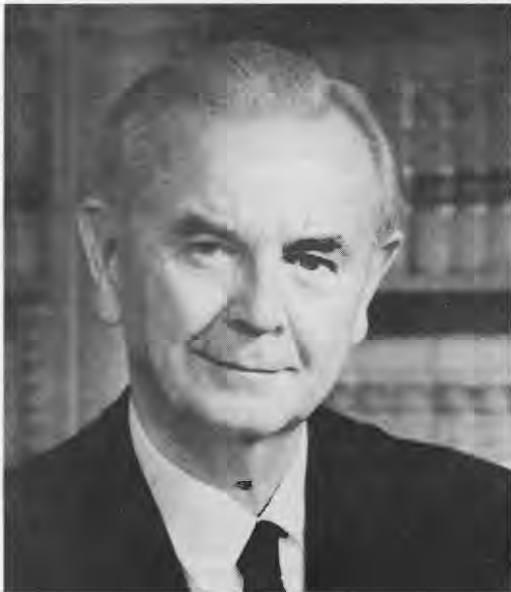
tion.

Finally, mention must be made of changes in education of the bench and bar. In Webster's day, the curriculum included speeches by Demosthenes and Cicero and other classical orators. But the tradition of oratory has been on the wane in American colleges and law schools for many years. Prominent law schools explicitly or implicitly discourage it. A student with no speaking ability can graduate at the top of the class. The limited occasions for speaking in law school — class discussion and moot court sessions — afford experience in the Socratic method, not in oratory. In the student's most important work in law school, the emphasis is on accurate (not stylish) writing, and that has become the dominant medium of communication in our appellate system. Neither the justices nor the counsel appearing before them are likely to be at ease with high-style oratory.

Practical Implications for Today's Supreme Court Advocate

The trend toward reduced argument time in the Supreme Court does not imply that argument is unimportant to the Justices. The trend simply illustrates the aesthetic paradox that sometimes "less is more." Thus, even those Justices who have been most insistent on avoiding wasteful prolongation of argument have been equally insistent on preserving a reasonable amount of argument time. For example, Chief Justice Hughes once wrote that "the desirability . . . of a full exposition by oral argument in the highest court is not to be gainsaid," for it is "a great saving of time of the court in the examination of extended records and briefs, to be able more quickly to separate the wheat from the chaff."⁸³

More recently, Justice Brennan has said that "oral argument is the absolutely indispensable ingredient of appellate advocacy . . . [O]ften my whole notion of what a case is about crystallizes at oral argument."⁸⁴ Justice Brennan also has observed that "I have had too many occasions when my judgment of a decision has turned on what happened in oral argument, not to be terribly concerned for myself were I to be denied oral argument."⁸⁵ Similarly, Justice White has emphasized that oral argument is not merely a "ritual extension of due process to the parties," but "remains an important step in the decision-making process."⁸⁶ And Justice Rehnquist has observed that



"Oral argument is the absolutely indispensable ingredient of appellate advocacy," concludes Justice William J. Brennan.

"[o]ral advocacy is probably more important in the Supreme Court of the United States than in most other appellate courts. For unlike other appellate courts, a grant of certiorari by the Supreme Court to review a decision of a lower court suggests that the case at issue is a genuinely doubtful one."⁸⁷ Thus, at least for the present, there is little prospect of any further reduction in argument time — and certainly no danger of its elimination.

The evolution outlined above has important implications, nonetheless, for counsel presenting a case in the Supreme Court today. The essential conditions of the modern argument are rigid time limitations and unpredictable, but usually intense, questioning from the bench. Lawyers preparing for argument must constantly bear those conditions in mind. The following more specific suggestions also may be of value.⁸⁸

It is important to recognize that the Court does not desire a speech from counsel, but expects help in resolving the case according to its own needs. As Justice White has explained, the justices use argument "to clarify their own thinking and perhaps that of their colleagues. Consequently, we treat lawyers as a resource rather than as orators who should be heard out according to their own desires."⁸⁹ Because the Court uses counsel as an information resource, he or she must know the record, the issues, and the authorities from top to

bottom, so that accurate answers to questions can be quickly provided. It is not enough to master a prepared speech.

Counsel also must bear in mind that the amount of questioning will be unpredictable, and that the argument must therefore shift smoothly from a prepared presentation to a spontaneous colloquy with the Court. This means that any prepared remarks should expand or contract like an accordion. Counsel must identify in advance the few important points that need to be made, no matter how intense questioning becomes, and be prepared to put the rest aside. As the Chief Justice has stated, "I recommend that you not rely on a prepared argument, because the Court is not going to let you present it."⁹⁰ This means that counsel should in no event attempt to stick inflexibly to a prepared script or fail to follow the Court's lead to areas of interest.

When questioning is intensive, it is important to try to weave key substantive ideas into answers to questions presented by the Court. This requires flexibility. Questions from the Court should be used as stepping stones to points that need to be explained. Every question requires an accurate and courteous answer, but more time should be spent in dealing with central issues than with collateral issues raised by the bench.

The substantive points during argument should be the main, common sense reasons why your cli-



Commenting on the Court's view of the value of oral argument, Justice Byron White (left) has said that despite the availability of written briefs, oral argument "... remains an important step in the decision-making process." Justice William H. Rehnquist (right) notes that oral advocacy "... is probably more important in the Supreme Court of the United States than in most other appellate courts" because the Court's grant of *certiorari* "... suggests that the case at issue is genuinely a doubtful one."

ent is entitled to win the case. The technical side of the case can be left to the briefs. As Justice Rehnquist has said, "the more flesh and blood you can insert into it, as opposed to a dry recitation of principles of law or decided cases, the more interesting and effective that argument can be." He also analogized the relationship between a brief and an oral argument to the relationship between a movie and a preview that "selects dramatic or interesting scenes that are apt to catch the interest of the viewer and make him want to see the entire movie."⁹¹

In selecting the substantive points for emphasis during argument, one should, in the current vernacular, "go for the jugular." That means you should pick the most important point or two and make your most convincing argument. As Justice Rehnquist has observed, in some cases the most impressive point may be factual and in other cases legal.⁹² But the argument never should begin with a dubious or provocative contention that throws a bath of cold water on the rest of the presentation.

It also is helpful to remember, in arguing substantive legal principles, that the Court has moved considerably beyond the "age of discovery." The Court no longer lacks judicial precedents, and it renders many of its decisions in the context of Congressional prescriptions of public policy. In debating the meaning of federal legislation, it is important to focus on the intent of the draftsmen, as expressed in the literal language of the provisions at issue, their structure, and their history. As the Court has reminded the bar, while it is "emphatically the province and duty of the judicial department to say what the law is," "it is equally — and emphatically — the exclusive province of Congress . . . to formulate legislative policies."⁹³

Finally, in light of the heavy workload of the Court, it is best to follow the example of twentieth-century advocates such as John W. Davis — rather than the example of Webster and Pinkney — and "sit down."⁹⁴ While the rules grant counsel a maximum of thirty minutes, the Court admires even greater brevity in oral presentation.

Footnotes

¹ Mr. Shapiro previously served as Deputy Solicitor General of the United States. He is currently a partner in Mayer, Brown & Platt.

² "The Supreme Court — Its Homes Past and Present," 27 *American Bar Assn. Journal* 283 (1941); 1 C. Warren, *The Supreme Court in United States History* 459 (1937).

³ See Supreme Court Rule VII, promulgated in 1791 and reproduced in 1 Peters (26 U.S.) vi (1828). Professor Moore observes that this rule was "not very informational [and] it was also misleading." 13 *Moore's Federal Practice* at ¶800.01 (1982 ed.).

⁴ See *Georgia v. Brailsford*, 3 Dallas (3 U.S.) 1 (1794); *Oswald v. New York*, 2 Dallas (2 U.S.) 401 (1795); *Cutting v. South Carolina*, 2 Dallas (2 U.S.) 415 (1797). In *Brailsford*, Chief Justice Jay charged the jury under "the good old rule" that permitted the jury "to judge . . . the law as well as the fact in controversy." 3 Dallas 4. The jury findings appear in "The Supreme Court — Its Homes Past and Present," *supra*, 27 *American Bar Assn. Journal* at 286 n. 3.

⁵ G. White, "The Working Life of the Marshall Court, 1815-1835," 70 *Virginia Law Review* 1, 2 (1984).

⁶ G. Casper & R. Posner, *The Workload of the Supreme Court* 16 (1976).

⁷ "It was upon this bar that the profession generally was dependent for information and ultimately for the management of a cause in the Supreme Court." J. Goebel, 1 *History of the Supreme Court of the United States* 666 (1971).

⁸ M. Baxter, *Daniel Webster and the Supreme*

Court 31 (1966) ("After all, should not those who made laws help interpret them?").

⁹ Daniel Webster, for example, served in the House, the Senate, and the State Department while representing private clients before the Supreme Court. *Id.* at 227-228.

¹⁰ J. W. Davis, "The Argument of an Appeal," 26 *American Bar Assn. Journal* 895 (1940): "in the *Girard* will case Webster, Horace Binney and others, for ten whole days assailed the listening ears of the Court."

¹¹ I. C. Warren, *supra*, at 471. Some counsel appeared more concerned with the festive than the professional side of their performances. See J. Frank, *Marble Palace* 91-92 (1958): "In one case, argument was adjourned to give the distinguished lawyer Luther Martin a chance to sober up."

¹² S. W. Finley, "Daniel Webster Packed Them In," 1979 *Supreme Court Historical Society Yearbook* at 70.

¹³ I. C. Warren, *supra*, at 473 n. 1. Pinkney's speeches often were oratorical bouquets for the ladies. He once informed the Justices that "he would not weary the court, by going through a long list of cases to prove his argument, as it would not only be fatiguing to them, but inimical to the laws of good taste, which on the present occasion (bowing low) he wished to obey." M. Baxter, *supra*, at 28.

¹⁴ R. Strickland, "The Court and the Trail of Tears," 1979 *Supreme Court Historical Society Yearbook* 20, 26 ("Wirt's conclusion was so emotional that Chief Justice Marshall shed tears, something he had not done

since the *Dartmouth College Case*").

¹⁵ I. C. Warren, *supra*, at 467.

¹⁶ *Id.* at 470-471.

¹⁷ See M. Baxter, *supra*, at 34: "Neither the bench nor bar felt as restrained by jurisdictional limits as would its modern counterpart. In their elaborations, lawyers wandered far beyond the record."

¹⁸ As described by Grant Gilmore, lawyers practicing in the age of Marshall had few legal guideposts. Post-revolutionary lawyers knew English common law, but did not know the degree to which English precedent would govern in American courts. Anglophobia stemming from the Revolutionary War and the War of 1812 constrained enthusiastic acceptance of English precedent on a wholesale basis. "Thus, without constitutional guidance, the courts, state and federal, set out as joint venturers in quest of an American law." *The Ages of American Law* 19-25 (1977).

¹⁹ "In this country, . . . a pure Mansfieldianism flourished: not only were his cases regularly cited, but his lighthearted disregard for precedent . . . became a notable feature of our early jurisprudence. Justice Story, in particular, both in his opinions and in his non-judicial writings, never tired of acknowledging his indebtedness to, and his reverence for, Lord Mansfield." *Id.* at 24.

²⁰ "His speeches expertly mingled the simple with the complex and, though generally incisive, sparkled with literary and historical allusions. A gifted Latin scholar, he spiced his arguments with classical quotations." M. Baxter, *supra*, at 10.

²¹ "There was indeed a Websterian format. He commenced in a quiet, almost monotonous tone by stating the facts and questions of a controversy. His voice deepened and took on organ tones as he warmed to the topic. When he reached the crucial part of his case, his delivery attained compelling force, sweeping aside opposing positions as superficial or erroneous, advancing his own points — few and carefully chosen — with emphasis that made them plain. Finally his peroration. Wonderful moment! Here the pace slowed, but sentiment was lofty, punctuated with some of the lawyer's favorite Latin. At the end his auditors felt profoundly moved and nearly as exhausted as the orator." M. Baxter, *supra*, at 10.

²² A. Konefsky & A. King, II *The Papers of Daniel Webster*, Ch. 2 (1983).

²³ Webster's argument appears in II *The Works of Daniel Webster* 452 (Little & Brown ed. 1851). See *id.* at 469, arguing that the English parliament, while claiming power to alter college charters, "has very rarely attempted the exercise of this power."

²⁴ *Id.* at 470, citing Lord Mansfield's decisions.

²⁵ *Ibid.*: "there are prohibitions in the constitution and Bill of Rights . . ." *Id.* at 494: "The words themselves contain no such distinction."

²⁶ *Id.* at 495: "If [New Hampshire] cannot repeal [charter provisions] altogether . . . it cannot repeal any part of them, or impair them, or essentially alter them, without the consent of the corporators."

²⁷ *Id.* at 485, quoting at length from Kent and Bracton.

²⁸ *Id.* at 477: "In New England, and perhaps

throughout the United States, eleemosynary corporations have been generally established" by private charters under the governance of trustees.

²⁹ *Id.* at 483, citing a decision of the Supreme Court of North Carolina.

³⁰ *Id.* at 483-484.

³¹ *Id.* at 486, discussing Roman law in the time of Justinian.

³² *Id.* at 489-490: "Of all the attempts of James the Second to overturn the law, and the rights of his subjects, none was esteemed more arbitrary or tyrannical than his attack on Magdalen College, Oxford."

³³ *Id.* at 493, citing Madison's *Federalist Paper* No. 44.

³⁴ *Id.* at 500: "It will be a dangerous, a most dangerous experiment, to hold these institutions subject to the rise and fall of popular parties — Colleges and halls will be deserted by all better spirits . . . These consequences are neither remote nor possible only. They are certain and immediate."

³⁵ *Id.* at 489: "Nothing could have been less expected, in this age, than that there should have been an attempt, by acts of the legislature, to take away these college livings, the inadequate but the only support of literary men who have devoted their lives to the instruction of youth."

³⁶ *Id.* at 486: "If the constitution be not altogether wastepaper, it has restrained the power of the legislature in these particulars."

³⁷ M. Baxter, *supra*, at 84.

³⁸ W. Lewis, "Backstage at Dartmouth College," 1977 Supreme Court Historical Society *Yearbook*, 29, 36.

³⁹ J. Frank, *Marble Palace* 92 (1958): "A good crowd gave the bench a sense of self-importance; the Justices themselves were sometimes stimulated to more active interest by the presence of an audience."

⁴⁰ Casper and Posner, *supra*, at 13.

⁴¹ *Id.* at 12.

⁴² 4 A. Beveridge, *The Life of John Marshall* 83 (1929).

⁴³ Quoted in Chief Justice Hughes, *The Supreme Court of the United States* 60 (1928).

⁴⁴ C. Swisher, V *History of the Supreme Court of the United States* 277 (1974).

⁴⁵ *Id.* at 278.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ F. Frankfurter and J. Landis, *The Business of the Supreme Court* 52 (1928).

⁴⁹ The rule is reproduced at 21 Howard (62 U.S.) XII.

⁵⁰ *Ibid.*

⁵¹ See III C. Warren, *The Supreme Court in United States History* 9-10 (1922), describing newspaper accounts of the "eloquent and witty" argument of counsel, which "partook more of the character of a stump speech than that of a jurist."

⁵² C. Fairman, VI *History of the Supreme Court of the United States* 451, 456 (1974).

⁵³ See III C. Warren, *supra*, citing the complaint of observers that argument in the *Dred Scott* case was "too brief," counsel being limited "to one hour and a

quarter." *Id.* at 9.

⁵⁴ A. Garland, *Experience in the United States Supreme Court* 46-47 (1898).

⁵⁵ *Id.* at 50.

⁵⁶ *Id.* at 48-49. Garland voiced no objection to the two-hour limitation, but observed whimsically that "[w]hile I have not heard of any lawyers dying under this limitation upon their speaking, yet I have known some to grow melancholy and sicken under it. . . ." *Id.* at 49.

⁵⁷ *Id.* at 62.

⁵⁸ *Id.* at 62-63.

⁵⁹ C. Butler, *A Century at the Bar of the Supreme Court of the United States* 86-87 (1942 ed.).

⁶⁰ John W. Davis, "The Argument of an Appeal," 26 *American Bar Assn. Journal* 895, 898 (1940). In one such instance, Chief Justice White "was heard to moan 'I want to hear the argument.' 'So do I, damn him,' growled his neighbor, Justice Holmes."

⁶¹ C. Butler, *supra*, at 87.

⁶² *Id.* at 87-88.

⁶³ 43 Stat. 936 (1925). The background of this statute and its effect on the Court's workload are discussed in Chapter 1 of R. Stern, E. Gressman, and S. Shapiro, *Supreme Court Practice* (6th edition 1986).

⁶⁴ The Court's 1925 rules revisions appear in 266 U.S. 653, 673-674.

⁶⁵ *The Supreme Court of the United States* 61-62 (1928).

⁶⁶ *Ibid.*

⁶⁷ Justice Felix Frankfurter, "The 'Administrative Side' of Chief Justice Hughes," 63 *Harvard Law Review* 15, 16-17 (1949).

⁶⁸ *Id.* at 17.

⁶⁹ J. Frank, *Marble Palace* 102-105 (1958).

⁷⁰ *Id.* at 102. Counsel in the case referred to by Mr. Frank encountered a total of 237 questions during the entire argument. Such intense questioning was "improperly called 'the Felix problem.'" *Id.* at 106. And while Garland had seen counsel frightened into utter silence by sharp questions (see p. 13, *supra*), Frank reports two instances in which counsel "fainted in the courtroom" under heavy questioning from the bench (*id.* at 101).

⁷¹ See 398 U.S. 1009, 1058 (1970). Oral argument under the one-half hour rule is discussed in S. Shapiro, "Oral Argument in the Supreme Court of the United States," 33 *Catholic University Law Review* 525 (1984).

⁷² In 1980, the Court curtailed written argument by limiting the page length of briefs and other filings. See 445 U.S. 983 (1980).

⁷³ See R. Stern, E. Gressman, and S. Shapiro, *Supreme Court Practice* Ch. 1 (6th edition 1986), for a review of the growth in the Court's caseload.

⁷⁴ See M. Baxter, *supra*, at 33-34: "Accustomed to interminable speeches in Congress, these political war horses could not change their pace when they went to Court. But in both instances they exemplified the standards of their times, for this was the golden age of American oratory. As college students, they had at-

tended rhetoric classes, read the Greek and Latin orations, joined debating societies. . . . In the Supreme Court, the attorneys were fulfilling the expectations of everyone."

⁷⁵ "[T]hese years were a formative era of constitutional law, to some extent of other branches of law as well, and counsel enjoyed the freedom of pioneers. Penetrating the unmapped wilderness of social and legal problems, they defined issues, uncovered precedents, suggested promising rules of decision. The Court, and the public too, was willing for them to do so. A dual status as lawyers and politicians strengthened their ability to cut paths through the legal thickets of their time." M. Baxter, *supra*, at 35. See also G. White, "The Working Life of The Marshall Court, 1815-1835," 70 *Virginia Law Review* 1, 48-52 (1984). For another historical view, see R. Pound, *The Spirit of the Common Law* 124-125 (1921) (likening long arguments to "combat" by attrition and "frontier modes of thought").

⁷⁶ "In comparison with counsel in other periods these men were peculiarly well prepared for such a function. Many, like Webster, had political experience applicable to questions before the bench. Many more contributed from their study of scarce or obscure reports and commentaries." M. Baxter, *supra*, at 27.

⁷⁷ *Proceedings in commemoration of the 150th Anniversary of the Supreme Court*, H. R. Doc. No. 649, 76th Cong., 3d Sess. 12 (1940).

⁷⁸ G. White, *supra*, 70 *Virginia Law Review* 1.

⁷⁹ Justice Joseph Story, quoted by Chief Justice Hughes in *The Supreme Court of the United States* 61 (1928).

⁸⁰ G. White, *supra*, 70 *Virginia Law Review* at 6 ("The boardinghouse became the nerve center of their existence in Washington").

⁸¹ *Id.* at 30.

⁸² *Id.* at 30-31. Professor White indicates that the Justices also may have been "using time during oral argument to prepare the skeleton of opinions." *Id.* at 32.

⁸³ Chief Justice Hughes, *The Supreme Court of the United States* 62-63 (1928).

⁸⁴ Harvard Law School Occasional Pamphlet Number Nine at 22-23 (1967).

⁸⁵ *Remarks at the Third Circuit Judicial Conference*, reproduced at 67 F.R.D. 195, 254 (1975).

⁸⁶ Justice White, "The Work of the Supreme Court: A Nuts and Bolts Description," October 1982 *New York State Bar Journal* 346, 383.

⁸⁷ Justice Rehnquist, "Oral Advocacy, A Disappearing Art," 35 *Mercer Law Review* 1015, 1027 (1984).

⁸⁸ For a detailed discussion of oral argument technique, see S. Shapiro, "Oral Argument in the Supreme Court of the United States," 33 *Catholic Univ. Law Review* 529 (1984).

⁸⁹ Justice White, *supra*, October 1982 *New York State Bar Journal* at 383.

⁹⁰ Chief Justice Burger, "Conference on Supreme Court Advocacy," 33 *Catholic Univ. Law Review* 525, 527 (1984).

⁹¹ Justice Rehnquist, *supra*, 35 *Mercer Law Review* at 1024-1025.

⁹² *Id.* at 1025-1027. The Court will not ordinarily reconsider factual questions decided in the same way by two lower courts (*Berenyi v. Immigration Director*, 385 U.S. 630, 635 (1967)), but it may well disagree about the legal significance of those facts (*Illinois v. Gates*, 462 U.S. 213, 225-246 (1983)).

⁹³ *TVA v. Hill*, 437 U.S. 153, 172, 194 (1978). In

other words, the advocate must approach the Court with recognition that, while it has an enormously important role in elucidating statutory policy, it has no disposition to revise federal legislation or prescribe statutory policy of its own.

⁹⁴ Davis' famous Tenth Commandment of oral argument was peremptory: "Sit down." "The Argument of an Appeal," *supra*, 26 *American Bar Assn. Journal* at 898.

Wheaton v. Peters: The Untold Story Of The Early Reporters

by Craig Joyce*

Introduction

One cold day in January of 1817, Joseph Story, himself recently appointed a Justice of the Supreme Court of the United States, took pen in hand to congratulate the Court's newest employee, Reporter of Decisions Henry Wheaton, on the publication of the first volume of *Wheaton's Reports*. Story wrote:

I received yesterday your obliging favour accompanied with a copy of your reports. I have read the whole volume through hastily, but *con amore* . . . In my judgment there is no more fair or honorable road to permanent fame . . . [Y]our reports are the very best in manner of any that have ever been published in our Country, & I shall be surpris[ed], if the whole profession do not pay you this voluntary homage.¹

Happily for Justice Story, his own place in the history of American law rests on footing substantially more solid than the foregoing prophecy to Reporter Wheaton. For little of what the young Justice so confidently predicted, and the fledgling Reporter so fondly hoped, has come to pass. Indeed, contemporary observers largely ignored the vital contribution of Henry Wheaton and the other early Reporters² to the Court's institutional life and ultimate renown; and today that contribution is almost totally forgotten.

Wheaton and his fellow Reporters deserve better. In this paper, I hope to accord their memories at least a small measure of that "permanent fame" that has, to date, so conspicuously eluded them. My vehicle is the Court's 1834 decision in *Wheaton v. Peters*,³ a contest between Henry Wheaton and his successor in office, Richard Peters, Jr., over the copyrightability of the Court's own opinions. *Wheaton* is an old case, I grant; but it is also a great case. In addition to highlighting the role of the early Reporters in the everyday life of the Court, it provides an illuminating perspective on the ascendance of that tribunal to its present preeminent position in American law. In this sesquicentennial year of the Marshall Court, I assure you that few activities will prove nearly as enlightening — or, I hope, as enjoyable! — as a



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Justice Joseph Story praised Henry Wheaton for his first volume of the Court's reports.

study of the fascinating but heretofore untold story that is *Wheaton v. Peters*.

I. Antecedents and Beginnings

Only forty-six years separate the beginning of the Chief Justiceship under John Jay in 1789 from the death of John Marshall in 1835. The transformation of the Supreme Court's role and power within the American constitutional system during that period has long been a leading theme in histories of the Marshall Era.⁴ But the reasons underlying the progress of the Court from its status as an "almost faceless" onlooker during the nation's first decade⁵ to a position of "judicial hegemony" in the federal system by the close of Marshall's tenure⁶ have yet to be fully explored. Typically, commentators have focused on the doctrinal aspects of that development, while paying scant attention to its institutional dimension.

Two examples will suffice. Representative of an earlier day is H. L. Carson's *Centennial History of the Court*, published in 1891. Carson sum-

marized the effects of Marshall's insistent nationalism in terms suggestive of inescapable destiny: "Beneath the strong and steady rays cast by his mind the mists were rising, and the bold outlines of our national system were gradually revealed."⁷ Similarly, among present-day historians, George L. Haskins, in his recent study of the separation of law from politics in Marshall Court jurisprudence, has written:

Under Marshall, the Court became the ultimate seat of federal judicial power and, more important, a fertile breeding ground for developing the idea of the supremacy of the rule of law, as distinct from elusive and unpredictable accommodations to the executive and the legislature. Inevitably, these developments and the ideas they nurtured permeated the lower federal courts, and helped to spread nascent ideas of a new American nationalism.⁸

Inevitable? No. Modern lawyers, accustomed to air courier delivery of judicial opinions announced in Washington, D.C., the preceding day, are understandably blind to the difficulties encountered by the bar, the public at large and even the lower courts, in obtaining copies of the Supreme Court's decisions in an earlier age. In truth, however, the reputation of the Court in those years, and even knowledge of its utterances, depended in large part upon dissemination of its opinions by an unofficial system of private enterprise reporting whose hallmarks were delay, omission and inaccuracy, and unmanageable expense. Obscured by such deficiencies in the reporting of Marshall Court decisions, it is little wonder that the "bold outlines of our national system" rose but slowly from the "mists" during the first decades of the nineteenth century.

In retrospect, it seems merely commonsensical to expect that the need for an official Reporter of the decisions of the Supreme Court, authorized to disseminate those decisions to the bench, bar and general populace of the new nation, should have been recognized contemporaneously with the formation of the Court. It was not. The members of the first Congress in 1789, while laying out an elaborate blueprint for the structure of the new federal judiciary,⁹ were silent on the subject of a Reporter, as were the Justices themselves in the first and second Terms of the Court held at New York City in 1790.¹⁰ Nor does there appear to have been any discussion of appointing a Reporter when the government moved to Philadelphia, where the Court held its third Term in February of 1791.¹¹

The explanation for this apparent oversight, however, is reasonably plain. As a practical mat-

ter, the Court had no need of a Reporter, official or otherwise, during its first three Terms, for its docket was empty.¹² Not until the Court's August 1791 Term was its first case, *West v. Barnes*, called for argument (and dismissed on procedural grounds without reaching the merits).¹³

It was at this juncture that the need for a Reporter of the Court's decisions became clear, if not to the Court, at least to an enterprising young member of the Philadelphia bar named Alexander James Dallas. Born in Jamaica and educated in England, Dallas had migrated to the United States in 1783 and been admitted to the practice of law in Pennsylvania in 1785 at the age of twenty-six.¹⁴ Dallas' career, both in private practice and public service, was to prove long and distinguished,¹⁵ culminating in his appointment as Madison's Secretary of the Treasury in 1814.¹⁶

In the years immediately prior to the arrival of the federal government in Philadelphia, however, Dallas had yet to achieve notable success in his adopted nation or chosen profession. His biographer characterizes the period from 1783 to 1790 as "seven lean years of law practice, political reporting, magazine editing, hack writing, and clerical work,"¹⁷ and his practice as consisting of "minor cases in the city and county courts and routine office work on wills and conveyances."¹⁸ Not that Dallas' efforts had been entirely in vain. On the contrary, having occupied himself indus-



Enterprising Philadelphia attorney Alexander James Dallas became the first unofficial reporter of opinions for the Supreme Court.

triously with editing and writing for political, literary and legal journals¹⁹ in Pennsylvania's capital city, Dallas had achieved an unusual degree of visibility that would lead, in December of 1790, to his appointment as Secretary of the Commonwealth.²⁰

In addition, albeit quite inadvertently, Dallas had positioned himself perfectly to become the first Reporter of Philadelphia's newest court, the lately itinerant and largely unknown Supreme Court of the United States. Between 1788 and 1790, Dallas published at least eleven accounts of cases decided in the Pennsylvania and Delaware courts. The reception accorded these reports by the bench and bar was so favorable that Dallas determined to undertake the systematic collection and publication of Pennsylvania court decisions in book form.²¹ His first volume, published in June of 1790, contained accounts of Pennsylvania decisions from as early as 1754, based on notes preserved by judges and lawyers,²² and was appropriately titled *Reports of Cases Ruled and Adjudged in the Courts of Pennsylvania Before and Since the Revolution*.

Perhaps the most remarkable aspect of volume 1 of Dallas' *Reports*, other than its primacy as the first volume of the *United States Reports* notwithstanding the absence therefrom of a single decision of the new nation's highest court, is its virtual novelty as an art form in American law. But for one important volume of Connecticut cases by Ephraim Kirby,²³ which preceded it by barely a year, Dallas' initial volume would stand indisputably as the first comprehensive publication of American law reports, federal, state or colonial.²⁴

The American colonies had hardly been a backwater of civilization during the eighteenth century. Why then the dearth of law reports, given the long tradition of reporting in English practice?²⁵ One possible explanation is the limited size of the bar during the period, which presumably rendered the publication of reports of decisions in the various colonies (and later, states) a commercially dubious venture.²⁶ Certainly, commercial difficulties were later to prove debilitating to Dallas and his immediate successors in reporting the decisions of the Supreme Court.²⁷

In addition, there was little need to study the judgments of American courts so long as the colonies remained yoked to the mother country.²⁸ With independence, however, American lawyers embarked upon the daunting task of tailoring English law to American circumstances, when



From 1791 to 1800, the justices passed through this corridor on their way to convene the Court in Philadelphia's Old City Hall.

possible, and creating a distinctly American body of law, when necessary.²⁹ Suddenly, neither English reports nor the notebooks of decisions maintained by many lawyers for use by themselves and their friends³⁰ would suffice for the practice of law in a new nation. Although a majority of the new American states considered common law decisions announced before the break with England persuasive in their courts, there seemed a pressing need for *American* decisions as precedent.³¹ No published reports of such cases appeared in the decade following independence, however, and American courts remained almost entirely dependent on English legal literature for their common law precedents.³² The law that did develop in American courts was, in the words of Ephraim Kirby, "soon forgot, or misunderstood, or erroneously reported from memory."³³

Clearly, American soil had become fertile ground for the flowering of "home-grown" law reports.³⁴ It remained to be determined, however, who would undertake the task and how it would be financed. The contrasting approaches taken in Kirby's *Connecticut Reports* and Dallas' *Pennsylvania Reports* are instructive of the problems faced by all of the early reporters, state and federal, and shed particular light on the development of the *United States Reports* under Dallas and his three immediate successors.

From the start, Kirby had significant advantages over Dallas. As early as 1784, the Connecti-

cut General Assembly had recognized the need "to lay the foundation of a more perfect and permanent system of common law in this state," and had accordingly required the judges of the Supreme Court of Errors and the Superior Court "to give in writing the reasons of their decisions upon points of law, and lodge them with their respective clerks, with a view, as the statute expressly declares, that the cases might be *fully reported*."³⁵ Plainly, Kirby's *Reports*, covering judgments in the named courts from May of 1785 through May of 1788, benefited directly from the General Assembly's foresight and carried into effect its specified purpose.

Dallas was not as fortunate. Not until 1806, just as he was concluding his *Reports*,³⁶ did the Pennsylvania General Assembly require judges to reduce their opinions to writing, and then only at the request of the parties or their attorneys.³⁷ Dallas, therefore, was able to give only the barest description of the earliest decisions reported in his first volume. For a number of the more recent cases, he had access to the opinions of his patron, Chief Justice Thomas McKean of the Pennsylvania Supreme Court, but generally to no others.³⁸ Even this limited assistance was unavailable in the instance of the Supreme Court of the United States, whose opinions first appeared in volume 2 of Dallas' *Reports*: while Dallas reported its decisions, the Court apparently failed, even in its most

important cases, to reduce its opinions to writing.³⁹ Certainly, no statute or rule of court required the Justices to do so.⁴⁰

Kirby, like Dallas, undertook his task without benefit of an official appointment as Reporter.⁴¹ The two men's conceptions of their informal responsibilities to the bench and bar, however, seem to have been substantially similar, at least as reflected in their finished products.

In preparation for his work, Kirby had collected and examined numerous volumes of English reports and abridgments, along the way discovering that his intended models shared little in the way of purpose, style or arrangement.⁴² Kirby's own reports seem to assume a readership interested primarily in ready access to clear, concise statements of the main points of law settled in each decision and content with bare summaries of the pleadings and arguments of counsel.⁴³ Thus, in addition to providing an alphabetical index of his 201 cases by plaintiffs' names, Kirby prepared a twenty-three page legal index abstracting by subject the points of law in the collected cases and referring the reader, with respect to each point, to the precise page on which the court's own words might be found.

The models for Dallas' first volume, if any, are unknown, but in execution the volume closely resembles Kirby's *Reports*. Like his Connecticut contemporary, Dallas placed primary emphasis on identifying and making accessible to practitioners the main points of law decided in the cases. Like Kirby's *Reports*, volume 1 of Dallas' *Reports* includes a lengthy subject matter index, alerting the reader to the principal issues addressed in the reports and referring him to the pertinent decision for further details. Dallas preceded each case, as had Kirby, with a brief abstract (frequently, one sentence) distilling its significance. He also prepared, in addition to an index of cases reported, an index of cases cited in the opinions of the courts. This innovation, not found in Kirby's *Reports*, seems particularly well calculated to meet the needs of a post-Revolutionary bar hungry for precedent; and the relative brevity of the index reveals what a pioneering effort it was.

Besides the differing availability of written opinions as the basis for their reports and the similarity of purpose that they brought to them, there is one final point of comparison between Dallas and Kirby that is worthy of note: the contrasting means by which the two men financed their ven-



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Chief Justice Thomas McKean of the Pennsylvania Supreme Court provided Dallas important background for his early reports on decisions reached in Pennsylvania courts.

tures. Neither, of course, could rely on a salary as Reporter to defray expenses, as neither held an official appointment carrying an assured stipend. In Kirby's case, however, the lack of such an appointment did not forestall legislative assistance in completing his undertaking. Initially, he had hoped to cover all costs of publication through an ambitious subscription drive, which failed in part due to uncertainties concerning the effect of the proposed Federal Constitution upon state legal systems.⁴⁴ By May of 1788, Kirby had raised but half of the necessary funds. He thereupon petitioned the Connecticut General Assembly for the remainder, which it appropriated for payment upon delivery of 350 copies of the finished reports for distribution to town clerks throughout the state.⁴⁵ Both the appropriation and the proviso may reasonably be seen as further steps toward the accomplishment of the purposes that underlay the General Assembly's 1784 determination to require written judicial opinions in the first place.

In Pennsylvania, meanwhile, Dallas labored without Kirby's advantages. True, Dallas' first volume appeared with the express imprimatur of the judges of the state's highest court, commending its author's "learning, integrity and abilities" and "approv[ing] and recommend[ing] the printing and publishing [of] his book."⁴⁶ But practical support, in the form of an appropriation by the legislature to offset current expenses and perhaps establish a market in the state for future sales, was never forthcoming.⁴⁷ Whereas the assistance of the General Assembly apparently enabled Kirby to break even on his Connecticut *Reports*, Dallas' experience in Pennsylvania was one of profound frustration.⁴⁸

Thus, in many respects, Kirby proved more successful than Dallas at the untried business of law reporting in a new nation. Both Dallas' first volume and Kirby's *Reports* provided otherwise unavailable reports of the decided cases, accompanied by useful aids for the diligent practitioner. Kirby, however, had the advantage of being able to reproduce all of the opinions handed down by the subject courts during the years covered by his volume; and his reports, widely circulated through the beneficence of the General Assembly, broadened his reputation without depleting his pocketbook. Yet, apparently content to let his fame rest on his first and only volume, Kirby essayed no sequel.⁴⁹

Dallas pressed on, however, perhaps spurred by the prospect of increased sales prompted by the

inclusion in his second, third and fourth volumes of the decisions of the federal courts newly located in Philadelphia since the publication of volume 1.⁵⁰ But there were numerous grounds for complaint concerning the execution of Dallas' later volumes, particularly by readers interested primarily in the decisions of the Supreme Court of the United States. Those problems (which, in fairness to Dallas, were not to end with his reportership) included delay, expense, omission and inaccuracy.

With respect to promptness in the publication of his reports, Dallas' pattern proved to be extremely uneven. Volume 1 of Dallas' *Reports*, containing cases decided as late as the December 1789 term of the Philadelphia County Court of Common Pleas, appeared in June of 1790, less than six months later.⁵¹ But between *Chisholm v. Georgia*,⁵² the last decision of the Supreme Court of the United States reported in Dallas' second volume, and the publication of the volume itself in 1798, there was a gap of five years. Volume 3 of Dallas' *Reports* appeared in late 1799, less than a year following the February 1799 Term with which it concluded.⁵³ Volume 4, however, contained no Supreme Court cases decided after the Court's August 1800 Term (the last held in Philadelphia) and did not reach the public until 1807, a lapse of almost seven years.

The lion's share of the blame for these delays in Dallas' publication of federal court decisions is clearly attributable to the free enterprise character of his venture. Lacking an official appointment and salary from the federal or state governments, and lacking also the comfort of a subsidy, like Kirby's in Connecticut, to assure the viability of his reports, it would be strange if Dallas had not been heavily influenced by commercial considerations. Having commenced publication of his first volume with Pennsylvania attorneys as his primary audience, Dallas may well have thought it prudent to design succeeding volumes in such a way as to maintain that readership as a core for sales. Indeed, the bulk of Dallas' volume 2 was devoted to state rather than federal cases;⁵⁴ and its 1798 publication date may well have been dictated by a desire to include as many decisions as possible of the Supreme Court of Pennsylvania, which volume 2 reported through that court's December 1797 term. Volume 3 of Dallas' *Reports*, published only a year after Volume Two, appears to have been necessitated by a huge backlog of federal Supreme Court decisions.⁵⁵ The Court,

but not Dallas,⁵⁶ moved to the District of Columbia after its August 1800 Term. The move left Dallas with but forty-six pages of cases to report. Dallas' fourth volume, therefore, did not appear until 1807, when he had a sufficient number of cases collected from the state and federal circuit courts, up to and including the December 1806 term of the Supreme Court of Pennsylvania, to justify publication.⁵⁷

Whatever the cause, Dallas' tardiness was a major hindrance to those hungry for information concerning the jurisprudence of the highest federal tribunal, particularly its appellate practice. In general, newspaper accounts of decisions were of little assistance in disseminating such information;⁵⁸ and, in consequence, counsel who were unable to attend the sessions of the Supreme Court in Philadelphia found it necessary to inquire of friends at the seat of government whether the Court had decided various issues of interest to them.⁵⁹

Delay, however, was not the only obstacle to the success of Dallas' venture. Expense, too, undoubtedly played a part. Publishing costs in America were generally higher than in England, and American attorneys had grown accustomed to purchasing the less expensive imported volumes. In Connecticut, Kirby's *Reports* had been considered excessively dear at three dollars per copy.⁶⁰ Dallas' four volumes, reporting courts as disparate as the Supreme Court of the United States and the Mayor's Court of Philadelphia⁶¹ and costing substantially more,⁶² appear to have encountered resistance at least as stiff from potential purchasers.

Yet delay and excessive expense may not have been the most grave deficiencies of Dallas' *Reports*, at least from a present-day perspective. To these must be added the twin charges that Dallas reported the first decade of the Court's existence both incompletely and inaccurately.

Completeness, or lack thereof, is a matter difficult to decide with certainty. Charles Warren's classic history of the Court claimed that Dallas had omitted at least ten percent of the cases decided during the sixteen active Terms that he reported,⁶³ including one "of much interest" to a later Court.⁶⁴ Chief Justice Hughes, concurring with one of Dallas' successors, thought that Dallas "probably published all the opinions that were filed."⁶⁵ Writing more recently, Julius Goebel, Jr., concluded in 1971 that "somewhat less than half of the dispositions made by the Su-

preme Court in the first decade of its existence are reported,"⁶⁶ although the figure "probably exceeds 70 percent" once the inquiry is limited to cases adjudicated on the merits or on jurisdictional grounds.⁶⁷ The dispute, in short, concerns not *whether* but *to what extent* Dallas' three volumes of *Supreme Court Reports* are incomplete.⁶⁸

As to accuracy, the verdict on Dallas' *Reports* is less certain. When, as Goebel notes, an opinion of the Court or of one of the Justices, "as reported by Dallas, is no model of clarity,"⁶⁹ who is to be blamed: the Justices or the Reporter? If Dallas, and not the Justices themselves, must be held responsible for garbling the opinions that he transmitted to lower court judges and practitioners, the fault would be great indeed in an age when newspaper reports, the primary alternative means of communicating the developing jurisprudence of the Court, "usually [imparted] only the bare outlines of the case and the result."⁷⁰

Any careful attempt to ascertain the accuracy of Dallas' accounts of the Justices' opinions, however, raises an even more arresting question: are the opinions in fact the handiwork of the Justices — or of Dallas himself? Not a single formal manuscript opinion is known to have survived from the Court's first decade;⁷¹ and few, if any, may ever have existed for Dallas to draw upon.⁷² Nor may it be confidently assumed that in all instances Dallas was present in court to take down the very words spoken by the Justices in their seriatim opinions, or that he was able afterwards to consult any notes they may have kept of the opinions they announced. In one instance, Dallas wrote to Justice Cushing for assistance with a series of cases, only to find that Cushing had not retained his notes in certain of the cases, or had not delivered his opinion from notes in other cases, or had not delivered an opinion at all.⁷³

Instead, it seems entirely possible that many of Dallas' reports of individual cases were constructed primarily from the notes of other counsel who had attended the proceedings. For example, *Ware v. Hylton*⁷⁴ contains an acknowledgment that, having been absent during argument of the case, Dallas had resorted to the notes "of Mr. W. Tilghman, to whose kindness . . . I have been frequently indebted for similar communications, in the course of the compilation of these Reports."⁷⁵ A comparison of the arguments as reported by Dallas with the recently rediscovered original of Tilghman's notes, however, reveals that Dallas



Justice William Cushing's opinion in *Ware v. Hylton* may not be accurately reflected by Dallas' report of the decision.

did more than merely retranscribe his source. Among other liberties taken with Tilghman's notes, Dallas omitted whole paragraphs, while embroidering on, strengthening and shifting emphases in what he retained.⁷⁶ The arguments in *Ware v. Hylton*, then, appear to be a combination of counsel's remarks and Dallas' improvements upon those remarks.

Whether the same may be said of the actual opinions in *Ware* is problematical. Having been otherwise occupied during the argument of the case, did Dallas nonetheless find time to attend the rendering of opinions? His report does not say. Justice Chase's rather detailed opinion, as recounted by Dallas, follows Tilghman's notes. Justice Cushing's does not.⁷⁷ Dallas attempted to obtain Cushing's notes in *Ware*, but he may or may not have succeeded.⁷⁸ Does Cushing's opinion as it appears in volume 3 of Dallas' *Reports* depart from Tilghman's notes because of information that Dallas subsequently obtained from the Justice himself, or because Dallas actually heard the opinion delivered in court but recorded it differently from Tilghman, or because Dallas improved upon whatever notes he obtained, just as he had with Tilghman's notes of the arguments of counsel? On any analysis, the circumstances "cast doubt on the accuracy of the Cushing opinion as rendered by Dallas."⁷⁹

Delay, expense, omission and inaccuracy: these were among the hallmarks of Dallas' work.

His *Reports*, however, had scant precedent in American law, and the task he set for himself in chronicling the rise of the nascent federal judiciary had absolutely none. The accomplishment, no doubt, fell short of the aspiration, and perhaps volumes 2, 3 and 4 of Dallas' *Reports* have found their place in the official *United States Reports* principally "for want of anything better."⁸⁰ In light of the difficulties that confronted him, however, a more accurate (if still restrained) summation may be that "Mr. Dallas was a very competent person [who] eventually left things better than he found them."⁸¹

Whatever the judgment of posterity, Dallas became "the subject of . . . much abuse" at the hands of his contemporaries.⁸² When at last the federal government, including the Supreme Court, moved to Washington City in 1800, he seems almost to have rejoiced to have the yoke of reporting the Court's decisions lifted from his shoulders. Writing to his friend, Jonathan Dayton, in 1802, Dallas lamented:

I have found such miserable encouragement for my Reports, that I have determined to call them all in, and devote them to the rats in the State-House. . . . [L]et me beg the favor of you to direct a servant to nail up, and forward, those that remain in your care. The manuscript of the 4th Volume is compleat — it brings the decisions of the Supreme Court of the U.S. down to the last Term; but I will commit it to the flames instead of the press.⁸³

Indeed, the Justices themselves doubted that Dallas had sufficient relish for reporting left to publish the cases decided during the Court's last three Terms in Philadelphia;⁸⁴ and Dallas' successor, William Cranch, wrote to him in 1803 offering to print the opinions from those Terms in the first volume of his own *Reports*.⁸⁵ Ultimately, the decisions in question, carrying the work of the Court through its August 1800 Term, appeared in volume 4 of Dallas' *Reports* (preceded, however, by the first three volumes of the eager Cranch).

William Cranch, like Dallas before him, assumed his responsibilities as Reporter more by chance than premeditation.⁸⁶ Born in Massachusetts in 1769 and graduated from Harvard at age nineteen, Cranch had been a classmate there of John Quincy Adams. His mother, moreover, was Abigail Adams' sister. Having moved to the new capital city as legal agent for a real estate speculation syndicate, Cranch was caught up and ruined in its spectacular collapse,⁸⁷ only to be rescued by his well-placed uncle, President John Adams. Adams appointed the young lawyer a Commis-



Michael King's 1803 water-color illustrates how the new capital city in the District of Columbia appeared about the time the Court moved there from Philadelphia.

sioner of Public Buildings in the Federal City in 1800, and an assistant judge of the newly created District of Columbia Circuit Court in 1801. The Act of March 8, 1802, intended by the Jeffersonians to sweep out Adams' "midnight judges," made no mention of Cranch's court.⁸⁸ Cranch remained on the bench for an unprecedented fifty-four years, becoming chief judge upon appointment by President Jefferson in 1805.

In the meantime, Cranch had begun to report the decisions of the Supreme Court. Precisely how he came to the post is not known. The older histories occasionally refer to Cranch as the first "regularly appointed" Reporter of the Court's decisions.⁸⁹ But no such entry appears in the minutes of the Court, nor had Congress or the Court provided for such an appointment by statute or rule.⁹⁰ Without doubt, the reports published by Cranch, like the volumes of his predecessor, remained at all times a private venture.⁹¹ Thus, it seems most likely that Cranch, like Dallas, appointed himself to report the decisions of the Court, perhaps encouraged by the closeness, both physical and personal, that conditions in the Federal City fostered within its small legal community.⁹²

Cranch also seems to have been motivated to take on the burdens of reporting, at least in part, by a keen appreciation of the importance of the task.⁹³ Witness the preface to his first volume:

Much of that *uncertainty of the law*, which is so frequently, and perhaps so justly, the subject of complaint in

this country, may be attributed to the want of American reports.

Uniformity . . . can not be expected where the judicial authority is shared among such a vast number of independent tribunals, unless the decisions of the various courts are made known to each other. Even in the same court, analogy of judgment can not be maintained if its adjudications are suffered to be forgotten. It is therefore much to be regretted that so few of the gentlemen of the bar have been willing to undertake the task of reporting.

One of the effects, expected from the establishment of a national judiciary, was the uniformity of judicial decision; an attempt, therefore, to report the cases decided by the Supreme Court of the United States, can not need an apology . . .

If the fate of the present volume should not prove him totally inadequate to the task he has undertaken, it is [the Reporter's] intention to report the cases of succeeding terms.⁹⁴

Despite high hopes and laudable intentions, however, Cranch and his readers found Supreme Court reporting an exercise in disappointment.

Certainly, Cranch made every attempt to please the profession by improving on the standard of his predecessor's volumes. While retaining the case tables, indices and rudimentary notes introduced by Dallas, the new Reporter also pledged to (and, it appears, did) provide "faithful summar[ies] of the arguments of counsel."⁹⁵ The result, as described by William Pinkney of Baltimore, was merely "unprofitable and expensive prolixity."⁹⁶ Cranch also attempted, in appendices to his first and fourth volumes, to supplement the opinions themselves with useful additional matter. But

again, the result seemed not to warrant the effort, and even these perfunctory attempts at scholarship were not repeated in the remainder of Cranch's nine volumes.⁹⁷

The greater length of Cranch's *Reports* also worked against their success as a commercial venture by contributing to their cost. Eventually, the combined expense of a full set of Cranch's volumes approached fifty dollars.⁹⁸ Further adding to Cranch's woes was the rise of the Court's admiralty docket. Maritime cases, including those concerning marine insurance, had comprised nearly half of the Court's appellate workload even in Dallas' time;⁹⁹ as compared with that earlier period, the total number of such cases decided by the Court during Cranch's reportership almost tripled.¹⁰⁰ Unfortunately, "only a few of the most eminent admiralty lawyers in the great cities ha[d] any use for" such decisions, or, in consequence, for Cranch's accounts of them.¹⁰¹

It remains a matter of conjecture whether those accounts attained the level of completeness and accuracy seemingly required by the lofty purposes stated in Cranch's preface to volume 1. On the matter of omissions, J. C. Bancroft Davis observed in his hundredth anniversary retrospective on reporting at the Court that "there is no means of knowing whether, during the time covered by the nine volumes of Cranch, . . . the court deliv-

ered any opinion in writing which the Reporter failed to report."¹⁰² As to inaccuracies, the Holmes Devise volume devoted to the period refers only to the "vagaries of William Cranch's reporting";¹⁰³ but Justice Story complained on at least one occasion that several of Cranch's volumes were "particularly & painfully erroneous."¹⁰⁴

Clearly, however, the most serious of Cranch's deficiencies was his inability to render his reports in a timely fashion. Cranch's delays became more pronounced with practically every volume. The first volume of Cranch's *Reports*, including cases decided as early as the August 1801 Term, did not appear until June of 1804. As to the August and December 1801 Terms, Cranch could reasonably plead that he had not yet assumed responsibility for the *Reports* at that point and had required time to assemble the notes of others.¹⁰⁵ In 1802, the Court had not sat at all.¹⁰⁶ No such ready explanation, however, justified Cranch's subsequent delays or excused the inconvenience imposed on his readers. For example, volume 7 of Cranch's *Reports* (which included the Court's 1812 and 1813 sittings) appeared only after a five-year delay, at a time when litigation inspired by Jefferson's Embargo Acts and the War of 1812 had begun to flood the Court's docket.¹⁰⁷

Delay of this magnitude in the reporting of the decisions of the nation's highest court necessarily diminished, in many instances almost to the vanishing point, the immediate impact that the Court's actions might otherwise have been expected to have on the bar and the public at large. For the newspapers of the period, the only other significant means of disseminating information concerning the jurisprudence of the Court, routinely reported even its most major doctrinal pronouncements in almost summary fashion.

One illustration will suffice. Certainly few, if any, of the Marshall Court's decisions, at least in today's estimation, exceed *Marbury v. Madison*¹⁰⁸ in importance. Yet contemporary newspaper accounts of Marshall's opinion, on which the country was forced to rely pending the publication of Cranch's *Reports*, left much to be desired. Although perhaps too strong, Beveridge's comment on the notoriety of the decision in its time indicates the existence and gravity of the problem. "[T]he first of Marshall's great Constitutional opinions," he said of *Marbury*, "received scant notice at the time of its delivery. The newspapers had little to say about it. Even the



When the Court moved to Washington William Cranch took over as the Court's unofficial reporter.

bench and bar of the country, at least in sections remote from Washington, appear not to have heard of it"¹⁰⁹ In fact, several newspapers reprinted the opinion in full, although the *Daily National Intelligencer*, one of the more prominent sources of information concerning the Court's activities, published only a brief resume.¹⁰⁹ Significantly, the vast majority of attention in the press was devoted not to Marshall's assertion of the Court's right to hold an act of Congress unconstitutional, but to his alleged trespass on the field of presidential power; and many of the stories printed, in Warren's estimation, "contained a very erroneous account of the point decided."¹¹¹

The unavailability of accurate and full newspaper accounts of the decisions of the Supreme Court made the prompt publication of Cranch's *Reports* essential.¹¹² His chronic inability to accomplish that objective became a source of considerable dismay to leading members of the profession, including the Justices themselves. Pinkney of Baltimore complained that counsel "suffered a good deal by the tardiness of [Cranch's] publications," noting that the "promptitude" of his successor, Henry Wheaton, in issuing his own reports "greatly enhances their value to us all."¹¹³ Indeed, so dilatory were Cranch's efforts that Chief Justice Marshall, on receiving prepublication copies of volumes 7 and 8 of Cranch's *Reports* two years after Cranch had been supplanted by Wheaton, sent thanks to the latter, apparently on the assumption that Wheaton had undertaken to complete Cranch's reports for him.¹¹⁴

In short, it had become clear by 1815, if not before, that Cranch's volumes in many respects merely continued the glaring deficiencies first introduced into the reports of the Supreme Court by Dallas. Further, the nature of that tribunal's work had been dramatically altered, due in part to political developments beyond its control,¹¹⁵ but also to the Marshall Court's bold willingness to expand its role in the structure of national government.¹¹⁶ Finally, and perhaps most importantly, the Court had recently acquired, in the person of Joseph Story,¹¹⁷ a new member keenly aware of the advantages of prompt, accurate reporting and deeply interested in the promotion of a national jurisprudence. William Cranch may well have found the delights of his reportership exhausted by the time the Court rose from its February 1815 sitting;¹¹⁸ but, whether he had or not, the moment had clearly come for a change.

II. Wheaton's Reportership

The stories of Cranch's successors, Henry Wheaton and Richard Peters, Jr., are inextricably intertwined with the foresight and ambition of Joseph Story. In the course of two decades, from Wheaton's appointment in 1816 to the rendering of the bitterly contested decision in *Wheaton v. Peters* in 1834, these three men redefined the responsibilities and significance of the Reporter in the life of the Supreme Court. Wheaton and Peters were to be the instruments of change; Story, their constant supporter and sometime collaborator.

Just when Wheaton and Story first met is uncertain. Their correspondence indicates at least a nascent professional relationship as early as 1812, when Wheaton sought a letter of introduction from Story to William Pinkney of Baltimore, the uncrowned king of the American bar.¹¹⁹ Story, although slow in complying, ultimately advised Wheaton that he would "be happy at all times to serve you in any way in my power."¹²⁰ Already, the two had assumed the roles of mentor and protégé—roles that were shortly to play so important a part in the advancement of both Wheaton's career and Story's ambitions for the Supreme Court and American law.

Story and Wheaton had much in common. To begin with, both were young lawyers and native New Englanders. Story had been born in Marblehead, Massachusetts in 1779 and admitted to the bar of that state in 1801.¹²¹ Wheaton, Story's junior by six years, had been born in Providence in 1785 and admitted to the Rhode Island bar in 1805.¹²² Both had the benefit of superior educations, Story at Harvard and Wheaton at Brown (then Rhode Island College).¹²³ In public life, both had complemented their professional endeavors with active, if somewhat irregular, participation in Republican politics.¹²⁴

Story's friendship with Wheaton, however, arose from common interests and inclinations rooted in deeper soil than mere politics, or even the practice of law. In part, Story seems to have been attracted to Wheaton by a shared fascination with legal scholarship. Story's contributions to the literature of American law, besides being literally epic in proportion, span over four decades, almost the entire length of their author's professional life. Although the best known of Story's works (other than his judicial opinions) date from his incumbency in the Dane Professorship at Har-



Henry Wheaton became the Court's third, though still unofficial reporter in 1816 supplanting Cranch who had failed to publish any of the Court's decisions since 1810.

vard Law School,¹²⁵ at least four antedate even his appointment to the Supreme Court: an explanation of the procedural mysteries of the common law entitled *A Selection of Pleadings in Civil Action* in 1805, and new editions of Chitty's *A Practical Treatise on Bills of Exchange*, Abbott's *A Treatise of the Law Relative to Merchant Ships* and Lawe's *A Practical Treatise on Pleading in Assumpsit* in 1809, 1810 and 1811 respectively.¹²⁶

Wheaton's scholarly fame, like Story's, rests in substantial part on works dating from the middle and later years of his career, particularly *Elements of International Law* (1836).¹²⁷ Also like Story, however, Wheaton displayed his literary and scholarly talents at an early date. Circumstances required it. He had moved from Providence to New York City in 1812 in search of greater professional opportunities, only to find that the bar there would not waive its requirement of a three-year novitiate prior to admission.¹²⁸ In the interim, Wheaton needed alternative employment. The solution, made possible by his home state political activities, was the editorship of New York's new Tammany paper, the *National Advocate*. The paper soon became a vehicle for semi-official expositions of Madison administration policy, including the war against England.¹²⁹ These interests, in turn, led Wheaton to prepare a series of articles on national policy concerning the war¹³⁰ and to condemn the New England sectionalism epitomized by the Hartford Conven-

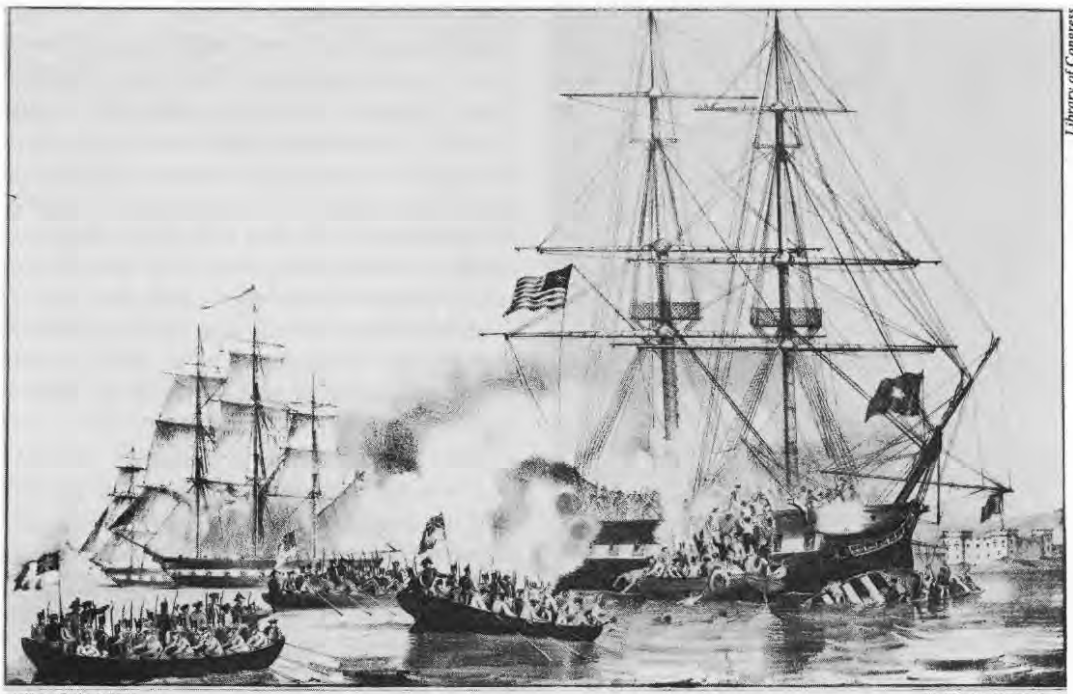
tion.¹³¹ Fortunately for Wheaton, both his nationalism and his interest in admiralty law coincided exactly with the predilections of Joseph Story. Admiralty was Story's obsession. It was complex. It was arcane. And, in the wake of the War of 1812, it was the focus of a great portion of the litigation before the Supreme Court. Indeed, in a seafaring nation, Story saw admiralty as the short road to transferring ever greater power to the federal judiciary. In the words of one observer: "if a bucket of water were brought in [Story's] court with a corn cob floating in it, he would at once extend the admiralty jurisdiction of the United States over it."¹³²

Historically, admiralty jurisdiction had evolved into two separate bodies of law. Under the first heading, administered by the "prize" courts, fell all maritime matters touching the conduct of war, particularly the capture of enemy vessels.¹³³ Complementing these powers, at least in medieval England, had been the jurisdiction of the admiralty tribunals, sitting as what were classically denominated "instance" courts, over a broad range of peacetime affairs, including maritime commercial contracts.¹³⁴

Story's whole life had been spent in coastal Massachusetts, and maritime cases had formed a large part of his law practice prior to his appointment to the bench.¹³⁵ From 1812 on, his circuit court had been flooded with prize law cases, which formed the basis for by far the greatest part of his early opinions.¹³⁶ Indeed, so important did such matters become during the War of 1812 that even the Supreme Court, whose national jurisdiction extended well beyond Story's seafaring First Circuit, found admiralty cases amounting to at least a third of its docket.¹³⁷

Moreover, Story recognized the potentially immense importance of admiralty law to young America once the war was concluded. In England, a series of historical accidents had shriveled the admiralty court's instance (or peacetime) jurisdiction to such vestigial matters as collisions, salvage, seamen's wages and bottomry bonds; whereas, on the Continent, admiralty courts in Story's time retained expansive jurisdiction over all cases connected with the sea.¹³⁸ Adoption of the Continental model in the United States would have delivered perhaps half the commercial litigation of the country to the exclusive jurisdiction of the federal courts.¹³⁹

In his efforts to add breadth and detail to the admiralty jurisdiction of the federal courts, Story



THE AMERICAN PRIVATEER "GENERAL ARMSTRONG" CAPT. SAM'L. H. BULL
In the Harbor of Regal (Cocoon) Oct. 26th 1814. Repelling the attack of 11 boats containing 500 men from the British Ship "Platagon" 16th Rate 44 and 10 gunboats. The General Armstrong was 266 tons burden carried 6 Nine pounders and a Long Tom 49 pounder, armed with a crew of 90 men. The British loss was 100 killed and 130 wounded. Americans lost 2 killed and 7 wounded.

The American privateer *General Armstrong* in action against the British navy in 1814. Admiralty cases, many of them arising from the War of 1812, comprised a large proportion of the Court's docket following the war. Wheaton's expertise in admiralty law, shared by his major supporter Justice Story, helped him secure the reporter's position.

soon found in Henry Wheaton a ready and able assistant. Wheaton's *National Advocate* had been the first paper in the country¹⁴⁰ to publish Story's May term 1813 circuit court opinion in *The Julia*, outlawing the common practice among New England shippers of purchasing safe-conduct passes through British Royal Navy.¹⁴¹ Also, by early 1813, if not before, Wheaton had begun arguing prize cases before Story on circuit in Rhode Island.¹⁴²

Wheaton seems to have made a strongly favorable impression, which Story expressed in an immediate and concrete fashion. By the summer of 1813, Wheaton could write to his father-in-law: "I have commenced an undertaking, to which I have been stimulated by Judge Story, who has flattered me that I might gain both money and reputation by it. It is to write a digest of the law of prizes." The undertaking would cost him "a great deal of labour," he reported, but "[t]here is not in our language any such work of considerable merit of the elementary kind, and it is very much wanted."¹⁴³

Wheaton's *Digest of the Law of Maritime Captures and Prizes* appeared in July of 1815.¹⁴¹ Its

title proved too modest. The work not only summarized, but also gave a full analysis of, the prize decisions of the tribunals of various countries, especially the United States and England, and included a general exposition of the law of nations.¹⁴⁵ Clearly, Story had found a soul mate for his scholarly interests.

Fortuitously, the appearance of Wheaton's *Prize Digest* in 1815 came just as what Story termed the Court's "disrelish" with William Cranch's work as Reporter reached the breaking point.¹⁴⁶ Cranch had failed to place in print a single case decided by the Court since its February 1810 Term.¹⁴⁷ In the meantime, the Court had rendered a total of 131 decisions,¹⁴⁸ all of which remained unavailable, in their complete and final form, to the bench and bar.¹⁴⁹ Even Attorney General Richard Rush, who as the government's chief representative appeared before the Court more often than any other member of the bar, could not obtain access to its recent decisions. "They are all in the hands of Judge Cranch himself," he lamented to Wheaton in April of 1815, adding that Cranch "ought to be supplanted as some penalty for his inexcusable delays."¹⁵⁰ By

whom might Cranch be "supplanted"? There is evidence, although ambiguous, that Wheaton had already volunteered himself to Rush.¹⁵¹ Certainly, Wheaton would have been an obvious choice, if for no other reason than that more than half of the decisions handed down in the Terms as yet unreported by Cranch had concerned the emerging law of admiralty.¹⁵²

Naming a new Reporter, however, remained the prerogative of the Court itself. Fortunately for Wheaton, he had there, in the person of Justice Story, an ally even more powerful and ardent than Rush. Story not only valued Wheaton's talents and interests as a scholar; he had also a keen appreciation of the importance of court reporters in disseminating the law and enhancing the reputations of the judges who expounded it. Story's own professional apprenticeship had been hindered by the scarcity of American reports "to enable the student to apply the learning of the Common Law to his own country, or to distinguish what was in force here, from what was not."¹⁵³ Within two years of his admission to the bar in 1801, however, Massachusetts had become the first of the American states to provide statutorily for an official reporter to its highest court.¹⁵⁴ Story's own elevation to the bench in 1811 brought the immediate appointment of a reporter—the first ever in the First Circuit—to chronicle his judicial progress there.¹⁵⁵ Pending publication of his opinions on circuit, an anxious Story advised Wheaton, "I have now no compendious method of carrying the decisions with me" from sitting to sitting.¹⁵⁶ Nor could lower court judges readily obtain access to Story's collected wisdom.¹⁵⁷ Indeed, as Story himself foresaw clearly, posterity's estimation of his "character as a Judge" would depend critically on his opinions being "fully and accurately" preserved for study and application.¹⁵⁸ How much worse that the decisions of the nation's highest court should languish, unknown to the public or the profession, in the hands of the tardy Cranch!¹⁵⁹

By the opening of the Supreme Court's February 1816 Term, both Story and Rush had cause for rejoicing. Cranch had indeed been supplanted—not surprisingly—by Wheaton. The selection of the Court's third Reporter seems to have occurred, like those of his predecessors, by informal agreement among the Justices themselves.¹⁶⁰ As an inducement to procure his appointment, Wheaton had submitted a plan proposing "regular annual publication of the decisions, with good

type, and to be neatly printed."¹⁶¹ The Justices, for their part, agreed to furnish to him any written opinions they might prepare, or notes they might make in connection with their oral opinions.¹⁶²

Wheaton immediately set about discharging his new responsibilities. Inevitably, the demands of the reportership, and conditions in the Federal City itself, drew him closer to the tight circle of men with whom he worked most closely—the Justices of the Court. Washington at the close of the War of 1812 remained a dusty and dismal place, "a picture of sprawling aimlessness, confusion, inconvenience, and utter discomfort."¹⁶³ The Justices themselves, enduring a self-imposed reclusive existence almost wholly divorced from the politics and society of the city, all lived and took their meals together in the same boarding house on Capitol Hill.¹⁶⁴ There Wheaton joined them, quickly becoming Story's roommate or "chum."¹⁶⁵

Wheaton's intimacy with Story went well beyond rooming arrangements. On occasion, the two assumed a relationship strikingly like that of present-day law clerks to their Justices. Neither man, for example, found anything unusual in Wheaton's provision of authorities for Story to review in the preparation of his opinions.¹⁶⁶ Further in a spirit of collaboration, they seem to have assembled a common library for use while in Washington.¹⁶⁷

Wheaton's relationships with the other Justices, while not nearly as familiar as with Story,¹⁶⁸ seem in most instances to have been professionally cordial. To cite but one example, in 1817 Wheaton found himself compelled to apply to Bushrod Washington for a fresh copy of an opinion for which Wheaton had apparently misplaced his own notes.¹⁶⁹ Washington replied warmly that he had been pleased to receive Wheaton's request, as it provided him the opportunity to remedy an error in the opinion as delivered.¹⁷⁰ In preparing the amended opinion for the press, he enjoined Wheaton "to correct with freedom all errors in language."¹⁷¹ To be sure, not every aspect of Wheaton's new surroundings was equally supportive.¹⁷² But, in general, conditions seemed highly propitious for Wheaton to justify the Court in supplanting his predecessor with a new Reporter determined to succeed in those respects in which both Dallas and Cranch had so conspicuously failed: delay, omission and inaccuracy, and expense.

In attacking the problem of chronic delay in the



In the early 1800s the justices lived in the same boarding house, Brown's Indian Queen Hotel, and generally took their meals together, while discussing the Court's business. Wheaton also roomed at Brown's, sometimes sharing lodgings with Justice Story, where the two men would collaborate on the Court's reports.

appearance of the *Reports*, Wheaton moved decisively and victoriously, although not without a few disheartening moments along the way. The February 1816 Term, Wheaton's first as Reporter, concluded on March 21, 1816, when the Court handed down eleven of its forty-three decisions.¹⁷³ By early May, he had completed his work in preparing the opinions, abstracts and arguments of counsel for the press.¹⁷⁴

A series of misadventures, only partly the fault of the new Reporter, then combined to delay the publication of the *Reports* for another seven months. First, Wheaton himself decided to prepare an extensive set of scholarly annotations, both in the margins of the cases and in a separate appendix, to "illustrate the decisions by analogous authorities" and "subjoin a more ample view" of the Court's developing jurisprudence (particularly in the field of prize law).¹⁷⁵ Second, he allowed himself to become sidetracked by a number of activities peripheral to the actual publication of the *Reports*. One was an effort by Story, largely unsuccessful, to counteract negative reaction to *Martin v. Hunter's Lessee*, arising from newspaper reports based on Justice Johnson's concurrence, by encouraging dissemination of his own majority opinion.¹⁷⁶ Wheaton, agreeing that Johnson's opinion "placed the decision of the Court on a quicksand

—yours on a rock,"¹⁷⁷ found himself occupied on and off for the next three months trying to oversee the placement of Story's opinion in satisfactory forums.¹⁷⁸ Also, Wheaton further diminished the time available to him for editing the *Reports* by an energetic, and for the moment unsuccessful, attempt to cajole Congress into voting him a formal title and salary as Reporter.¹⁷⁹

The most serious impediment to early publication of the *Reports*, however, arose from a source utterly beyond Wheaton's control. To his great dismay, initially not one law book publisher could be found willing to print the proposed volume on terms he felt he could accept.¹⁸⁰ As Peter S. Du Ponceau, Wheaton's agent in Philadelphia, succinctly advised him: "Bookselling is at present a very bad business, & Booksellers are all out of spirits, & unwilling to undertake any original work."¹⁸¹ This turn of events ought not to have surprised Wheaton, given his knowledge of the grave difficulties that even Story himself had encountered in trying to arrange the publication of law reports.¹⁸² But the situation did force Wheaton to become painfully practical. He instructed Du Ponceau to offer the right to print the work to Mathew Carey, a bookseller not generally engaged in the law trade, for a mere \$1500 in notes. Carey promptly and emphatically refused the offer.¹⁸³ Ultimately, Wheaton had no choice

but to let Carey purchase the copyright itself, thereby depriving him of the ownership of volume 1 of his own *Reports*.¹⁸⁴ He received just \$1200, payable in notes due up to fifteen months after the date of purchase.¹⁸⁵

From June 17, when Wheaton reluctantly signed the contract,¹⁸⁶ until December 20, when Carey entered his copyright for the work in the United States District Court Clerk's Office in Philadelphia,¹⁸⁷ six months more elapsed. As summer turned to fall, an embarrassed Wheaton assured Story that the fault lay solely with the printers, who had "sadly procrastinated."¹⁸⁸ As autumn turned to winter, he pleaded with increasing discomfort that "the delay . . . ha[d] been occasioned solely by Mr. Carey's failure to furnish paper from time to time as it was wanted by the printers."¹⁸⁹

However valid his excuses, Wheaton did not escape the pointed inquiries of those painfully accustomed to the snail-like pace of his predecessors. Attorney General Rush became increasingly impatient, passing from polite entreaty to insistence that the *Reports* issue "before the next [T]erm" to morose musings that Wheaton's first volume would likely be upstaged by the appearance of Cranch's final three.¹⁹⁰ Justice Washington, communicating to the Court's new Reporter through his mentor, Story, noted evenly as the months wore on: "I hear nothing of

Wheaton's Reports."¹⁹¹ Story himself was more direct, pointing out the importance of timely publication of Wheaton's first volume "to justify the Court in their choice of a successor to Mr. Cranch."¹⁹²

Fortunately for Wheaton, the publication of the *Reports* for the 1816 Term prior to the commencement of the 1817 Term answered all doubts regarding the wisdom of the Court in appointing a new Reporter. Dallas, at his worst, had allowed the decisions of the nation's highest tribunal to go unreported for eight years.¹⁹³ Cranch, at one point, had permitted a lacuna of six years.¹⁹⁴ Now, for the first time in the history of the *Reports*,¹⁹⁵ the bench and the bar of the Supreme Court had the luxury of preparing for the coming campaign in Washington with copies of the preceding Term's decisions already in hand. Wheaton had accomplished his task, including the preparation of an unprecedented 487 pages of abstracts, arguments and opinions and forty-six pages of notes, in less than nine months. Nor, in retrospect, would this rapidity be seen as an unusual occurrence. Indeed, never again would Wheaton require *so long* to place a volume in print: typically, later volumes appeared in the summer following the Term reported, and in no instance later than October.¹⁹⁶ Clearly, Wheaton had met and mastered the problem of delay.

Timeliness alone, however, while greatly to be desired, did not itself ensure an increase in the completeness and accuracy of the *Reports*. Indeed, it might have been purchased at their expense. Or perhaps such failings in the volumes of Dallas and Cranch merely demonstrated the limitations inherent in a system dedicated to the preservation of opinions and arguments often extemporaneously delivered from only the most rudimentary notes.

In fact, whether absolute completeness in the *Reports* ought to be sought at all posed, as Wheaton clearly saw, a series of thorny problems. There was, for one thing, the notorious vanity of the Supreme Court's distinguished bar, which then included Pinkney, Rush, Samuel Dexter, William Wirt, Thomas Addis Emmett, Robert Goodloe Harper, David B. Ogden, Henry Clay and Daniel Webster, to name but a few. To what extent, if any, should their orations before the Court be reproduced in the *Reports*? In the preface to his first volume, Wheaton addressed the issue candidly: "Of the arguments of counsel nothing more has been attempted," he wrote,



Attorney General Richard Rush expressed dissatisfaction with the delays in publishing Wheaton's first reports.

"than to give a faithful outline; to do justice to the learning and eloquence of the bar would not be possible, within any reasonable limits"¹⁹⁷ Not surprisingly, the bar objected. Responding privately to Webster's public animadversions on this aspect of his reporting, Wheaton observed sardonically to Story: "I bow with submission to [his] criticism as to the inutility of attempting to incorporate into a brief microcosmic sketch of a law argument any of those brilliant displays of eloquence which we frequently hear at the bar."¹⁹⁸ The new Reporter's practice in the matter, however, did not change.

Wheaton's pique was understandable. Reproduction in full would have ballooned his volumes to unmanageable size. What he labored to achieve, and protested that he had achieved, was to assure that the "style and thoughts" of each advocate had been "transfused into the report of his argument,"¹⁹⁹ with all "the points and authorities . . . faithfully recorded, where the cases either admitted of, or required, it."²⁰⁰ Increasingly in subsequent Terms, however, he found it politic and expedient to request assistance from counsel themselves in preparing his summaries of arguments.²⁰¹ Most were happy to comply, even to the point of furnishing sketches drafted "as if taken down by you."²⁰² In due course, the bar became so confident of Wheaton's talent and good will that it dismissed its former anxieties and entrusted matters willingly into his hands.²⁰³

More troublesome by far was the question of including or omitting certain decisions of the Court. Wheaton's difficulty, as his notebooks show,²⁰⁴ lay neither in careless preservation of the Court's opinions nor in ignorant underestimation of their utility. He simply recognized that a number of the decisions lacked any precedential value, and thus would take up precious space in his *Reports* without adding measurably to their appeal to potential purchasers. The preface to volume 1 of Wheaton's *Reports* explained matter-of-factly that "discretion" had therefore been exercised "in omitting to report cases turning on mere questions of fact, and from which no important principle, or general rule, could be extracted."²⁰⁵ Wheaton seems to have continued the practice in his later volumes, with almost no criticism.²⁰⁶

Accuracy, on the other hand, would admit of no half measures. In this aspect of his reporting, Wheaton was fanatical to the point of "correcting the proof sheets twice with [his] own hand" to

prevent even the most minute error from creeping in.²⁰⁷ Story, who yielded to none in his devotion to detail, could find but five "errors of the press" — i.e., typographical errors — in examining Wheaton's first volume, and none whatsoever in its substance.²⁰⁸ In fact, the only suggestion of consequential error during Wheaton's entire reportership appears in Justice Johnson's concurrence in *Ramsay v. Allegre*,²⁰⁹ the last opinion in the last case in Wheaton's very last volume. Johnson's bitter allegation of deliberate misrepresentation in Wheaton's reporting of William Pinkney's argument in *The General Smith*²¹⁰ was only one facet of a comprehensive attack ultimately directed at Wheaton's patron, Story, whose expansive views on the federal admiralty jurisdiction the case helped to establish.²¹¹ Wheaton's reply, in a note appended to Johnson's opinion,²¹² reveals much about his attitude toward his responsibilities:

It is a duty which [the Reporter] owes to the Court, to the profession, and to his own reputation, to maintain the fidelity of the Reports, which are received as authentic evidence of the proceedings and adjudications of this high tribunal. If they are not to be relied on in this respect, they are worthless.²¹³

In truth, Wheaton's objectives in the preparation of his *Reports* went well beyond unadorned accuracy, embracing as well scholarly excellence and improvement of the law. Cranch, it had been said, "did his work without a spark of enthusiasm, some little of which ingredient is indispensable even to a law reporter."²¹⁴ Wheaton's own "enthusiasm for jurisprudence," which he claimed to have caught from Story,²¹⁵ quickly became for him not a mere ingredient of reporting but the source of a consuming passion for elaboration. Others might be content to cease their labors upon reproducing correctly the citations of counsel and the Court to leading precedent. Not Wheaton. To these, he added two species of scholarly notes calculated to enhance the utility (even as they greatly enlarged the bulk) of his *Reports*. First, he appended to the cases themselves minor commentaries, which he called "marginal notes," designed "to illustrate the decisions by analogous authorities."²¹⁶ The typical marginal note elucidated a point of law referred to, but not explained, in the arguments of counsel or the opinions of the Justices. Second, Wheaton added at the conclusion of his *Reports* a series of scholarly monographs (hereinafter, "appendix notes") intended to provide a comprehensive view of entire areas of

law apropos the decisions of the Term. His aim, as he explained in the preface to his first volume, was "to collect the rules and grounds dispersed throughout the body of the same laws, in order to see more profoundly into the reason of such judgments and ruled cases," with the expected result "that the uncertainty of law, which is the principal and most just challenge that is made to the laws of our nation at this time, will, by this new strength laid to the foundation, be somewhat the more settled and corrected."²¹⁷ It was an ambitious undertaking: in all, the appendix notes to Wheaton's twelve volumes run to 516 pages.²¹⁸

In the preparation of his notes, Wheaton found in his friend and Washington "chum," Justice Story, an expert and eager collaborator. This was hardly surprising, given their shared interests in admiralty and civil law. Story considered these bodies of law to rank among "the most beautiful & scientific efforts of the human mind, & [to be] worthy of the most diligent attention of all the profession."²¹⁹ Wheaton now proposed to place his own and Story's best learning on those and other subjects dear to his mentor's heart where they could not possibly escape the profession's notice, namely, in the *Reports* of the Supreme Court of the United States. Within weeks of the conclusion of the February 1816 Term, Story and Wheaton were in constant communication concerning supplementation for the Court's decisions. "Let me know," wrote the Justice to the Reporter, "when you shall want my proposed notes for your Reports . . ."²²⁰

The results of Wheaton and Story's combined efforts were impressive. Wheaton's first volume contained over thirty marginal notes, and forty-six pages of appendix notes (nine percent of the volume's total). Forty of the forty-six pages in the appendix treated admiralty law, twelve in a note entitled *On the Practice in Prize Causes*²²¹ and twenty-eight in a note captioned *On the Rule of the War of 1756*.²²² The marginal notes appear, without exception, to be Wheaton's own, although occasionally he sought and obtained from Story advice and authorities for use in preparing them.²²³ The appendix notes were clearly the products of collaboration. Story assumed responsibility for elucidating the question of prize court practice, transmitting his draft to Wheaton with encouragement to "enlarge the sketch as far as you think expedient."²²⁴ The grateful recipient confined his amendments to the addition of certain ordinances demonstrating the similarity of

prize jurisprudence among the European states.²²⁵ Wheaton's own draft concerning the Rule of 1756 benefited, in turn, from Story's detailed advice and review.²²⁶

Story's praise of Wheaton's final product was fulsome: "I am extremely pleased with the execution of the work. The arguments are reported with brevity[,] force & accuracy, & the [marginal] notes have all your clear, discriminating, & pointed learning. They are truly a most valuable addition to the text, & at once illustrate & improve it."²²⁷

In the preparation of his second volume, Wheaton requested and received from Story extensive marginal notes explaining decisions in matters in which he felt "least at home" and believed he could most benefit from the riches of Story's mind and library.²²⁸ Story also responded to Wheaton's entreaties that the two co-venturers "finish the whole prize practice this time,"²²⁹ in due course furnishing a seventy-nine page *Additional Note on the Principles and Practice in Prize Causes*.²³⁰ Wheaton himself prepared the remaining two appendix notes, which together with Story's contribution produced a total of eighty-seven pages, all on admiralty.

For volume 3 of Wheaton's *Reports*, Story prepared two more marginal notes,²³¹ both on common law subjects, and a seventeen-page dissertation on the patent laws for the appendix.²³² Wheaton contributed all other marginal notes, which Story pronounced "pointed, accurate, & learned,"²³³ and ten pages of selected documents on the law of blockades to complete the appendix notes.

Volume 4, reporting the February 1819 Term, featured no marginal notes by Story and but two appendix notes: a twenty-page note entitled *On Charitable Bequests* by Story,²³⁴ and thirty-seven pages of prize law documents inserted by Wheaton. Perhaps both Justice and Reporter were simply enervated, coming off a Term peculiarly charged with activity and excitement.²³⁵ Wheaton had even considered printing this volume, the longest of his *Reports* to date, in two parts. This arrangement, he saw, might afford certain commercial advantages by allowing his publisher to treat purchasers of the first part, which would contain the *Sturges* and *Dartmouth College* cases, as subscribers for the entire volume.²³⁶ The plan might have allowed him to reprint, possibly in an appendix to the second part, Chief Justice Marshall's essays on *McCulloch v. Maryland*

from the *Philadelphia Union*. Story had urged that they be made a part of the *Reports*, and Wheaton seems to have detected no impropriety: "It must by no means be left doubtful even for an instant whether the ground assumed by the Court is to be maintained at all hazards."²³⁷ Ultimately, volume 4 of Wheaton's *Reports* appeared all in one part, and its author reported apologetically to Story that there would be no room for Marshall's *Union* essays.²³⁸

In his fifth volume, Wheaton returned with a vengeance to his project of creating a comprehensive body of admiralty jurisprudence. The appendix notes consisted of five entries, four of them (or 107 of the 158-page total) devoted exclusively to admiralty matters. All were from Wheaton's pen. Story contributed a lengthy marginal note on piracy;²³⁹ and a second marginal note, defining the admiralty jurisdiction in cases of crime, was prepared by Wheaton largely from Story's unpublished opinion in *United States v. Bevans*.²⁴⁰ The result was a volume occupied more than one-fourth by scholarly matter, causing Wheaton to moan to Story: "I hope my readers won't think I mean to make a Law Magazine of the work."²⁴¹ Wheaton was to prove a better prophet than he knew.²⁴²

Volume 6, appearing in 1821, marked the end of Wheaton's obsession with admiralty law, at least in his *Reports*. Like the immediately preceding volume, it contained five appendix notes. This time, all five (a total of seventy-one pages) dealt with admiralty; but none contained original matter, consisting instead of treaties and foreign decisions that Wheaton apparently believed should be entered on the record for future reference. Notably, for the first time since Wheaton's initial volume, Story's hand was nowhere visible. Story may have felt abused by Wheaton's ceaseless importunings for further assistance.²⁴³ Or he may have been exhausted from his part in preparing Wheaton's 547-page *Digest* of the Court's opinions from 1789 to 1820, which like volume 6 of the *Reports* appeared in the latter part of 1821.²⁴⁴ The *Digest of Decisions* had been three years in the making; and, while the original conception was Story's,²⁴⁵ Wheaton had quickly assumed control of the project²⁴⁶ and pressed mercilessly to obtain his tired benefactor's promised contributions.²⁴⁷ Those contributions, however, proved to be a final gift. Never again would Story assist, at least in a literary capacity, in the preparation of Wheaton's *Reports*.

Not that he would have had many occasions to do so. By 1821, Wheaton had accomplished everything he believed possible to put admiralty jurisprudence on its proper course in the federal courts,²⁴⁸ and his own finances and ambitions dictated redirecting his energies to other matters.²⁴⁹ As a result, while not abandoning his practice of providing useful matter, as necessary, in the margins of the cases, Wheaton included only three appendix notes in the remaining six volumes of his *Reports*: two sets of excerpts concerning common law points in volume 8 and one collection of documents on the slave trade in volume 10. Altogether, these annotations totaled just seventy-two pages.

One curious aspect of Story's joint venture with Wheaton in the preparation of notes to the *Reports* remains to be mentioned. In the course of five years, Story had contributed to Wheaton's *Reports* 131 closely printed pages of highly sophisticated annotations, or 184 pages overall when marginal notes are included.²⁵⁰ Yet, in Wheaton and Story's time, this significant and interesting circumstance appears to have been almost completely unknown. The collaborators wished it to be so. Writing confidentially in his memorandum book in 1819, Story noted simply: "It is not my desire ever to be known as the author of any of the notes in Mr. Wheaton's Reports." Indeed, he said, he had made it "an express condition, that the notes furnished by me should pass as his own, and I know full well, that there is nothing in any of them which he could not have prepared with a very little exertion of his own diligence and learning."²⁵¹ Wheaton was properly grateful, but also embarrassed by the praise bestowed on certain of "his" annotations.²⁵² Neither man, however, revealed the deception. Story's son, William, disclosed a portion of the story after the deaths of both of the principals,²⁵³ and the full record is preserved in their correspondence. But it remains a secret in the official reports of the Court they served.

Whatever the source of the annotations to Wheaton's *Reports*,²⁵⁴ they were in many respects a considerable success, at least among the leading members of the bar who could afford to possess the volumes. William Pinkney summed up nicely the reaction of this segment of Wheaton's intended audience. Putting his finger on that aspect of the Reporter's accomplishment perhaps most appreciated by his readership, Pinkney wrote: "The promptitude, with which

the Reports follow the decisions, greatly enhances their value to us all. We have heretofore suffered a good deal by the tardiness of your predecessor's publications." As to "the Manner in which these reports are given," Pinkney rejoiced that Wheaton had managed to "avoid . . . prolixity in stating the arguments of Counsel," while providing "the substance of them with perfect clearness." The appendices to the *Reports* were "well executed and cannot fail to be useful." In short, said Pinkney, "[t]he Profession [is] infinitely indebted to you" ²⁵⁵

One difficulty, however, remained. If omission and inaccuracy had been Dallas' principal weakness and "inexcusable delay" Cranch's, the *Reports* of Henry Wheaton suffered most seriously from inordinate expense. In his zeal for scholarly excellence and improvement of the law, Wheaton had inadvertently pushed the cost of the final product well beyond the reach of that critical market, the mass of ordinary practitioners. The *Reports* had become a treasure trove of law and learning, but one that required a king's ransom to possess. Wheaton's volumes, more expensive than Cranch's even at the outset, ²⁵⁶ were by the conclusion of his service "exorbitantly dear" at \$7.50 each. ²⁵⁷ "It is manifest," as Story so accurately noted in a letter to Wheaton's successor in 1828, "that the profession at large cannot afford to buy" Wheaton's volumes, however valuable. ²⁵⁸

Not only were Wheaton's *Reports* expensive, but they also lacked reviews in the legal periodicals, at least initially. ²⁵⁹ Without public commendation to mirror the private praise that his efforts had already received, Wheaton soon found himself the victim of slow sales and unexpected financial difficulties. He had arrived in Washington convinced that his appointment as Reporter placed him "in the way to secure an honorable independence." ²⁶⁰ Friends predicted that the profits derived from his new position would "treble those of [his] predecessors." ²⁶¹ Yet, from the very beginning, Wheaton found himself obliged to "anticipate this income by a loan of \$1000 for a year." ²⁶² Three years later, he still could not repay the loan. In regretting his inability to do so, he advised the lender: "I have not yet found the law a thrifty servant All my calculations as to pecuniary matters have been hitherto so erroneous that I will not now fix the epoch when you may certainly expect payment." ²⁶³

Chief among Wheaton's erroneous calculations, obviously, had been his confidence in the

salability of his volumes, incorporating as they did such significant improvements over those of his predecessors. There were other miscalculations, as will appear; ²⁶⁴ but slow sales of the *Reports*, resulting in meager contracts with booksellers, were the foundation of Wheaton's misery. Mechanically, Wheaton himself did not profit directly from purchases of his volumes. ²⁶⁵ Rather, he was paid a flat sum by his publishers, based on the anticipated popularity of each volume of his *Reports*. Wheaton's income from this source is listed below:

1 <i>Wheat.</i>	(1816)	\$1200 ²⁶⁶
2 <i>Wheat.</i>	(1817)	500
		in law
		books ²⁶⁷
3 <i>Wheat.</i>	(1818)	500
4 <i>Wheat.</i>	(1819)	800
5 <i>Wheat.</i>	(1820)	650
6 <i>Wheat.</i>	(1821)	700
7 <i>Wheat.</i>	(1822)	700
8 <i>Wheat.</i>	(1823)	700
9 <i>Wheat.</i>	(1824)	800
10 <i>Wheat.</i>	(1825)	700
11 <i>Wheat.</i>	(1826)	500
12 <i>Wheat.</i>	(1827)	700

The sum obtained for volume 1 is deceptively high, as this constituted the only instance in which Wheaton sold the actual copyright to the volume, not just a license to print a specified number of copies. ²⁶⁸ The purchase prices of volumes 4 and 9 are also somewhat inflated, due to the importance and notoriety of the cases decided during the 1819 and 1824 Terms. ²⁶⁹ In addition to the listed sums (and the \$250 paid for a projected second edition of volume 2), Wheaton sold the rights to his *Digest of Decisions* for \$1200. ²⁷⁰ Altogether, his twelve years of labor as Reporter brought him, from the sale of rights to his publications, a mere \$9900. ²⁷¹

Fortunately, not all of Wheaton's hopes for an "honorable independence" rested on the sale of his volumes. Two other prospects seemed, at least in 1816, to hold the promise of significant additional revenues which might afford him, in short order, the comforts of a respectable income. One was the quest for professional retainers in connection with his annual pilgrimage to Washington. Surely, the visibility of his new position would guarantee a lively business as an advocate before the bar of the Court, whose judges and affairs he knew so intimately. The title page of Wheaton's

Reports, unlike those of Dallas and Cranch, advertised the author as a "Counsellor at Law"; and his expertise in the law of prize, which made up such a large part of the Supreme Court's docket, was well known. Amidst heavy competition from more established members of the Supreme Court bar, however, this hope, too, soon evaporated.²⁷²

Slow sales, infrequent retainers: a sad saga indeed, but by no means the full roll call of Wheaton's disappointments. To these must be added a blow, administered in the first, hopeful year of his reportership, from which he never recovered. At that time, he had enjoyed a third (and, it seemed, highly promising) prospect for attaining that "honorable independence" that both his pride and his pocketbook so clearly required. But, once again, reality fell short of anticipation.

Wheaton had arrived in Washington for his first year as Reporter not entirely unmindful that his predecessors had found the position highly unremunerative. Nothing he learned during the Court's 1816 sitting changed his mind. Concerning his finances, he remarked to one correspondent shortly after the Court rose that "the copy right alone [*i.e.*, income from the *Reports* themselves] will not indemnify me against the expense of time and money devoted to" reporting the cases in the manner he had pledged.²⁷³ The solution, he thought, lay in a bill then pending before Congress to allow the Supreme Court officially to appoint its Reporter and to recompense him for his labors directly from the Treasury of the United States.

The proposal had antedated Wheaton's arrival by at least two years and presumably contributed to his willingness, as he said, "to undertake so irksome a task as that of reporting the decisions of a tribunal which sits in such a place as Washington."²⁷⁴ The author of the proposal, not surprisingly, was Joseph Story. Story's interest in court reporting has been noted earlier in this paper.²⁷⁵ By 1814, there was precedent for the official appointment of a salaried reporter to the highest court of the state not only in Massachusetts (1803), but also in New York (1804), New Jersey (1806) and apparently Kentucky (1804) as well.²⁷⁶ "Might not Congress be induced," Story asked Attorney General Rush in the summer preceding Cranch's final term, "to authorize the president to appoint a reporter for the U.S. with a proper salary, in the same manner as is done in Massachusetts & New York?"²⁷⁷

The 1815 Term, however, slipped away without

the introduction of the Reporter's Bill in Congress, and Cranch gave way to Wheaton. On February 20, 1816, within weeks of the beginning of Wheaton's first year as Reporter, the measure was proposed in the Senate by Wheaton's fellow Rhode Islander, William Hunter.²⁷⁸ As introduced, S. 37 (*A Bill Providing for the Publication of the Decisions of the Supreme Court of the United States*) would have required that the Reporter, to be appointed by the Court itself rather than the President, furnish to the United States within one year of the Court's rising an unspecified number of copies of the preceding Term's decisions, for distribution as Congress might direct. Also left unspecified was the Reporter's compensation, although the Bill did clearly provide that the copies be delivered "free of charge" to the Secretary of State for the government's use.²⁷⁹

To the new Reporter, the situation must have seemed promising. He had no intention of dawdling, as Cranch had, in the publication of his volumes, and a year's time to place them in print would be more than ample. The delivery of copies to the United States, free of charge, might prove somewhat burdensome, but it would assure that the *Reports*, the foundation of Wheaton's enlarged reputation, received thorough circulation among the government's leading figures. As to salary, he had reason for great hope: William Johnson, Kent's reporter in New York, enjoyed an annual salary of \$2000.²⁸⁰

The Senate, however, imposed more stringent requirements than Wheaton had anticipated, and for a lesser compensation: fifty copies to be delivered to the Secretary of State within six months, with a salary to the Reporter of only \$1000.²⁸¹ As amended and sent to the House, the Bill seemed likely to cause little controversy, and Wheaton was so confident of the result that he returned to New York immediately after the Court rose in March, rather than remaining in Washington to lobby for passage in the House. There, however, the Bill met delay, to the great dismay of both Wheaton and Story.²⁸² Their efforts to save the measure fell short, and the House postponed consideration of it indefinitely on April 29, 1816.²⁸³

Discouraged as he was that Congress should refuse him "so paltry a pittance" out of "gross mercenary selfishness,"²⁸⁴ Wheaton determined to succeed in the House in the lame duck session following the November elections. To that end, he enlisted the aid of John C. Calhoun, then a leader

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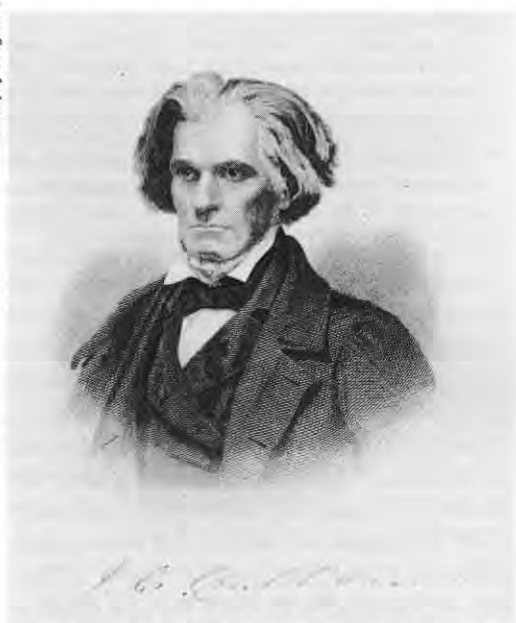
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Representatives John C. Calhoun (left) and John W. Taylor (right) pressed their colleagues in the House to pass a bill in late 1816 to compensate Wheaton for his work.

of administration forces in the House, who replied that he considered the reporting of Supreme Court decisions a matter of "national importance,"²⁸⁵ and of John W. Taylor of New York, later to be twice elected Speaker.²⁸⁶ Matters seemed to go well. By late December, Wheaton had no doubt that the Bill would pass and began focusing his attention on obtaining revisions to make the end result more favorable. As it would be desirable for the United States to possess copies of his newly published first volume, he suggested to Taylor, ought not the Bill to be made retroactive and provide the Reporter a salary for the year 1816? And ought not the salary provided be "adequate to the important nature of the object, scarcely less interesting than the promulgation of the Acts of Congress itself?" After deducting, from the \$1000 proposed, the sum of \$250 required to furnish fifty copies to the government (on the assumption that Wheaton could procure them for that purpose at \$5 each), there would be left to the Reporter for his time, effort and expenses just \$750!²⁸⁷ But again, on the day after Christmas, the Bill failed in the House, its opponents contending that the decisions of the Supreme Court were not entitled to the status of laws "binding on their successors and on other authorities," and that appointing a Reporter involved creating "a monopoly of a privilege . . . which ought to be free to all." In any event, "publication would afford sufficient emolument, unaided by a salary, from the exten-

sive sale of the reports."²⁸⁸ In the privacy of a letter to Wheaton, Story responded sharply: "Shame, shame on Congress, that the Reporter's bill should be lost. Are we indeed travelling back to the dark ages?"²⁸⁹

Wheaton, although beside himself with indignation, could hardly afford to sulk. His difficulties in finding a bookseller willing to publish volume 1 of his *Reports*, which had arrived in Washington too late to do him any good in the session just ended,²⁹⁰ made the necessity of pushing forward at once painfully clear. The argument most damaging to his cause in the House had been that, while a stipend might be necessary to encourage the publication of state reports, none was needed to ensure the prompt appearance of the Supreme Court's reports, due to their presumed wider circulation. "The truth," Wheaton cried in attempting to plant a rebuttal argument in the Philadelphia press, is that "the decisions of the U.S. court are only read by the most eminent of the profession in the great cities, whilst the State reports circulate throughout the most sequestered districts of the country."²⁹¹ Johnson of New York might receive annually \$2000 in salary and \$2000 more from his publisher. But Cranch had never gotten more than \$1200 or \$1500 for his volumes; and Wheaton himself had been forced to take \$1200 in notes payable over a fifteen month period. Without some encouragement from the government, it would be difficult to find even one

professional man — let alone the multiple competitors presupposed by the anti-monopoly argument — willing to serve in so unprofitable an office.²⁹²

In the third and final battle of the war for the Reporter's Bill, its proponents rolled out their heaviest artillery. Immediately upon the introduction of S. 36 on January 31, 1817, Dudley Chase of the Senate Judiciary Committee wrote to Chief Justice Marshall, asking his views "relative to the object and utility of the proposed act."²⁹³ The views thus solicited can scarcely have been required to inform the Senate, where the Bill had twice passed with minimal opposition. Transparently, Chase had provided the Court with an opportunity to go on record for the benefit of the House. Marshall was not long in responding. While supporting Wheaton on each of the points raised in the latter's own lobbying campaign, the Chief Justice's reply also attacked head-on the issue that Wheaton had conspicuously avoided, namely, the effect of the *Reports* on the institutional supremacy of the Supreme Court within the national judicial structure:

Sir:

Your letter . . . was yesterday received, and communicated to the judges. We all concur in the opinion that the object of the bill is in a high degree desirable.

That the cases determined in the Supreme Court should be reported with accuracy and promptness, is essential to correctness and uniformity of decision in all the courts of the United States. It is also to be recollected that from the same tribunal the public receive that exposition of the constitution, laws, and treaties of the United States as applicable to the cases of individuals which must ultimately prevail. It is obviously important that a knowledge of this exposition be attainable by all.

It is a minor consideration, but not perhaps to be entirely overlooked, that, even in cases where the decisions of the Supreme Court are not to be considered as authority except in the courts of the United States, some advantage may be derived from their being known. It is certainly to be wished that independent tribunals having concurrent jurisdiction over the same subject should concur in the principles on which they determine the causes coming before them. This concurrence can be obtained only by communicating to each the judgments of the other, and by that mutual respect which will probably be inspired by a knowledge of the grounds on which their judgments respectively stand. On great commercial questions, especially, it is desirable that the judicial opinions of all parts of the Union should be the same.

From experience, the judges think there is much reason to apprehend that the publication of the decisions of the Supreme Court will remain on a very precarious footing if the reporter is to depend solely on the sales of his work for a reimbursement of the expenses which must be incurred in preparing it, and for his compensation. The patronage of the Government is believed to be necessary to the secure and certain attainment of the object.

Law reports can have but a limited circulation. They rarely gain admission into the libraries of other than pro-

fessional gentlemen. The circulation of the decisions of the Supreme Court will probably be still more limited than those of the courts of the States, because they are useful to a smaller number of the profession. Only a few of those who practice in the courts of the United States, or in great commercial cities, will often require them. There is, therefore, much reason to believe that no reporter will continue to employ his time and talents in preparing those decisions for the press after he shall be assured that the Government will not countenance his undertaking.

With very great respect, I am, sir, your obedient servant,

John Marshall²⁹⁴

Predictably, the Bill sailed through the Senate again on February 19, 1817. On March 1, it was at last approved by the House. And, on March 3, the Reporter's Bill was signed by the President and became law.²⁹⁵ Even in this long-delayed victory, however, Wheaton had suffered two final buffets. First, the duration of the new Act was expressly limited to "three years, and no longer."²⁹⁶ Second, in finally agreeing to the Bill, the House retained the \$1000 salary but increased the number of volumes to be provided by the Reporter to the United States from fifty to eighty, effectively decreasing Wheaton's "take-home pay" to \$600.²⁹⁷ At best, then, the new salary might serve as "additional encouragement."²⁹⁸ As he remarked to Story within six weeks of his supposed triumph (and in the midst of trying to arrange publication of his second volume without again relinquishing the copyright): "[I]f I do persevere, it will be against all odds."²⁹⁹

Wheaton did indeed decide to persevere as Reporter, but the odds against success (at least, financial success) were, as he saw, exceedingly long. At the outset, he had given himself five years to attain his goals.³⁰⁰ Within three months of the conclusion of his first Term as Reporter, however, he had been forced to surrender the copyright to volume 1 of his *Reports*, at a price he considered wholly inadequate, simply to place it in print. Within little more than a year, he had seen his hopes of all but a meager salary dashed by a penurious Congress. With each passing year, his failure to attract more than a handful of retainers became a source of increasing embarrassment. By his fourth year, he felt driven to confess to his mentor, Story, that only the latter's "cheering admonitions" prevented him from becoming "quite sick of 'literary fame & glory,'" which brought with it so little "of 'the one thing [truly] needful.'" ³⁰¹ In many ways, it seems surprising that Wheaton stuck to the five-year plan he had laid out for himself, and more wondrous still that he stayed the course seven years beyond even that.

By at least the beginning of 1825, and probably well before, Wheaton had emphatically "tire[d] of the mechanical drudgery of reporting." To his brother-in-law, Edward, he promised soon to test the professed "zeal and ability" of his friends to assist him in securing a higher station.³⁰² His connections, however, failed to secure him missions to Mexico, South America or The Netherlands;³⁰³ and the sole appointment he did obtain, as one of three revisors of New York's statute laws, appears never to have fully engaged his interest.³⁰⁴

The nadir came in 1826. Wheaton sought but failed to obtain appointment to the Supreme Court upon the death of Thomas Todd.³⁰⁵ He tried to secure an opening in the office of United States Attorney in New York City through the forced removal of the incumbent, but that campaign, too, fell short.³⁰⁶ And in December came the blow that he found "more difficult" to accept than any other: the rejection by President Adams of his candidacy to succeed William P. Van Ness as District Judge for the Southern District of New York, an appointment of which he had felt virtually assured.³⁰⁷ Even in a year so full of humiliation, it must have pained Wheaton deeply to confess in a letter imploring the great Webster's aid: "If it were not *absolutely necessary* to me, you would not find my name on the list of *office seekers*. If I could live over again the years that are past, those who are in power should not know me in that character."³⁰⁸ When, on March 3, 1827, Adams announced his intention to name Wheaton charge d'affaires to Denmark, a post so minor as to amount almost to a slap in the face, Wheaton's acceptance was nevertheless a foregone conclusion. After requesting "three or four months" to afford the prospect due consideration, he gratefully accepted Adams' proffered crumb barely four weeks later.³⁰⁹

Story had predicted the outcome to his wife within days of Adams' offer.³¹⁰ The reportership, as Wheaton himself said, had been "good in its day," but he had made it widely known that he felt he was "born for better things."³¹¹ Yet, if he reflected at all objectively in the summer of 1827, Wheaton must have allowed himself some little satisfaction in the accomplishments of the twelve years just past. True, there had been isolated criticisms of his work in the preceding year.³¹² But these were minor alongside the vast advances in completeness, accuracy, promptitude and scholarship that Wheaton's *Reports* constituted in com-

parison with his predecessors' volumes. In accepting Wheaton's resignation, Chief Justice Marshall wrote:

I can assure you of my real wish that the place you have resigned had been more eligible and had possessed sufficient attractions to retain you in it. I part with you with regret, and can assure you that I have never in a single instance found reason to wish your conduct different from what it was.³¹³

III. Wheaton vs. Peters

When at last it came in June of 1827,³¹⁴ Wheaton's notice of resignation surprised neither the Court nor his eventual successor, Richard Peters, Jr., of Philadelphia. Peters' eagerness for the appointment, while superficially resembling Wheaton's quest a dozen years before, sprang from motives significantly different in character. Wheaton's interests had been predominantly, albeit not exclusively, scholarly in nature. True, he had cherished ambitions for appointment to higher office, even to the Court itself. True, he had hoped for greater financial rewards than he ultimately achieved. But Wheaton's successes had been primarily as a scholar, because it was there that his talents lay. Peters, too, had ambitions, but not to be a scholar. Above all else, he saw court reporting as an entrepreneurial venture. He seems not to have viewed his appointment as a steppingstone to still loftier heights; nor did he see it as a vehicle to rationalizing and improving the law through his own erudite contributions. Rather, Peters' central perception of the reportership appears to have been that, properly managed, the job could be made to pay. In seeking to exploit that potential, he was to increase dramatically the profession's access to the Court's decisions, both at the practical level of decreased expense and as a matter of legal doctrine.

Peters had the good fortune to be the son of Richard Peters, Sr., a member of the Continental Congress who later served as United States District Judge for the District of Pennsylvania from 1792 until his death in 1828. The younger Peters was born in Philadelphia in 1780, making him five years older than Henry Wheaton. In contrast to Wheaton, Peters was not an inveterate office seeker. He did hold the post of Philadelphia County Solicitor from 1822 to 1835, and he helped to found the Philadelphia Savings Bank. In the main, however, Peters kept a remarkably low profile for one favored with his father's connections, and occupied himself largely with court



Justice Bushrod Washington (left) lent Richard Peters, Jr., (right) considerable assistance in securing an appointment to succeed Wheaton as court reporter.

reporting. As District Judge, Peters, Sr., served on the Third Circuit with Bushrod Washington. Together, the two assisted Peters, Jr., materially at every level of his professional advancement. The son's progress proved steady but not spectacular. For example, whereas Wheaton had assumed the reportership at the relatively early age of 30, Peters, Jr., did not become Reporter until he was 47.³¹⁵

Peters' literary accomplishments, while scarcely rivaling Wheaton's *Elements of International Law* (1836) and *History of the Law of Nations* (1845), were not confined to his reports of the Third Circuit and the Supreme Court. Early in his career, he began collecting the opinions of his father's court on matters of maritime law, a project that led to the publication in 1807 of *Admiralty Decisions in the District Court of the United States for the Pennsylvania District*.³¹⁶ Following the War of 1812, he expanded the scope of his reporting efforts through the preparation of *Reports of Cases in the Circuit Court of the United States for the Third Circuit . . . District of New Jersey, 1803 to 1818, and in the District of Pennsylvania, 1815-1818* (1819).³¹⁷ In 1819, Peters published a new three-volume edition of *Chitty on Bills of Exchange*.³¹⁸ These activities, combined with his father's friendship with Justice Washington, undoubtedly helped to bring Peters, Jr., to Washington's attention as a possible editor for *Re-*

ports of Cases . . . in the Circuit Court of the United States, for the Third Circuit . . . from the Manuscripts of . . . Bushrod Washington (1826-29).³¹⁹ In due course, the grateful Washington felt moved to assist Peters in his attempts to succeed Wheaton as Reporter.

The first evidences of a concerted campaign by Peters for the reportership appeared in 1826, when Wheaton's flurry of activity as an office-seeker seemed likely (if only because of the law of averages) to presage his departure from the Court. Everything depended, of course, on Wheaton's nomination to succeed Judge Van Ness in the Southern District of New York, but both men presumed that act to be a mere formality on the part of President Adams. Accordingly, Peters began an energetic campaign to line up the votes necessary to replace Wheaton upon the latter's inevitable resignation. The support of Justice Washington, whose circuit court reports Peters had just begun sending to the press, seemed certain. Justice Story, who had corresponded with Peters about securing Massachusetts subscriptions for the same reports,³²⁰ seemed the next most likely target, and Peters wrote to him immediately upon hearing the rumors of Wheaton's impending translation to the New York judgeship.³²¹ Story replied upon receipt, promising: "[Y]ou shall cheerfully have my vote. . . . I know no person who would be more acceptable to me."³²² Peters knew Chief

Justice Marshall less well. Good strategy, then, dictated a less direct approach, first through the agency of Justice Washington and then by forwarding to Marshall, together with his own cover letter, a plea from old Judge Peters himself.³²³ Like Story, Marshall capitulated at once, replying to Peters' *father*, rather than the applicant himself, that the younger Peters "may be assured of my cordial support."³²⁴ The fourth and final vote necessary for Peters' majority proved surprisingly easy to obtain. Justice Duvall, having already been softened on the subject by another of Bushrod Washington's letters, decided to break his "general rule [of holding himself] disengaged until the day of election" and endorse Peters' appointment out of a settled conviction "that no one better qualified will be presented as a candidate."³²⁵

It was all but done — all but done, that is, except for the inconvenient fact that, in the end, Van Ness' place went to another and a desolate Wheaton found himself compelled, as usual, to present himself for duty during the Court's 1827 Term. "Had the P[re]s[iden]t made the appointment which was anticipated," wrote Washington to Peters, "both offices would have been well filled, & I sincerely regret that he did not."³²⁶

Adams' offer on March 3, 1827 to make Wheaton *chargé d'affaires* to Denmark brought

renewed hope. Upon hearing the news in Philadelphia, Peters again swung into furious action. He assured Justice Washington that Wheaton's acceptance of the proffered post admitted of "no doubt" and requested Washington's "kind publication [to the other members of the Court] of my wishes to become his successor."³²⁷ Perhaps to ensure the fulfillment of that wish, Peters also wrote at once to Wheaton. After reciting the "express promises" of Marshall, Story, Washington and Duvall in support of his candidacy, Peters offered to Wheaton (who, at this point, had not yet accepted the mission to Denmark) the following proposition: Peters would repair at once to Washington and "undertake to publish for [Wheaton] the reports of this Session of the Court, either for your exclusive benefit, or on such terms as you may yourself propose."³²⁸ Wheaton decided to publish his own reports of the 1827 Term.

By the time Wheaton finally announced his leave-taking to Chief Justice Marshall in June of 1827, the Court had already been in recess for almost three months. Still, as the Justices prepared to return for the January 1828 Term, Story felt sufficiently sure of Peters' appointment to offer to ride together to Washington, predicting: "[Y]ou will find yourself *located* [there] for the winter."³²⁹ Within the month, Peters had indeed been named Reporter, apparently by unanimous vote of the Court.³³⁰ At a party of his Philadelphia friends, "it was confidently asserted by several, that [the office] would yield [him] more than \$5000 per annum."³³¹ The new Reporter himself did not attend, as he was already on the job in Washington.

The end of the 1828 Term brought a flurry of activity, culminating in the publication of Peters' first volume of *Reports* on June 16, 1828.³³² The brief preface to this volume set forth its author's aims in crisp, businesslike fashion. "[I]t has been the [Reporter's] earnest endeavour," he said, "to exhibit the facts of each case . . . briefly and accurately; and to state such of the arguments of counsel, as, in his opinion, were required for a full and correct understanding of the important points of the case, and the decision of the Court." Lest the latter point be lost on "his brethren of the profession," Peters put the matter more plainly still: "It has not been within the scope of [my] purpose, to give, at large, all the reasoning and learning addressed by them to the Court."³³³ The decisions, of course, were to be presented faithfully as handed down by the Court. And what of the notes



President Adams (above) initially dashed Peters' hopes of becoming the Court's reporter when he failed to grant Wheaton an expected judicial appointment. Adams later appointed Wheaton to a diplomatic post in Denmark, creating the vacancy Peters had hoped to fill.

that had so distinguished Wheaton's *Reports*? Of them, Peters said precisely nothing, for the simple reason that his volumes were to contain only the most basic marginal notes, and no appendix notes whatsoever. In short, Peters' plan for his *Reports* resembled the man himself: brisk, practical and determined to avoid unremunerative detours into esoteric scholarship.

The preface did contain two novelties, however. First, Peters advised his readers that, pursuant to the recently amended Reporter's Act,³³⁴ he had stipulated with his publisher that the price per volume should be five dollars.³³⁵ What measures had been taken to provide a greater margin of profit at the *Reports'* new, low price, he did not say. Second, Peters drew special attention to his plan for presenting the abstracts (or headnotes) of the Court's decisions: "The syllabus of each case, contains an abstract of all the matters ruled and adjudged by the Court, and, generally, in the language of the decision, with a reference to the page of the Report in which the particular point will be found."³³⁶ Clearly, the provision of page references could only be regarded as an advance over preceding volumes of the *Reports*. Yet, overall, no aspect of Peters' work was to prompt such bitter criticism as the content of his presumably straightforward abstracts.³³⁷

Predictably, the first assessment of volume 1 of Peters *Reports* came from Joseph Story. Story's interest in the reporting of the Court's decisions had obviously not diminished with Wheaton's departure. Writing within ten days of publication, Story assured Peters that he had great reason "to be proud of" his initial effort. "[U]pon a general survey of the volume," he could not but commend Peters' "great qualities" as a Reporter. He had performed his task with "fidelity, promptitude, & success." In particular, Story regarded Peters' inclusion of internal page references in the abstracts as a useful improvement. On the other hand, there were a number of defects requiring mention. The volume contained a few errors that should be noted in its successor. In future volumes, Peters would do well to allow himself additional time before printing, "not only to accommodate the Printer's Devils, who after all are so mean foes, & much given . . . to misrepresentation, but to have more leisure to examine the proofs and compare the materials." Even more seriously, Story regretted "that the text is so compact & small." He "suppose[d]" this was unavoidable in order to bring the work into a moderate compass, so as to

afford it at the price established by the Act of Congress But, in this respect, he "greatly . . . preferred . . . the 12th of Wheaton."³³⁸

The first reviews of Peters' initial volume to appear in print displayed an even more profound ambivalence. Boston's *American Jurist and Law Magazine*, for example, thought that Peters had improved on Wheaton "in forbearing to insert at length instruments and documents . . . where short . . . extracts only were necessary." While the *Jurist* pronounced itself "far from being insensible to the extensive research and erudition of Mr. Wheaton," it believed that the profession generally "were hardly satisfied with the high price of his volumes, or with the materials used to swell their dimensions." But Wheaton's prolixity had now been traded for Peters' imprecision, especially in the case abstracts of which the new Reporter had been so proud. An abstract of the case, the review pointed out, should "present briefly and accurately . . . all the important principles which have been decided or discussed" in the course of the decision. Instead, Peters had "heap[ed] into his abstracts incidental observations, reflections, and reasonings of the court The mass of matter thus thrown together serves to bewilder, rather than to assist the reader," making it almost as difficult "to ascertain the points from the note, as from the whole case."³³⁹ After providing a few particularly garbled excerpts from the volume to illustrate its point, the *Jurist* concluded with pointers for improvement in Peters' upcoming second attempt.³⁴⁰

Alas, the *Jurist* found volume 2 of Peters' *Reports* "liable to the same objections," only more so. In fact, "the mode of reporting, adopted in these volumes, not only renders them very inconvenient to readers, but is also likely to diminish very seriously the value and influence of the decisions of the highest tribunal in the country" Having made due allowance for the arduous labors of reporting and, on that account, forgiven Peters' "little imperfections," the review passed on to those that it found "essential and glaring." Again, its strongest strictures were reserved for the Reporter's abstracts of cases, which it charged amounted to little more than extracting from each decision "a number of sentences or paragraphs, on what principle of selection it is difficult to say, and plac[ing] them at the head of the case." In almost every instance, the *ratio decidendi* of the case seemed to escape Peters' method: "After

studying a page or two of fine type, [the reader's] mind is in a painful state of uncertainty as to the points actually decided by the court, and can only be relieved by examining the body of the decision." Consistently, the Reporter reproduced observations of the Justices out of context, creating the misimpression of general rather than specific applicability; or he failed to include anything in the abstract that would alert the reader to the point actually determined by the Court. In at least one instance, Peters had stated as the holding of a case a rule "directly the reverse of the opinion" handed down by Marshall. "Indeed there is scarcely a single abstract in the volume which states the points in the case definitely and tersely, and which is not open to serious objections."³⁴¹

Sadly for Peters, the *Jurist* was not alone in its low estimation of his powers of intellect. To some, his work became a benchmark of mediocrity. Writing to a friend concerning Wheeler's *Abridgment of American Common Law Cases*, Thomas Day, the Connecticut Reporter, observed in 1833: "As to his digests of cases, he neither gives you the *principle* nor the *case*, but generally presents some excerpts, from which one or the other — or possibly both — may be *conjectured*. He reminds one strongly of Peters' abstracts in his Reports."³⁴² And, commenting thirty years later upon the resignation of one of Peters' successors, a Philadelphia legal newspaper noted with considerable heat that

the Reports of the Supreme Court of the United States have been for many years past — ever since the time, in fact, that Mr. Wheaton ceased to report them — eminently discreditable to our professional character, abroad, and a vexatious burden [in] every way to those among us who were obliged to read them, at home.³⁴³

As if these troubles were not enough, Peters quickly discovered upon assuming the reportership that it could not easily be made to pay nearly so well as he had imagined. The five-dollar-per-volume limitation imposed by the Reporter's Act of 1827 proved to be a financial strait-jacket that defied easy escape. It appears extremely doubtful that the reduction in price mandated by the Act produced a surge in sales of the *Reports*, perhaps because the subject matter had a limited audience at any price; but, whether it did or not, the one fact startlingly clear is that the net effect did not improve the Reporter's bottom line. Under the initial Act procured by Wheaton, it appears that his income ranged be-

tween \$1500³⁴⁴ and \$1800.³⁴⁵ Peters, unlike Wheaton, arranged with his publishers to be paid a set price, in the amount of \$2.875 per copy, on the sales of his *Reports* (the better, presumably, to be compensated for increased sales at the volumes' cheaper price). At least through 1834, however, sales never exceeded 700 copies per volume, meaning that Peters' publishers never paid him more than \$2012.50 per annum. Of this sum, he paid out of his own pocket each year \$820 for printing and \$780 for paper, or \$1600. Thus, Peters' profits from the sale of the *Reports* (\$412), added to the salary paid him by the government (\$1000), amounted to an income that never exceeded \$1412 — less than Wheaton's income in his worst years!³⁴⁶

Yet these figures tell only a part of Peters' plan to tap what he believed to be the hidden profit-generating potential of the reportership. The second, intermediate step in the plan involved publishing a six-volume "bare bones" edition of his predecessors' reports at more affordable prices, in expectation of adding to his regular purchasers those innumerable members of the profession previously unable even to contemplate owning a complete set of the Supreme Court's *Reports*.³⁴⁷ The *piece de resistance* of the entire programme, however, became apparent only in 1834, when its foundation had been fully laid by Peters' other activities. In essence, it involved creating by law a vast new market for Peters' own *Reports* and his editions of *Dallas*, *Cranch* and *Wheaton*, in every public office in the United States.

The audacity of this last suggestion, made to the Chairman of the House of Representatives' Committee on the Judiciary in the midst of its consideration of a new Reporter's Bill, can hardly be overstated. Congress had neglected to renew the 1827 Act in 1830; but it had continued to appropriate \$1000 annually for the Reporter, and Peters, in turn, had continued to treat himself as bound by the five-dollar-per-volume limitation in the 1827 Act.³⁴⁸ Now seemed the time to put the Reporter's relationship with the government on a different footing, more advantageous to both. By 1834, Peters' abbreviated editions of the *Reports* of *Dallas*, *Cranch* and *Wheaton* were all in print. The entire jurisprudence of the Supreme Court was now contained in those six volumes, plus the seven volumes of Peters' own *Reports*. This invaluable collection must be made accessible, urged Peters, "to every portion of our wide spread coun-

try" by dissemination to the county clerk "in every county of the several states and territories of the Union," to "each hall of legislation," to "the executive departments of the states and territories," to the libraries of the states and of every court, and to "each diplomatic agent of the Country abroad to be kept in his official Bureau." No doubt the states and territories would identify other needy recipients for additional volumes, and a further stock should be purchased and kept in reserve for future distribution by the national government. All in all, Peters calculated the demand for his various *Reports* to be 1250 sets. These, he would sell to the United States at a discount. And, in return for the guaranteed purchase of a similar number of his annual volumes in each succeeding year (and deletion of the required delivery of eighty free copies), Peters would gladly forego the "present allowance" of \$1000 in any new Reporter's Act.³⁴⁹

Grandiose? Yes. Far-sighted? That, too. Admittedly, the sales of 1250 copies to the government would have nearly tripled Peters' sales. But surely he spoke a truth plain to many friends of the Court in pointing out that the advantages of the plan proposed "are intimately connected with sound and accurate knowledge of the supreme law of the land, and therefore closely united with the interest and prosperity of every citizen of the Union."³⁵⁰ Congress, however, elected to do nothing, and Peters was forced to carry on under the old arrangement until 1842.³⁵¹

In short, two of the three major components of Peters' plan for enhancing the Reporter's income miscarried badly: his own reports from 1827 forward generated no more net income than had Wheaton's; and the government failed to embrace his scheme for trebling their circulation by distributing them to public offices throughout the Union. Happily for Peters, the remainder of his programme — which the title of the work, *Condensed Reports of Cases in the Supreme Court of the United States, Containing the Whole Series of the Decisions of the Court From Its Organization to the Commencement of Peters's Reports at January Term 1827*,³⁵² aptly describes — possessed an instant and assured appeal. Both the need for such a publication and Peters' gift for identifying and exploiting that need shine with luminous clarity from the pages of his self-confident *Proposals* for the work, issued less than six months after assuming the Reporter's office:

The Supreme Court of the United States has been organized for thirty-eight years, and its decisions form in themselves almost an entire code of laws. Many of the difficult and important questions of constitutional construction, and of the nature and extent of the powers reserved, granted, and claimed, under the constitution, have passed under the careful observation and judgment of the court. . . .

Considerations growing out of these circumstances, seem to impose the necessity that the law thus general, thus established, thus supreme, should be universally known. That there should be found but few copies of the reports of the cases decided in the Supreme Court of the United States in many large districts of our country, in which there are federal and State judicial tribunals, is asserted to be a frequent fact. In some of those districts, it is positively averred that not a single complete copy of all the reports is in the possession of any one, and thus the great and overruling law of the land is almost unknown in many populous parts of the Union. These things should not be.

It will not be denied that these circumstances are the consequences of the heavy expense which must be incurred by the purchase of the two [*sic*] volumes of the Reports of Mr. Dallas, the nine volumes of Mr. Cranch, and the twelve of Mr. Wheaton's Reports; together twenty-three [*sic*] volumes — the cost of which exceeds one hundred and thirty dollars.

It is proposed to publish all the cases adjudged in the Supreme Court of the United States from 1790 to 1827, inclusive, in a form which will make the work authority in all judicial tribunals, and to complete the publication in not more than six volumes, the price of which shall not exceed thirty-six dollars.³⁵³

Thirty-six dollars! There were trade-offs, to be sure. The type employed in the *Condensed Reports* was smaller than in the original volumes. The arguments of counsel that had appeared in the earlier reports were omitted entirely, as well as the appendix notes contained in the twelve volumes of *Wheaton*. And, most significantly, Peters pared away concurring and dissenting opinions in his zeal to present the cases in "abbreviated form."³⁵⁴ On the other hand, Peters promised to add "a reference in each case to the parallel cases which have been decided by the court, and, in some instances, the reported and manuscript decisions upon the same questions, in the circuit courts of the United States."³⁵⁵ Helpful as these aids might be, however, the central appeal of the proposed condensation remained simply this: by purchasing the *Condensed Reports*, the bar might soon obtain access to all the volumes of Peters' predecessors at a price reduced by nearly seventy-five percent.

Two sorts of reactions were readily predictable. Typical of the first sort were those of Story and Washington, men deeply interested in disseminating broadly the reports of the Supreme Court. Story thought the "compressed Edition" contemplated by Peters "a most valuable present to

the Profession." The aggregate expense of the *Reports* of Dallas, Cranch and Wheaton had become prohibitive. "Either therefore few persons must be in possession of those Decisions, or a plan of publication like yours must be adopted."³⁵⁶ Washington, too, enthusiastically supported Peters' undertaking. "Your prospectus for the consolidated work," he wrote, "is excellent, and must take with the bar in every part of the United States. To them, it cannot fail to be a treasure, & I do not doubt but that the unusual patronage it will receive in the Western, as well as the Atlantic States, will liberally reward you . . ."³⁵⁷

Inevitably, Peters' proposals for his *Condensed Reports* drew another sort of response as well. With the exception of A. J. Dallas,³⁵⁸ each of Peters' predecessors as Reporter vigorously protested his plans. The first missive to arrive was William Cranch's. Writing with "great reluctance" a month following publication of the *Proposals*, Cranch objected strongly to the publication of any "new edition" of his reports by Peters: "I have not yet been reimbursed the actual expense of publishing my 3 last volumes by one thousand dollars and . . . must insist upon all my legal rights."³⁵⁹ Upon due deliberation, Peters riposted that he had no objection to Cranch's insistence on his legal rights. For he had no desire to publish a new edition of any valuable matter added by Cranch to the decisions contained in his *Reports*. On the contrary, "My Work will be a 'Digest' of the facts of the Cases and the opinions of the Court—no more." Neither the facts nor the opinions, Peters asserted, could be the subject of copyright, and thus his proposed reports "will not be obnoxious to the law protecting literary property." Besides, Cranch had overlooked the bright side: "I have not adopted the opinion, that my Work will injure the sale of your or Mr. Wheaton's Reports." Rather, "they will be more in demand as their more valuable contents shall by my means be made more known. All Booksellers say 'Digests' promote the sale of the original Works."³⁶⁰

Wheaton, in faraway Denmark, first learned of Peters' plans from Donaldson, who informed him also that the proposals had put "almost an entire stop to the sales" of both the *Reports* and the *Digest of Decisions*. Wheaton's publisher, lacking a copyright interest of his own in all but the first volume of *Reports*, demanded that Wheaton immediately engage counsel to protect their mutual interests. Donaldson saw the larger importance of the situation as well, pointing out that "until an

example is made of these literary Pirates there can be no security for the labours of authors and Publishers."³⁶¹

At first, Wheaton seems not to have appreciated fully the gravity of his peril. He responded to his publisher's entreaties in September with the suggestion that Donaldson or Wheaton's former law partner, Elijah Paine, journey to Philadelphia to confer with local counsel there. Considering his copyright legally sound, Wheaton assumed that the mere threat of suit might be sufficient to deter Peters from carrying into effect his announced intentions.³⁶² In November of 1828, however, Wheaton felt it advisable that he himself write to Daniel Webster. Might not Webster speak directly with Peters, who undoubtedly had not "duly considered the injury" that his proposed publication would cause to Wheaton? Wheaton had counted on the second editions of his works in order to realize the fruits of his labor, but this expectation would be "entirely defeated" if Peters persisted in his designs. In that event, Wheaton would feel it his duty to protect his property by legal measures. In fact, he had already given "contingent instructions" if such action became necessary, "but not to be executed until amicable remonstrances have been first tried."³⁶³

Nothing, however, would budge Peters from his chosen path. Volume 1 of the *Condensed Reports* went to press late in 1829.³⁶⁴ Having just lost his principal patron, Bushrod Washington, to death,³⁶⁵ Peters wasted no time in shoring up his support on the Court against any eventuality. He promised to dispatch a copy of his newest work immediately when printed to Justice Story,³⁶⁶ and dedicated the work itself, "most respectfully and affectionately," to Chief Justice Marshall.³⁶⁷ Story responded at once upon receipt of volume 1, pronouncing himself "so much pleased" with the "plan & execution" of the work "that I shall take it with me to Washington for use during the next Session of the Supreme Court in lieu of the orig[ina]l Reports."³⁶⁸ Other members of the Court, to whom Peters had also provided complimentary copies, offered similar praise.³⁶⁹ And, a step lower in the federal judiciary, District Judge Joseph Hopkinson of Philadelphia, a member of the Circuit Court for the Eastern District of Pennsylvania that would later issue the key trial court ruling in *Wheaton v. Peters*, observed: "The importance of a general circulation of the decisions of the highest judicial tribunal of our country to the uniformity and correctness of the judgments

of inferior courts renders a work like the present, almost one of necessity."³⁷⁰

In fact, Peters' *Condensed Reports* quickly became a roaring success. By February 8, 1831, when volume 3 appeared in an edition of 1500, fully 900 copies had been sold by subscription in advance.³⁷¹ Volume 3, besides containing the first volume of Wheaton's *Reports*, included Cranch's last two volumes. Any threat of suit by Cranch had vanished earlier, however, when Cranch, apparently seeing the handwriting on the wall, agreed to settle without litigation in return for fifty copies of the *Condensed Reports*.³⁷² Only the problem of Wheaton's claims remained.

Wheaton and his publisher refused to concede. In light of the extraordinary subscription achieved by Peters' third volume, they had no choice: the market for Wheaton's own *Reports* would soon be glutted. In May of 1831, on behalf of Wheaton and himself, Donaldson filed in the Circuit Court for the Eastern District of Pennsylvania a bill in equity against Peters and his publisher, John Grigg of Philadelphia, praying for an injunction to prevent the further printing, publication or sale of volume 3 of the *Condensed Reports* and an accounting of profits. The bill alleged that the said volume contained "without any material abbreviation or alteration, all the reports of cases" in volume 1 of Wheaton's *Reports*.³⁷³ In his answer, Peters denied that he had violated the complainants' rights, contending that the statutory requirements for securing a federal copyright had not been met, that no right to common law copyright existed in the United States and that, in any event, the contents of Wheaton's *Reports*, insofar as they had been taken over into Peters' *Condensed Reports*, were incapable of supporting a copyright either under statute or at common law.³⁷⁴

For two years, the matter remained mired in the circuit court.³⁷⁵ Initially, the court issued the preliminary injunction sought by Wheaton and Donaldson. In early 1832, Peters and Grigg moved to dissolve the injunction. The two judges constituting the court — Henry Baldwin (who had succeeded Bushrod Washington on the Supreme Court) and Joseph Hopkinson (who had succeeded Peters' father on the circuit court) — found themselves unable to agree on a disposition. Hopkinson favored dissolving the injunction; Baldwin, dismissing the motion. Accordingly, the injunction remained in force. Circumstances had changed, however, by the time the action came before the court for final hearing in December of



Office of the Curator, Supreme Court

Justice Henry Baldwin was incapacitated by a "derangement of the mind" at a crucial phase of the litigation between Wheaton and Peters in Circuit Court for the Eastern District of Pennsylvania.

1832. Baldwin, incapacitated by a "derangement of the mind" of progressive severity, could not or would not sit. Hopkinson, refusing to defer the hearing "for a day," proceeded with the arguments. His opinion, dismissing the bill and dissolving the injunction, was entered on January 9, 1833.³⁷⁶ In essence, Hopkinson agreed with Peters and Grigg that the complainants had failed to accomplish the prerequisites for statutory copyright under the laws of the United States and that any claim to common law copyright, state or federal, had been precluded by the pertinent enactments of Congress.³⁷⁷ The opinion did not address the issue of the copyrightability of the opinions and other matter taken by Peters from earlier reports. Wheaton and Donaldson immediately appealed to the Supreme Court.³⁷⁸

The significance of the resolution of the issues in *Wheaton v. Peters* to the law of intellectual property in the life of the new nation can scarcely be overstated. In seeking to engage Daniel Webster to argue the case on what all parties considered its certain review by the Supreme Court, Elijah Paine had observed: "This suit . . . will be more interesting than any reported case on copyrights, and I believe the future interest of all authors in this country will be greatly affected by its decision."³⁷⁹ If anything, Paine's letter undersold to Webster the importance of his proposed representation. In fact, there had been only two

reported decisions on the law of copyright in the four decades since the founding of the national government in 1789. One, a state case,³⁸⁰ had displayed a liberal attitude toward authorship by excusing certain prerequisites to statutory copyright as merely "directory," while the other, a Third Circuit decision by Justice Washington,³⁸¹ had held any departure from the strict requirements of the Acts of 1790 and 1802 fatal to the author's rights. At issue were two competing interests of great moment to the new American nation. On the one hand, authors claimed the right to profit from the creations of their minds, both for the encouragement of their own work and for the advancement of a national literature. Among the best known authors of the period were several of the Justices themselves, most notably Marshall and Story. On the other hand, too generous an attitude toward authorship might result in the creation of literary monopolies, thereby defeating the legitimate interest of the public in wide dissemination of the fruits of authors' labors at affordable prices. The resolution by the Supreme Court of the controversy in *Wheaton v. Peters* could not help but determine how the balance between these opposing considerations would be struck.

Wheaton decided to leave as little to chance as possible in the determination of his cause. Paine, who had taken charge of the matter during Wheaton's absence in Copenhagen, urged in August of 1833 "the great importance of [his] being present" for argument of the case at the Court's January 1834 Term. "Peters is on the spot," wrote Paine, "& alas, the face of a party does often turn a doubtful balance held by human judges."³⁸² After a boisterous late-season passage of thirty-two days from Liverpool, Wheaton arrived in New York on November 26, 1833.³⁸³

From New York, Wheaton proceeded to Washington, where he arrived in mid-January looking, in the words of his opponent, Peters, "very mad."³⁸⁴ Wheaton at once threw himself into preparing memoranda for use by Webster and Paine in argument. Unquestionably, in Wheaton's view, "a Reporter is an *Author*"; and, as such, "his exclusive right to the Copy cannot be affected by the circumstance of his being appointed by the Court." The annual salary of \$1000, first secured in 1817, "was notoriously intended as an *additional* encouragement to induce Mr. W. to continue to act as Reporter." The true reward for his labors lay in the reasonable expectation of continuing purchases of the *Reports* themselves,

which in turn rested on the promise of continuing protection of the Reporter's copyright under the laws of the United States. "Who would have undertaken the risk & expense of publishing an edition of 1000 to 1200 copies (for \$600) which might be encountered the next day by a piratical edition?" In establishing the office of Reporter, Congress had not decreed that its occupant should surrender the copyright to his *Reports* nor authorized others to republish them without charge. "Does any man believe that Mr. W. would have made such an absurd bargain with the Government had it been *expressed*? [A]nd can it be *implied* from any thing in the nature & history of the transaction?"³⁸⁵

Wheaton's central point — that the decisions of the Court as rendered by the Reporter had always been regarded as subject to copyright by him — was not without substantial foundation. In the period immediately preceding passage of the first Reporter's Act, scarcely anyone had questioned the wisdom of according to Wheaton and his predecessors, or indeed to the various state reporters, the exclusive right to multiply copies of their works. Certainly Justice Story, Wheaton's mentor and friend, had then harbored no doubts concerning the copyrightability of judicial reports. One of his earliest letters to Wheaton had requested the young New York lawyer's aid in locating a publisher for the reports of Story's First Circuit: "Do you know of any Bookseller at New York who would be willing to print the work? If any would be willing, on what terms would he *purchase the copy right & print*?"³⁸⁶ And again, in response to Wheaton's plea for assistance in finding a publisher for the first volume of his own *Reports*, Story had written: "I am fearful that at present there is not a bookseller in Boston who is able to print them, *or give anything for the copy right*."³⁸⁷ In his letters to members of Congress urging the creation of a salaried office of Reporter, Wheaton himself had consistently, and without correction by his correspondents, assumed an exclusive right in that officer to publish and profit by his efforts.³⁸⁸ Even Chief Justice Marshall, in his letter to the Senate endorsing the Reporter's Bill on behalf of the Court, had expressed the conviction that a salary would serve as a necessary addition to, not a substitute for, the income justifiably anticipated by the Reporter from the sales of his works.³⁸⁹ In short, Wheaton's expectations regarding the copyrightability of his *Reports* had an entirely reasonable basis. The assumptions on

which those expectations rested simply had not had occasion to be examined with a critical eye until challenged by Peters.

In recounting his expectations as Reporter, then, Wheaton could make an impressive case. He faltered slightly, however, in describing to Webster precisely *which* aspects of his works constituted copyrightable authorship. "Mr. W. is unquestionably author," he wrote, "of the Summaries of Points decided — of the Statements of the Cases prefixed — of the analytical Indexes at the end of each vol. All these Mr. P. has pirated." But what of the opinions themselves, the principal component of the *Condensed Reports'* commercial appeal? Wheaton noted that "there [were] in every volume several Opinions delivered orally from the Bench, & taken down by Mr. W." Yet, even assuming this to be true, the rationale for according such opinions copyright protection plainly would not extend to the Court's more significant opinions, prepared by the Justices themselves in manuscript, which constituted the great bulk of the *Reports*. To this objection, Wheaton suggested the following reply:

Supposing then Mr. W. has no Copy Right in the written opinions of the Judges — for argument's sake, — it is enough if he has such Right in any substantial portion of his 12 vols., which Mr. Peters has copied, no matter how little *mind* it may have required to compose that portion, or how piddling the labour may have been.³⁹⁰

In effect, Wheaton found himself reduced to arguing that the *Reports*, because they included parts individually susceptible to copyright, constituted compilations entitled to protection in their entirety.³⁹¹

Similar difficulties confronted Wheaton in attempting to dispose of Peters' remaining objections to his claims. On the issue of his compliance with the statutory formalities imposed by the Copyright Acts of 1790 and 1802,³⁹² Wheaton assured Webster that each and every requirement had been fulfilled. He failed, however, to note or suggest solutions to the case's chronic and potentially fatal evidentiary deficiencies concerning publication of the copyright claims in the public press.³⁹³ And he attempted feebly to explain away his own inattention to depositing a copy of each volume of the *Reports* with the Secretary of State, pursuant to the Copyright Acts, with the argument that he considered furnishing eighty copies, as required under the Reporter's Act, sufficient for both purposes.³⁹⁴ In sum, Wheaton had achieved substantial compliance with all of the statutory re-

quirements; and, in those instances when his observance had been less than punctilious, the requirements were "directory merely" and "not a condition, the non-compliance with which forfeits the right."³⁹⁵

On the issue of a possible common law copyright subsisting apart from the right claimed under statute, Wheaton declined "to be drawn into the field of controversy whether the federal Courts have a common law jurisdiction, although it would be easy to show that they have." Instead, he considered it sufficient to "assume that the Acts of Congress were intended to secure my right of property existing independent of the Acts themselves." Being "remedial & protective" only, they should be given a "liberal construction." Thus, Wheaton considered himself entitled to an injunction to secure the enjoyment of "sacred rights," whose origin (apart from statute) he was unwilling or unable to describe.³⁹⁶

In the actual argument of the case on March 11, 12, 13 and 14, 1834 before Marshall, Story, Duvall, McLean, Thompson and Baldwin,³⁹⁷ the arguments propounded in Wheaton's memoranda metamorphosed significantly in the hands of Webster and Paine. Paine assumed, without really arguing, that proper notice of Wheaton's copyright claims had been given in the press, and asserted, without really proving, that in actuality eighty-one copies of the *Reports* (not simply the eighty copies required to obtain the Reporter's salary) had been transmitted annually to the Department of State.³⁹⁸ Wheaton was thus within the letter of the law, and most certainly within its spirit. The statutes at issue must not be construed, contrary to the Constitution, in such a way as to impair an author's right of property in copies of his work by loading down that right "with burdensome and needless regulations" making the preservation of the right "wholly dependent on accidental mistake or omission."³⁹⁹ For the framers of the Constitution had "adopted it with a particular view to preserve the common law right to copyrights untouched."⁴⁰⁰

Unlike Wheaton, however, Paine located the origin of an author's "acknowledged pre-existing right" to profits derived from the multiplication of his work not in federal common law, but in the common law of Pennsylvania. Merely by adopting the Constitution, the states "ha[d] not surrendered to the Union their whole power over copyrights, but [had] retain[ed] power concurrent with the power of congress."⁴⁰¹ For any violation

of his common law right, Paine declared, an author might obtain "the ordinary remedies by an action on the case and bill in equity,"⁴⁰² either in state court or "in the circuit court of the United States . . . independently of the provisions of the act of congress."⁴⁰³ Thus, the federal copyright acts neither conferred the natural property right sued upon by Wheaton nor diminished in any way the ordinary remedies available to him to vindicate it. Instead, the Acts of 1790 and 1802 operated only to "secure" the author's rights by adding to his remedies under state law the possibility of "penalties and forfeitures" to be enforced against infringing parties upon compliance by the author with the statutory formalities.⁴⁰⁴ Wheaton had sought no such penalty or forfeiture. Hence, any noncompliance with the Acts, even if conceded, could hardly deprive him of his right to obtain justice in the federal courts.

Paine reserved his greatest ingenuity, however, for the coda to his argument. Of the four supposed objects of Peters' piracy,⁴⁰⁵ only one really mattered: unless Wheaton had somehow obtained copyrights in the manuscript opinions of the Justices in every significant decision handed down during his tenure as Reporter, the *Condensed Reports* had infringed no interest of any real value in the marketplace. Paine thought the matter transcendently clear. Wheaton had acquired a copyrightable interest in all such opinions, he averred, "by judges' gift";⁴⁰⁶

Were not the opinions of the judges their own to give away? Are opinions matter of record, as is pretended? Was such a thing ever heard of? They cannot be matters of record, in the usual sense of the term. Record is a word of determinate signification; and there is no law or custom to put opinions upon record, in the proper sense of that term. Nor were they ever put on record in this case. . . .

The copy[ri]ght in the opinions, as they were new, original and unpublished, must have belonged to some one. If to the judges, they gave it to Mr. Wheaton. That it did belong to them is evident; because they are bound by no law or custom to write out such elaborate opinions. They would have discharged their duty by delivering oral opinions. What right, then, can the public claim to the manuscript? The reporter's duty is to write or take down the opinions. If the court choose to aid him by giving him theirs, can anyone complain?⁴⁰⁷

All this, the Court had known in appointing Wheaton its Reporter and furnishing him the Justices' opinions. Reporters had always been assumed to acquire copyrightable interests in this, the single most valuable component of their works. To rule otherwise now would be to deprive not only Wheaton, but all other reporters as well, of their familiar rights.⁴⁰⁸ Such a result, as Paine

clearly foresaw, would alter fundamentally the entrepreneurial underpinnings of court reporting throughout the country.

J. R. Ingersoll and Thomas Sergeant, on behalf of Peters, contradicted Paine's argument on every point. Each recognized, however, that Wheaton's case would stand or fall according to the Court's disposition of Paine's claim that the opinions of the Justices constituted copyrightable matter, the rights to which they had transferred to the Reporter. Said Sergeant:

The court appointed [Wheaton] under the authority of a law of the United States, and furnished him the materials for the volumes; not for his own sake, but for the benefit and use of the public: not for his own exclusive property, but for the free and unrestrained use of the citizens of the United States.⁴⁰⁹

Ingersoll put the matter on an even higher plane, according equal dignity and an equal necessity of diffusion to enactments of Congress and decisions of the Court:

Reports are the means by which judicial determinations are disseminated, or rather they constitute the very dissemination itself. . . . The matter which they disseminate is, without a figure, the *law of the land*. Not indeed the actual productions of the legislature. Those are the rules which govern the action of the citizen. But they are constantly in want of interpretation, and that is afforded by the judge. He is the "*lex loquens*." His explanations of what is written are often more important than the mere naked written law itself. His expressions of the *customary law*, of that which finds no place upon the statute book, and is correctly known only through the medium of reports, are indispensable to the proper regulation of conduct in many of the most important transactions of civilized life. Accordingly, in all countries that are subject to the sovereignty of the laws, it is held that their promulgation is as essential as their existence. . . . It is therefore the true policy, influenced by the essential spirit of the government, that laws of every description should be universally diffused. To fetter or restrain their dissemination, must be to counteract this policy. To limit, or even to regulate it, would, in fact, produce the same effect. Nothing can be done, consistently with our free institutions, except to encourage and promote it.⁴¹⁰

Webster's speech to the Court, concluding the arguments, briefly rehearsed the doctrinal points discussed by other counsel but sought primarily to reduce the case to its essential human dimension. There had come a point late in the reportership of Wheaton's predecessor, Webster said, when the very continuance of the *Reports* had hung in the balance. But for Wheaton's appearance on the scene, with the promise of "a regular annual publication of the decisions" of the Court, there might have been no dissemination whatsoever of future reports. In order to supplement his income



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In representing Peters, J. R. Ingersoll (left) and Thomas Sergeant (middle), had the unenviable task of arguing against the famous orator, Daniel Webster (right) who represented Wheaton.

for the copyright to his *Reports*, "[i]t was found necessary that there should be some patronage from the legislature," i.e., a salary for the Reporter. Wheaton had "applied to congress, personally solicited its aid, and made a case which prevailed." The Reporter's Act had been regularly renewed, and thus "[t]he successor of Mr. Wheaton has had the full benefit of the grant obtained by the personal exertions of Mr. Wheaton." Lately, although "well advised" of Wheaton's rights, Peters had "materially injured" those interests by publication of the *Condensed Reports*. In short, he had made "an indefensible use of [his predecessor's] labours," which the Court must now remedy by construing Wheaton's rights "liberally."⁴¹¹

The reluctance of the Court in deciding so bitter a controversy between two of its own officers, past and present, with each of whom the Justices had lived and worked on intimate terms, can readily be imagined. And that discomfort is reflected vividly in a series of extraordinary occurrences preceding and accompanying the announcement of the decision itself.

On the morning of March 18, 1834, as Wheaton prepared to leave his lodging for the Capitol, he encountered a messenger sent by Justice Story to both Wheaton and Peters with identical messages.⁴¹² Acting, in what the messenger assured Wheaton were the Justice's own words, "entirely on his own hook," Story summoned the Court's past and present Reporters to meet with him personally, in succession, in his chambers.⁴¹³ Upon arriving as bid at half past ten, Wheaton was greeted by Story "in his usual cordial manner" and handed a memorandum which Story had been "authorized by the Court to communicate

to" each of the litigants.⁴¹⁴ The memorandum, which Story furnished also to Peters, advised the parties that the decision of the Court, if handed down, would unanimously hold that no right of property did or could exist in the Court's opinions, and that the Justices were without power to confer upon its Reporters any copyright thereto. As to the marginal notes and indices prepared by Wheaton, however, the Court had touched upon but not finally determined the litigants' rights. "Under the circumstances," the memorandum concluded, "the Court (except Mr. Justice Baldwin, who declines any expression of his views as to the suggestion) thinks, that it is a fit subject for honourable compromise between the parties, by a reference to Gentlemen of the Bar or otherwise as a matter of equity & honour."⁴¹⁵

Wheaton's initial reaction was both flustered and angry. Three weeks earlier, he advised Story, he had himself suggested to Peters, through Webster, that "the whole Cause" be referred to arbitrators. That offer had been rejected. At this late date, there would be insufficient time to secure agreement from Donaldson in New York to any compromise taking into account the Court's views concerning the noncopyrightability of its opinions. Moreover, Wheaton confessed to Story in humiliation, the inconvenience and expense of concluding the litigation at a later date, if the need arose, would be insupportable: he had largely exhausted his assets and paternal inheritance already. Story seemed unmoved, and in fact suggested "in a menacing tone" that Wheaton might be operating under a supposition regarding the remaining issues in the case "that my rights were more extensive than they might turn out to be."⁴¹⁶ Wheaton then asked for and received

leave to confer with Webster, who "unhesitatingly advised" him to reject the suggested compromise. Wheaton's formal reply to the Court, while restrained in tone, firmly reiterated the points made to Story and insisted that "the merits of the Cause so fully & ably discussed" be now finally resolved.⁴¹⁷ Left with no choice, the Court proceeded to do as Wheaton had demanded at its conference later in the same day.

The necessity of resolving the difficult and highly charged issues presented by the case seems to have brought to a head many stresses already present in the Court. The death of Bushrod Washington five years before, as Peters then observed to Story, had destroyed "[t]he triple column [Marshall, Story and Washington] in which the Court ha[d] rested for many years in balance."⁴¹⁸ In the years following, several members of the Court had fallen seriously and repeatedly ill.⁴¹⁹ By 1830, the Justices' traditional practice of keeping joint lodgings had broken down;⁴²⁰ and, by 1832, Story had begun to lament privately a decline in the "dignity, character, & courtesy" of the Court.⁴²¹ In the White House sat a President generally considered hostile to many of the doctrines theretofore promulgated by the Court and eager to install new men in the old Justices' places.⁴²² And, by the 1834 Term, the Court could in some instances no longer muster the votes necessary to decide even major constitutional cases.⁴²³

The atmosphere at the Justices' conference was no doubt made more painful by the reopening of old wounds inflicted in prior discussions of the case at hand. In recounting the conference to Wheaton on the day following the Court's announcement of its decision,⁴²⁴ Baldwin recalled that Story had accused him, at an earlier date, "of having granted an Injunction [on circuit] to prevent the publication of the Decisions of the Court."⁴²⁵ Perhaps to reduce the likelihood of such exchanges recurring, the conference decided without discussion (and adversely to the complainants) the question of Wheaton's supposed copyright under federal or state common law. On the statutory issues (also decided against Wheaton and Donaldson), discussion was allowed but kept so brief that the Justices left the conference table unclear, as they would discover the next morning, on whether there had been a majority for holding the notice and delivery provisions of the copyright law mandatory under the Act of 1802. Finally, while all of the conferees departed with an understanding that the matter

must be remanded to the circuit court for further evidentiary proceedings, the majority was unwilling or unable to instruct Baldwin, who, with Hopkinson, would have to preside over the trial, concerning matters of law certain to arise there.⁴²⁶

Confusion at the conference presaged disaster on the day of decision. Just how deeply the matter had divided the Court became startlingly clear on the morning of March 19, 1834, when the Justices convened to announce their opinions.⁴²⁷ Story, the member of the Court previously closest to the two main litigants, missed the melee altogether. He had departed Washington on the 8 a.m. stage, leaving Justice McLean, in Wheaton's words, "to fire off the blunderbuss [Story] had loaded, but had not courage to discharge."⁴²⁸ The unfortunate McLean, on behalf of himself, Marshall, Story and Duvall, began by reading the opinion of the Court.⁴²⁹ Wheaton appeared "strongly excited during its reading," while Peters was "anxious but perfectly calm." Immediately upon McLean's conclusion, Thompson stated that he differed from the majority and that he considered the case "one of the most important ever decided." Thompson then delivered the "purport" of his own opinion,⁴³⁰ which he had not yet written out but which adopted the main points of Paine and Webster's argument, "with much feeling." In addition, Thompson asserted that "the Ct. were equally divided, so far as the operation of the Statute of 1802 went."⁴³¹ Baldwin followed,⁴³² agreeing with Thompson and also dissenting "from another point of the opinion of the Ct. — viz. that the U. States *qua* U.S. had no common law" under which Wheaton might claim copyright.

McLean then attempted an explanation of the Court's opinion dealing with the statutory issues, claiming that his analysis "was based on the St[atute] of 1790"⁴³³ and that the matter "was all clearly stated in the opinion he had read." Thompson, "with intemperate warmth," replied that "if [the analysis] had been clearly stated there w[ou]ld have been no need for explanation." At this juncture, Marshall "made a statement of the opinion of the Ct. on the debated point [*i.e.*, statutory construction] which was listened to with gr[ea]t attention." McLean, "with mingled pride & feeling checked by the proprieties of the place,"⁴³⁴ at once "read the very words of the opinion & added that *this dialogue across from one to another* was very unpleasant [*i.e.*, between



Justice John McLean read the majority opinion in the case on March 19, 1834.

members of the Court holding differing views]"⁴³⁵ Thompson rejoined "in a perfect boil,"⁴³⁶ while Baldwin, "by looks & motions & whispers" evidenced a "strong passion at his back."⁴³⁷ The Chief Justice "then s[ai]d that unless he had thought that the opinion as read needed explanation, he sh[ou]ld not have made it." Looking "like the good man whom Virgil has described as able to still the tumult of a crowd, by his very appearance,"⁴³⁸ Marshall then "stated in full" the holding of the majority on the point of statutory construction. Through it all, Duvall sat "in utter unconsciousness of the strife around him," thereby "adding o the grotesqueness of the scene," while "a large number of the bar" looked on "in anxiety & grief."⁴³⁹

At length, calm prevailed, and the Justices concluded their business for the Term. Word of the unusual "altercation" in court quickly spread to "all Congress," where it was "magnified . . . ten times over."⁴⁴⁰ The profession at large, however, was not to be similarly titillated. Before quitting Washington late the same afternoon, Marshall admonished Peters that he "did not wish [him] to make any mention of the *differences* in his report of the case."⁴⁴¹ Not surprisingly, the *Reports* when published remained silent concerning the colorful events of the day. Initial newspaper accounts of the decision likewise confined themselves to sober summaries of the doctrine of the case, venturing no comment beyond the observation that the Court had "ruled every point of law

. . . in favor of the appellee, Mr. Peters."⁴⁴²

In technical terms, Peters had not won quite the sweeping victory suggested by the press. McLean's opinion left open the possibility that a tiny, unspecified portion of the matter claimed by Wheaton as author — in addition to the opinions of the Justices, the bill in equity had asserted copyrights in "the statements of the cases . . . and the abstracts thereof"⁴⁴³ — might indeed have been infringed by Peters. Accordingly, the mandate of the Court in fact reversed and remanded the judgment and decree of the Third Circuit for a trial by jury to determine if Wheaton had published proper newspaper notice of his claim and delivered the requisite copy of the work to the Secretary of State for each volume of his *Reports*.⁴⁴⁴ The parties regarded this disposition as a matter of considerable consequence. Peters sought vigorously, but unsuccessfully, to have the mandate amended and thereby avoid the inconvenience of a trial of the remaining factual questions, however trivial.⁴⁴⁵ Wheaton returned to Denmark in June,⁴⁴⁶ but not before setting in progress through his Philadelphia attorneys the necessary work of gathering the evidence to be adduced at trial.⁴⁴⁷ Ultimately, the jury returned a verdict in Wheaton's favor in 1838,⁴⁴⁸ but the matter then dragged on interminably on its way back to the Supreme Court.⁴⁴⁹ Before the appeal could be heard there, both of the principal parties had died: Wheaton, on March 11, 1848, and Peters, less than two months later, on May 2, 1848. Ultimately, their estates settled the litigation for a mere \$400 paid by Peters' estate to Wheaton's estate in 1850.⁴⁵⁰

For all practical purposes, however, the controversy had come to an end on March 19, 1834, when McLean announced in the concluding paragraph of his opinion:

It may be proper to remark that the court are unanimously of opinion, that no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right.⁴⁵¹

In those few words, the Court destroyed much more than Wheaton's hope of leaving to his descendants a modest inheritance. It destroyed as well a presumption of ownership, long shared by Wheaton, his predecessors and the Justices themselves, which if given the force of law would have bestowed upon the Reporters of the Supreme Court exclusive title to those classic expressions of American law that constitute the Court's essen-

tial legacy to the nation.⁴⁵² The decision thus stands as an indispensable prerequisite to the emergence of a truly national Supreme Court. No doubt, Wheaton and Peters saw the matter in more narrow and immediate terms. But their contribution to the development of a national jurisprudence, and the advancement of the Court they both served, is no less for that.

Conclusion

In the century and a half that have passed since its decision, the fame of *Wheaton v. Peters* has rested largely on its contribution to the law of intellectual property. Certainly, the primacy of the case in that sphere is well deserved, and not only because of its status as the Court's first pronouncement on the subject of copyright. For, while much of the decision's specific doctrine was long ago rendered obsolete by successive statutory revisions,⁴⁵³ the philosophy and direction which *Wheaton v. Peters* imparted to the American law of copyright endures. The basic premise of the Court's opinion — that copyright is a monopoly recognized by law primarily for the benefit of the public rather than the author, and is therefore attended by appropriate limitations and conditions — has remained the cornerstone of construction in this field down to the present day.⁴⁵⁴ Likewise, the federal courts have never since doubted that, upon publication, the author's common law right of property in his manuscript comes to an end, to be replaced, if at all, by an entirely new statutory right in the copies of his work;⁴⁵⁵ or that, in deference to the public's paramount interest in the wide dissemination of ideas, the latter right may be fully secured only upon faithful compliance with the formalities prescribed by Congress.⁴⁵⁶

From an institutional perspective, however, there was more to *Wheaton v. Peters* than its copyright aspects alone, however important those aspects may have been. The case marked the culmination of a long struggle by the Reporters and their friends on the Court which, by 1834, had already contributed greatly to the transformation and expansion of the Court's role in American life. Contemporaries were not entirely insensitive to these facts, although later generations have tended to overlook them. In reviewing the part that the *Reports* of Henry Wheaton had played in the growth of federal judicial power through 1824, the editors of the *North American Review* observed:

The Supreme Court of the United States did not rise up, like the state courts, merely as a successor, almost unchanged in form or name, of institutions over which a hundred years had accumulated the veneration of populous colonies, or powerful provinces. . . . It was a court wholly new in its name, organization, powers, process, thrown forth on the country in naked simplicity, instead of being invested with the prescriptive respect due or deferred to ancient institutions; With such an immense mass of obstacles for it to struggle through, in order to reach its present dignity and maturity, it needed all the influence of sober and reflecting men, all the concentrated strength of national authority, all the virtues of judges like Jay, Rutledge and Marshall, of master minds and pure patriots, to ensure its success.⁴⁵⁷

By his "care," "industry" and "skill," Wheaton, the Court's "faithful and accomplished reporter," had helped materially to ensure that "the broad scope of the important principles established" by the decisions of the Court "w[ould] continue to acquire increased value, interest, and importance" with each passing year.⁴⁵⁸

It had not always been so with the *Reports*. Dallas, the Court's first Reporter, had inaugurated the series with a record of omission and inaccuracy scarcely calculated to ensure universal knowledge or approbation of the fledgling tribunal he reported. Cranch, his immediate successor, had elevated delay, an occasional failing in Dallas' time, to a level of intolerable magnitude. Yet both Dallas and Cranch had undertaken their tasks without assurance of reward, and ultimately each found his service to the Court profoundly unremunerative. Neither can be judged by the standards that their successors established. Dallas assured that the earliest judgments of the Court would be preserved for posterity, while in the end Cranch provided an invaluable record of the work of Marshall and his colleagues on the bench at the dawn of the institution's power. If it is true that, prior to Wheaton, "little was known of [the decisions of the Supreme Court] by the general public or even by the Bar,"⁴⁵⁹ the fault lay as much in the absence of a formal reporter system with defined responsibilities as it did in the Reporters themselves.

Wheaton's appointment in 1816 effectively brought an end to the old system by the introduction of complete, meticulous and timely reports unlike any that had gone before. The passage of the Reporter's Act in the following year made the revolution official. In addition to his many other virtues, Wheaton brought to his duties a scholarly aptitude and zeal unique in the history of the reportership. Unhappily, that very quality (and the

increased activity of the Court in Wheaton's time) led to an escalation of the expense of the *Reports* that eventually overshadowed, in the mind of the profession, all else in Wheaton's work.⁴⁶⁰

Wheaton's successor, Peters, although apparently not burdened by the weight of an overpowering intellect, did possess one useful quality of mind that all of his predecessors had conspicuously lacked: real business acumen. Peters' genius lay in his recognition that there existed in the new nation a substantial and as yet untapped market for reports of the decisions of the Supreme Court, ready to be exploited if only the cost of obtaining them could be reduced dramatically. This, Peters accomplished. In the process, and quite inadvertently, he occasioned young America's first landmark decision in the law of literary property.⁴⁶¹

Of all the players in the drama that ultimately became *Wheaton v. Peters*, however, none performed a more interesting and important part than Joseph Story. Story had been instrumental in supplanting Cranch; he had proven an invaluable ally to Wheaton both in his appointment as Reporter and in the preparation of his annual *Reports* and his 1821 *Digest*; and his support for Peters' project to publish a "compressed Edition" of the Court's decisions had been early and unstinting. Nothing in Story's correspondence or character as described by those who knew him casts the slightest doubt on the genuineness of his affection for the many reporters whom he befriended and encouraged on circuit and at the Supreme Court throughout his long career. But without question the overriding purpose of these exertions, as of Story's entire public life, was as he described it to Wheaton early on: "the establishment of a great national policy on all subjects."⁴⁶² How natural, then, that Story should have been the draftsman of the Act constituting the Reporter a salaried official of the Court, and the guiding light in every improvement by the Reporters in the performance of their duties.

Story's part in the determination of *Wheaton v. Peters*, not surprisingly, made him in the eyes of his former protege, Wheaton, "the prime mover and instigator in Peters' piratical attack on [Wheaton's] property in the Reports."⁴⁶³ There had been but a "nominal majority" for the decision.⁴⁶⁴ Story himself had loaded the "blunderbuss of infidelity" discharged by McLean,⁴⁶⁵ while the mad Duvall was "notoriously incapable of understanding any thing about it."⁴⁶⁶ Wheaton

even imagined that Story had deluded Marshall into concurring with his diabolical plan: the Chief Justice "never studied the cause, . . . [but instead] pinned his faith on the sleeve of his prevaricating brother, believing that, if the latter had any leaning, it was towards me on the score of the friendship the hypocrite once professed — & which doubtless he still continued to pour into that venerable man's ear."⁴⁶⁷ In short, Story had "betrayed [Wheaton], Judas-like, with a kiss."⁴⁶⁸

The truth was otherwise. The circumstances of the case, at least as viewed in historical perspective, are utterly devoid of any hint of personal animosity toward Wheaton by any member of the majority. Moreover, on the decision's central point — the noncopyrightability of the opinions of the Justices — there was unanimity: the Court could allow no impediment to the fullest possible dissemination of its judgments. The needs of the Court and the nation simply outweighed the needs of a single Reporter, however deserving. At a personal level, Story in fact found the necessity of deciding against Wheaton, his former friend and collaborator, a "bitter cup."⁴⁶⁹ At the professional level, however, Story simply embodied the instinct and will of a Court determined to be faithful both to the law and to its own institutional interests. In this instance, as in so many others, Carson's assessment of Story's role in the Marshall Court's rise to power is amply confirmed: "he did more, perhaps, than any other man who ever sat upon the Supreme Bench to popularize the doctrines of that great tribunal and impress their importance and grandeur upon the public mind."⁴⁷⁰

In the end, *Wheaton v. Peters* is a "great case" for none of the reasons usually associated with Marshall Court decisions. Its focus is not predominately constitutional, nor can it claim authorship by the Chief Justice himself or even by Justice Story. Rather, the "greatness" of the case lies in what it tells us about the Court itself — its strengths and its weaknesses, its personnel and its conflicts, its aspirations and, above all, its achievements — during a critical passage in the life of a vitally important national institution. Few cases tell stories so fascinating as *Wheaton v. Peters*, and few have been so long neglected. Wheaton himself put the matter best: "The incidents attending this case, should they ever be given to the world, would form a curious chapter in the history of judicature & indeed of human nature."⁴⁷¹

So, now, they do.

Footnotes

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In the preparation of this address, the author has had access to the files of the Oliver Wendell Holmes Devise History of the Supreme Court of the United States [collection hereinafter cited as Devise History], for which he thanks the Devise Project, Professor G. Edward White of the University of Virginia School of Law and Professor Gerald Gunther of Stanford Law School. In addition, the author acknowledges with gratitude the research assistance of Mr. Douglas I. Brandon of the Vanderbilt Law School Class of 1985.

¹ Justice Joseph Story to Reporter Henry Wheaton (Jan. 8, 1817), Wheaton Papers, The Pierpont Morgan Library, New York City [collection hereinafter cited as Wheaton Papers].

² The first four Reporters of the Court, and the years covered by their volumes of *Reports*, were: Alexander James Dallas, 1790-1800; William Cranch, 1801-1815; Henry Wheaton, 1816-1827; and Richard Peters, Jr., 1828-1843. Peters was dismissed by the Court on January, 25, 1843, after the publication of 16 volumes of his *Reports*. His little-known seventeenth volume, covering the Court's 1843 Term, is not a part of the *United States Reports*. C. Swisher, *The Taney Period 1836-64*, at 304-06 (5 Devise History, 1974, *supra* note *).

³ 33 U.S. (8 Pet.) 591 (1834).

⁴ See, e.g., H. Carson, *The History of the Supreme Court of the United States; With Biographies of All the Chief and Associate Justices* (1891); C. Warren, *The Supreme Court in United States History* (rev. ed. 1937); G. Haskins & H. Johnson, *Foundations of Power: John Marshall, 1801-15* (2 Devise History, 1981, *supra* note *).

⁵ J. Goebel, Jr., *Antecedents and Beginnings to 1801*, at 662 (1 Devise History, 1971, *supra* note *).

⁶ R. McCloskey, *The American Supreme Court* 79 (1960).

⁷ H. Carson, *supra* note 4, at 242.

⁸ Haskins, *Law Versus Politics in the Early Years of the Marshall Court*, 130 U. Pa. L. Rev. 1, 27 (1981) (emphasis added).

⁹ Judiciary Act of 1789, 1 Stat. 73 (1789).

¹⁰ The Justices first met on February 1, 1790, the day appointed for the Court's organization, but did not achieve a quorum until the following day. The Court then sat for six days (February 2, 3, 5, 8, 9 & 10), during which time, *inter alia*, the Justices appointed two officials (the Crier on February 2 and the Clerk on February 3), but no Reporter. The Court sat again on August 2 and 3, 1790, but adjourned without any activity other than the admission of attorneys to its bar. 1 Engrossed Minutes, Records of the Supreme Court of the United States, Record Group 267, National Archives, Washington, D.C.; 1 C. Warren, *supra* note 4, at 46-51.

¹¹ 2 U.S. (2 Dall.) 400 (1791).

¹² 1 C. Warren, *supra* note 4, at 50-51, 53.

¹³ 2 U.S. (2 Dall.) 401 (1791). The Court's only other activity during the Term was to rule on a second procedural motion in *Vanstophorst v. Maryland*, 2

U.S. (2 Dall.) 401 (1791). There were likewise no arguments on the merits during the February 1792 Term. The Court did at least hear a motion in *Oswald v. New York*, but without deciding it. 2 U.S. (2 Dall.) 401 (1792). The Justices were kept occupied on circuit, however, discharging their duties under the Judiciary Act. 1 C. Warren, *supra* note 4, at 57-61.

¹⁴ R. Walters, Jr., *Alexander James Dallas: Lawyer — Politician — Financier 1759-1817*, at 7, 8-9, 15 & 21 (1943) (annotated manuscript thesis in Butler Library, Columbia University, of work published in abbreviated book form by University of Pennsylvania Press).

¹⁵ Sec. of Commonwealth of Penn. 1791-94; Paymaster-General to Armed Forces 1794-96; U.S. Dist. Atty. (E.D. Penn.) 1801-14 (Jefferson appointment). H. Carson, *supra* note 4, at 617-19.

¹⁶ Daily Nat'l Intelligencer, Oct. 7, 1814, at 2, col. 4.

¹⁷ R. Walters, Jr., *supra* note 14, at 30.

¹⁸ *Id.* at 22.

¹⁹ Among the journals which Dallas edited or to which he contributed extensively between 1787 and 1790 were the semiweekly *Pennsylvania Evening Herald* and two monthlies, the *Columbian Magazine* and the *American Museum*. *Id.* at 22-28.

²⁰ The Secretary acted as personal assistant to the Governor. *Id.* at 34.

²¹ See 1 U.S. (1 Dall.) iii-iv (1790).

²² See 1 U.S. (1 Dall.) v, 30 (1790); R. Walters, *supra* note 14, at 28-29.

²³ Reports of Cases Adjudged in the Superior Court of the State of Connecticut From the Year 1785 to May 1788 With Some Determinations in the Supreme Court of Errors (1789) [hereinafter cited as Kirby's Reports].

²⁴ Before Kirby's Reports, only certain sensational cases had been reported in newspapers or pamphlets. In 1788, for example, Dallas had published accounts of six such cases in the *Columbian Magazine*. R. Walters, Jr., *supra* note 14, at 27. Kirby's compendium of 201 cases covering three-and-a-half years appears, therefore, to be the first comprehensive volume of law reports published in America. The only other possible contender for the title is Francis Hopkinson's *Judgments in Admiralty in Pennsylvania*, also published sometime in 1789. See J. Wallace, *The Reporters Arranged and Characterized* 571 n.2 (4th ed. 1882). But see Briceland, *Ephraim Kirby: Pioneer of American Law Reporting, 1789*, 16 Am. J. Legal Hist. 297, 315 n.68 (1972) (arguing that Kirby's Reports must have preceded Hopkinson's *Judgments*). In comparison with the reports prepared by Kirby, however, Hopkinson's were highly specialized in subject matter and far less comprehensive. J. Wallace, *supra*, at 571 n.2. Volume 1 of Dallas' Reports, covering 253 cases over a period of 36 years, appeared a year after Hopkinson and Kirby.

²⁵ Familiarity with the English reports, particularly of common law decisions, was hardly unusual during the eighteenth century, as shown by studies of estates dating from that period. Surrency, *Law Reports in the United States*, 25 Am. J. Legal Hist. 48, 49 (1981).

²⁶ *Id.* at 54.

²⁷ See text at notes 60-62, 83, 98 & 256-58 *infra*.

²⁸ Surrency, *supra* note 25, at 54. Even so, the necessity of relying solely on English reports had not been gladly accepted by all American lawyers. As one of Ephraim Kirby's correspondents observed, such reliance "ha[d] long been" less than wholly satisfactory "where the circumstances of the people, the State of Society & the modes of transacting business [in England] are very dissimilar to ours." William Whitman to Ephraim Kirby (Dec. 7, 1787), Kirby Papers, Manuscript Department, Duke University Library, Durham, N.C.

²⁹ Surrency, *supra* note 25, at 54-55; Briceland, *supra* note 24, at 303-05.

³⁰ Surrency, *supra* note 25, at 50; Briceland, *supra* note 24, at 302.

³¹ Briceland, *supra* note 24, at 302 n.17, 303.

³² *Id.* at 297.

³³ Kirby's Reports, *supra* note 23, at iii.

³⁴ After the Revolution, American attorneys and judges began for the first time to search the law of other American jurisdictions for citations to adorn their arguments and opinions. Surrency, *supra* note 25, at 54. This, too, must have encouraged lawyers contemplating the publication of reports.

³⁵ 1 Conn. xxvii (1817) (emphasis in original), *citing* "An act establishing the wages of the judges of the superior court," 3 State Rec. May Sess. 1784 at 9.

³⁶ The fourth and last of Dallas' volumes includes the December 1806 term of the Supreme Court of Pennsylvania. (Its last reported decision of the Supreme Court of the United States, however, dates from that Court's August 1800 Term. See text at notes 51-57 *infra* regarding the problem of delays in the publication of Dallas' Reports.)

³⁷ Act of Feb. 24, 1806, §25, Pa. Laws 345. In 1845, the Assembly finally required Pennsylvania's judges to render all of their decisions in writing. Act of Apr. 11, 1845, Pa. Laws 374.

³⁸ Alexander J. Dallas to Thomas McKean (Apr. 18, 1789), *cited in* R. Walters, Jr., *supra* note 14, at 29 n.34; 1 U.S. (1 Dall.) v (1790).

³⁹ 5 U.S. (1 Cranch) iv-v (1804).

⁴⁰ It was not until 1834 that the Court ordered the filing with the Clerk of such opinions as were written, 33 U.S. (8 Pet.) vii (1834), and even then oral opinions were not invariably reduced to writing. Richard Peters, Jr., to John Bell (Chairman, Judiciary Committee of the U.S. House of Representatives) (Jan. 20, 1834), Peters Papers, Historical Society of Pennsylvania, Philadelphia [collection hereinafter cited as Peters Papers].

⁴¹ Connecticut first required the appointment of an official reporter by statute in 1821. *American Reports and Reporters*, 22 Am. Jurist & L. Mag. 108, 119 (1839). Pennsylvania did not make comparable provision for the preparation of official reports until 1845. *American Reports and Reporters No. IV*, 4 Alb. L.J. 5, 6 (1871).

⁴² Among these sources, Kirby seems to have been most heavily influenced by the format and philosophy of Cowper's reports of King's Bench decisions ren-

dered during the 1770s. Briceland, *supra* note 24, at 312-13.

⁴³ "In these Reports, I have endeavoured to throw the matter into as small a compass as was consistent with a right understanding of the case: — Therefore, I have not stated the pleadings or arguments of counsel further than was necessary to bring up the points relied on" Kirby's Reports, *supra* note 23, at iv.

⁴⁴ Briceland, *supra* note 24, at 307-10.

⁴⁵ 6 Public Records of the State of Connecticut 461-62 (1945), *cited in* Briceland, *supra* note 24, at 310 n.49. Cf. text at notes 418-21 *infra* (proposal by Richard Peters, Jr., for nationwide dissemination of *United States Reports*).

⁴⁶ 1 U.S. (1 Dall.) ii (1790). Kirby likewise secured the approbation of the Judges of the Connecticut Superior Court, whose decisions formed the bulk of his Reports. Kirby's Reports, *supra* note 23, at v.

⁴⁷ "We believe that all the reports of [Pennsylvania as of 1839] are the result of individual enterprise; no statute regulations existing in relation to the publication of the decisions of the courts." *American Reports and Reporters*, *supra* note 41, at 126 (1839); see also R. Walters, Jr., *supra* note 14, at 146 (Dallas published "at his own financial risk").

⁴⁸ See text at note 83 *infra*.

⁴⁹ In 1798, Connecticut Superior Court Judge Jesse Root published a volume of reports containing cases from July, 1789 to June, 1793. Between 1806 and 1813, Thomas Day published four volumes containing cases from 1802 to 1810. In 1814, the Assembly finally provided for official state reports and appointed Day to prepare them. See Briceland, *supra* note 24, at 316; *American Reports and Reporters*, *supra* note 41, at 118-19 (1839); *American Reports and Reporters No. II*, 3 Alb. L.J. 466, 468 (1871). In the meantime, Kirby became more interested in land speculation than in law reporting, eventually becoming a land commissioner in the Mississippi Territory. President Jefferson appointed him to a federal judgeship there shortly before Kirby's death in 1804. See Briceland, *supra* note 24, at 318-19.

⁵⁰ In fact, the "federal presence" in Dallas' later volumes seems not to have increased their sales. Steady demand for volume 1 of Dallas' Reports resulted in a second printing of that volume in 1806. The three later volumes sold more slowly despite their author's efforts to promote them nationally. Alexander J. Dallas to Mathew Carey (June 22, 1803), *cited in* R. Walters, Jr., *supra* note 14, at 147 n.6.

⁵¹ R. Walters, Jr., *supra* note 14, at 30.

⁵² 2 U.S. (2 Dall.) 419 (1793).

⁵³ Even more timely was the inclusion in Dallas' third volume of cases from the April 1799 term of the U.S. Circuit Court for the Pennsylvania District.

⁵⁴ Pennsylvania cases comprise 251 of the volume's 480 pages. Dallas also added a smattering of cases decided in the United States Circuit Court for the Pennsylvania District and retitled his second volume *Reports of Cases Ruled and Adjudged in the Several Courts of the United States, and of Pennsylvania, Held at the Seat of the Federal Government*.

⁵⁵ Decisions of Supreme Court of the United States occupy 466 of the 519 pages in volume 3 of Dallas'

Reports.

⁵⁶ By 1800, Dallas was a successful Philadelphia lawyer and had little incentive to follow the Court to Washington City. See R. Walters, Jr., *supra* note 14, at 144-56 (professional advancement), 159-68 (social success).

⁵⁷ In addition to the 46 pages devoted to decisions by the Supreme Court of the United States, volume 4 of Dallas' *Reports* contains 318 pages of Pennsylvania cases and 111 pages of decisions by the United States Circuit Court for the Pennsylvania District.

⁵⁸ J. Goebel, Jr., *supra* note 5, at 665 n.9. See text at notes 108-11 *infra* (press accounts of *Marbury v. Madison*).

⁵⁹ J. Goebel, Jr., *supra* note 5, at 665-66 n.10 (citing inquiry by Alexander Hamilton).

⁶⁰ Briceland, *supra* note 24, at 308.

⁶¹ *Commonwealth v. Schaffer*, 4 U.S. (4 Dall.) xxvi (1797).

⁶² See text at note 83 *infra*. The cost of Dallas' *Reports* seems, if anything, to have exceeded the price of Kirby's. Dallas sold his first volume by advance subscription in 1788 for one guinea a copy, R. Walters, Jr., *supra* note 14, at 29, which was then roughly equivalent to five dollars. In 1828, the total expense of purchasing volumes 2-4 of Dallas' *Reports*, volumes 1-9 of Cranch's *Reports*, and volumes 1-12 of Wheaton's *Reports* (24 volumes) was \$130—more than \$5 each. Peters, *Proposals For publishing, by subscription, The Cases Decided in the Supreme Court of the United States, From its organization to the close of January term, 1827* (1828), Record at 9-11, *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834), 4 The Records and Briefs of the Supreme Court of the United States 1523 (microfilm: Scholarly Resources, Inc., Wilmington, Del.) [trial record hereinafter cited as Record]. One of the leading legal periodicals of the day, *American Jurist and Law Magazine*, found the combined cost of the cited volumes such a "heavy expense" that it was unable to purchase a complete set of *United States Reports* for its own library. 4 Am. Jurist & L. Mag. 417, 418 (1830) (untitled review of volumes 1 and 2 of Peters' *Condensed Reports*).

⁶³ Between 1790 and 1800, Dallas reported "about sixty cases." There were, however, "various other cases decided but not reported," among which are the eight that Warren cites. 1 C. Warren, *supra* note 4, at 158 n.2.

⁶⁴ *United States v. Todd*, decided February 17, 1794. The decision was first mentioned in an endnote by Chief Justice Taney to *United States v. Ferreira*, 54 U.S. (13 How.) 40, 52 (1852), as bearing on "the nature and extent of judicial power."

⁶⁵ C. Hughes, *The Supreme Court of the United States* 65 (1928) (following J. C. Bancroft Davis' views stated in 131 U.S. app. xvi (1888)). Neither Davis nor Hughes explained the meaning of the term "filed" in the period before the Court's order of March 14, 1834, 33 U.S. (8 Pet.) vii (1834) (requiring all opinions to be filed with the Clerk).

⁶⁶ J. Goebel, Jr., *supra* note 5, at 799.

⁶⁷ *Id.* at 799 n.22.

⁶⁸ The matter may ultimately be resolved with the

publication of the multivolume *Documentary History of the Supreme Court of the United States, 1789-1800* [hereinafter cited as *Documentary History Project*], currently in preparation under the joint sponsorship of the Court and the Supreme Court Historical Society. Maeva Marcus, Coeditor of the Project, has said that, when the *Documentary History* is completed, "lawyers will be able to find and cite cases that the profession had not known existed." Marcus, *Documentary History of the Supreme Court of the United States, 1789-1800*, in *Legal Information for the 1980's: Meeting the Needs of the Legal Profession* 421 (B. Taylor ed. 1982). Dallas failed to print a total of 110-20 opinions. Telephone conversation with Maeva Marcus (Nov. 17, 1984).

⁶⁹ J. Goebel, Jr., *supra* note 5, at 718.

⁷⁰ Marcus, *supra* note 68, at 424.

⁷¹ Telephone conversation with Maeva Marcus, Coeditor, *Documentary History Project* (Nov. 17, 1984). "It seems odd that if opinions were written not a single one in the hand of a justice survives. So it is likely that few, if any, ever existed." Marcus, *supra* note 68, at 424. One draft opinion, by Justice Iredell for *Chisolm v. Georgia*, which appears to be the substance of the opinion printed at 2 U.S. (2 Dall.) 419, 429 (1793), has been uncovered by the *Documentary History Project* (see note 68 *supra*) in the Charles E. Johnson Collection at the North Carolina State Archives at Raleigh, N.C.

⁷² See text at notes 39-40 *supra*.

⁷³ J. Goebel, Jr., *supra* note 5, at 720 n.240.

⁷⁴ 3 U.S. (3 Dall.) 199 (1796).

⁷⁵ 3 U.S. (3 Dall.) at 207 n.*.

⁷⁶ Marcus, *supra* note 68, at 425.

⁷⁷ *Id.*

⁷⁸ J. Goebel, Jr., *supra* note 5, at 720 n.240.

⁷⁹ Marcus, *supra* note 68, at 425.

⁸⁰ *Id.* at 421.

⁸¹ B. Hammond, *Banks and Politics in America* 229 (1957).

⁸² Richard Rush to Henry Wheaton (Oct. 17, 1816), *Wheaton Papers*, *supra* note 1.

⁸³ Alexander J. Dallas to Jonathan Dayton (Oct. 18, 1802), George M. Dallas Papers, Historical Society of Pennsylvania, Philadelphia [collection hereinafter cited as *Dallas Papers*] (emphasis in original). The author gratefully acknowledges being directed to this correspondence, and to the documents cited in notes 84, 89 & 104 *infra*, by James R. Perry, Coeditor, *Documentary History Project*.

⁸⁴ According to Cranch, Justice Washington had advised him that Dallas possessed notes of the cases decided during those Terms but "ha[d] relinquished the idea of publishing them." William Cranch to Alexander J. Dallas (July 25, 1803), *Dallas Papers*, *supra* note 83.

⁸⁵ As Cranch rightly noted, "It would certainly be interesting to the profession, and important to the stability of our national jurisprudence, that the chain of cases should be complete." *Id.*

⁸⁶ The information in the following paragraph is distilled from Hagner, *William Cranch, 1769-1855*, in 3 *Great American Lawyers* 87 (W. Lewis ed. 1907), and

Dunne, *Early Court Reporters*[:] *Proprietors – Sometimes Predators*, in 1976 Supreme Court Historical Society Yearbook 61, 63-64 (1975).

⁸⁷ Ironically, the debacle wound up a subject of Cranch's own reports in *Pratt v. Carroll*, 12 U.S. (8 Cranch) 471 (1814).

⁸⁸ While repealing the Acts of Feb. 13 (ch. 4, 2 Stat. 89 (1801) (repealed by Act of Apr. 29, 1802, ch. 31, 2 Stat. 171)) and Mar. 3, 1801 (ch. 32, 2 Stat. 109 (1801) (repealed by Act of Mar. 8, 1802, ch. 8, 2 Stat. 132)), the Republicans left untouched the Act of Feb. 27, 1801 (ch. 15, 2 Stat. 103), which had created the U.S. Circuit Court for the District of Columbia.

⁸⁹ E.g., H. Carson, *supra* note 4, at 619; Hagner, *supra* note 86, at 93. As indicated in note 10 *supra*, however, the Court's only appointed officials during the period appear to have been the Clerk and the Crier (and possibly the Marshal). Cranch had earlier tried but failed to secure an appointment as Clerk. See Thomas B. Adams (son of John and Abigail Adams, and Cranch's cousin) to William Cranch (July 15, 1799), William Cranch Papers, Cincinnati Historical Society, Cincinnati [collection hereinafter cited as Cranch Papers] (predicting the retirement of Samuel Bayard as Clerk and offering to assist Cranch in succeeding him); William Cranch to Thomas B. Adams (Jan. 30, 1800), Cranch Papers, *supra* (expressing Cranch's hope that "obtaining this little unenvied place" would help him replenish his finances after the land speculation fiasco); Thomas B. Adams to William Cranch (Aug. 15, 1800), Cranch Papers, *supra* (consoling Cranch when the Clerkship went instead to Elias B. Caldwell).

⁹⁰ Hagner, *supra* note 86, at 93. See text at notes 273-99 *infra* concerning the controversy over passage of the first Reporter's Bill (finally approved by Congress as the Act of Mar. 1, 1817, ch. 63, 3 Stat. 376).

⁹¹ See text at notes 359-63 *infra* (protests of Cranch and Wheaton regarding impact of Peters' *Condensed Reports* upon income of Peters' predecessors).

⁹² See generally G. Haskins & H. Johnson, *supra* note 4, at 74-78; see also text at notes 164-65 *infra* (sharing of quarters by Henry Wheaton and Justice Joseph Story in boarding house occupied by remainder of Court).

⁹³ Indeed, Cranch's reporting was not confined to decisions of the Supreme Court. His *Reports of Cases Civil and Criminal in the U.S. Circuit Court for the District of Columbia* fill six volumes and contain over 2100 cases decided in his own court, more than five times the number in his nine volumes of *United States Reports*. Although financial embarrassment resulting from the failure of his District of Columbia land speculation had forced him into insolvency and may have contributed to his early enthusiasm for reporting, he later settled all claims with his creditors. His reports of circuit court cases, published in 1852, appear therefore to have sprung from a sincere desire to bequeath the profession the gift of useful precedents. Hagner, *supra* note 86, at 89, 94-95.

⁹⁴ 5 U.S. (1 Cranch) iii-v (1804) (emphasis in original).

⁹⁵ 5 U.S. (1 Cranch) at iv. Cf. text at notes 74-76 *supra* (concerning Dallas' reconstructions of the argu-

ments of counsel).

⁹⁶ William Pinkney to Henry Wheaton (Sept. 3, 1818), Wheaton Papers, *supra* note 1.

⁹⁷ Ninety-five of the 466 pages in volume 1 of Cranch's *Reports* were devoted to a note discussing the District of Columbia Circuit Court's decision, with Cranch's concurrence but over the dissent of James Marshall (the Chief Justice's brother), on a point of commercial law decided to the contrary by the Supreme Court in *Mandeville v. Riddle*, 5 U.S. (1 Cranch) 290 (1803), in an opinion by John Marshall. The second note in volume 1 occupied but five pages; and the 62 pages of notes to volume 4 of Cranch's *Reports* consisted exclusively of reproductions of two affidavits, three depositions, an opinion on an evidentiary motion and a circuit court opinion by Justice William Johnson.

⁹⁸ Justice Smith Thompson's purchase of volumes 7, 8 and 9 of Cranch's *Reports* cost him \$16 in 1818. W. Gould to Smith Thompson (Feb. 3, 1818), Gilbert Livingston Papers, New York Public Library, New York City.

⁹⁹ Thirty-five cases, or 40% of the total caseload, during the period from 1790 to 1801. J. Goebel, Jr., *supra* note 5, at 803.

¹⁰⁰ One hundred and twenty-five cases, or 33.1% of a docket increasingly filled with important constitutional cases, between 1801 and 1815. G. Haskins & H. Johnson, *supra* note 4, at 379, 656.

¹⁰¹ Henry Wheaton to Jonathan Russell (Jan. 4, 1817), Wheaton Papers, *supra* note 1.

¹⁰² Davis, 131 U.S. app. xvi (1889).

¹⁰³ Haskins and Johnson note that Cranch "obscure[d]" the relationship between certain of the cases that he reported. Further, he "was not unduly particular in the placement of his reports of cases in the proper year": decisions seem sometimes to have been allocated among the volumes of Cranch's *Reports* on a "space available" basis. G. Haskins & H. Johnson, *supra* note 4, at 497 n.6.

¹⁰⁴ Joseph Story to Richard Peters, Jr. (Dec. 10, 1829), Peters Papers, *supra* note 40. Cranch's papers also contain a complaint from Justice Duvall concerning the report of his dissent in *McIver's Lessee v. Walker*, 13 U.S. (9 Cranch) 164 (1815): "As it stands it does me injustice." Gabriel Duvall to William Cranch (Dec. 3, 1816), Cranch Papers, *supra* note 89.

Cranch did, of course, have the benefit of the Court's new practice "of reducing their opinion to writing, in all cases of difficulty or importance," and he noted explicitly that he had been "permitted to take copies of those opinions." 5 U.S. (1 Cranch) iv (1804). From the experience of his successor, however, it seems highly likely that what Cranch copied were the Justices' notes, sometimes polished and sometimes not, of opinions delivered orally, rather than the finished written opinions that the Reporter of Decisions receives today. See, e.g., text at note 169 *infra* regarding Wheaton's access to the Justices' notes of their opinions.

¹⁰⁵ In his preface, Cranch specifically acknowledged his debt "to Mr. [Elias B.] Caldwell, for his notes of the cases which were decided prior to February term, 1803, without the assistance of which he

would have been unable to report them, as his own notes of those cases, not having been taken with that view, were very imperfect." 5 U.S. (1 Cranch) iv-v (1804). Caldwell and Cranch had been rivals for appointment as Clerk of the Court. See note 89 *supra*.

¹⁰⁶ The new Jeffersonian Congress, having repealed the Judiciary Act of 1801, ch. 4, 2 Stat. 89, in early 1802 (Act of Apr. 29, 1802, ch. 31, 2 Stat. 156), postponed the next session of the Supreme Court for over a year, apparently out of fear that the Court would declare the repealing act unconstitutional. G. Haskins & H. Johnson, *supra* note 4, at 184.

¹⁰⁷ Of all the maritime and prize cases decided during Cranch's reportership, fully 53% (66 of 125) fell into his last three years. *Id.* at 656.

¹⁰⁸ 5 U.S. (1 Cranch) 137 (1803).

¹⁰⁹ 3 A. Beveridge, *The Life of John Marshall* 153 (1919). But see 1 C. Warren, *supra* note 4, at 245 n.2.

¹¹⁰ 1 C. Warren, *supra* note 4, at 245.

¹¹¹ *Id.* at 245 n.2.

¹¹² Warren goes so far as to observe that, prior to the publication of volume 1 of Cranch's *Reports*, "the opinions in the cases heard from 1801 to 1804 had been practically unknown." *Id.* at 288.

¹¹³ William Pinkney to Henry Wheaton (Sept. 3, 1818), Wheaton Papers, *supra* note 1; see also the complaints of Justice Story, note 159 *infra*, and of Attorney General Richard Rush, note 150 *infra*.

¹¹⁴ John Marshall to Henry Wheaton (Oct. 27, 1816), Wheaton Papers, *supra* note 1. Had Cranch fully appreciated the sacrifice that publishing his last three volumes would entail, he might well have decided to risk the displeasure of the profession by foregoing publication altogether. As late as 1828, he was still \$1000 out-of-pocket on volumes 7 through 9. William Cranch to Richard Peters, Jr. (July 18, 1823), Record, *supra* note 62, at 55.

¹¹⁵ See text at notes 107 *supra* and 136 *infra* concerning the effect of the War of 1812 on the Court's docket.

¹¹⁶ See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

¹¹⁷ Appointed by President Madison in 1811. See H. Carson, *supra* note 4, at 236.

¹¹⁸ "[T]he business of the courts of the District of Columbia had steadily increased . . . the duties of the Chief-Judge. These and other increasing engagements were doubtless influential in deciding [Cranch] to discontinue his connection with the reports of the Supreme Court." Hagner, *supra* note 86, at 94.

¹¹⁹ Henry Wheaton to Joseph Story (July 23, 1812), Wheaton Papers, *supra* note 1. The characterization of Pinkney is taken from G. Dunne, *Justice Joseph Story and the Rise of the Supreme Court* 148 (1970).

¹²⁰ Joseph Story to Henry Wheaton (Oct. 16, 1813), Wheaton Papers, *supra* note 1.

¹²¹ Joseph Story to William W. Story (his son) (Jan. 23, 1831), reprinted in W. Story, *The Miscellaneous Writings of Joseph Story* 18 (1852) [hereinafter cited as *Miscellaneous Writings*].

¹²² Lawrence, *Introductory Remarks by the Editor*, in H. Wheaton, *Elements of International Law* xiv-xv (W. Lawrence 6th ed. 1855).

¹²³ Story graduated in 1798. G. Dunne, *supra* note 119, at 25-26; see also *Miscellaneous Writings*, *supra* note 121, at 15-18. Wheaton received his degree in 1802 and also traveled extensively in England and on the Continent, studying European law, during 1805 and 1806. Lawrence, *supra* note 122, at xv-xxii.

¹²⁴ Story's lifelong deference to the principle of federal sovereignty, and particularly his judicial opinions once appointed to the Supreme Court of the United States, would seem to stamp him a Federalist *par excellence*. Yet, despite frequent deviations from the standard Jeffersonian line, including his notable ambivalence on the embargo issue, Story remained a member of the Republican party throughout his career in the Massachusetts legislature (1805-1808) and the United States House of Representatives (1808-1809). J. McClellan, *Joseph Story and the American Constitution* 17-39 (1971). As Story later explained to his son, "A Virginia Republican of that day, was very different from a Massachusetts Republican, and the anti-federal doctrines of the former state then had . . . very little support or influence in the latter State, notwithstanding a concurrence in political action upon general subjects." *Miscellaneous Writings*, *supra* note 121, at 27.

Meanwhile, in Providence, Wheaton had joined the local Tammany Society, then a Jeffersonian political organization, and in 1810 delivered a Fourth of July oration praised by Jefferson himself. Lawrence, *supra* note 122, at xxiii-xxiv; E. Baker, *Henry Wheaton 1785-1848*, at 16-17 (1937). Upon moving to New York City in 1812, Wheaton became editor of the *National Advocate*, a Tammany organ and Administration mouthpiece. E. Baker, *supra*, at 19-21.

¹²⁵ Story assumed the Dane Professorship, the terms of which required publication of lectures given under its auspices, in 1829. There followed in rapid succession Story's *Commentaries on the Law of Bailments* (1832), *Commentaries on the Constitution of the United States* (1833), *Commentaries on the Conflict of Laws* (1834), *Commentaries on Equity Jurisprudence* (1836), *Commentaries on Equity Pleadings* (1838), *Commentaries on the Law of Agency* (1839), *Commentaries on the Law of Partnership* (1841), *Commentaries on the Law of Bills of Exchange* (1843), and *Commentaries on the Law of Promissory Notes* (1845). Story's output subsequent to his Supreme Court appointment, but apart from the Dane Professorship, included unsigned articles on legal subjects in Francis Lieber's *Encyclopedia Americana*, legal essays in such periodicals as *North American Review* and *American Law Review*, a statutory compilation entitled *Laws of the United States* (1827), and the fourth American edition of Abbott's *Shipping* (1829). Dunne, *Joseph Story*, in 1 *The Justices of the United States Supreme Court 1789-1969*, at 442-43 (L. Friedman & F. Israel eds. 1969).

¹²⁶ J. McClellan, *supra* note 124, at 22-23, 26.

¹²⁷ Wheaton's two-volume treatise became, in its time and for a generation thereafter, the standard work on the subject, admired by other writers and widely translated into foreign tongues. Almost as well known, although not as frequently reprinted, was Wheaton's *History of the Law of Nations* (1845). E. Baker, *supra*

note 124, at 146-50, 288-94; Scott, *Henry Wheaton, 1785-1848*, in 3 *Great American Lawyers* 279-85 (W. Lewis ed. 1907).

¹²⁸ Lawrence, *supra* note 122, at xxiv.

¹²⁹ *Id.* at xxiv, xxix; E. Baker, *supra* note 124, at 18-19.

¹³⁰ For example, the *National Advocate*, July 30, 1813, at 2, col. 1, contained an editorial by Wheaton on the subject of impressed seamen and the right of search. See E. Baker, *supra* note 124, at 20.

¹³¹ Lawrence, *supra* note 122, at xxviii. Story anticipated the separationist tendencies of the New England states a full two years before the Hartford Convention met. Writing to a friend in the summer of 1812, he lamented: "I am thoroughly convinced that the leading Federalists meditate a severance of the Union, and that if the public opinion can be brought to support them, they will hazard a public avowal of it. . . . Gracious God!" Joseph Story to Nathaniel Williams (Aug. 24, 1812), reprinted in 1 W. Story, *Life and Letters of Joseph Story* 229 (1851) [hereinafter cited as *Life and Letters*].

¹³² Note, *Extension of Federal Jurisdiction Over State Canals*, 37 *Am. L. Rev.* 911, 916 (1903).

¹³³ *Black's Law Dictionary* 1080 (rev. 5th ed. 1979).

¹³⁴ *Id.* at 718. For a fuller description of the history of admiralty jurisdiction, see Story's opinion in *De Lovio v. Boit*, 7 F. Cas. 418 (C.C.D. Mass. 1815) (No. 3776), described by Justice Frankfurter as the "classical" American decision on the subject. *Swift & Co. Packers v. Compania Columbiana Del Caribe, S.A.*, 339 U.S. 684, 691 (1950).

¹³⁵ See *Appleton v. Crowninshield*, 8 Mass. 340 (1811); *Whitridge v. Norris*, 6 Mass. 125 (1809); *Cook v. Essex Fire & Marine Ins. Co.*, 6 Mass. 122 (1809); *Pearce v. Phillips*, 4 Mass. 672 (1808); *Cotel v. Hilliard*, 4 Mass. 664 (1808); *Appleton v. Crowninshield*, 3 Mass. 443 (1807); *Wellman v. Nutting*, 3 Mass. 434 (1807); *Stocker v. Harris*, 3 Mass. 409 (1807); *Cleveland v. Fettyplace*, 3 Mass. 392 (1807).

¹³⁶ 1 *Life and Letters*, *supra* note 131, at 223, 227.

¹³⁷ G. Haskins & H. Johnson, *supra* note 4, at 407.

¹³⁸ G. Dunne, *supra* note 119, at 100.

¹³⁹ *Id.* at 101.

¹⁴⁰ Lawrence, *supra* note 122, at xxix; Joseph Story to Nathaniel Williams (Aug. 3, 1813), reprinted in 1 *Life and Letters*, *supra* note 131, at 246.

¹⁴¹ 14 F. Cas. 27 (C.C.D. Mass. 1813) (No. 7575). The case arose from the continued presence of the British consul in Boston selling what were popularly known as "enemy licenses." The licenses protected American ships and cargoes on the high seas from becoming prize to British men-of-war (or privateers). Merely holding such a license had not heretofore been held to be an offense against the United States because, in the typical case, the voyage itself was argued to be intended for trade with neutrals. Story held that sailing on a voyage under the license of an enemy was a furtherance of its views and interests, and as such was an illegal act which, standing alone, subjected both ship and cargo to forfeiture as prize. The Supreme Court

subsequently upheld the decision in an opinion written by Story himself. 12 U.S. (8 Cranch) 181 (1814).

¹⁴² Judge W.P. Van Ness to Henry Wheaton (July 1, 1813), *Wheaton Papers*, *supra* note 1.

¹⁴³ Henry Wheaton to Levi Wheaton (his uncle and father-in-law) (July 21, 1813), *Wheaton Papers*, Hay Library, Brown University, Providence [collection hereinafter cited as *Hay Library Papers*].

¹⁴⁴ Scott, *supra* note 127, at 251.

¹⁴⁵ Lawrence, *supra* note 122, at xxxi-xxxii.

¹⁴⁶ Joseph Story to Henry Wheaton (Sept. 15, 1816), *Wheaton Papers*, *supra* note 1.

¹⁴⁷ Volume 6 of Cranch's *Reports*, covering the 1810 Term only, had appeared in early 1812. The publication of Cranch's volume 7, making available the decisions of the February 1812 and 1813 Terms, did not occur until September of 1816. The February 1811 Term produced no decisions. William Cushing, Story's predecessor, had died on September 13, 1810. Johnson, *William Cushing*, in 1 *The Justices of the Supreme Court of the United States 1789-1969*, at 70 (L. Friedman & F. Israel eds. 1969). Samuel Chase, who died on June 19, 1811, "was frequently ill with gout and unable to participate in . . . deliberations" during his last years on the Court, including its 1811 sitting. Dilliard, *Samuel Chase*, in 1 *The Justices of the United States Supreme Court 1789-1969*, at 197 (L. Friedman & F. Israel eds. 1969). Story and Gabriel Duvall, who eventually succeeded Chase, were not nominated until November 15, 1811, with confirmation following two days later. G. Haskins & H. Johnson, *supra* note 4, at 391-92. Thomas Todd and William Johnson did not attend the Court in 1811. The remaining Justices — Marshall, Bushrod Washington and Brockholst Livingston — met but did not constitute a quorum. Joseph Story to Richard Peters (July 26, 1830), *Peters Papers*, *supra* note 40.

¹⁴⁸ Forty-seven cases during the February 1813 Term, 46 cases during the 1814 Term, and 38 cases during the 1815 Term. G. Haskins & H. Johnson, *supra* note 4, at 652.

¹⁴⁹ See text at notes 108-111 *supra* (regarding the insufficiency of contemporary news accounts in publicizing the decisions of the Court).

¹⁵⁰ Richard Rush to Henry Wheaton (Apr. 6, 1815), *Wheaton Papers*, *supra* note 1.

¹⁵¹ Richard Rush's letter of April 8, 1815 to Henry Wheaton, responding to Wheaton's communication to Rush two days earlier, reported the Attorney General's "great pleasure in intimating to" other members of the bar "the wishes contained in your letter of the 6th instant" and Rush's own "desire . . . that they should be gratified." *Wheaton Papers*, *supra* note 1. See also Richard Rush to Henry Wheaton (Apr. 6, 1815), *Wheaton Papers*, *supra* note 1 (advising of Rush's "unit[y] in sentiment" with Wheaton that Cranch should be replaced).

¹⁵² Twenty cases in 1813, 29 in 1814, and 17 in 1815. G. Haskins & H. Johnson, *supra* note 4, at 656.

¹⁵³ *Miscellaneous Writings*, *supra* note 121, at 19.

¹⁵⁴ Act of Mar. 8, 1804, 4 Mass. *Perpetual Laws* 227 (Thomas & Andrews 1807).

¹⁵⁵ *American Reports and Reporters*, 22 *Am. Jurist*

& L. Mag. 111 (1839).

¹⁵⁶ Joseph Story to Henry Wheaton (Oct. 16, 1813), Wheaton Papers, *supra* note 1.

¹⁵⁷ Judge W.P. Van Ness to Henry Wheaton (July 1, 1813), Wheaton Papers, *supra* note 1 (requesting from Wheaton, who had argued the case, an outline of one of Story's early prize decisions on circuit in Rhode Island).

¹⁵⁸ Joseph Story to Judge Joseph Hopkinson (Feb. 10, 1840), Hopkinson Papers, Historical Society of Pennsylvania, Philadelphia.

¹⁵⁹ Joseph Story to Richard Rush (June 26, 1814), Rush Family Papers, Princeton University Library, Princeton, New Jersey [collection hereinafter cited as Rush Family Papers] (regretting "the extraordinary delay in the publication of our Reports").

¹⁶⁰ That would soon change. See text at notes 274-99 *infra* (concerning the origin of the Court's official authority to select its own Reporter). See also text at notes 320-31 *infra* (appointment of Richard Peters as Wheaton's successor).

¹⁶¹ Report of the Copyright Case of Wheaton vs. Peters 6 (1834), Columbia University Library, New York City, cited in E. Baker, *supra* note 124, at 27 n.5.

¹⁶² Record, *supra* note 62, at 2 (Wheaton's bill in equity); see also *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 614-15 (1834) (Wheaton's counsel asserting that the Justices "invited [Wheaton] to attend at his own expense and report the cases; and there was at least a tacit engagement on their part to furnish him with such notes or written opinions as they might draw up").

¹⁶³ 3 A. Beveridge, *supra* note 109, at 4.

¹⁶⁴ J. Young, *The Washington Community 1800-1828*, at 76-77 (1966); cf. White, *The Working Life of the Marshall Court, 1815-1835*, 70 Va. L. Rev. 1, 6 (1984) (noting that "the justices' correspondence suggests a more active social life" than Young describes).

¹⁶⁵ E.g., Henry Wheaton to Joseph Story (Dec. 19, 1816), Wheaton Papers, *supra* note 1 (first broaching the possibility); Joseph Story to Henry Wheaton (Dec. 23, 1816), Wheaton Papers, *supra* note 1 (responding that "[n]othing could be more pleasant to me than to chum with you this winter; & we will so arrange it at all events"); Henry Wheaton to Joseph Story (Dec. 25, 1817), Wheaton Papers, *supra* note 1 (thanking Story for suggesting that they continue the arrangement).

¹⁶⁶ E.g., *Gelston v. Hoyt*, 16 U.S. (3 Wheat.) 246 (1818). "I shall always be happy to have aids from your mind & your studies," Story wrote in thanking Wheaton for citations to support Story's opinion, then in draft form. "My own acquaintance with the civil & French codes is very imperfect, & I have little time to devote to a more thorough examination of them. But I shall always be grateful for the instruction which I receive from you on these subjects; & they cannot fail to be in the highest degree useful to me . . ." Joseph Story to Henry Wheaton (Nov. 13, 1817), Wheaton Papers, *supra* note 1.

¹⁶⁷ See Henry Wheaton to Joseph Story (Dec. 25, 1817), Wheaton Papers, *supra* note 1 (indicating which volumes Wheaton would carry with him for the 1818 Term and requesting Story to extract cases from others

that "Lord knows . . . will not be found in Washington"). At a later date, Wheaton collected funds from members of the bar to establish a Supreme Court library (although nothing came of the project until Peters' time). Richard Peters, Jr., to Henry Wheaton (Apr. 30, 1827), Peters Papers, *supra* note 40.

¹⁶⁸ For discussion of Story's active collaboration with Wheaton in the preparation of notes for his *Reports*, see text at notes 219-47 *infra*.

¹⁶⁹ See Bushrod Washington to Henry Wheaton (May 24, 1817), Wheaton Papers, *supra* note 1.

¹⁷⁰ Washington had been led into the error, he noted, "by depending upon an abridgment for the want of the full reports of cases." Bushrod Washington to Henry Wheaton (May 24, 1817), Wheaton Papers, *supra* note 1. The occurrence provides a further and ironic illustration of the deficiencies of law reporting during the period. The defective abridgment in question had been of Washington's own circuit court opinion in *Thelusson*, which he had meant to deliver *verbatim* in the Supreme Court! 15 U.S. (2 Wheat.) at 426 n.(h).

¹⁷¹ Bushrod Washington to Henry Wheaton (May 24, 1817), Wheaton Papers, *supra* note 1.

¹⁷² Justice William Johnson seems always to have been Wheaton's mortal enemy, perhaps because he was Story's also. See Johnson's attack on Wheaton's reporting, and Wheaton's defense, in *Ramsay v. Allegre*, 25 U.S. (12 Wheat.) 611, 614, 640 n.(a) (1827) (concurring opinion) (discussed in text at notes 209-13 *infra*).

¹⁷³ The most important decision of the Term, *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816) (scope of federal appellate jurisdiction), had been handed down on the preceding day.

¹⁷⁴ See Henry Wheaton to Joseph Story (Dec. 19, 1816), Wheaton Papers, *supra* note 1.

¹⁷⁵ 14 U.S. (1 Wheat.) iii, iv (1816) (Wheaton's preface). See text at notes 214-53 *infra* (further discussion of the scholarly notes to Wheaton's *Reports*).

¹⁷⁶ Joseph Story to Henry Wheaton (Apr. 11, 1816), Wheaton Papers, *supra* note 1 (complaining about coverage of Johnson's views in the *Daily National Intelligencer* and urging Wheaton to prepare a copy of Story's opinion for publication in the same journal).

¹⁷⁷ Henry Wheaton to Joseph Story (Apr. 19, 1816), Wheaton Papers, *supra* note 1.

¹⁷⁸ E.g., Henry Wheaton to Joseph Story (Apr. 19 & May 21, 1816), Wheaton Papers, *supra* note 1; Joseph Story to Henry Wheaton (May 25 & July 28, 1816), Wheaton Papers, *supra* note 1.

¹⁷⁹ E.g., Henry Wheaton to John Sergeant (Apr. 20, 1816), Sergeant Papers, Historical Society of Pennsylvania, Philadelphia [collection hereinafter cited as Sergeant Papers]; Henry Wheaton to Joseph Story (May 21, 1816), Wheaton Papers, *supra* note 1. See text at notes 274-99 *infra* (further discussion of the Reporter's Bill).

¹⁸⁰ Wheaton tried both New York, his home base, and Boston, where Story interceded unsuccessfully for him, before turning to Philadelphia. Henry Wheaton to Joseph Story (May 21, 1816), Wheaton Papers, *supra* note 1; Joseph Story to Henry Wheaton (May 23,

1816), Wheaton Papers, *supra* note 1.

¹⁸¹ Peter Du Ponceau to Henry Wheaton (June 3, 1816), Wheaton Papers, *supra* note 1.

¹⁸² See Joseph Story to Henry Wheaton (Oct. 16, 1813), Wheaton Papers, *supra* note 1 (decrying the timidity of Boston booksellers in printing law books and entreating Wheaton to locate a publisher in New York for the first volume of Story's circuit court opinions, collected by John Gallison); Henry Wheaton to Joseph Story (Sept. 2, 1815), Wheaton Papers, *supra* note 1 (reciting Wheaton's efforts to obtain subscriptions for the same volume); Joseph Story to Henry Wheaton (Sept. 5, 1815), Wheaton Papers, *supra* note 1 (lamenting that sales might prove so poor as to discourage publication of a second volume of Story's opinions on circuit).

Perhaps nothing better underscores the limited commercial appeal of court reports during the period than Story's decision to help subsidize the publication of Gallison's first volume, in concert with District Judge John Davis and their clerk, William Shaw. Gallison, who supplied only his labor, received in return both "the copy right & an equal share of all profits." J. Gallison, manuscript diary (July 4, 1815), *cited in* G. Dunne, *supra* note 119, at 129 n.25. This source is also cited by Professor G. Edward White of the University of Virginia School of Law in *The Reporters: Henry Wheaton, Richard Peters and Wheaton v. Peters*, an unpublished chapter in his forthcoming Holmes Devise volume on the Marshall Court between 1815 and 1835. The author gratefully acknowledges the opportunity to review a draft of Professor White's manuscript prior to the publication of this address, which Professor White likewise reviewed in another version.

¹⁸³ Peter Du Ponceau to Henry Wheaton (June 6, 1816), Wheaton Papers, *supra* note 1.

¹⁸⁴ Wheaton never again permitted himself to be parted from his copyrights. For a summary of his later contracts with publishers conveying printing rights only, see text at notes 266-71 *infra*.

¹⁸⁵ Contract between Henry Wheaton and Mathew Carey (June 17, 1816), Wheaton Papers, *supra* note 1.

¹⁸⁶ *Id.*

¹⁸⁷ 14 U.S. (1 Wheat.) ii (1816). Wheaton's correspondence, however, indicates that the work was not generally available to the public for at least another three weeks. *E.g.*, Charles J. Ingersoll to Henry Wheaton (Jan. 8, 1817), Wheaton Papers, *supra* note 1.

¹⁸⁸ Henry Wheaton to Joseph Story (Sept. 5, 1816), Wheaton Papers, *supra* note 1.

¹⁸⁹ Henry Wheaton to Joseph Story (Dec. 19, 1816), Wheaton Papers, *supra* note 1.

¹⁹⁰ Richard Rush to Henry Wheaton (June 29, Oct. 17 & Nov. 2, 1816), Wheaton Papers, *supra* note 1. Rush's fears concerning Cranch's publication schedule proved to be well grounded, judging by the copyright notices in the volumes themselves. Volume 7 of Cranch's *Reports* appeared on September 11, 1816, and volume 8 on November 5, 1816, both prior to Wheaton's first volume, which appeared on December 20, 1816; volume 9 of Cranch's *Reports*, however, did not appear until February 10, 1817.

¹⁹¹ Joseph Story to Henry Wheaton (Dec. 14, 1816),

Wheaton Papers, *supra* note 1 (quoting Washington).

¹⁹² Joseph Story to Henry Wheaton (Dec. 23, 1816), Wheaton Papers, *supra* note 1.

¹⁹³ Volume 4 of Dallas' *Reports*, not published until 1807, contained cases dating back to the August 1799 Term.

¹⁹⁴ The last decision reported in volume 6 of Cranch's *Reports* had been handed down during the February 1810 Term. Volume 7 did not appear until late 1816.

¹⁹⁵ Dallas' third volume had reported the February 1799 Term (and nine other Terms dating back to February of 1794) before the close of the calendar year, but probably not before the Court returned for its August 1799 Term.

¹⁹⁶ Volume 2 of Wheaton's *Reports* appeared on September 1, 1817; volume 3, on August 19, 1818; volume 4, on August 26, 1819; volume 5, on July 11, 1820; volume 6, on July 16, 1821; volume 7, on July 20, 1822; volume 8, on October 10, 1823; volume 9, on September 21, 1824; volume 10, on June 21, 1825; volume 11, on July 20, 1826; and volume 12, on June 25, 1827. Record, *supra* note 68, at 27-39. While it is true that the Reporter's Bill, discussed in the text at notes 274-99 *infra*, provided Wheaton a further incentive for the early publication of his *Reports*, this does not detract from his previously demonstrated determination and capacity to accomplish the same result as a matter of professional honor.

¹⁹⁷ 14 U.S. (1 Wheat.) iii (1816).

¹⁹⁸ Henry Wheaton to Joseph Story (June 6, 1817), Wheaton Papers, *supra* note 1. Ostensibly, Webster had spoken not in defense of his own efforts, but to vindicate the reputation of Samuel Dexter, a popular member of the Supreme Court bar, who died following the 1816 Term.

¹⁹⁹ *Id.*

²⁰⁰ 14 U.S. (1 Wheat.) iii (1816).

²⁰¹ On occasion, he also worked from notes of arguments taken down by members of the Court. *See, e.g.*, Robert G. Harper to Henry Wheaton (Sept. 28, 1823), Wheaton Papers, *supra* note 1 (use of Marshall's argument notes).

²⁰² Richard Rush to Henry Wheaton (May 28, 1817), Wheaton Papers, *supra* note 1; *see also* Richard Rush to Henry Wheaton (July 2, 1817), Wheaton Papers, *supra* note 1 ("making it appear as your work").

²⁰³ To cite but three examples from the February 1818 Term: G.W. Campbell to Henry Wheaton (Mar. 28, 1818), Wheaton Papers, *supra* note 1 (providing summary of argument and inviting Wheaton to "correct all errors, & supply all deficiencies both in arrangement & otherwise"); Daniel Webster to Henry Wheaton (Apr. 1, 1818), Wheaton Papers, *supra* note 1 ("Cut & carve [my argument]. . . at your own pleasure"); and William Wirt to Henry Wheaton (June 3, 1818), Wheaton Papers, *supra* note 1 (regretting inability to provide sketch of argument but noting that "I am safer in your hands than in my own, on points of law").

²⁰⁴ The notebooks are preserved in the Wheaton Papers, *supra* note 1.

²⁰⁵ 14 U.S. (1 Wheat.) iv (1816).

²⁰⁶ Story did inquire at one point why two opinions of Chief Justice Marshall had been omitted from Wheaton's second volume. Joseph Story to Henry Wheaton (Sept. 4, 1817), Wheaton Papers, *supra* note 1. Wheaton replied that the opinions in question "contain[ed] not a grain of law, and [were] uninteresting in their details." Henry Wheaton to Joseph Story (Sept. 7, 1817), Wheaton Papers, *supra* note 1. Story let the matter drop.

²⁰⁷ Henry Wheaton to Joseph Story (Aug. 16, 1821), Story Papers, University of Michigan Microfilm, Ann Arbor, Mich.

²⁰⁸ Joseph Story to Henry Wheaton (Jan. 8, 1817), Wheaton Papers, *supra* note 1.

²⁰⁹ 25 U.S. (12 Wheat.) 611, 614 (1827).

²¹⁰ 17 U.S. (4 Wheat.) 438 (1819).

²¹¹ See, e.g., G. Dunne, *supra* note 119, at 263-65. Story's brief opinion for the Court in *The General Smith* had begun with an unsupported dictum of considerable consequence: "No doubt is entertained by this Court, that the Admiralty rightfully possesses a general jurisdiction in cases of material men; and if this had been a suit *in personam*, there would not have been any hesitation in sustaining the jurisdiction of the District Court." 17 U.S. (4 Wheat.) at 443 (emphasis added). The only apparent justification for Story's dictum had been Pinkney's admission, as reported by Wheaton, of the federal courts' "general jurisdiction . . . over suits by material men *in personam* and *in rem*, and over other maritime contracts." 17 U.S. (4 Wheat.) at 441 (emphasis in original). Wheaton's headnotes in *The General Smith* reported Story's dictum, founded on Pinkney's reported concession, as a leading principle of the case, 17 U.S. (4 Wheat.) at 441-42; and, by the argument in *Ramsay v. Allegre*, Pinkney's admission had evolved into a full-blown precedent cited by counsel for the material men. 25 U.S. (12 Wheat.) at 614. In his *Ramsay* concurrence, an outraged Johnson asserted that Pinkney, the leading admiralty lawyer of the day, never in fact made the sweeping concession attributed to him by Wheaton, 25 U.S. (12 Wheat.) at 636-37 — plainly mindful that the purported admission did, however, parallel and reinforce the views of Wheaton's mentor, Story, as expressed in *De Lovio v. Boit*, 7 F. Cas. 418 (C.C.D. Mass. 1815) (No. 3776).

²¹² 25 U.S. (12 Wheat.) at 640-43 n.(a). "I left Judge Johnson my compliments at the end of the Reports." Henry Wheaton to Daniel Webster (Nov. 20, 1827), cited in G. Dunne, *supra* note 119, at 265 n.16.

²¹³ 25 U.S. (12 Wheat.) at 643. In fact, Wheaton's own manuscript notebook of decisions and arguments during the 1819 Term suggests that there may have been more substance to Johnson's charge than perhaps Wheaton remembered, or Johnson could have known, in 1827. The notebooks contain but four pages of argument (without any citations to authority) in *The General Smith*, together with two notations in Wheaton's hand. The first indicates his original intention not to report the argument at all. The second, entered at a later date, states in full:

Mem. Prepare a short argument in this case as it ought to have been argued — giving all the

authorities. They will be found principally in 2 *Gallis*. [i.e., the volume of Story's circuit court reports containing his decision in *De Lovio v. Boit*].

N.B. Pinkney admit the Adm. jurisdiction to its full extent.

H. Wheaton, *Manuscript Notebook of Decisions and Arguments During the 1819 Term of the Supreme Court of the United States*, Wheaton Papers, *supra* note 1 (emphasis in original). The import of the *nota bene* reminder, in particular, is difficult to determine. Clearly, Wheaton found it necessary to reconstruct Pinkney's argument, supplying citations, after the fact. In presenting the argument "as it ought to have been argued," Wheaton may well have been motivated by respect for Pinkney (whose posthumous biography he prepared in 1826), by a scholarly compulsion for completeness, or by misplaced zeal to assist Story in extending the federal admiralty jurisdiction. Wheaton's intention concerning Pinkney's purported admission is still less clear. At best, Wheaton did no more in his report of the case than to emphasize remarks of counsel that the Court itself had obviously found significant; at worst, he manufactured a concession so plausible that no one, including Pinkney himself, detected it for almost a decade after the event.

²¹⁴ Charles J. Ingersoll to Henry Wheaton (Jan. 1, 1817), Wheaton Papers, *supra* note 1.

²¹⁵ Henry Wheaton to Joseph Story (Dec. 19, 1816), Wheaton Papers, *supra* note 1.

²¹⁶ 14 U.S. (1 Wheat.) iv (1816).

²¹⁷ 14 U.S. (1 Wheat.) at v-vi (1816) (quoting Lord Bacon).

²¹⁸ Volume 1 contains 46 pages of appendix notes alone (nearly nine percent of the total 534 pages); volume 2, 87 pages; volume 3, 27 pages; volume 4, 57 pages; volume 5, 156 pages; volume 6, 71 pages; volume 8, 22 pages; and volume 10, 50 pages.

²¹⁹ Joseph Story to Henry Wheaton (Nov. 13, 1817), Wheaton Papers, *supra* note 1.

²²⁰ Joseph Story to Henry Wheaton (Apr. 11, 1816), Wheaton Papers, *supra* note 1.

²²¹ 14 U.S. (1 Wheat.) 494 (1816).

²²² 14 U.S. (1 Wheat.) 507 (1816). The remaining six-page note, consisting entirely of an excerpt from other law reports, elucidated the land law of Kentucky.

²²³ E.g., Henry Wheaton to Joseph Story (Apr. 19, 1816), Wheaton Papers, *supra* note 1, and Joseph Story to Henry Wheaton (May 25, 1816), Wheaton Papers, *supra* note 1 (both concerning the right of a subject of a belligerent state, domiciled in a neutral country, to trade with the enemy).

²²⁴ Joseph Story to Henry Wheaton (July 28, 1816), Wheaton Papers, *supra* note 1.

²²⁵ Henry Wheaton to Joseph Story (Sept. 5, 1816), Wheaton Papers, *supra* note 1.

²²⁶ Joseph Story to Henry Wheaton (Sept. 15, 1816), Wheaton Papers, *supra* note 1 (suggestions regarding scope and authorities); Joseph Story to Henry Wheaton (Oct. 18, 1816), Wheaton Papers, *supra* note 1 (marking up Wheaton's draft). The Rule of 1756, so named because it had been first applied during the Seven Years' War (1756-1763), concerned the con-

fiscation in wartime of neutral ships and cargo intended for the enemy.

²²⁷ Joseph Story to Henry Wheaton (Jan. 8, 1817), Wheaton Papers, *supra* note 1 (same letter quoted) (emphasis in original).

²²⁸ Henry Wheaton to Joseph Story (Apr. 17, 1817), Wheaton Papers, *supra* note 1. Three of Story's notes appeared in explanation of *Duval v. Craig*, 15 U.S. (2 Wheat.) 45, 56 n.(a), 60 n.(b), 62 n.(c) (1817), and one in connection with *Liter v. Green*, 15 U.S. (2 Wheat.) 306, 311 n.(a) (1817).

²²⁹ Henry Wheaton to Joseph Story (May 27, 1817), Wheaton Papers, *supra* note 1.

²³⁰ 15 U.S. (2 Wheat.) app. n.1 (1817). Story's authorship of this note was not acknowledged in the *Reports*, however. See text at notes 250-53 *infra*.

²³¹ See *Lanusse v. Barker*, 16 U.S. (3 Wheat.) 101, 148 n.(a) (1818), *Robinson v. Campbell*, 16 U.S. (3 Wheat.) 212, 224 n.(a) (1818). *Robinson* also contains a second marginal note, 16 U.S. (3 Wheat.) at 219, for which Story apparently was not responsible. See 1 Life and Letters, *supra* note 131, at 283.

²³² 16 U.S. (3 Wheat.) app. n.(ii) (1818).

²³³ Joseph Story to Henry Wheaton (June 7, 1818), Wheaton Papers, *supra* note 1.

²³⁴ 17 U.S. (4 Wheat.), app. n.(i) (1819).

²³⁵ The decisions reported in volume 4 of Wheaton's *Reports* included *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819) (sanctity of contract), *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (Bank of the United States), and *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819) (federal bankruptcy power). "As this volume will contain so much good matter in the Opinions of the Court & the arguments of Counsel, I do not think it worth while to put [in] many Notes." Henry Wheaton to Joseph Story (May 13, 1819), Wheaton Papers, *supra* note 1.

²³⁶ Henry Wheaton to Joseph Story (Mar. 24, 1819), Wheaton Papers, *supra* note 1.

²³⁷ Henry Wheaton to Joseph Story (June 14, 1819), Wheaton Papers, *supra* note 1.

²³⁸ Henry Wheaton to Joseph Story (July 25, 1819), Wheaton Papers, *supra* note 1. Marshall would surely have rejoiced at his omission from the appendix, had he known, for the *Union* essays appeared in a garbled form which Marshall himself found "nauseous to the intellectual palate." John Marshall to Bushrod Washington (May 6, 1819), Marshall Papers, Library of Congress, Washington, D.C. For the full and engrossing story of Marshall's essays on *McCulloch*, see Professor Gerald Gunther's fascinating article, *John Marshall, "A Friend of the Constitution": In Defense and Elaboration of McCulloch v. Maryland*, in 21 Stan. L. Rev. 449 (1969).

²³⁹ *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 163 n.(a) (1820).

²⁴⁰ 16 U.S. (3 Wheat.) 336 (1818).

²⁴¹ Henry Wheaton to Joseph Story (July 2, 1820), Wheaton Papers, *supra* note 1.

²⁴² See, e.g., text accompanying note 353 *infra* (concerning the efforts of Wheaton's successor to bolster the sales of his own works by playing on the

profession's distaste for Wheaton's prolixity).

²⁴³ As early as volume 3 of Wheaton's *Reports*, Story had begun to note the difficulty of complying with Wheaton's numerous requests, owing to the press of family matters and other business. See Henry Wheaton to Joseph Story (May 8, 1818), Wheaton Papers, *supra* note 1. More recently, fearing a thin fifth volume, Wheaton had pressed Story for "two or three Notes which you may hang to any of the cases," only to find in the end that he had more matter than he could print. Henry Wheaton to Joseph Story (Apr. 20 & July 2, 1820), Wheaton Papers, *supra* note 1.

²⁴⁴ H. Wheaton, *A Digest of the Decisions of the Supreme Court of the United States*, from its establishment in 1789, to February term, 1820, including the Cases decided in the Continental Court of Appeals in Prize Causes, during the war of the Revolution (1821). The title of the work reflects Wheaton and Story's continued devotion to building up the law of admiralty.

²⁴⁵ See Henry Wheaton to Joseph Story (Aug. 10, 1818), Wheaton Papers, *supra* note 1 (acknowledging Story's "proposal" for the *Digest of Decisions*, agreeing to "grapple with the task" and accepting Story's "kind offer" of assistance). Story's far-sighted love of scholarship even led him to suggest that the work include a table "of the cases which have been doubted, overruled, explained or specially commented on." Joseph Story to Henry Wheaton (Aug. 12, 1818), Wheaton Papers, *supra* note 1. No such table appeared in the *Digest of Decisions*, when published.

²⁴⁶ Henry Wheaton to Joseph Story (Aug. 10, 1818), Wheaton Papers, *supra* note 1 (stating also Wheaton's preference that the labor of preparing the work be divided between them by "titles," i.e., subject matter, rather than by volumes of the Court's *Reports* as Story had suggested).

²⁴⁷ E.g., Henry Wheaton to Joseph Story (Oct. 10, 1820), Wheaton Papers, *supra* note 1 (hoping to receive Story's overdue titles by the end of the week, while acknowledging that "[b]eggars must not be choosers, either as to time, or anything else").

²⁴⁸ Of his 444 pages of appendix notes to date, 378 had been devoted to admiralty matters — almost 85!

²⁴⁹ See text at notes 260-301 *infra*.

²⁵⁰ The latter figure is derived from 1 Life and Letters, *supra* note 131, at 282-83. Story also prepared nine titles for Wheaton's *Digest of Decisions*, discussed in notes 244-47 *supra*. *Id.* at 292-93.

²⁵¹ *Id.* at 283 (quoting Story's entry of June 12, 1819).

²⁵² "I blush to see," he confided to Story, "that Chief Justice Spencer [of New York] has very much praised Mr. Wheaton's note on guaranties to *Lanusse v. Barker* in my [3]d vol. You know how much of that praise I deserve." Henry Wheaton to Joseph Story (June 14, 1819), Wheaton Papers, *supra* note 1 (emphasis in original).

²⁵³ 1 Life and Letters, *supra* note 131, at 283-84.

²⁵⁴ In fairness to Wheaton, it must be remembered that he personally had authored three-quarters of the appendix notes, and virtually all of the marginal notes.

²⁵⁵ William Pinkney to Henry Wheaton (Sept. 3, 1818), Wheaton Papers, *supra* note 1.

²⁵⁶ Justice Smith Thompson's 1818 purchase of volumes 7, 8 and 9 of Cranch's *Reports* cost him \$16, while Wheaton's second volume alone cost \$6.50. Invoice of W. Gould to Smith Thompson (Feb. 3, 1818), Gilbert Livingston Papers, New York Public Library, New York City.

²⁵⁷ W.F. Gray to Phillip Barbour (Nov. 29, 1826), Ambler Family Papers, University of Virginia, Charlottesville, Va.

²⁵⁸ Joseph Story to Richard Peters, Jr. (June 26, 1828), Peters Papers, *supra* note 40 (complaining of the high cost of both Wheaton's and Cranch's *Reports*); see also Robert Donaldson to Henry Wheaton (Aug. 11, 1828), Wheaton Papers, *supra* note 1 (publisher of volumes 2 through 12 of *Reports* reminding Wheaton of continuing slow sales of *Reports* and *Digest of Decisions*).

²⁵⁹ Wheaton considered early, favorable reviews of the *Reports* to be crucial to the success of his undertaking. They were not forthcoming. Story ascribed the absence of such reviews to "the indolence & want of professional esprit de corps among the members of the bar . . . It is strange," he wrote following the publication of volume 2 of Wheaton's *Reports*, "that not one learned and eloquent advocate has as yet volunteered to commend your works to the public as they deserve." Joseph Story to Henry Wheaton (Dec. 21, 1817), Wheaton Papers, *supra* note 1.

Wheaton's first response to the bar's dereliction in this regard was an abortive attempt at backscratching: he pressed Story to encourage his friend, Webster, to place an appropriately laudatory assessment of volume 2 of the *Reports* in Boston's *North American Review*, promising in return to ensure that the reports of Story's circuit court decisions would be "properly noticed" in New York. Henry Wheaton to Joseph Story (Aug. 1 & Nov. 6, 1817), Wheaton Papers, *supra* note 1. Story tried to deflect this ploy tactfully with the suggestion that Webster might not be the ideal reviewer for the volume in question: "probably he feels a little unpleasant from losing nearly all the causes which he argued" during the 1817 Term. Joseph Story to Henry Wheaton (Sept. 4, 1817), Wheaton Papers, *supra* note 1; see also Joseph Story to Henry Wheaton (Nov. 13, 1817), Wheaton Papers, *supra* note 1 (noting that "petty jealousy, local feeling, & narrow common law illiberality" in Massachusetts might indefinitely postpone a proper estimation of Wheaton's merits there).

Not satisfied, Wheaton proposed that Story confidentially prepare the desired review, omitting only a critical analysis of the doctrine and style of the opinions. These, Wheaton pledged to provide himself, "as I am willing to take my share of the sin of this *pious fraud*." Henry Wheaton to Joseph Story (Nov. 30, 1817), Wheaton Papers, *supra* note 1 (emphasis in original). Story pleaded the press of family and other matters in declining. Joseph Story to Henry Wheaton (Dec. 21, 1817), Wheaton Papers, *supra* note 1.

Ultimately, the press did notice Wheaton's *Reports* substantially in the manner he had hoped. Webster's review of volume 3, for example, while noting such blemishes as tediously long reports of cases turning primarily on evidentiary matters, praised Wheaton's

notes as providing "an enlightened adaptation of the case reported, of the principles and rules of other systems of jurisprudence, or a connected view of decisions on the principal points, after exhibiting the subject with great perspicuity, and in a manner to be highly useful to the reader." 8 N. Am. Rev. 63, 71 (1818). And the same publication's April 1824 number commended Wheaton as "a faithful and accomplished reporter" whose current volume "indicates the same care and industry, the same happy talent for discriminating the leading points in the evidence and the argument of counsel, and the same skill in recording and illustrating them, which have characterized the preceding volumes of his reports." Untitled review, 18 N. Am. Rev. 371, 372 (1824).

²⁶⁰ Henry Wheaton to Jonathan Russell (May 11, 1816), Wheaton Papers, *supra* note 1.

²⁶¹ Charles J. Ingersoll to Henry Wheaton (Jan. 8, 1817), Wheaton Papers, *supra* note 1.

²⁶² Henry Wheaton to Jonathan Russell (Nov. 28, 1816), Wheaton Papers, *supra* note 1.

²⁶³ Henry Wheaton to Jonathan Russell (Oct. 1, 1819), Wheaton Papers, *supra* note 1.

²⁶⁴ See text accompanying notes 272-99 *infra*.

²⁶⁵ Authors of more popular books sometimes did. Chief Justice Marshall's biography of George Washington, for example, brought the author and the copyright holder, Bushrod Washington, a total of one dollar per copy sold. Bushrod Washington to Elizabeth Hamilton (Dec. 14, 1819), Bartholf Collection of Hamilton and McLane Family Papers, Library of Congress, Washington, D.C. [collection hereinafter cited as Bartholf Collection] (advising the widow of Alexander Hamilton regarding a contract for the publication of Hamilton's biography by Joseph Hopkinson). Wheaton apparently lacked the clout to obtain so favorable an arrangement.

²⁶⁶ Contract between Henry Wheaton and Mathew Carey, *supra* note 185. Wheaton's first volume sold so badly that, five years later, Carey still had 200 copies lying about. Record, *supra* note 62, at 23-24 (evidence of H. C. Carey). In 1821, Carey assigned his interest under the contract (and sold the remaining 200 copies) to Robert Donaldson of New York, Wheaton's publisher for volumes 2 through 12. Wheaton, of course, took nothing by the assignment. Assignment by Mathew Carey & Sons to Robert Donaldson (Sept. 7, 1821), *reprinted in* Record, *supra* note 62, at 23. All of Wheaton's contracts for the publication of the remaining volumes of his *Reports* are likewise reproduced in the Record.

²⁶⁷ Memorandum of Agreement between Cornelius S. Van Winkle and Charles Wiley, two New York printers, and Wheaton (Apr. 28, 1817), *reprinted in* Record, *supra* note 62, at 28. This time, Wheaton retained his copyright. He granted Van Winkle and Wiley only an exclusive license to print 1000 copies of his second volume, plus a right of first refusal on the second edition, if any. On the day following their contract with Wheaton, Van Winkle and Wiley conveyed all rights thereunder to Robert Donaldson. Memorandum of Agreement between Cornelius S. Van Winkle and Charles Wiley, and Robert Donaldson (Apr. 29,

1817), reprinted in *Record*, *supra* note 62, at 29. Apparently, Donaldson acted as Wheaton's publisher, but Van Winkle and Wiley did the actual printing. In 1827, Donaldson purchased from Wheaton for \$250 the right to print a second edition of volume 2. Memorandum of Agreement between Henry Wheaton and Robert Donaldson (June 23, 1827), reprinted in *Record*, *supra* note 62, at 29.

²⁶⁸ See text at notes 180-86 *supra*. Accordingly, Wheaton's claims in his lawsuit against Peters involved only volumes 2 through 12.

²⁶⁹ The 1819 Term included *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 578 (1819) (sanctity of contract), *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (Bank of the United States), and *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819) (federal bankruptcy power). The 1824 Term featured *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) (Eleventh Amendment), and *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824) (Eleventh Amendment). Because the contracts between Wheaton and his publishers were generally not entered into prior to the Terms reported, the contract price could easily be made to reflect anticipated demand for each volume.

²⁷⁰ Contract between Henry Wheaton and Robert Donaldson (Aug. 29, 1820), Wheaton Papers, *supra* note 1. Wheaton offered to recompense Story, "in good law books," for his part in preparing the *Digest*. Henry Wheaton to Joseph Story (Oct. 11, 1819), Wheaton Papers, *supra* note 1. Whether Story accepted is unknown.

²⁷¹ By contrast, John Marshall's *The Life of George Washington* generated at least \$11,000. Bushrod Washington to Elizabeth Hamilton (Dec. 14, 1819), Bartholf Collection, *supra* note 265.

²⁷² Wheaton's first Term as Reporter, in 1816, brought only one retainer, and his second Term, in 1817, none. The 1818 Term, affording him three opportunities to appear before the Court, brightened his spirits somewhat, but he was retained only twice in 1819, and not at all in 1820. He argued seven causes in 1821; none in 1822; two in 1823; one each in 1824 and 1825; two in 1826; and seven again during his swan song as Reporter during the January 1827 Term.

(Beginning in 1827, sittings of the Court convened on the second Monday in January. Act of May 4, 1826, ch. 37, § 4 Stat. 160.)

²⁷³ Henry Wheaton to John Sergeant (Apr. 20, 1816), Sergeant Papers, *supra* note 179.

²⁷⁴ Henry Wheaton to Charles J. Ingersoll (Jan. 6, 1817), Charles J. Ingersoll Papers, Historical Society of Pennsylvania, Philadelphia [collection hereinafter cited as Ingersoll Papers].

²⁷⁵ See text at notes 153-59 *supra*.

²⁷⁶ The development of reporter systems in these and the remaining states of the Union during the early years of the nineteenth century is discussed in detail in *American Reports and Reporters*, 22 Am. Jurist & L. Mag. 108 (1839), edited by the redoubtable Charles Sumner (himself the Reporter for Story's First Circuit from 1830-39), and in a series of articles of the same title appearing in the *Albany Law Journal* between

1871 and 1872.

²⁷⁷ Joseph Story to Richard Rush (June 26, 1814), Rush Family Papers, *supra* note 159. Story had at first written that "the Supreme Court" should appoint the Reporter; but perhaps, on reflection, "the president" seemed a more politic suggestion.

²⁷⁸ 29 Annals of Cong. 142 (1816).

²⁷⁹ S. 37, 14th Cong., 1st Sess. (1816).

²⁸⁰ Henry Wheaton to Jonathan Russell (Jan. 4, 1817), Wheaton Papers, *supra* note 1.

²⁸¹ 29 Annals of Cong. 181 (1816). S. 37 was amended by S. 57 on March 8, 1816 and, as amended, passed by the Senate and sent to the House on March 12, 1816. 29 Annals of Cong. 184, 1202 (1816). The Senate's amendments also prescribed the various officers of government to whom the 50 copies should be distributed by the Secretary of State. S. 57, 14th Cong., 1st Sess. (1816).

²⁸² E.g., Henry Wheaton to John Sergeant (Apr. 20, 1816), Sergeant Papers, *supra* note 179 (fearing that the bill "may go over to the next Session if it is not attended to" and urging "the importance of a regular publication" of the Court's decisions); Joseph Story to Henry Wheaton (Apr. 11, 1816), Wheaton Papers, *supra* note 1 (suggesting that Wheaton place an article in the *National Advocate* supporting both the Reporter's Bill and a companion measure to raise the Justices' salaries, on grounds that "both of their objects are so purely national . . . that they ought to be put upon grounds of public policy"). Story's letter, discussed in text at notes 176-78 *supra*, also lamented that the appearance in the *Daily National Intelligencer* of Justice Johnson's concurrence in *Martin v. Hunter's Lessee*, rather than Story's opinion for the Court, might prejudice both measures in the House (where indeed they eventually expired from inattention). Clearly, the Court did not suppress Story's opinion. Professor William Crosskey's bizarre conjecture to the contrary, seeking an explanation for the initial failure of the Reporter's Bill in supposed nationalistic manipulations of the press by the *Martin* majority, is thus patently incorrect. 2 W. Crosskey, *Politics and the Constitution in the History of the United States*, app. G, at 1243-45 (1953).

²⁸³ 29 Annals of Cong. 1458 (1816).

²⁸⁴ Henry Wheaton to Joseph Story (May 21, 1816), Wheaton Papers, *supra* note 1.

²⁸⁵ John C. Calhoun to Henry Wheaton (May 18, 1816), Wheaton Papers, *supra* note 1.

²⁸⁶ Henry Wheaton to John Taylor (Dec. 25, 1816), Wheaton Papers, *supra* note 1. Even Attorney General Rush came to Wheaton's aid, placing in the *Daily National Intelligencer* an anonymous article favoring the Bill. Richard Rush to Henry Wheaton (Dec. 13, 1816), Wheaton Papers, *supra* note 1.

²⁸⁷ Henry Wheaton to John Taylor (Dec. 25, 1816), Wheaton Papers, *supra* note 1.

²⁸⁸ 30 Annals of Cong. 366-67 (1816).

²⁸⁹ Joseph Story to Henry Wheaton (Jan. 8, 1817), Wheaton Papers, *supra* note 1.

²⁹⁰ See William Hunter to Henry Wheaton (Dec. 25, 1816), Wheaton Papers, *supra* note 1.

²⁹¹ Henry Wheaton to Charles J. Ingersoll (Jan. 6, 1817), Ingersoll Papers, *supra* note 274.

²⁹² *Id.*; see also Henry Wheaton to Jonathan Russell (Jan. 4, 1817), Wheaton Papers, *supra* note 1.

²⁹³ John Marshall to Dudley Chase (Feb. 7, 1817), reprinted in 2 W. Crosskey, *supra* note 282, app. G, at 1246 (Marshall's reply).

²⁹⁴ *Id.* Implausibly, Crosskey characterizes Marshall's position here as a retreat from, and "utterly impossible to reconcile with," his earlier view that the Supreme Court's decisions were binding on every other court, federal or state. *Id.* at 1245.

²⁹⁵ 30 Annals of Cong. 132, 193, 1044 (1817). Act of Mar. 3, 1817, ch. 63, § 1, 3 Stat. 376.

Warren also makes reference to a *prior* enactment: "By Act of March 22, 1816, provision was made for the first time for an official publication of the decisions of the Court, but with no provision for a salary to the Reporter." 1 C. Warren, *supra* note 4, at 455 n.1. The author has been unable to confirm the existence of the Act referred to and believes the citation to be erroneous.

²⁹⁶ During Wheaton's reportership, the Act of Mar. 3, 1817 was renewed three times. Act of May 15, 1820, ch. 131, § 1, 3 Stat. 606; Act of Mar. 3, 1823, ch. 34, § 1-3, 3 Stat. 768; and Act of Feb. 22, 1827, ch. 18, § 1-3, 4 Stat. 205.

²⁹⁷ Same calculation as in text at note 287 *supra*. It appears from the contracts contained in the Record in *Wheaton v. Peters*, however, that Wheaton's publishers in each instance assumed the cost of providing the government its 80 copies. Record, *supra* note 62, at 30-40.

²⁹⁸ First of two pre-argument memoranda by Wheaton to Webster concerning the complainant's contentions in *Wheaton v. Peters* (Jan. 1834), Wheaton Papers, *supra* note 1 hereinafter cited as Wheaton's Pre-Argument Memorandum A].

²⁹⁹ Henry Wheaton to Joseph Story (Apr. 17, 1817), Wheaton Papers, *supra* note 1.

³⁰⁰ Henry Wheaton to Joseph Story (Dec. 19, 1816), Wheaton Papers, *supra* note 1.

³⁰¹ Henry Wheaton to Joseph Story (Aug. 30, 1819), Wheaton Papers, *supra* note 1.

³⁰² Henry Wheaton to Edward Wheaton (Jan. 11, 1825), Wheaton Papers, *supra* note 1.

³⁰³ See E. Baker, *supra* note 124, at 74.

³⁰⁴ *Id.* at 71-73. Wheaton resigned from the project, prior to its completion, to accept his appointment to the Danish court. Lawrence, *supra* note 122, at lii-liii; see text at notes 309-13 *infra*.

³⁰⁵ E. Baker, *supra* note 124, at 75. The seat went to Robert Trimble. Wheaton had also received mention in 1823 as a possible successor to Brockholst Livingston, but the post had gone instead to his fellow New Yorker, Smith Thompson. *Id.* at 64; Scott, *supra* note 127, at 265. Ironically, Wheaton was again touted for the Supreme Court upon Thompson's death in 1843 but was again disappointed: the seat went to yet another New Yorker, Samuel Nelson. 2 C. Warren, *supra* note 4, at 114, 119.

(Under the Judiciary Act of 1789, the Court was composed of six members. Judiciary Act of Sept. 24, 1789, ch. 20, § 1, 1 Stat. 73 (1789). Congress increased the size of the Court to seven in 1807, Act of Feb. 24, 1807, ch. 16, § 2, 2 Stat. 421, and to nine in 1837, Act of

Mar. 3, 1837, ch. 34, § 1, 5 Stat. 176.)

³⁰⁶ See, e.g., Henry Wheaton to John W. Taylor (Congressman from New York, Wheaton's ally in the old Reporter's Bill days and now Speaker of the House) (Mar. 29, 1826), Wheaton Papers, *supra* note 1.

³⁰⁷ Catherine Wheaton (Henry Wheaton's wife) to Levi Wheaton (her father) (Dec. 31, 1826), Wheaton Papers, *supra* note 1. Adams instead named Samuel Rossiter Betts, a "Bucktail" Republican whose appointment the President apparently deemed more likely to counteract the worrying attachment of New York Republicans to Adams' rivals, Henry Clay and William Crawford. Martin Van Buren to J.A. Hamilton (Dec. 20, 1826), Library of Congress, Washington, D.C.

³⁰⁸ Henry Wheaton to Daniel Webster (Apr. 12, 1826), Webster Papers, Library of Congress, Washington, D.C. (emphasis in original).

³⁰⁹ See Henry Wheaton to Levi Wheaton (Apr. 7, 1827), Wheaton Papers, *supra* note 1 (reporting that he had, within the preceding week, written to President Adams and Secretary of State Clay "signifying [his] acceptance"). In actuality, Wheaton had rationalized acceptance within a week as a steppingstone to other appointments. Henry Wheaton to Levi Wheaton (Mar. 10, 1827), Wheaton Papers, *supra* note 1. And, within three weeks, he had "made up [his] own mind to do it." Henry Wheaton to Levi Wheaton (Mar. 10 & 25, 1827), Wheaton Papers, *supra* note 1. Only wounded pride seems to have delayed him from embracing the opportunity at once.

³¹⁰ Joseph Story to Sarah Story (Mar. 8, 1827), Story Papers, University of Texas Library, Austin, Texas [collection hereinafter cited as Story Papers, Texas].

³¹¹ Henry Wheaton to Edward Wheaton (Jan. 11, 1825), Wheaton Papers, *supra* note 1.

³¹² See text at notes 209-17 *supra* (concerning Justice Johnson's attack on Wheaton's reporting in *Ramsay v. Allegre*).

³¹³ John Marshall to Henry Wheaton (June 21, 1827), Wheaton Papers, *supra* note 1.

³¹⁴ Henry Wheaton to John Marshall (June 6, 1827) (original letter has been lost, but is referred to in Marshall's reply to Wheaton dated June 27, 1827, in Wheaton Papers, *supra* note 1). Wheaton had accepted the Danish mission two months before officially advising Marshall of his retirement as Reporter. See note 309 *supra*.

³¹⁵ H. Carson, *supra* note 4, at 623; 14 Dictionary of American Biography 509-10 (1934) (biography of Peters, Sr.). Even this appointment, however, did not bring Peters, Jr., respect in the eyes of his peers. Visiting the City of Brotherly Love shortly after the conclusion of Peters' first year as Reporter, William Wirt found him "rather infirm of intellect and garrulous," but willing to bear the condescension of the grandees of Philadelphia society because "[he] is sensible that he cannot keep his place in their circle on any other terms." William Wirt to Elizabeth Wirt (his wife) (Apr. 27, 1828), Wirt Papers, Maryland Historical Society, Annapolis, cited in White, *supra* note 182.

³¹⁶ Richard Peters, Jr., to Samuel Hopkins (Nov. 15,

1805), Peters Papers, *supra* note 40; cf. 14 Dictionary of American Biography 509 (1934) (attributing the admiralty reports to Peters, Sr.).

³¹⁷ 14 Dictionary of American Biography, *supra*, at 510.

³¹⁸ H. Carson, *supra* note 4, at 623.

³¹⁹ "The decisions [of the Third Circuit] from 1803 to 1827 were reported by Bushrod Washington . . . and published in four volumes, under the editorial supervision of Richard Peters, [Jr.]" *American Reports and Reporters*, 22 Am. Jurist & L. Mag. 108, 112 (1839). Peters apparently prepared the reports, which appeared between 1826 and 1829, from Washington's old manuscript opinions. See Richard Peters, Jr., to Joseph Story (June 28, 1824), Story Papers, Library of Congress, Washington, D.C. [collection hereinafter cited as Story Papers, Washington, D.C.] (seeking Massachusetts subscriptions).

³²⁰ See note 319 *supra*.

³²¹ Richard Peters, Jr., to Joseph Story (Sept. 22, 1826), Peters Papers, *supra* note 40.

³²² Joseph Story to Richard Peters, Jr. (Sept. 25, 1826), Peters Papers, *supra* note 40. In fact, a "more acceptable" candidate quickly appeared in the person of Simon Greenleaf, one of Story's favorite proteges. Had he even "suspected" that Greenleaf would be a candidate, an embarrassed Justice advised the Maine Reporter (and later, Royall Professor at Harvard), "I need hardly say that I should not have hesitated to have given you all my aid." Joseph Story to Simon Greenleaf (Oct. 10, 1826), Simon Greenleaf Papers, Harvard Law School Library, cited in White, *supra* note 182.

³²³ Richard Peters, Jr., to John Marshall (Sept. 30, 1826), Peters Papers, *supra* note 40.

³²⁴ John Marshall to Richard Peters, Sr. (Oct. 2, 1826), Peters Papers, *supra* note 40.

³²⁵ Gabriel Duvall to Richard Peters, Jr. (Nov. 3, 1826), Peters Papers, *supra* note 40.

³²⁶ Bushrod Washington to Richard Peters, Jr. (Jan. 28, 1827), Peters Papers, *supra* note 40.

³²⁷ Richard Peters, Jr., to Bushrod Washington (Mar. 5, 1827), Peters Papers, *supra* note 40.

³²⁸ Richard Peters, Jr., to Henry Wheaton (Mar. 5, 1827), Peters Papers, *supra* note 40.

³²⁹ Joseph Story to Richard Peters, Jr. (Dec. 15, 1827), Peters Papers, *supra* note 40 (emphasis in original).

³³⁰ See C.C. Biddle to Richard Peters, Jr. (Jan. 25, 1828), Peters Papers, *supra* note 40 (congratulating Peters on his success).

³³¹ C.C. Biddle to Richard Peters, Jr. (Jan. 22, 1828), Peters Papers, *supra* note 40. This estimate, in terms of income from Peters' initial Reports, proved to be wildly optimistic, although he made every effort to reduce the cost of printing the volumes. See text at note 338 *infra*. Peters' plans to make the reportership a paying proposition also included condensing and republishing the decisions reported by his predecessors. See text at note 353 *infra*. Finally, Peters had in mind a modest scheme for restructuring the Reporter's compensation which, if adopted, would surely have made him a wealthy man. See text at notes 348-51 *infra*.

³³² Of his predecessor's 12 volumes, only volume 10

had appeared more quickly (June 2, 1824); and, in that instance, Wheaton had had the added incentive of great public demand for reports of the several major cases decided during the 1824 Term. See note 269 *supra*.

³³³ 26 U.S. (1 Pet.) iii (1828).

³³⁴ The Act had been routinely renewed in 1820 and 1823, in each instance for three years. Act of May 15, 1820, ch. 131, § 1, 3 Stat. 606; Act of Mar. 3, 1823, ch. 34, §§ 1-3, 3 Stat. 768, cited in Record, *supra* note 62, at 47. The third renewal of the Act was delayed for a year by wrangling in Congress over the expense of the Reports, and the statute as enacted added the critical proviso "that the said decisions shall be sold to the public at large at a price not exceeding Five Dollars per volume." Act of Feb. 22, 1827, ch. 18, §§ 1-3, 4 Stat. 205. Wheaton secured \$1000 in salary for the eleventh volume of his reports by a special appropriation two weeks later. Act of Mar. 2, 1827, ch. 23, § 1, 4 Stat. 213.

³³⁵ 26 U.S. (1 Pet.) at iv. In fact, the statute plainly did not compel that the price per volume be five dollars, but only that the price per volume not exceed five dollars. Peters' successors apparently read the Act more carefully than he did: nearly 40 years later, Reporter John William Wallace still found it possible to charge four dollars per volume. C. Fairman, Reconstruction and Reunion 1864-88, at 79 (6 Devise History Pt. 1, 1971, *supra* note *).

³³⁶ 26 U.S. (1 Pet.) iii-iv (1828). At least in theory, then, Peters could claim parentage of the headnote reference system now so commonly employed in judicial reports.

³³⁷ See text at notes 339-43 *infra*.

³³⁸ Joseph Story to Richard Peters, Jr. (June 26, 1828), Peters Papers, *supra* note 40. Even the new Reporter himself later admitted that his first volume had been published in "exceedingly small type," which became "a subject of general censure." Richard Peters, Jr., to John Bell (Jan. 20, 1834), Peters Papers, *supra* note 40 (emphasis deleted).

³³⁹ Peters's Reports, 1 Am. Jurist & L. Mag. 177-79 (1829).

³⁴⁰ *Id.* at 180.

³⁴¹ Peters's Reports, 3 Am. Jurist & L. Mag. 101-03, 108-09 (1830). The case incorrectly summarized by Peters was *Boyce v. Anderson*, 27 U.S. (2 Pet.) 150 (1829).

³⁴² Thomas Day to Willard Phillips (Dec. 16, 1833), Phillips Papers, Massachusetts Historical Society, Boston [collection hereinafter cited as Phillips Papers] (emphasis in original).

³⁴³ Editorial, *A Duty and a Right - The Supreme Court of the Union*, Legal Intelligencer (Philadelphia), Feb. 12, 1864, at 52, col. 1.

³⁴⁴ In each of the years 1817, 1818 and 1826, Wheaton received \$1000 from the government and \$500 from his publisher. See text at notes 266-71, 287 & 297 *supra*.

³⁴⁵ In both 1819 and 1824, Wheaton received \$1000 from the government and \$800 from his publisher. *Id.*

³⁴⁶ All of the figures concerning Peters, Jr.'s, finances as Reporter are taken from his January 20, 1834 letter to John Bell, Chairman of the House Judiciary

Committee. Peters Papers, *supra* note 40 [hereinafter cited as Peters' Letter A to Bell].

³⁴⁷ See text at notes 352-55 *infra* (discussion of Peters' *Condensed Reports*).

³⁴⁸ Peters' Letter A to Bell, *supra* note 346. In the meantime, Peters had been compelled to report annually almost twice as many cases as Wheaton, excepting only Wheaton's last year. *Id.*

³⁴⁹ Richard Peters, Jr., to John Bell (Jan. 20, 1834), Peters Papers, *supra* note 40 [hereinafter cited as Peters' Letter B to Bell] (companion to Letter A of the same date, cited in note 346 *supra*). Cf. text at notes 44-45 *supra* (dissemination of Kirby's Connecticut Reports).

³⁵⁰ *Id.*

³⁵¹ Act of Aug. 26, 1842, ch. 202, 2, 5 Stat. 524 (raising the Reporter's salary to \$1250, but requiring presentation of 150 copies to the government and publication within four months). By the Act of July 1, 1922, ch. 267, 1, 2, 42 Stat. 816, the entire plan of publication was revised to provide for printing to be done at the Government Printing Office, with the sale of the Reports to the public to be accomplished by the Superintendent of Documents. The Reporter was divested of all interest in the Reports, and his salary was adjusted to reflect the new arrangements.

³⁵² Published in six volumes between 1830 and 1834.

³⁵³ *Proposals For publishing, by subscription, The Cases Decided in the Supreme Court of the United States, From its organization to the close of January term, 1827* (1828), Record, *supra* note 62, at 9-11 [hereinafter cited as *Proposals*]. In revising his *Proposals* for inclusion as the preface to the first volume of the *Condensed Reports*, Peters correctly noted that the work would encompass three of Dallas' volumes (volumes 2, 3 and 4), making a total of twenty-four volumes contained in the *Condensed Reports*.

Owning a full set of the Reports of Dallas, Cranch, and Wheaton at \$130 was beyond the means of all but the most successful lawyers in major commercial centers. Comprehensive information concerning contemporary lawyers' income is difficult to obtain, but examples abound. Consider:

According to George W. Strong, his father, who practiced in upstate New York, earned \$217 during his first year at the bar (1826-27), but "in his third year of practice was evidently making good headway, for his receipts in 1829 amounted to \$670.00." Bartholomew F. Moore, who was admitted to the North Carolina bar in 1823, relates that his total income from the practice of law during his first seven years [*i.e.*, through 1830] amounted to only \$700, or about \$100 per year.

2 A. Chroust, *The Rise of the Legal Profession in America* 88 (1965) (quoting G. Strong, *Landmarks of a Lawyer's Lifetime* 11 (1910)).

In Boston, the bar followed a schedule of minimum fees, designed to eliminate cost competition between lawyers and place a floor under their incomes. An attorney received \$1.50 for a case in the Massachusetts

Court of Common Pleas, \$2.50 for a Supreme Judicial Court case and \$.33 per day for attendance. 2 *The Papers of Daniel Webster* 119 n.3 (A. Konefsky & A. King eds. 1983) (citing Suffolk County Bar Book, 1770-1805, at 29-30 (1882)).

³⁵⁴ Record, *supra* note 62, at 16 (Peters' separate answer to Wheaton's bill in equity).

³⁵⁵ *Proposals*, *supra* note 353, at 10-11.

³⁵⁶ Joseph Story to Richard Peters, Jr. (June 26, 1828), Peters Papers, *supra* note 40.

³⁵⁷ Bushrod Washington to Richard Peters, Jr. (July 21, 1828), Peters Papers, *supra* note 40.

³⁵⁸ Dallas had died in 1817. This, in itself, would not have cut off claims by his heirs or assigns to copyright in the four volumes of his Reports, provided that any such interest still subsisted in 1828. This seems doubtful for a variety of technical reasons, including the difficulty of proving compliance by Dallas with the statutory formalities when each of the volumes was originally published. Moreover, under the Copyright Act of May 31, 1790, ch. 15, 1 Stat. 124 (providing an initial term of 14 years and the possibility of a renewal term of the same duration), no work could remain in copyright under any circumstances for longer than 28 years. Dallas had issued his first three volumes in 1790, 1798 and 1799, so that clearly those works had fallen into the public domain prior to the publication of Peters' *Proposals* in 1828. The copyright in volume 4 might theoretically have been extended through 1835, had Dallas lived to effect the renewal in 1821. Even so, volume 4 of Dallas' Reports had contained only 45 pages of decisions by the Supreme Court of the United States, scarcely an interest sufficient to justify protracted litigation. Whatever the reasons, Peters received no communication from anyone purporting to hold an interest in Dallas' works.

³⁵⁹ William Cranch to Richard Peters, Jr. (July 18, 1828), Peters Papers, *supra* note 40.

³⁶⁰ Richard Peters, Jr., to William Cranch (Aug. 14, 1828), Peters Papers, *supra* note 40. Peters had actually anticipated his arguments to Cranch in the *Proposals* themselves. *Proposals*, *supra* note 353, at 11. His references to "Digests" both there and in this letter, however, seem oddly misplaced. In the *Proposals*, Peters described his *Condensed Reports* as equivalent to Wheaton's *Digest of Decisions*. *Proposals*, *supra* note 353, at 11. Yet Wheaton's work literally digested or summarized the holdings of the Court's decisions, whereas Peters intended to reproduce the actual decisions. Plainly, Wheaton's *Digest* had encouraged resort to the reports containing the decisions in full. In contrast, Peters' *Condensed Reports* would tend to eliminate any need to consult the original volumes: indeed, that was their purpose.

³⁶¹ Robert Donaldson to Henry Wheaton (Aug. 11, 1828), Wheaton Papers, *supra* note 1. Donaldson complained directly to Peters that

the effect of [the *Condensed Reports*] would be to me literally ruinous on a large amount of property . . . Likewise the injury that would be done to my absent friend Henry Wheaton, Esq., by such a publication and the result of

which would be to deprive him and his family of the pecuniary reward due to his professional labors of 12 years.

Robert Donaldson to Richard Peters, Jr. (Sept. 25, 1828), Peters Papers, *supra* note 40. Peters responded by sending Donaldson a copy of his reply to Cranch. Richard Peters, Jr., to Robert Donaldson (Sept. 26, 1828), Peters Papers, *supra* note 40.

³⁶² Henry Wheaton to Robert Donaldson (Sept. 30, 1828), Wheaton Papers, *supra* note 1.

³⁶³ Henry Wheaton to Daniel Webster (Nov. 25, 1828), Webster Papers, Library of Congress, Washington, D.C. Wheaton anticipated an annual income of \$2000 from future editions of his *Reports*. E. Baker, *supra* note 124, at 130.

³⁶⁴ For convenience, the contents and publication dates of this and each succeeding volume of Peters' *Condensed Reports* are listed below:

- | | |
|----------------|---|
| Vol. 1 (1830): | Vols. 2, 3 and 4 of Dallas' <i>Reports</i> ;
Vols. 1, 2 and 3 of Cranch's <i>Reports</i> |
| Vol. 2 (1830): | Vols. 4, 5, 6 and 7 of Cranch's <i>Reports</i> |
| Vol. 3 (1831): | Vols. 8 and 9 of Cranch's <i>Reports</i> ;
Vol. 1 of Wheaton's <i>Reports</i> |
| Vol. 4 (1833): | Vols. 2, 3, 4 and 5 of Wheaton's <i>Reports</i> |
| Vol. 5 (1833): | Vols. 6, 7, 8 and 9 of Wheaton's <i>Reports</i> |
| Vol. 6 (1834): | Vols. 10, 11, and 12 of Wheaton's <i>Reports</i> |

Although the title page of volume 1 indicates publication in 1830, the correspondence in notes 365 and 368-370 *infra* indicates that it had actually begun circulating among Peters' friends by December of 1829.

³⁶⁵ Justice Washington died in Philadelphia on November 26, 1829. Richard Peters, Jr., to Joseph Story (Nov. 26, 1829), Story Papers, Massachusetts Historical Society, Boston [hereinafter cited as Story Papers, Boston].

³⁶⁶ *Id.*

³⁶⁷ R. Peters, Jr., *Condensed Reports of Cases in the Supreme Court of the United States, Containing the Whole Series of the Decisions of the Court From Its Organization to the Commencement of Peters's Reports at January Term 1827 iii* (1830).

³⁶⁸ Joseph Story to Richard Peters, Jr. (Dec. 10, 1829), Peters Papers, *supra* note 40. Indeed, Story's enthusiasm for the *Condensed Reports*, as for all projects likely to increase the circulation of the Court's decisions throughout the country, knew few bounds. He understood from the outset that Wheaton and Cranch had "scarcely reaped" the "fair reward" to which their labors entitled them; but, doubting that they ever would, he endorsed Peters' project anyway. Joseph Story to Richard Peters, Jr. (June 26, 1828), Peters Papers, *supra* note 40. He even approved Peters' "proposed course of dropping the dissentient opinions" from his condensation, graciously announcing that "[s]o far as I am personally concerned I have no desire

that my own should reappear." Joseph Story to Richard Peters, Jr. (May 30, 1830), Peters Papers, *supra* note 40. Ultimately, the "great value" of the *Condensed Reports* to him was that they "bring with[in] the compass of the most moderate means all the important decisions of the Supreme Court." Joseph Story to Samuel E. Sewell (Sept. 13, 1830), Phillips Papers, *supra* note 342.

³⁶⁹ E.g., Smith Thompson to Richard Peters, Jr. (Dec. 19, 1829), Peters Papers, *supra* note 40 ("a highly useful book").

³⁷⁰ Joseph Hopkinson to John Grigg (publisher of the *Condensed Reports*) (Dec. 1, 1829), Hopkinson Papers, Historical Society of Pennsylvania, Philadelphia.

³⁷¹ F. Hicks, *Men and Books Famous in the Law* 208 (1921). This subscription exceeded by 200 the number of copies of Peters' own reports regularly purchased by the public. See text at note 346 *supra*.

³⁷² Richard S. Coxe to Richard Peters, Jr. (Dec. 11, 1829), Peters Papers, *supra* note 40 (stating Cranch's offer); Peters to Coxe (Dec. 13, 1829), Miscellaneous Papers, New York Historical Society, New York City (accepting offer).

³⁷³ Record, *supra* note 62, at 6-7.

³⁷⁴ *Id.* at 14-18. Grigg's separate answer contained substantially the same allegations. *Id.* at 18-21.

³⁷⁵ The following account relies primarily on Elijah Paine's report to Wheaton, dated January 16, 1833 (Wheaton Papers, *supra* note 1), on the progress of the litigation.

³⁷⁶ 29 F. Cas. 862 (C.C.E.D. Pa. 1832) (No. 17,486), also reproduced in *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, app. at 725 (1834). In his opinion, Hopkinson invited an appeal by Wheaton and Donaldson: "I am conscious of the importance of the questions which have been discussed in this cause, to the parties and to the public; and it is a real satisfaction to me to know that my opinion may be, and I presume will be, reviewed by another tribunal." 33 U.S. (8 Pet.) at 742.

³⁷⁷ Act of May 31, 1790, ch. 15, 1 Stat. 124 and Act of Apr. 29, 1802, ch. 36, 2 Stat. 171.

³⁷⁸ Record, *supra* note 62, at 61. Peters, for his part, proceeded with publication of the remaining three volumes of the *Condensed Reports*. Volume 6 appeared in January of 1834, two months prior to argument of the appeal in the Supreme Court.

³⁷⁹ Elijah Paine to Daniel Webster (Dec. 6, 1831), Webster Papers, New Hampshire Historical Society, Concord, N.H., quoted in E. Baker, *supra* note 124, at 347 n.5.

³⁸⁰ *Nichols v. Ruggles*, 3 Day 145, 158 (Conn. 1808) (publishing title of book in newspaper and delivering copy to Secretary of State "constitute no part of the essential requisites for securing the copyright").

³⁸¹ Ewer V. Coxe, 8 F. Cas. 917 (C.C.E.D. Pa. 1824) (No. 4584) (holding all statutory requirements under 1790 and 1802 Acts, by virtue of latter enactment, to be mandatory).

³⁸² Elijah Paine to Henry Wheaton (Aug. 28, 1833), Wheaton Papers, *supra* note 1.

³⁸³ E. Baker, *supra* note 124, at 127.

³⁸⁴ Richard Peters, Jr., to Thomas Sergeant (Jan. 15, 1834), Sergeant Papers, *supra* note 179.

³⁸⁵ Wheaton's Pre-Argument Memorandum A, *supra* note 298 (emphasis in original).

³⁸⁶ Joseph Story to Henry Wheaton (Oct. 16, 1813), Wheaton Papers, *supra* note 1 (emphasis added).

³⁸⁷ Joseph Story to Henry Wheaton (May 25, 1816), Wheaton Papers, *supra* note 1 (emphasis added).

³⁸⁸ E.g., Henry Wheaton to John Sergeant (Apr. 20, 1816), Sergeant Papers, *supra* note 179 (asserting that "the copy right alone will not indemnify me against the expense of time and money devoted to the object"). But see text at notes 288-89 *supra* (debates in Congress).

³⁸⁹ See text at note 294 *supra*. Even opponents of the Bill, who argued that "the sale of the copyright would amply pay [the Reporter] for the trouble" of preparing the volumes, apparently assumed the Reporter's ownership of the copyright. See Henry Wheaton to Charles J. Ingersoll (Jan. 6, 1817), Ingersoll Papers, *supra* note 274.

³⁹⁰ Wheaton's Pre-Argument Memorandum A, *supra* note 298 (emphasis in original).

³⁹¹ Cf. the Copyright Act of 1976, which specifically approves the copyrightability of compilations, but provides that "[t]he copyright in a compilation . . . extends only to the material contributed by the author of such a work [*i.e.*, by the compiler], as distinguished from the preexisting material employed in the [compilation] . . ." 17 U.S.C. 103 (1982).

³⁹² Taken together, the acts prescribed four steps to be taken by an author seeking to obtain a federal statutory copyright: (1) record the title of the work in the office of the clerk of the federal judicial district in which the author resided; (2) print a copy of the record thus procured on the title page, or following page, of the work; (3) within two months of recording the title, cause a copy of the record to appear in the public press for a period of four weeks; and (4), within six months of publication of the work itself, deliver a copy thereof for deposit at the Department of State. Specifically, Peters claimed that Wheaton had failed to perform the third and fourth steps.

³⁹³ See, e.g., Elijah Paine to Henry Wheaton (Jan. 16, 1833), Wheaton Papers, *supra* note 1.

³⁹⁴ Carey, as proprietor of the initial term of the copyright to Wheaton's first volume, had attended to compliance with the statutory formalities concerning that volume. Record, *supra* note 62, at 23-24 (evidence of Henry C. Carey). With respect to succeeding volumes, Wheaton himself had exercised considerable care to assure proper delivery of the 80 copies required to obtain payment of his salary. Record at 40-48 (deposition of Daniel Brent and certificates of receipt by Department of State). None of the available evidence, however, suggests that Wheaton ever sought to insure a separate deposit of one copy of each of his volumes (making a total of 81) for purposes of securing his copyrights.

³⁹⁵ Second of Wheaton's pre-argument memorandum to Webster (Jan., 1834) [hereinafter cited as Wheaton's Pre-Argument Memorandum B].

³⁹⁶ *Id.*

³⁹⁷ "Mr. Justice Johnson was absent, from indisposition, during the whole term." 33 U.S. (8 Pet.) iii (1834).

³⁹⁸ "The fact is, that eighty-one copies were sent, but the law giving the salary, not requiring more than eighty, the papers in the department under these acts speak of but eighty; and all being sent to the department together, is the reason why there was no minute, or memorandum, or certificate . . ." 33 U.S. (8 Pet.) at 612.

³⁹⁹ 33 U.S. (8 Pet.) at 605.

⁴⁰⁰ 33 U.S. (8 Pet.) at 601.

⁴⁰¹ 33 U.S. (8 Pet.) at 597-98.

⁴⁰² 33 U.S. (8 Pet.) at 607.

⁴⁰³ 33 U.S. (8 Pet.) at 606.

⁴⁰⁴ 33 U.S. (8 Pet.) at 609.

⁴⁰⁵ "[F]irst, . . . the abstracts made by Mr. Wheaton; secondly, . . . the statements of the cases . . . ; thirdly, . . . points and authorities, and, in some instances, the arguments, and in all cases oral opinions . . . ; [and] fourthly, . . . the whole of the [written] opinions" prepared by the Justices. 33 U.S. (8 Pet.) at 617.

⁴⁰⁶ 33 U.S. (8 Pet.) at 614. Peters seems to have anticipated, and in some measure feared, this argument. Writing to Justice McLean in early 1830, he observed that the *Condensed Reports* had excited among booksellers holding unsold copies of his predecessors' volumes "no small degree of hostility," which he apprehended might lead to "an attempt to injure" his own *Reports*. Therefore, Peters wrote, "as I am under some doubt whether by the mere circumstance of my being Reporter I obtain a property in the opinions of the Court I have thought it a measure of prudence to obtain from each member of the Court a special assignment [of] the right to each opinion delivered by him." Richard Peters, Jr., to John McLean (May 24, 1830), Miscellaneous Papers, New York State Library, Albany, N.Y. (emphasis in original). McLean, author of the Court's opinion in *Wheaton v. Peters* four years later, responded with notable care: "A faithful report of the decisions of the Supreme Court of the United States, is of great importance to the public, & I should exceedingly regret, any interference with your rights as Reporter. So far as I have any right in the opinions delivered by me, at the late session of the Court, I hereby, freely and fully, transfer it to you." John McLean to Richard Peters, Jr. (June 3, 1830), Peters Papers, *supra* note 40 (emphasis added). Other members of the Court exercised similar caution. E.g., Joseph Story to Richard Peters, Jr. (June 1, 1830), Peters Papers, *supra* note 40 (assigning the copyright in his opinions "in as ample a manner as I now hold the same," while reserving the right of Congress to authorize future publications by others); and Henry Baldwin to Richard Peters, Jr. (June 8, 1830), Peters Papers, *supra* note 40 (same). The prickly William Johnson, however, rejected Peters' request *in toto*, on grounds that "our opinions I have never doubted were public property & not assignable by us." William Johnson to Richard Peters, Jr. (June 5, 1830), Peters Papers, *supra* note 40.

⁴⁰⁷ 33 U.S. (8 Pet.) at 615. By an order adopted on

March 14, 1834, however, the Court did provide that, upon publication of each volume of the *Reports*, the originals of such written opinions as had been prepared should be filed by the Reporter with the Clerk. 33 U.S. (8 Pet.) vii (1834), published in 42 U.S. (1 How.) xxxv (1843) as Rule No. 41. By a subsequent order, the Court required that opinions be first delivered to the Clerk for recording and then sent to the Reporter. 42 U.S. (1 How.) xxxv (1843) (Rule No. 42).

⁴⁰⁸ 33 U.S. (8 Pet.) at 616-17.

⁴⁰⁹ 33 U.S. (8 Pet.) at 638.

⁴¹⁰ 33 U.S. (8 Pet.) at 619-20 (emphasis in original).

⁴¹¹ 33 U.S. (8 Pet.) at 651-52.

⁴¹² Memorandum prepared by Wheaton after argument (Mar. 18, 1834), Wheaton Papers, *supra* note 1 [hereinafter cited as Wheaton's Post-Argument Memorandum]. Story's messenger appears to have been Charles Sumner of Boston, the Reporter of Story's First Circuit decisions in three volumes between 1830 and 1839. Wheaton refers only to "Mr. Sumner, a young gentlemen who had been employed by Mr. Peters in taking notes for him on the argument of the Cause."

⁴¹³ Wheaton's Post-Argument Memorandum, *supra* note 412; Joseph Story to Henry Wheaton (Mar. 17, 1834), Wheaton Papers, *supra* note 1.

⁴¹⁴ Wheaton's Post-Argument Memorandum, *supra* note 412. Apparently, Story's particular contribution to the Court's design to force a resolution of the controversy short of final decision was his plan to broker the compromise personally in meetings with the parties.

⁴¹⁵ Wheaton's Post-Argument Memorandum, *supra* note 412; Story's Post-Argument Memorandum (undated copy furnished by Story to Wheaton with letter of Mar. 25, 1834), Wheaton Papers, *supra* note 1.

⁴¹⁶ Wheaton's Post-Argument Memorandum, *supra* note 412.

⁴¹⁷ Wheaton's Post-Argument Memorandum, *supra* note 412; Wheaton's letter to the Court (Mar. 18, 1834), Wheaton Papers, *supra* note 1. Wheaton's reply also specifically noted his claims, which he supposed the Court had "omitted by accident to mention," to his abstracts and statements of the facts and cases.

⁴¹⁸ Richard Peters, Jr., to Joseph Story (Nov. 26, 1829), Story Papers, Boston, *supra* note 365.

⁴¹⁹ Marshall's periodic bouts of infirmity are well known. *E.g.*, Richard Peters, Jr., to Joseph Story (Sept. 29, 1831), Story Papers, Boston, *supra* note 365 (Chief Justice, "exceedingly emaciated," in Philadelphia to see Dr. Physick, but illness "is said to be fatal"); and Richard Peters, Jr., to Joseph Story (Dec. 5, 1831), Story Papers, Boston, *supra* note 365 (Marshall "a well man!"). Johnson, suffering from "severe and continued indisposition," was unable to sit at all during the 1832 and 1834 Terms. 31 U.S. (6 Pet.) iii (1832); 33 U.S. (8 Pet.) iii (1834). Baldwin's supposed insanity proved a constant source of difficulty to his colleagues: he failed to attend the Court's 1833 Term in its entirety and missed a portion of the 1834 Term as well. 32 U.S. (7 Pet.) iii (1833).

⁴²⁰ White, *supra* note 164, at 45 (noting that, after 1829, "Justices McLean and Johnson did not take

meals or sleep in the Court's quarters"). Somewhat later, in preparing for the 1833 Term, Story wrote to Peters that he would depend on Peters and Marshall to procure him lodgings in Washington. "I wish to go where ever the Ch. Justice goes. So I suppose will Judge Thompson & Judge Duvall. As to the rest, it is not worth while to make any arrangements for them, as the affair would be wholly uncertain on their side." Joseph Story to Richard Peters, Jr. (Nov. 13, 1833), Peters Papers, *supra* note 40 (emphasis in original).

⁴²¹ Joseph Story to Richard Peters, Jr. (Mar. 31, 1832), Peters Papers, *supra* note 40.

⁴²² See, *e.g.*, H. Carson, *supra* note 4, at 283-84; 2 C. Warren, *supra* note 4, at 1-5. Interestingly, President Jackson's first two appointees, McLean and Baldwin, split in *Wheaton v. Peters*, McLean writing for the majority (with Marshall, Story and Duvall, holdovers from the Court's "glory days") and Baldwin dissenting (along with Thompson, a Monroe appointee).

⁴²³ In the consolidated cases of *Briscoe v. Commonwealth Bank* and *Mayor of New York v. Miln*, Marshall announced the practice of the Court "not (except in cases of absolute necessity) to deliver any judgment in cases where constitutional questions are involved, unless four judges concur in opinion, thus making the decision that of a majority of the whole court," and the necessity of putting over *Briscoe* and *Miln* in the absence of Johnson and Duvall from the bench. 33 U.S. (8 Pet.) 118, 122 (1834).

⁴²⁴ All information in this paragraph, unless otherwise stated, is taken from Wheaton's Post-Decision Memorandum (Mar. 20, 1834, the day after the decision), Wheaton Papers, *supra* note 1.

⁴²⁵ Story's attitude toward the case may be further conjectured from his remark to Peters that he had been "surpri[s]ed at the appeal." Joseph Story to Richard Peters, Jr. (Nov. 13, 1833), Peters Papers, *supra* note 40.

⁴²⁶ In particular, Baldwin sought direction regarding how to instruct the jury as to the effect of lapse of time on Wheaton's assertions of actual, albeit unprovable, compliance with the statutory formalities.

⁴²⁷ All information in the next three paragraphs, unless otherwise stated, is taken from Charles Sumner's account to Story, written in the courtroom itself on March 19, 1834, immediately after the incidents he describes. Story Papers, Washington, D.C., *supra* note 319. Sumner also wrote a supplementary letter to Story on the same subject, dated March 20, 1834. See notes 434-41 *infra* and accompanying text.

⁴²⁸ Henry Wheaton to Catherine Wheaton (Mar. 21, 1834), Wheaton Papers, *supra* note 1.

⁴²⁹ 33 U.S. (8 Pet.) at 654-68. The scene that followed no doubt owed its origin in part to the Court's failure during this period to circulate opinions among the Justices prior to reading them in the courtroom. See White, *supra* note 164, at 30-33, for a description of contemporary practices in this regard. The problem may have been compounded by the breathtaking speed with which the Court routinely handed down its decisions. *Id.*

⁴³⁰ 33 U.S. (8 Pet.) at 668-98.

⁴³¹ Charles Sumner to Joseph Story (Mar. 19,

1834), Story Papers, Washington, *supra* note 319 (emphasis in original). In William Johnson's absence from the bench (*see* note 419 *supra*), there were only six members of the Court sitting. Thompson did not disclose which majority Justice he believed disagreed with McLean on the point at issue. In any event, an equally divided vote would have resulted in affirming Hopkinson's decision that the 1802 Act made the performance of all four of the statutory requirements mandatory.

⁴³² 33 U.S. (8 Pet.) at 698-98bb (F. Brightly ed. 1884). Baldwin apparently delivered a copy of his lengthy dissent to Peters too late for inclusion in the first edition of the *Reports* for the 1834 Term, thereby necessitating the unusual pagination of the opinion in later editions. The three opinions in the case are discussed at length, with helpful background concerning the doctrinal development of copyright law in America, in chapters 9 and 10 of L. Patterson, *Copyright in Historical Perspective* (1968).

⁴³³ Charles Sumner to Joseph Story (Mar. 19, 1834), Story Papers, Washington, D.C., *supra* note 319.

⁴³⁴ Charles Sumner to Joseph Story (Mar. 20, 1834), Story Papers, Washington, D.C., *supra* note 319.

⁴³⁵ Charles Sumner to Joseph Story (Mar. 19, 1834), Story Papers, Washington, D.C., *supra* note 319 (emphasis in original).

⁴³⁶ Charles Sumner to Joseph Story (Mar. 20, 1834), Story Papers, Washington, D.C., *supra* note 319.

⁴³⁷ *Id.*

⁴³⁸ *Id.*

⁴³⁹ *Id.*

⁴⁴⁰ *Id.* (emphasis in original).

⁴⁴¹ *Id.* (emphasis in original).

⁴⁴² U.S. Telegraph, Mar. 19, 1834.

⁴⁴³ Record, *supra* note 62, at 8. In his dissent, Justice Baldwin carefully noted that, in the proceedings on remand, Wheaton might still prove his rights to literary property in "the marginal notes, or syllabus of the cases and points decided, the abstract of the record and evidence, and the index to the several volumes." 33 U.S. (8 Pet.) at 698g (F. Brightly ed. 1883).

⁴⁴⁴ 33 U.S. (8 Pet.) at 698bb-99 (F. Brightly ed. 1883).

⁴⁴⁵ *See, e.g.*, John Marshall to Richard Peters, Jr. (May 15, 1834), Peters Papers, *supra* note 40 (one of several letters by various members of the Court rejecting Peters' argument that the mandate did not accurately reflect McLean's opinion).

⁴⁴⁶ E. Baker, *supra* note 124, at 132-33.

⁴⁴⁷ *See, e.g.*, Charles Chauncey to Henry Wheaton (Apr. 11, 1834), Wheaton Papers, *supra* note 1; John Cadwalader to Henry Wheaton (Apr. 24, 1834), Wheaton Papers, *supra* note 1; Charles Chauncey to Henry Wheaton (Apr. 29, 1834), Wheaton Papers, *supra* note 1; John Cadwalader to Henry Wheaton (June 10, 1834), Wheaton Papers, *supra* note 1.

⁴⁴⁸ John Cadwalader to Henry Wheaton (May 23, 1838), Wheaton Papers, *supra* note 1 (verdict advisory only, however, to equity court).

⁴⁴⁹ The appeal in the case was finally perfected in 1846. John Cadwalader to William Lawrence (Wheaton's friend, and later executor) (Sept. 24, 1846), Cadwalader Papers, Historical Society of Pennsylvania, Philadelphia [collection hereinafter cited as Cadwalader Papers].

⁴⁵⁰ William Lawrence to Robert Wheaton (Henry's son) (Feb. 18, 1850), Wheaton Papers, *supra* note 1.

⁴⁵¹ 33 U.S. (8 Pet.) at 668. The larger principle vindicated by this holding, at least as it has subsequently been read, is that no work prepared by a public official in the performance of his or her public duties is subject to copyright. The Copyright Act of 1976 codifies *Wheaton v. Peters* with respect to all U.S. government works. 17 U.S.C. 105 (1982). The same principle has been applied quite generally to works created by state officials in the course of their duties. *See, e.g., Georgia v. Harrison Co.*, 548 F. Supp. 110 (N.D. Ga. 1982), *vacated by agreement between the parties*, 559 F. Supp. 37 (N.D. Ga. 1983) (all state statutes and judicial opinions are in the public domain). The case law emphasizes the public's ownership of government works by virtue of having employed the officials who created them, as well as the practical need for free access by citizens to the documents that govern their lives. *See, e.g., Building Officials & Code Adm. v. Code Technology, Inc.*, 628 F.2d 730, 733-35 (1st Cir. 1980).

⁴⁵² The decision had a similar effect on law reporting at every level, both state and federal. Nowhere was the surge of entrepreneurial energy more pronounced than in New York State, where access to the opinions of Chancellor Kent had long been impeded by the "exorbitant price asked by the booksellers" for Johnson's *Reports*. Anticipating in 1836 the imminent publication of Johnson's *Chancery Reports Condensed* by an unnamed "gentleman of the profession" other than Johnson, a legal periodical observed:

The decision of the Supreme Court of the United States, in the case of *Wheaton v. Peters*, . . . has entirely shaken the right of property in the written opinions of any court. It is presumed that no just cause of complaint will exist in any quarter, if the admirable judgments of Chancellor Kent should be released from the state of confinement in which they are at present kept by means of the large sums asked for the volumes which contain them. The more extended circulation, which they will naturally have, if published in a cheaper form than that in which they now appear, will contribute to the already widespread fame of Chancellor Kent, and to the increase among the profession of a knowledge of the principles of Equity which he has expounded with so much learning and eloquence.

In Preparation, 15 Am. Jurist & L. Mag. 249 (1836). Kent's friend and colleague, Justice Story, could not have put the matter better himself.

⁴⁵³ The current law of notice, deposit and registration is found at 17 U.S.C. 401-12 (1982).

⁴⁵⁴ For discussion of the Jacksonian anti-monopoly character of the McLean opinion, *see* G. Dunne, *supra*

note 119, at 326; L. Patterson, *supra* note 504, at 209. The present Court, in its widely noted *Betamax* decision handed down last Term, stated the premise of the copyright law as follows:

The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.

Sony Corp. v. Universal City Studios, 464 U.S. 417, 429, 104 S.Ct. 774, 782, 78 L.Ed.2d 574, 584 (1984).

⁴⁵⁵ The leading modern authority on copyright in America states succinctly: "*Wheaton v. Peters* is a significant landmark . . . because it established the American view that publication *ipso facto* divested an author of common law copyright protection. . . . The *Wheaton* decision rested . . . on the simple basis that . . . an author may protect published works, if at all, only under the federal copyright statute." 1 M. Nimmer, *Nimmer on Copyright* 4.02[C], at 4-13 (1985).

⁴⁵⁶ "No one can deny that when the legislature are about to vest an exclusive right in an author or an inventor, they have the power to prescribe the conditions on which such right shall be enjoyed" 33 U.S. (8 Pet.) at 663-64. The Copyright Act of 1976, while providing the author liberal opportunities to cure deficiencies in his or her compliance with the statutory formalities, does not dispense altogether with such requirements. Failure to comply may result in fines, diminish the copyright holder's remedies or, in some instances, entirely preclude bringing an action for infringement. See, e.g., 17 U.S.C. 405-07, 411-12 (1982).

⁴⁵⁷ 18 N. Am. Rev. 371, 372-73 (1824).

⁴⁵⁸ *Id.*

⁴⁵⁹ 1 C. Warren, *supra* note 4, at 455.

⁴⁶⁰ Upon Wheaton's death, a German obituary preserved in the family scrapbook proclaimed his *Reports* "the golden book of American national law." Obituary (original source unknown), *Wheaton Papers*, *supra* note 1. In every respect, the assessment was remarkably apt.

⁴⁶¹ Ironically, Peters' heirs eventually became victims of the new freedom in reporting won by their forebearer at such great expense to Wheaton and his heirs.

In the 1850s, Peters' *Reports* and *Condensed Reports* were themselves superseded by Justice Benjamin R. Curtis' edition of the *Reports*. Whereas, in the old Reporter series, 58 volumes had been priced at \$222, Curtis offered 22 volumes, covering the same body of opinions, for \$66. F. Hicks, *supra* note 371, at 211; C. Swisher, *supra* note 2, at 313-14.

⁴⁶² Joseph Story to Henry Wheaton (Dec. 13, 1815), reprinted in 1 *Life and Letters*, *supra* note 131, at 270-72. Story's list of the objects to which he was passionately committed included:

a [national] navigation act; . . . the extension of the jurisdiction of the Courts of the United States over the whole extent contemplated in the Constitution; the appointment of national notaries public, and national justices of the peace; national port wardens and pilots for all the ports of the United States; a national bank, and national bankrupt laws.

He had "meditated much on all these subjects," Story informed Wheaton, "and ha[d] the details in a considerable degree arranged in [his] mind." *Id.*

⁴⁶³ Henry Wheaton to Catherine Wheaton (Mar. 20, 1834), *Wheaton Papers*, *supra* note 1.

⁴⁶⁴ Henry Wheaton to Charles Chauncey (June 11, 1834), *Cadwalader Papers*, *supra* note 449.

⁴⁶⁵ Henry Wheaton to Levi Wheaton (Mar. 20, 1834), *Wheaton Papers*, *supra* note 1.

⁴⁶⁶ Henry Wheaton to Charles Chauncey (June 11, 1834), *Cadwalader Papers*, *supra* note 449 (emphasis in original).

⁴⁶⁷ Henry Wheaton to Eliza W. Lyman (his sister) (May 14, 1837), *Hay Library Papers*, *supra* note 143 (emphasis in original).

⁴⁶⁸ Henry Wheaton to Levi Wheaton (Mar. 20, 1834), *Wheaton Papers*, *supra* note 1.

⁴⁶⁹ Story confided to his friend Chancellor Kent:

I am sorry for the controversy . . . [and] wish Congress would make some additional provisions on the subject, to protect authors, of whom I think no one more meritorious than Mr. Wheaton. You, as a Judge, have frequently had occasion to know how many bitter cups we are not at liberty to pass by.

Joseph Story to James Kent (May 17, 1834), reprinted in 2 *Life and Letters*, *supra* note 131, at 182.

⁴⁷⁰ H. Carson, *supra* note 4, at 234.

⁴⁷¹ Henry Wheaton to Levi Wheaton (Apr. 15, 1840), *Wheaton Papers*, *supra* note 1.

Justice David J. Brewer: A Voice for Peace on the Supreme Court

by Michael J. Brodhead



Kansas State Historical Society

Battles such as the Battle of the Blue depicted here, convinced Brewer that warfare threatened not only the life and property of individuals, but their other rights as well.

David Josiah Brewer's long career as a jurist spanned most of the reform era of the late nineteenth and early twentieth centuries. In many works dealing with the American judiciary in those years he appears as a genial conservative who consistently opposed the public's reform demands. In some respects this reputation is warranted. Yet on and off the bench he spoke out for a variety of causes, notably women's rights, education, charities, the rights of the Chinese in America, and — most of all — peace. Given his prominence and the force and frequency of his peace advocacy, it is somewhat surprising to find him so seldom mentioned in the historical treatments of the peace movements of his time.

Nowhere does he tell us directly what forces shaped his opposition to war. But there are certain events, institutions and persons that certainly must have been influences. The peaceable teachings of Christianity were there from his birth in 1837, in Smyrna, Asia Minor (then the Ottoman

Empire), where his father, a Congregationalist minister was serving as a missionary. His uncle, the distinguished lawyer David Dudley Field, who helped to guide his namesakes' early legal career, was a conspicuous advocate of the arbitration of international disputes.¹ Perhaps also contributing to Brewer's antipathy to war was the fact that one of his brothers lost his life in the Civil War.

After graduating from Yale, Brewer received his law training at Albany Law School, taking his diploma in 1858. From there he migrated to Leavenworth, Kansas, married, and began his long and successful climb through the American judicial system.

A county and state district judge during the Civil War, he performed no military duties beyond those of a lieutenant in a home guard unit in Leavenworth.² Being a Republican, he believed in the Union cause but was not blind to the horrors of war. Although eastern Kansas was far



Both Maj. Gen. William T. Sherman (left), and Maj. Gen. John Pope (right) were severely criticized by Justice Brewer in 1861 for violating civil laws. Pope commanded the Union forces in the Second Battle of Bull Run in 1862. Badly defeated, he was removed from command. Sherman went on to become Grant's most dependable general and in 1869 succeeded Grant as commander of the army.

from the main centers of the conflict, vicious fighting did take place in the area. He saw at close hand that military force not only destroyed lives and property but also impaired the rights of individuals and property — rights to which he was steadfastly devoted for a lifetime.

A clash with army authority just at the close of the hostilities no doubt added to his dislike of all things military. Major General John Pope, commander of the Department of the Missouri, authorized the seizure of horses and other livestock believed to have been illegally obtained from the Indians. Brewer, then judge of the first judicial district of Kansas, saw the entire affair as a high-handed taking of property without due process. Pope wrote an intemperate letter to Brewer informing him that the matter was outside the jurisdiction of the state courts. In stern letters to Pope and his superior, Major General William T. Sherman, Brewer denounced the military's violations of civil law and its brushing aside of the civil courts.³

In 1883, while serving as an associate justice of the state's supreme court, Brewer addressed the graduates of Washburn College of Topeka, warning them against "the man on horseback" and the "pride, pomp and circumstances of glorious war." He singled out Sherman's march to the sea for special attention:

We forget the terrible ravages of that march, the burning towns, the ruined farms, the desolated fields; we forget the thousand homes scattered all over the land, where weeping eyes still cherish the sacred tear for the loved one whose footsteps shall echo on the threshold no more forever; we forget that, even as the great commander himself said, war is hell; we remember that Sherman broke the shell of the Confederacy, and ended the Rebellion, and today he is General of the army, while huzzas of brave men and kisses of fair women follow him from ocean to ocean, and many an ambitious youth looks lovingly on his gilded epaulets.

"The soldier," he continued, "is not the ruler of a free people. He is by nature a despot. He speaks of force, not thought; of arms, not ideas. His ideal of society is the army where each individual is but one part of a vast machine moved with mechanical certainty and metallic rigidity by the central and absolute power."⁴

Less than a year after speaking these words, Brewer received appointment as judge of the Eighth Circuit Court. His elevation to associate justice of the United States Supreme Court came in 1889.

As a national figure and a willing and accomplished orator, Brewer was much in demand as a public speaker. To the dismay of some of his colleagues on the court, he often gave his frank opinions on a variety of issues. Peace was a constant theme in his addresses.



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Sherman made the noted "march to the sea" from Atlanta to Savannah. The destruction and turmoil which followed in his wake seemed to demonstrate his statement that "war is hell."

Earlier in the nineteenth century, pacifist sects and peace and anti-war organizations of a general nature, such as the American Peace Society, had characterized the peace movement in America. In the 1890s, by which time arbitration of international disputes had long been practiced in American diplomacy, many conservative leaders embraced this device as a favorite remedy for preventing war.⁵ The arbitration movement gathered much popular support in the last years of the century. David Dudley Field, in a paper for the World's Congress on Jurisprudence and Law Reform in 1893, proudly announced that the United States was doing more than any other nation to advance the cause of arbitration.⁶

The practice appealed strongly to Brewer's judicial temperament. His attachment to the movement is evident in the early 1890s. The press of court business prevented his acceptance of an invitation to attend the Lake Mohonk conference on arbitration in 1895, but for the next several years he regularly participated in its annual gatherings.⁷

That summer he addressed the American Bar Association in Detroit. His remarks on arbitration were especially well received. He noted the growing number of successful arbitrations and the

progress being made towards the establishment of a world tribunal to adjudicate international conflict.⁸ Notions of a "parliament of man" and a world federation were, he argued, impractical dreams; a far more realistic proposal for insuring peace was adjudication by international courts. The lawyer and the judge, he told his appreciative audience, would lead the way.⁹

Soon thereafter Brewer had the opportunity to put his faith into action. The Cleveland administration, in an effort to goad Great Britain into accepting arbitration to settle the disputed boundary between Venezuela and British Guiana, persuaded Congress to establish a commission consisting of lawyers, jurists, and scholars, to investigate the question. Cleveland appointed Brewer to it and the other members unanimously elected him as its president. The commission and its staff began poring over a mass of documentary evidence. When it became apparent that the findings would be detrimental to the British claims, Britain agreed to arbitration.¹⁰

In submitting their final report, Brewer and the other commissioners pointed out that the boundary question had created "no little bitterness of feeling between the people of Great Britain and



Justice Brewer studied law with his uncle, David Dudley Field, Jr. (left) who wrote the "Field Code" which was adopted by 23 states to modernize civil procedures. Brewer himself (right) joined another uncle, Stephen Field on the Supreme Court in 1884.

the United States" and that there had been talk of war. The commissioners took pride in the influence of their work in bringing about arbitration and in allaying fears of war. They further expressed the hope that their findings would facilitate the work of the arbitral tribunal.¹¹

Brewer was appointed to serve on the tribunal, as was Chief Justice Melville W. Fuller. The other members were two British jurists and a Russian diplomat. Meeting in Paris from June to September, 1899, the tribunal arrived at a decision and the matter was settled. Since it was a compromise settlement which perhaps gave more to Britain than was just, no one, least of all Brewer, was entirely satisfied.¹² Yet the experience strengthened his conviction that arbitration was the best means of peaceably solving quarrels between nations.

Severely impairing his optimism for a pacific world was the bellicose mood of his own countrymen in the 1890s. Numerous American politicians, journalists, intellectuals, and other public figures were preaching the desirability and necessity of war — war with anybody and for any reason. Oliver Wendell Holmes, Jr., who was to join Brewer on the Supreme Court in 1902, is a prominent example of a *fin-de-siecle* exponent of the benefits of war. Brewer stoutly opposed all glorification of war. Even when addressing the ca-

dets at West Point during the dedication of a battle monument in 1897 he reminded them that their highest duty was to be "defenders of law and the guardians of peace."¹³

He openly ridiculed patriotic and veterans' societies that were so active in whipping up the war spirit. Such organizations "must have their local branches, and each with a roster of officials startling in number and amusing with the magnificence of their titles; presidents and president generals and honorary presidents. . . . It seems sometimes as though the dictionary had been ransacked not merely to find titles but adjectives to adorn those titles."¹⁴

As tensions between Spain and the United States mounted in the later 1890s Brewer voiced the belief that war was not likely since Spain could not hope to conquer and hold any portion of American soil.¹⁵ Such wishful thinking was no match for American demands for military action against Spain. When war did come he damned it with faint praise. He believed it to be justified only because of Spanish atrocities and by the freeing of Cuba.¹⁶

While the fighting was taking place, Brewer told his countrymen that America's strength lay "not so much in its army and navy as its public schools" and warned against "the dazzle of military glory." He also voiced his anxiety over the



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Theodore Roosevelt and the Rough Riders storm San Juan Hill in Cuba on July 1, 1898. In actuality, because the fighting was heavy in the area, the Rough Riders were unable to move their horses up to the front and only Roosevelt was on horseback at the battle.

talk of seizing the Philippines, Cuba, and Puerto Rico. The nation, he believed, would be far better off if it let the oceans continue to separate the new world from the old and ceased looking outside of her borders for wrongs to make right; instead, Americans should use their energy to promote domestic reform and commercial and industrial advancement. "So doing we shall make the United States the mightiest of nations, mightier than Great Britain with her navy, than Germany with her soldiers, than Russia with all her vastness of territory; mightier through the might of a great and bold example and thus more than in any other way hasten the day when the tramp of the armed battalion and the boom of the destroying cannon shall no more be heard, and peace shall fill the earth with the blessed sunlight of heaven."¹⁷

His grudging endorsement of the war did not lead to acceptance of the imperial expansion resulting from the conflict. He frequently and vigorously denounced his country's venture in imperialism. Even before the peace treaty was agreed to, he told a newspaper interviewer that American ownership of Puerto Rico and the Philippines would be contrary to America's traditional opposition to government by force and would

weaken the Monroe Doctrine.¹⁸

Once the former Spanish possessions became United States property, Brewer expressed his anti-imperialist sentiments in two ways. As a member of the Supreme Court he consistently voted with those of his colleagues who opposed the view that the new territories were not fully incorporated into the American constitutional system.¹⁹ Although he wrote none of the opinions in the *Insular Cases*, he urged the Chief Justice, in a private letter, to "stay on the court till we overthrow this unconstitutional idea of colonial supreme control."²⁰

Off the bench he inveighed against American participation in European-style colonialism. In a magazine article he wrote of his difficulty understanding how the Constitution — written by men who had overthrown colonial rule — could be interpreted as granting power to Congress "to hold other people in like colonial subjection."²¹

His major statement on the war and the acquisition of the Spanish islands was an address before the Liberal Club in Buffalo, "The Spanish War: A Prophecy or an Exception?" In it he conceded that the war was waged mostly for humanitarian reasons, but he noted other, less exalted factors:

threats to American commercial relations and investments; the "tempestuous utterances of those jingo orators who shouted for war but never enlisted"; and of course the desire for military glory.²² As the title of the address suggests, Brewer hoped that the war and its imperialistic aftermath were aberrations, not portents of things to come, and that the United States would not seek other wars or more colonies to govern by force.

The main theme of the Buffalo address was anti-imperialism but throughout his remarks he consistently emphasized peace and opposition to militarism: "... is there not such a thing as overdoing this getting ready for war? I have noticed that a man who goes about with a chip on his shoulder is very apt to have many quarrels, but the gentleman who minds his own business is ordinarily let alone and goes through life without a fight."²³

In a talk before the New England Society of Pennsylvania he argued that the United States had not become a world power because of the Spanish-American War; rather it was already a world power by virtue of religious strength and commercial growth.²⁴ Not all commercial activity met with Brewer's approval. He no doubt took satisfaction in writing two opinions in which the Supreme Court ruled against shipbuilding companies seeking more than the agreed-upon payment for the construction of naval vessels.²⁵

At the end of the nineteenth century Brewer predicted that the coming century would bring a better day for mankind: "Peace, with its white wings, hovers everywhere in the air," even though "the steady arming of the world goes on and the great battallions and huge armaments increase."²⁶ Had he not added these qualifying words he would appear impossibly naive because the first years of the century were marked by the increase of tensions that were to culminate in the outbreak of World War I.

The first ten years of the new century was also the last decade of Brewer's life. During this time, despite declining health, he redoubled his efforts in the cause of peace. Before a variety of audiences — lawyers, church groups, businessmen, and students — he spoke out on the same themes he had addressed previously: the promise and practicality of arbitration and adjudication, the evils of imperialism, the dangerous and expensive increase of armaments, the duty of Christians to work for peace, the Golden Rule as the guiding



Conservative Republicans nicknamed Theodore Roosevelt "that damned cowboy." Cartoonists also frequently pictured him with clubs and boxing gloves. Given his aggressive, imperialistic image, it is interesting to note that Roosevelt won the Nobel Peace Prize in 1906 for helping to end the Russo-Japanese War.

principle in diplomacy, the incompatibility of war and civilization, the rule of law in international relations, the progress being made in mitigating the horrors of war, and the role of commerce in promoting harmony between nations.²⁷

Several of these public addresses were also printed as articles or pamphlets, thereby reaching still more people. His willingness to grant interviews to journalists gave him further opportunities to incline public opinion towards peace.

Brewer continued to be active at the Lake Mohonk conferences. At the 1904 meeting he spoke optimistically on the work of the Hague Conference in furthering the cause of arbitration. Four years later at Lake Mohonk he urged that the United States assume leadership in the disarmament movement and praised the part played by women in promoting peace.²⁸

At the 1905 meeting, where he spoke on "The Enforcement of Arbitral Awards," he and other distinguished lawyers, jurists, and diplomats laid the groundwork for an organization, the American Society of International Law, which they formally established in 1907. Brewer was chosen as one of its vice-presidents.²⁹

With Charles Henry Butler he wrote a treatise on international law. In the preface they expressed

their faith in international tribunals.³⁰ Brewer was one of many of his generation who saw the United States Supreme Court, with its history of successfully settling quarrels between states, as a "pattern for a future court of nations" which could similarly decide controversies between sovereign powers. "This method of determining causes," he believed, "will be extended throughout the world."³¹

Despite a growing sentiment for peace, Brewer was sadly aware that most Americans of the early twentieth century seemed to favor the aggressive foreign policies of the Roosevelt administration and a larger army and navy to back up such policies. He repeatedly and forthrightly condemned the Big Stick in general and denounced in particular the wresting of Panama from Colombia. His views of course came to Roosevelt's attention and may have been more important than his judicial responses to social and economic matters in shaping Roosevelt's privately expressed antipathy for the justice.³²

Most of Brewer's addresses, lectures, interviews, and articles covered more than one topic, not peace alone. His last major address, however, a speech before the New Jersey State Bar Association in 1909, dealt with peace exclusively. Entitled "The Mission of the United States in the Cause of Peace," it was a forceful summing up of

the peace themes he had long espoused, e.g., arbitration and the Christian duty of the United States to lead the movement against war, but the major point was his opposition to increased armaments and the Big Navy thinking then so fashionable. Brewer blasted those "interests which profit by naval construction" for being "active and clamorous" in the Big Navy movement.³³

He then decried other manifestations of the martial spirit: "From the football field to the iron-clad, from the athlete to the admiral the thought and the talk is fight." The increasingly military aspect of the nation's capitol, so evident since the Spanish-American war, disturbed him. He considered the global voyage of the Great White Fleet to have been so much "parade and frolic" which contributed nothing to the promotion of peace. Also, he pointed out the disadvantages of war for both businessmen and the working classes; in time of war the former lost money and property, while the latter bore the brunt of the destruction of life.³⁴

Shortly after agreeing to speak before the New England Arbitration and Peace Conference,³⁵ Brewer, on March 28, 1910, died quietly in Washington. His passing was a deeply felt loss in American peace circles.³⁶ As the city of Leavenworth was preparing for his internment there, a spokesman for Fort Leavenworth announced that



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Roosevelt's Great White Fleet set out on a world cruise in 1907-08, as a show of force against Japan. In accordance with the Naval custom of the time, all the ships of the fleet were painted white.



Admiral Bob Evans (left) and Theodore Roosevelt on board the *Mayflower*, one of the ships in the Great White Fleet. Roosevelt's foreign policy was one of increasing U.S. imperialism which the fleet very visibly displayed.

army regulations had no provision for a military escort for the funeral of an associate justice.³⁷ No doubt David Brewer would have preferred it so.

In some respects Brewer was typical of the peace advocates of his day: a conservative member of an elite class who saw war as destructive to property and the social order and who had a legalistic faith in the efficacy of arbitration and adjudication.³⁸

Yet in other important ways, Brewer went beyond the typical anti-war spokesmen of that period. Unlike them, he was not content to work only within the small elitist peace groups. Although he did not attempt to reach a mass audience, he did take his message to many diverse groups of middle-class Americans. Several of his colleagues in the peace movement accepted imperialism and even embraced Big Navy thinking. Not Brewer. To him imperialism was both the evil fruit of past war and productive of future ones. And increased armaments in any form, he believed, inevitably resulted in war.

One recent student of early twentieth century peace movements has written that the peace advo-

cates of that time "refused to accept militarism as a growing evil of modern life. Rather, they regarded it as an anachronistic survival of an earlier, unenlightened era and as incompatible with modern industrialism."³⁹ If this generalization is valid, Brewer again is an exception. He was acutely aware that militarism was on the rise and said so repeatedly.

On the other hand, he was not a thorough pacifist. He believed that the Civil War had been necessary because it preserved the union and ended slavery and that the freeing of Cuba had given the Spanish-American War a measure of respectability. When American lives and property were in real jeopardy, armed force, he acknowledged, was justified. Brewer even stated that an American citizen owed military service to his country in time of war, even if the war itself was not altogether a just one.⁴⁰

These qualifications aside, we must recognize that David J. Brewer was a tireless, dedicated, and eloquent advocate of peace and among the most visible and vocal critics of militarism in his time.

Footnotes

¹ Henry M. Field, *The Life of David Dudley Field* (New York: Charles Scribner's Sons, 1898), 219-242, *passim*.

² Undated clipping, c. 1881, in scrapbook, Box 9, Brewer Papers, Yale University.

³ William E. Unrau, "Joseph G. McCoy and Federal Regulation of the Cattle Trade," *The Colorado Magazine*, 43 (Winter, 1966), 36-38; unidentified clipping, scrapbook, David B. Karrick Papers, Yale University.

⁴ Brewer, "The Scholar in Politics," *Commencement Exercises, Washburn College, June '83* (Manhattan, KS, n. p.: 1883), 23-24.

⁵ C. Roland Marchand, *The American Peace Movement and Social Reform, 1898-1918* (Princeton, NJ: Princeton University Press, 1972), 55, 63-64. The term arbitration, as used here, refers to the settlement of international quarrels with the participation of a person or persons mutually agreeable to the parties in the controversy. Arbitration, as opposed to adjudication, is not a judicial proceeding.

⁶ *American Advocate of Peace*, 55 (Nov., 1893), 254.

⁷ *Report of the First Annual Meeting of the Lake Mohonk Conference on International Arbitration* (1895), 17.

⁸ Adjudication, as distinguished from arbitration, is the settlement of international disputes by a court, tribunal, or other judicial body.

⁹ Brewer, "A Better Education the Great Need of the Profession," *The American Lawyer*, 4 (Jan., 1896), 13.

¹⁰ Leslie B. Rout, Jr., *Which Way Out? A Study of the Guyana-Venezuela Boundary Dispute* (East Lansing, MI: Latin American Studies Center, Michigan State University, 1971), 18-20; Marcus Baker, "The Venezuelan Boundary Commission and Its Work," *National Geographic Magazine*, 8 (July-Aug., 1897), 195-197.

¹¹ *Report of the Special Commission . . . to Examine and Report upon the True Divisional Line between the Republic of Venezuela and British Guiana*. 4 vols. Sen. Doc. No. 91, 55th Cong., 2d sess. (1898), I, 21-22.

¹² Marcus Baker, "The Anglo-Venezuelan Boundary Dispute," *National Geographic Magazine*, 11 (April, 1900), 143; Otto Shoenrich, "The Venezuela-British Boundary Dispute," *American Journal of International Law*, 53 (July, 1949), 528-530; Willard L. King, *Melville Weston Fuller, Chief Justice of the United States, 1888-1910* (Chicago: University of Chicago Press, 1967), 259-260; *Kansas City Star*, June 30, 1900.

¹³ *Address of David J. Brewer . . . at the Dedication of the Battle Monument, West Point, New York,*

May 31, 1897 (West Point [?]: U.S.M.A. Press and Bindery, 1897).

¹⁴ Brewer, *The Twentieth Century from Another Viewpoint* (New York: Fleming H. Revell Company, 1899), 23.

¹⁵ *Topeka Capital*, July 30, 1897.

¹⁶ *New York Times*, Dec. 17, 1906, 7:2.

¹⁷ Brewer, *The Income Tax Cases, Address Delivered before the Graduating Class of the Law Department of the University of Iowa at the Annual Commencement, June 8, 1898* (n. p., n. d.), 17, 21-23.

¹⁸ *New York Times*, July 22, 1898, 12:5.

¹⁹ James E. Kerr, *The Insular Cases: The Role of the Judiciary in American Expansion* (Port Washington, NY: Kennikat Press, 1982), 19-20.

²⁰ King, *Fuller*, 265-267, 269, 270-271, 273-276.

²¹ Brewer, "What I Have Gained from Bible Teaching," article from unidentified magazine, Brewer Papers, Box 3.

²² Brewer, *The Spanish War: A Prophecy or an Exception?* (Buffalo: The Liberal Club, 1899), 3-4.

²³ *Ibid.*, 12, 21-22.

²⁴ *New York Times*, Dec. 24, 1901, 1:1.

²⁵ *United States v. Bliss*, 172 U.S. 321 (1899); *United States v. Cramp & Sons Ship & Engine Building Company*, 206 U.S. 118 (1907).

²⁶ Brewer, *The Twentieth Century from Another Viewpoint*, 54.

²⁷ Brewer, "The Triumph of Justice" (University of Kansas commencement address), *Lawrence Journal*, June 10, 1903; Brewer, *The United States a Christian Nation*. Haverford Library Lectures (Philadelphia: John C. Winston Co., 1905), 63, 66, 68, 88-89; *New York Times*, Nov. 21, 1905, 2:3; *ibid.*, Dec. 17, 1906, 7:2; Brewer, *American Citizenship*. Yale Lectures on the Responsibilities of Citizenship (New York: Charles Scribner's Sons, 1906), 43, 51-54, 125-127; Association of Agents of the Northwestern Mutual Life Insurance Company, *Minutes of the Twenty-fifth Annual Meeting, July 16th and 17th* (1901), 30-41; Brewer, "The Ideal Lawyer," *Atlantic Monthly*, 98 (Nov., 1906), 597; *Official Report of the Universal Congress of Lawyers and Jurists, Held at St. Louis, Missouri, U.S.A., September 28, 29 and 30, 1904, under the Auspices of the Universal Exposition and the American Bar Association* (St. Louis, 1905), 5, 7.

²⁸ Brewer, "Keeping to the Highest Ideals," *Report of the Tenth Annual Meeting of the Lake Mohonk Conference on International Arbitration* (1904), 116-119; Brewer, "America's Duty in the Peace Movement," *ibid.*, *Fourteenth Annual Meeting* (1908), 147-149.

²⁹ *Proceedings of the American Society of International Law at its First Annual Meeting, Held at Washington, D.C., April 19 and 20, 1907* (New York: American Society of International Law, 1908), 9,

23-24, 37.

³⁰ Brewer and Butler, *International Law* (New York: American Law Book Company, 1906), 4-5.

³¹ "Remarks of Hon. David J. Brewer," *Report of the Thirteenth Annual Meeting of the Lake Mohonk Conference on International Arbitration* (1907), 169-171; *Kansas City Journal*, June 3, 1907.

³² E. F. Ware, "D. J. Brewer," *Proceedings of the Twenty-eighth Annual Meeting of the Bar Association of the State of Kansas* (1911), 20; Brewer, *American Citizenship*, 120-121, 122; *New York Times*, Dec. 17, 1906, 7:2; Brewer, "Why Do I Believe in Foreign Missions?," *The Envelope Series*, 8 (April, 1905), 7-8.

³³ Brewer, *The Mission of the United States in the Cause of Peace* (Boston: International School of Peace, 1910), 2,3, 13.

³⁴ *Ibid.*, 10-11, 15, 16, 18-20.

³⁵ Arthur Deer Call to Brewer, March 9, 1910, Brewer Papers.

³⁶ "Justice David J. Brewer," *Advocate of Peace*, 72 (May, 1910), 98-99.

³⁷ *Leavenworth Times*, April 1, 1910.

³⁸ David S. Patterson, "An Interpretation of the American Peace Movement, 1898-1914," in *Peace Movements in America*, ed. by Charles Chatfield (New York: Schocken Books, 1973), 20-38; see also Sondra R. Herman, *Eleven Against War: Studies in American Internationalist Thought, 1898-1921* (Stanford, CA: Hoover Institution Press, 1969).

³⁹ Patterson, "An Interpretation of the American Peace Movement," 31.

Historical Anomalies in Administrative Law

by Antonin Scalia*

Introduction

Some social philosopher observed that the popularity of art, almost all forms of art, as a subject of social conversation is in large part attributable to the fact that there are no demonstrable rights and wrongs, so that all participants in the conversation, the quick and the slow, the informed and the ignorant, can participate on a basis of apparent equality and with minimal risk of embarrassment. "N'aimez-vous pas Brahms? Ah well, *de gustibus non est disputandum*." I hope the science of law is not quite so latitudinarian, but sometimes I worry about it. "Ah, you think the right to play Dungeons and Dragons in the privacy of your own bedroom is embraced within the 3:00 PM penumbra of the First Amendment? Well, I disagree, but there's no accounting for constitutional tastes."

History, however — even legal history — is not at all like that. It is much more possible to be unquestionably, embarrassingly, flat-out wrong. If, for example, I were to assert that the writ which Lyndon Johnson was reputed, on one occasion, to have told an aide to run and fetch from some federal judge — a writ of fixitatus — if I were to assert that such a writ never existed, but was a creation of Johnsonian fancy and the Imperial Presidency, I might well be proven *wrong*. My friend and former colleague at the University of Chicago, John Langbein, unlike me a real historian, might bring forward a roll-book of the County Court in Lancashire, demonstrating beyond cavil (as we say) that the writ of fixitatus was common as late as 1323.



Judge Antonin Scalia (above) of the D. C. Court of Appeals for the District of Columbia delivered this lecture in the Restored Supreme Court Chamber in the Capitol Building.

In the face of such misgivings, however, I am resolved to press forward — or perhaps it is backward — into the realm of history. I have selected two juris-historical anomalies (or at least what have always seemed to *me* anomalies) in the field of administrative law. They are unrelated, except that they both pertain to that field, and except that they both suggest a lesson for the modern student, or indeed the modern judge, which I will try to make clear at the conclusion of my remarks.



William Marbury (left) asked the Supreme Court for a writ of *mandamus* against James Madison (right) in an attempt to force Madison to grant Marbury his commission as a justice of the peace for the District of Columbia.

The History of Sovereign Immunity

The first historical curiosity pertains to the doctrine of sovereign immunity, which has in our federal tradition — particularly from the mid-19th to the mid-20th century — been a substantial obstacle to suits against administrative officers. In fact, the “canned” Justice Department brief urging dismissal of the suit for judicial review of administrative action on sovereign immunity grounds remained a common phenomenon until 1976, when the Administrative Procedure Act was amended clearly to exclude that ground in most instances.

I always found that peculiar, since the fountainhead of American constitutional law was precisely a suit against a federal official — and a very high one at that — and did not think it necessary even to *mention* the issue of sovereign immunity. I refer, of course, to *Marbury v. Madison*. The opinion begins:

At the last term, on the affidavits then read and filed with the clerk, a rule was granted in this case, requiring the secretary of state to show cause why a *mandamus* should not issue, directing him to deliver to William Marbury his commission as a justice of the peace for the county of Washington, in the district of Columbia.

No cause has been shown, and the present motion is for a *mandamus*. In the course of his opinion, Chief Justice Marshall does, of course, discuss at some length whether a *mandamus* can issue to so important an official as the Secretary of State — but the discussion is strange to the modern ear, because it nowhere seeks to ask and resolve (as we moderns would) whether the suit is *in reality* one against the United States, though nominally against James Madison.

The explanation of this anomaly is quite simple: At the time of *Marbury v. Madison* there was no doctrine of domestic sovereign immunity, as there never had been in English law. As Marshall notes in passing in the portion of his opinion establishing the proposition that there is no right without a remedy: “In Great Britain, the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of the court.”

Of course there *was* in England, as there was in all civilized countries, a doctrine of *foreign* sovereign immunity, whereunder no sovereign could be sued in the courts of *another* sovereign without its consent. And it is the transposition of that quite different doctrine on American soil which ultimately leads to the “canned” Justice Depart-

ment brief and the use of sovereign immunity as a means of restricting judicial review of administrative action. The process of that development is interesting.

It begins with a case that antedates *Marbury*, decided in 1793, when John Jay was Chief Justice. *Chisolm v. Georgia* held that the constitutional grant of Supreme Court jurisdiction over controversies between a "State and a citizen of another State" conferred jurisdiction — despite the doctrine of foreign sovereign immunity — over a civil action brought *against* a state (and therefore unconsented to) in the Supreme Court. As you know, the decision provoked a furor, and at its very next session the Congress almost unanimously proposed the Eleventh Amendment, which precluded suit in federal courts against a state by citizens of another state. In 1821, twenty-eight years after *Chisolm* and eighteen years after *Marbury*, Chief Justice Marshall, in *Cohens v. Virginia* assumed that this doctrine of immunity against suit in federal courts applied to the United States as well. It was, he said "the universally received opinion . . . that no suit can be commenced or prosecuted against the United States; that the judiciary act does not authorize such suits." [19 Wheat. at 411.] The doctrine of domestic sovereign immunity for the United States has been with us ever since.

[I cannot avoid noting, parenthetically, the profound envy that my colleague Judge Ginsburg and I have of Justice Marshall's ability to decide such an important issue in four words: "the universally received opinion." A renewed acceptance of that practice would certainly solve the problem of over-long appellate opinions. It seems to me most dubious, moreover, that the opinion in question was in fact "universally received." It is assuredly incompatible with the opinion of Justice Wilson twenty-eight years earlier in *Chisolm*, which said:

A state, like a merchant, makes a contract. A dishonest state, like a dishonest merchant, wilfully refuses to discharge it: the latter is amenable to a court of justice: upon general principles of right, shall the former, when summoned to answer the fair demands of its creditor, be permitted, Proteus-like, to assume a new appearance, and to insult him and justice, by declaring I am a *sovereign* state? Surely not. '2 Dall. at 455.

End digression. Whether or not Marshall's assumption of federal sovereign immunity was influenced by the Eleventh Amendment (the judiciary act is assuredly silent on the subject), it is clear — and probably unfortunate — that the subse-

quent extension of federal sovereign immunity to suits against federal *officers* (as opposed to suits against the United States *eo nomine*) was influenced by the Eleventh Amendment cases. It had been established in a sharply contested series of cases in the early 19th century that, in determining whether a state was party to a suit, the court would not look beyond the record. If a state was not named, the Eleventh Amendment did not apply. If that rule had held, sovereign immunity as an obstacle to judicial review of federal administrative action would never have appeared. That is the reason, by the way, that mandamus and other suits against officers of the most venerable federal departments — tax collectors of the Treasury, land commissioners of the Department of the Interior, and postmasters general of the Post Office Department — have long been allowed in circumstances that would, in other contexts after the 1880s, have encountered the bar of sovereign immunity. But in fact the rule that if the state was not named the state was not sued did not hold — as it logically could not, given the purposes of the Eleventh Amendment. Since a state can only be administered by its officers, plenary power over them amounts to plenary power over the state itself. It makes little difference whether the state is ordered to pay over funds wrongfully held in its treasury, or whether the governor is ordered to do so. As Justice Miller said in one of the cases, decided in 1883, *firmly establishing the abandonment of the earlier rule*:

No money decree can be rendered against the State, nor against its officers, nor any decree against the treasurer . . .

If any branch of the State government has power to give plaintiff relief it is the legislative. Why is it not sued as a body, or its members by mandamus, to compel them to provide means to pay the State's indorsement?

The absurdity of this proposition shows the impossibility of compelling a State to pay its debts by judicial process. ²*Cunningham v. Macon & Brunswick Railroad Co.*, 109 U.S. 446, 457 (1883).

The new rule governing Eleventh Amendment cases was unthinkingly applied to *federal* sovereign immunity cases as well, the courts seeking to divine when it was that a suit nominally against a federal official was *in reality* (whatever that means) against the United States. Of course the transposition makes no sense — just as the original extension of sovereign immunity *as such* made no sense. The incompatibility is particularly evident — and wryly amusing — in mandamus cases. For mandamus was historically a writ is-

sued by the King's judges, *on behalf of the King*, to compel his officers throughout the country to perform their assigned functions. The whole theory of the action was that — far from being a suit *against* the sovereign — it was a suit *by* the sovereign, at the instance (or on the relation) of a private party. Hence, such actions were traditionally styled *Rex ex relatione (ex rel.) John Smith (the plaintiff) v. John Doe (The royal official)*. That practice has persisted in our federal courts — though with an inconsistency that matches the theoretical confusion that the doctrine of sovereign immunity has created. Thus, in the single subject area of suits to compel the issuance of land patents, you will find almost all possible permutations: A suit captioned *United States v. The Commissioner* — with no “ex rel.” in the title, but the plaintiff referred to in the body of the opinion as “the relator.” 372 U.S. (5 Wall.) 563 (1866). A suit captioned *McGarrahan v. The Secretary (The Secretary v. McGarrahan on appeal)*, in which McGarrahan is referred to as “the relator.” 476 U.S. (9 Wall.) 298 (1869). A suit entitled *In re Emblen*, in which the plaintiff is referred to as “the petitioner.” 5161 U.S. 52 (1896). And a suit entitled *United States ex rel. Frost v. Ballinger* (vice-versa on appeal), in which the plaintiff is referred to as “the relator.” 6216 U.S. 240 (1910). [Those of you who have occasionally wondered, as I have, when and why “United States ex rel.” appears in the caption of a mandamus case can cease wondering. The answers are “sometimes” and “no particular reason.”]

But historical ironies aside, the rule that a suit against an officer can be a suit against the United States made no sense because the purpose to be served by the rule of federal sovereign immunity (if any) was not the purpose to be served by the Eleventh Amendment. The purpose of the latter was the preservation of a sound federalism. The purpose of the former (if Marshall was correct that the federal judiciary act did not envision unconsented suits against the United States) was, if anything beyond mere protection of the federal fisc, the preservation of a sound separation of powers. What is needed to protect the states from the federal courts, and what is needed to protect the federal executive from the federal courts, is not necessarily identical. The historical developments I have described left us with a body of law that long served (and in a few isolated instances serves still) as an irrational impediment to judicial review. My objection, I hasten to add, is not to the impedi-

ment but to the irrationality. Which brings me back — as all things do — to *Marbury v. Madison*. Although, as I have said, Chief Justice Marshall did not discuss sovereign immunity — either the “universally received” existence of that doctrine, or its conceivable application to a suit against an officer had not occurred to him — he *did* address, and at some length, the considerations of separation of powers which the doctrine primarily (and most inefficiently) serves. We would have been better off, I think, if that sensible, direct approach had subsisted.

The Birth of the Independent Regulatory Agency

But it seems strange to discuss administrative law in the context of *Marbury v. Madison*. The real birth of the administrative state in this country dates from the New Deal — and it is in that era that my next historical vignette is set: I want to unburden myself of some historical reflections upon the famous case of *Humphrey's Executor v. United States*, the case that marks the birth of what has come to be known academically as the independent regulatory agency, and derogatorily as the headless fourth branch of government.

Humphrey's Executor was decided in 1935. Nine years earlier, in an opinion written by a for-



Franklin Roosevelt claimed a constitutional basis for his New Deal programs existed in emergency executive powers and the power of Congress to provide for the general welfare and to regulate interstate commerce.

mer President of the United States (Chief Justice Taft) for a court six of whose members were the same, the Court had decided that the Constitution's grant to the President of the power to appoint officers implied the power to remove them; and that that power could not be constrained by a statute purporting to require the advice and consent of the State for removal of postmasters. That earlier case, *Myers v. United States*, was one of the landmarks of American constitutional law, and had been treated as such. It was argued in December of 1923 and then reargued in April of 1925; the opinion issued more than a year and a half later, in October of 1926. The opinion for the Court was 70 pages; Justice Holmes filed a one-page dissent; Justices McReynolds and Brandeis, who were two of the six Justices still on the Court when *Humphrey's Executor* was later decided, filed dissents of 61 and 55 pages, respectively.

At issue in *Humphrey's Executor* was the removal not of a postmaster but of a commissioner of the Federal Trade Commission. The statute in question did not condition removal upon Senate consent, but provided that commissioners could be removed by the President "for inefficiency, neglect of duty, or malfeasance in office." Notwithstanding that provision, President Franklin Roosevelt had written to Commissioner Humphrey demanding his resignation, on the ground "that the aims and purposes of the Administration with respect to the work of the Commission can be carried out most effectively with personnel of my own selection," and that "I do not feel that your mind and my mind go along together on either the policies or the administering of the Federal Trade Commission." When Humphrey refused to resign, President Roosevelt removed him. Suit was brought by his widow in the Court of Claims to recover back pay. That court certified to the Supreme Court the questions whether the FTC Act prevented his removal without cause and, if so, whether it was constitutional.

The case was argued in the Supreme Court on May 1, 1935. On May 27, 1935, the Court issued a unanimous 14-page opinion — only six pages of which were devoted to the constitutional issue. *Myers* was distinguished as follows:

The office of a postmaster is so essentially unlike the office now involved that the decision in the *Myers* case cannot be accepted as controlling our decision here. A postmaster is an executive officer restricted to the performance of executive functions. He is charged with no duty at all related to either the legislative or judicial power . . .

The Federal Trade commission [by contrast] is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control. In administering the provisions of the statute in respect of 'unfair methods of competition' — that is to say in filling in and administering the details embodied by that general standard — the commission acts in part quasi-legislatively and in part quasi-judicially. In making investigations and reports thereon for the information of Congress under § 6, in aid of the legislative power, it acts as a legislative agency. Under § 7, which authorizes the commission to act as a master in chancery under rules prescribed by the court, it acts as an agency of the judiciary. To the extent that it exercises any executive function — as distinguished from executive power in the constitutional sense — it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial departments of the government. [295 U.S. at 627-28.] That most eloquent of modern Justices, Justice Jackson, has described the Court's pronouncement of a "quasi-legislative" or "quasi-judicial" agency as follows:

Administrative agencies have been called quasi-legislative, quasi-executive or quasi-judicial, as the occasion required, in order to validate their functions within the separation-of-powers scheme of the Constitution. The mere retreat to the qualifying 'quasi' is implicit with confession that all recognized classifications have broken down, and 'quasi' is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed. *FTC v. Ruberoid Co.*, 343 U.S. 470, 487-88 (1952) (Jackson, J. dissenting).

In any case, once having found the FTC to be part (or quasi-part) of the legislative and judicial branches, the rest was simple. The opinion went on, not to *respond* to concerns of separation of powers, but to *appeal* to the separation of powers as demanding that the President not be permitted to interfere with the tenure of these quasi-legislators and quasi-judges.

My purpose here, however, is not to dissect the reasoning of *Humphrey's Executor*, but to suggest what light historical considerations may cast upon its genesis, and, perhaps, upon its relevance to modern administrative law. As to genesis: As I noted earlier, *Humphrey's Executor* was argued on May 1, 1935. On May 2 and 3, 1935 the Court heard argument in *Schechter Poultry Corp. v. United States*, the electrifying case that proclaimed the National Recovery Act unconstitutional. Both opinions were handed down the same day, and appear separated by some 50 pages in Volume 295 of the United States Reports. If I were an historian, and thus had license to speculate upon motivation, I would say that, quite ob-



The Supreme Court gave a unanimous ruling in *Schechter Poultry*, finding the National Industrial Recovery Act was an unconstitutional delegation of power to the president by allowing him to approve codes for each industry which had the effect of law.

viously, the same mistrust of New Deal executive freewheeling aroused by the truly sweeping NRA proposals addressed in *Schechter* colored the Court's approach to the companion case as well. *Schechter*, as befitted its monumental immediate importance, was written by the Chief Justice — at that time Chief Justice Hughes. *Humphrey's Executor*, however, was written by Justice Sutherland — generally regarded with Justice McReynolds as the most implacable opponent of the New Deal.

In any event, there was more than merely political context to join the two cases. Several legal considerations made it appropriate, if not inevitable, that the assertions of presidential power in *Schechter* and *Humphrey's Executor* should stand or fall together. *Schechter* struck down the NRA, you will recall, on the grounds of unconstitutional delegation of legislative power. The NRA's grant of presidential power to prescribe what were called "codes of fair competition" for

all industries was so unconstrained by any "standards of legal obligation" that it amounted to an abdication of congressional responsibility. But come to think of it, the Federal Trade Commission Act gave *that* agency authority to prevent "unfair methods of competition" — and while prescribing fair competition and preventing unfair competition may not be quite the same thing, as far as the existence of a judicially discernible standard is concerned there is not an obvious difference between the two. The National Recovery Act itself apparently thought so, since it specifically provided that any violation of a code of fair competition under the NRA would automatically be an unfair method of competition under the FTC Act. Could it be, then, that in striking down the NRA the Court would have to call into question the constitutionality of the (by that time) 30-odd-year old Federal Trade Commission Act as well?

Well, in fact the Court in *Schechter* distinguishes the FTC Act — on grounds whose ade-

quacy I do not intend to discuss here. But adequate or not, the point is that it is infinitely easier to reconcile with *Schechter* the proscription of "unfair methods of competition" by a "quasi-legislative" agency immune from the doctrine of unconstitutional delegation.

One last historical reality about the case. On the basis of authority generally thought to rest upon *Humphrey's Executor*, rulemaking — by any agencies of government — has come to be referred to as "quasi-legislative" activity. In fact, however, *Humphrey's Executor* had nothing to do with rulemaking power, since the FTC had no such power (or at least did not assert any) in 1935. Only a decision of my court in 1973 found that the agency had such authority, unexercised for these many years. ⁸*National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672 (D.C. Cir. 1973). (The decision was not universally thought to be correct, but we will never know, since shortly thereafter Congress amended the FTC Act to confer rulemaking power explicitly. ⁹See 15 U.S.C. § 57a, enacted in 1975.) The "quasi-legislative" function the Court was referring to in 1935 was the FTC's task of "filling in and administering the details" of the "unfair methods of competition" standard — presumably in the course of its adjudications — and the statutory duty "to make

certain investigations at the instance of Congress, to report its findings to Congress, to make special and annual reports to Congress and to submit recommendations for additional legislation." ¹⁰295 U.S. at 607. Its "quasi-judicial" functions, by the way, consisted not only of adjudicating unfair trade practice cases, but also of implementing the following provision of § 7 of the FTC Act — now rarely used, though it remains in the United States Code:

In any suit in equity brought by or under the direction of the Attorney General as provided in the antitrust Acts, the court may, upon the conclusion of the testimony therein, if it shall be then of opinion that the complainant is entitled to relief, refer said suit to the Commission, as a master in chancery, to ascertain and report an appropriate form of decree therein . . . [T]he court may adopt or reject such report, in whole or in part, and enter such decree as the nature of the case may in its judgment require. ¹¹ 15 U.S.C. § 47 (1982).

As is well known, most of the anti-New Deal decisions of the Sutherland-McReynolds court have been relegated to the judicial dust-bin. About two years after *Humphrey's Executor*, in *West Coast Hotel Co. v. Parrish*, ¹²300 U.S. 379 (1937) the Court, with Justices Sutherland, McReynolds, Van Devanter and Butler dissenting, executed the "switch in time" that "saved nine" — the first of a series of decisions that re-



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The Supreme Court felt the New Deal went too far, and in 1935 struck down several of the key programs on grounds of unconstitutionality.

treated from previously pronounced doctrines obstructing New Deal programs. Some have thought (though I personally doubt it) that the flow of that change has even engulfed *Schechter*, so that that case would be decided differently today. But curiously enough, *Humphrey's Executor's* six-page constitutional pronouncement on a matter of central importance to the structure of government — and six pages concededly contrary to the much more extensive analysis in the pre-New Deal case of *Myers* nine years earlier — seems to have grown rather than diminished in its stature, or at least in its consequences. I say that not only because it has been assumed to be applicable to agencies which (unlike the 1935 FTC) do not act as masters in chancery for the judiciary or conduct investigations for the explicit purpose of recommending legislation to the Congress; but also because the holding of the case has been expanded to embrace its entire rationale. That rationale is, to be sure, that a proper understanding of the separation of powers must prevent the President from controlling the policies of an agency established by Congress as a “quasi-legislative” or “quasi-judicial” entity. All the case narrowly held, however, was that the President could not dismiss a commissioner unless the statutorily prescribed condition of “inefficiency, neglect of duty or malfeasance” was met. It did not hold that neglect of duty could not consist of a refusal to follow a particular policy duly prescribed by the President. The facts of the case did not even present that situation, since Roosevelt told Humphrey to leave simply because he had no confidence in Humphrey.

Yet half a century later, in an era when there is not a dime's worth of difference between the business of such “independent” regulatory agencies as the FTC and such executive branch agencies as the Food and Drug Administration, the National Highway Transportation Safety Board, and the Environmental Protection Agency; when post-New Deal (and indeed anti-New Deal) innovations such as a largely independent administrative judiciary, formalized procedures for rulemaking, and expanded judicial review, have eliminated or reduced the threat of executive arbitrariness which the *Schechter-Humphrey's* Court feared; *Humphrey's Executor* continues to induce the Executive to leave the policy control of the independent agencies to congressional committees, and fastidiously to avoid any appearance of influence in those entities. That may indeed still be the

law; and there may conceivably still be sound policy grounds to justify it. But to assume that with such facility, as the prevailing legal culture seems to have done, is to wrench the case out of the context of the times that gave it birth.

Conclusions

And that suggests the concluding lesson with which I rashly promised to bind the two parts of this talk together. It is this: The study of law, properly conceived, cannot be separated from a study of the law's history. Without that perspective, today's decision is an isolated point on a graph, with no indication where the line progressing from it will proceed. It is only the decisions of the past that have led us to where we are which, understood in their historical context, can establish a trajectory permitting us to project the past of the law in the future — whether forward, along a continuing line of development, or in apparent retreat, back to a continuity from which today's decision is an irrational and therefore endangered departure.

It has been a concern of mine that we increasingly fail to convey this sort of knowledge in our law schools. I refer to the need, not for more courses in legal history as such (though that is all to the good); but for more attention to historical development within the substantive courses themselves — whether constitutional law or contracts, administrative law or torts. So much current law must be mastered that the tendency is irresistible to dispense with the dead and superseded cases of the past. But without them, as I say, we can convey no genuine understanding of the cases of the present. No more than we can convey the concept of a river by displaying a bucket of water from the Potomac.

And the neglect, I fear, extends far beyond the law schools, and into the chambers of those guardians of the law, the judges themselves. At least into my chambers. I confess that I have taken real delight in the imposed necessity of rummaging about in old and forgotten cases to prepare this talk. It is a luxury I rarely enjoy — sacrificed to the more efficient alternative of sending a law clerk to look up the latest precedent so that I may proceed more promptly to the next set of briefs. Our modern judicial culture even displays a sort of anti-historical bias in the accepted rule for the citation of authority: Cite, if possible, a case decided yesterday. Never cite *Hadley v. Baxendale*

or *Marbury v. Madison* if a more current decision affirming the same proposition is available. Next week that decision in turn will be replaced by citation to today's case. The result is a decisional literature that has all the historical underpinnings of the morning newspaper.

In the course of preparing these remarks, I was struck with the much greater historical sense of the old opinions I revisited. For one of the most wide-ranging, consider the following excerpt from Justice Wilson's 1793 opinion in *Chisolm v. Georgia*. He is discussing why, in his view, no doctrine of domestic sovereign immunity exists:

In ancient Greece, as we learn from Isocrates, whole nations defended their rights before crowded tribunals . . .

Columbus achieved the discovery of that country which, perhaps, ought to bear his name. A contract made by Columbus furnished the first precedent for supporting, in his discovered country, the cause of injured merit against the claims and pretensions of haughty and ungrateful power. His son Don Diego wasted two years in incessant, but fruitless, solicitation at the Court of Spain, for the rights which descended to him, in consequence of his father's original capitulation. He endeavored, at length, to obtain, by a legal sentence, what he could not procure from the favor of an interested monarch. He commenced a suit against Ferdinand, before the Council which managed Indian affairs, and that court, with integrity which reflects honor on its proceedings, decided against the King, and sustained Don Diego's claim.

Other states have instituted officers to judge the proceedings of their Kings. Of this kind, were the Ephori of Sparta; of this kind also, was the mayor of the palace, and afterwards, the constable of France.

. . . When the Spaniards of Arragon elect a King, they represent a kind of play, and introduce a personage whom they dignify by the name of Law, *la Justiza*, of Arragon. This person they declare, by a public decree, to be greater and more powerful than their king, and then address him in the following remarkable expressions. "We, who are of as great worth as you, and can do more than you can do, elect you to be our King, upon the conditions stipu-

lated. But between you and us, there is one of greater authority than you."¹³

¹³² Dall. at 458-59. And so forth, through Blackstone and early English law. I have no idea whether all this stuff is true — though Wilson, one of the most influential participants in the Constitutional Convention, was "a legal scholar, widely recognized as the most learned and gifted in the nation."¹⁴ McCloskey, *James Wilson* in L. Friedman & F. Israel, 1 *The Justices of the United States Supreme Court 1789-1969* at 79. (He died, by the way, bankrupt. As one historian describes his final days: "Even while he rode circuit as a Justice of the Supreme Court, clamoring business associates and creditors pursued him, threatening scandal and debtors' prison. 'Hunted like a wild beast' (Smith 387) he hid from them in Bethlehem [Pennsylvania]. But they apprehended him and had him imprisoned in Burlington, New Jersey."

¹⁵*Id.* at 95.) But how marvelous that a judge — and a peculiarly modern judge, insofar as his impecuniousness is concerned — had the inclination (and, I suppose, the time) to seek to place such historical materials at his command — to fix the case before him in the scheme of things. It may be too much to expect today's judges, much less their law clerks, to match the historical scholarship and erudition of that Golden Age of American political achievement. But perhaps we should make the effort, and take the time, to try.

* Judge Scalia delivered the Society's 1985 Annual Lecture on May 13, 1985 in the restored Supreme Court chamber of the U.S. Capitol. This paper is a reprint of his remarks.

Go all to whom

those Presents shall come, we the undersigned Delegates of the States
affixed to our Names send greeting. Whereas the Delegates of the
United States of America in Congress assembled did on the fifteenth day
of November in the Year of our Lord One Thousand Seven Hundred and
Seventy seven, and in the Second Year of the Independence of America
agree to certain articles of Confederation and perpetual Union between the
States of New Hampshire, Massachusetts-bay, Rhode Island and Providence
Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware,
Maryland, Virginia, North Carolina, South Carolina and Georgia
in the Words following, viz. "Articles of Confederation and perpetual
Union between the States of New Hampshire, Massachusetts-bay, Rhode Island
and Providence Plantations, Connecticut, New York, New Jersey, Penn-
sylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina
and Georgia.

Article I. The said States of this confederacy shall be "The
United States of America."

Article II. Each State retains its sovereignty, freedom and
independence, and every Power, Jurisdiction and right, which is not by
this confederation expressly delegated to the United States, in Congress
assembled.

Article III. The said States hereby severally enter into a firm
league of friendship with each other, for their common defence, the security
of their Liberties, and their mutual and general welfare, binding them-
selves to assist each other, against all force offered to, or attacks made upon
them, or any of them on account of religion, sovereignty, trade, or any other
pretence whatsoever.

Article IV. The better to secure and perpetuate mutual friendship
and intercourse among the people of the different States in this union, the
free inhabitants of each of these States, paupers, vagabonds and fugitives
from Justice excepted, shall be entitled to all privileges and immunities of
free citizens in the several States; and the people of each State shall have
free ingress and egress to and from any other State, and shall enjoy therein
all the privileges of trade and commerce, subject to the same duties, im-
positions and restrictions as the inhabitants thereof respectively, provided

The Articles of Confederation were agreed upon in Congress in 1777, but were not ratified by the required nine states until July 9, 1778. The thirteenth state, Maryland, did not ratify the Articles until 1781. The document was more akin to a treaty among thirteen sovereign states than a constitution governing one union.

Toward 1987: A Dramatic Change in Goals, 1785-1787

by Cornelius Bryant Kennedy

Although styled "The United States of America," the government established by the Articles of Confederation, agreed to on July 9, 1778 by the delegates representing the 13 newly independent and sovereign States, was little more than a joint venture by the new sovereign States for common purposes if they could agree on any matter. The powers of government remained firmly lodged in the legislatures of the 13 States.

The Articles expressly noted, in Article I, that it was to be a "confederacy," in Article II that "each state retains its sovereignty, freedom and independence," and in Article III that the "Said states hereby severally enter into a firm league of friendship with each other, for their common defense, security of their Liberties, and their mutual and general welfare."

To implement this "firm league of friendship with each other," the Articles provided that representatives from the former colonies, now independent sovereign states, were to meet together "in Congress" to act on a variety of matters not relating to local self government within the States. There was to be no executive arm and the judicial function was limited to courts for the trial of piracies and felonies committed on the high seas and appeals "in all cases of captures." Any normally executive functions which might be considered necessary were to be performed by Congress, the legislative body, which was authorized to appoint a committee, called "A Committee of the States," consisting of one delegate from each State, and "such other committees and civil officers as may be necessary for managing [sic] the general affairs of the united states under their direction."

The Articles did provide, however, for reciprocity between the different sovereign States. The free inhabitants of each State were entitled to all privileges and immunities of free citizens of

the several States. The people of each State, moreover, were to have the right of free ingress and egress to and from any other State and the right to enjoy all privileges of trade and commerce of another State, subject to the same duties, impositions and restrictions as the inhabitants of such State, but no such restriction could prevent the removal of property imported into any State, to any other State of which the owner was an inhabitant.

To emphasize the independent, sovereign status of each State, the Articles provided that persons charged with treason, felony or a high misdemeanor, and fugitives from justice, could be extradited on the demand of the governor of the State from which he had fled. Full faith and credit would be given in each State to the records, acts and judicial proceedings of the courts of every other State. The representatives of each State were also protected. Freedom of speech and debate in Congress could not be impeached or questioned in any court or place outside of Congress and the members of Congress were protected in their persons from arrest or imprisonment during the time of their going to and from and attending Congress, except for treason, felony or breach of the peace.

Only on matters affecting the States jointly were there restraints. With respect to foreign and military affairs, no State could engage in war without the consent of the United States, unless actually invaded by enemies, nor could any State receive or send ambassadors to any other king, prince or state, or lay duties or impost to interfere with any stipulations and treaties entered into by the United States in Congress assembled.

The Congress was to have the sole and exclusive power to regulate the alloy and value of coin struck by the authority of the United States or by the authority of a State, and to fix the standard

of weights and measures throughout the United States. Congress also was to have the sole right to regulate trade and manage affairs with the Indians, to establish and regulate post offices, to appoint all military officers and to make rules for and direct the operations of the army and navy.

Each State was to have one voice in the Congress and, with some important exceptions, questions were to be determined by a majority vote. These exceptions notably included: declarations of war; granting letters of marque and reprisal in time of peace; treaties and alliances; coining of money and regulating the value thereof; determining the funds necessary for defense and welfare of the United States; printing of currency; borrowing and appropriation of money; the size of the naval and military forces; and, the appointment of the commander in chief of the Army and Navy. The assent of nine states was required in these matters.

Weak as the Articles of Confederation may appear to be as an instrument of national union, there were good reasons why they went no further. They were drafted in 1777, the year after the thirteen colonies had dissolved their allegiance to the English Crown and declared their status as free and independent sovereign States. In each of the newly sovereign States the people had just adopted constitutions for the governance of their State. Their desire for self government was forcefully and simply expressed by a soldier who had been in the battle of Concord and Lexington, when he was later interviewed by John Adams. When asked "What was the matter, what did you mean going into the fight?" he responded:

What we meant in going for those red-coats, was this: We had always governed ourselves and always meant to. They didn't mean we should.

After successfully fighting to preserve the broad right of self government which they had enjoyed for over 150 years, the people of each State were not about to give up the power to govern themselves to any other legislative body.

Indeed, the people of the thirteen newly sovereign independent states had every reason to fear oppression by a superior legislative body. For a decade, from 1765-1776, Parliament had asserted the right to pass laws affecting the colonies, and thereby had changed the broad right of local self government which each colony had long enjoyed. First, Parliament adopted the infamous Stamp Tax Act of 1765. Then came the Townsend Acts



*The Manner in which the American Colonies Declared themselves
INDEPENDANT of the King of ENGLAND,
the 4th of July 1776.*

A page from Barnard's "New Complete & Authentic History of England" shows the colonists declaring independence from England.

by which Parliament asserted increased governmental control over the colonies. Colonial resistance to these acts caused the repeal of some, but the duty on tea was not repealed. The Boston Tea Party followed, and, in retaliation, Parliament passed a series of statutes which became known as the Intolerable Acts. The colonists asserted that, in adopting these acts, Parliament was "stimulated by an inordinate passion for power," and they beseeched the king to redress their grievances against Parliament. He did not. Finally, on July 4, 1776, after their repeated appeals to the king to protect their right of local self government from invasion by Parliament went unheeded, the colonists dissolved their tie of allegiance to the British Crown by announcing their Declaration of Independence.

The Articles of Confederation, as they were drafted in November, 1777, were designed by the new independent states to prevent such an assertion of governmental power by a super legislative body. The result, however, according to George Washington, in July, 1780, was that: "Our measures are not under the influence and direction of one Council, but thirteen, each of which is actu-

ated by local views and politics."

With the end of the war in 1783, even the bond of defense against a common enemy which had united the newly sovereign States was no longer needed. Thus, free to return to their homes and pursue the fruits of peace, and aggravated by a reluctance on the part of the independent sovereign States to pay for the costs of the common war which was now over, there was an indifference by the people of the States to the need for a stronger, rather than a weaker, national union of the states. George Washington described the problem and the inadequacies of the Articles of Confederation to deal with it in a 1783 letter:

To suppose that the general concerns of this Country can be directed by thirteen heads, or one head without competent powers, is a solecism, the bad affects of which every man who has had the practice knowledge to judge from, that I have, is fully convinced of; tho' none perhaps has felt them in so forceful and distressing degree. The People at large, and at a distance from the theatre of action, who only know that the machine was kept in motion, and that they are at least arrived at the first object of their wishes, are satisfied with the event, without investigating causes of the slow progress to it, or the expenses which have accrued, and which they have been unwilling to pay — great part of which has arisen from that want of energy in the Federal Constitution, which I am complaining of, and which I wish to see given to it by a Convention of the People, instead of hearing it remarked that, as we have worked through in arduous contest with the powers Congress already have (but which, by the by, have been gradually diminishing) why should they be invested with more, . . . for Heaven's sake, who are Congress? Are they not the creatures of the people, amenable to them for their conduct, and dependent from day to day on their breath? Where then can be the danger of giving them such powers as are adequate to the great ends of Government and to all the general purposes of the Confederation (I repeat the word general, because I am no advocate for their having to do with the particular policy of any State, further than it concerns the Union at large).

Indeed, Washington felt so strongly about the urgency of the matter that on June 8, 1783, he advised the Governors of the States that:

There are four things, which, I humbly conceive, are essential to the well-being, I may even venture to say, to the existence of the United States, as an independent power. First. An indissoluble union of the States under one Federal head; secondly. A sacred regard to public justice; thirdly. The adoption of a proper peace establishment; and, fourthly. The prevalence of that specific and friendly disposition among the people of the United States, which will induce them to forget their local prejudices and policies; to make those mutual concessions, which are requisite to the general prosperity; and in some instances, to sacrifice their individual advantages to the interest of the community. These are the pillars on which the glorious fabrick of our independency and National character must be supported.

Washington was not alone in his view. John Jay



Library of Congress

John Jay served as secretary for foreign affairs under the Articles of Confederation from 1784-1789.

of New York wrote Gouverneur Morris of Pennsylvania in September, 1783:

I am perfectly convinced that no time is to be lost in raising and maintaining a National spirit in America. Power to govern the Confederacy, as to all general purposes, should be granted and exercised.

In September, 1783, Governor John Hancock made the same point in a message to the Massachusetts legislature:

How to strengthen and improve the Union so as to render it completely adequate, demands the immediate attention of these States. Our very existence as a free nation is suspended upon it.

Thomas Jefferson expressed the sentiment in a letter to Madison in 1784:

I find the conviction growing steadily that nothing can preserve our Confederacy unless the bond of union, their common Council, be strengthened.

And in 1785, Jefferson wrote to Monroe:

The interests of the States ought to be made joint in every possible instance, in order to cultivate the idea of our being one Nation.

But, as Stephen Higginson, observed in a letter to John Adams in December, 1785:



James Monroe served as a member of Congress under the Articles of Confederation and opposed adoption of the Constitution.

Experience and observation most clearly evince that in their habits, manners, and commercial interests, the Southern and Northern States are not only very dissimilar, but in many instances directly opposed. Happy for America would it be if there was a greater coincidence of sentiment and interest among them. Then we might expect those National arrangements soon to take place which appear so essential to our safety and happiness.

Thus, 1785 was, without doubt, a low point in the movement for a National government. The advocates for a stronger national union faced an apathetic audience. But 1786 was to be a quite different year. The differences between the Northern and Southern States became charged with emotion. A serious dispute arose in Congress over a proposal of the Secretary of Foreign Affairs, John Jay, to abandon for a time the right of the States to free navigation of the Mississippi River. James Monroe, then a member of Congress, wrote to Madison that:

It is manifest here that Jay and his party in Congress are determined to pursue this business as far as possible, either as the means of throwing the Western people and territory without the government of the United States and keeping the weight of population and government

or dismembering the government, itself, for the purpose of a separate Confederacy.

There were other fears, too, about population because the South, with its rapidly growing population through the importation of slaves, might soon be able to dominate the other States.

Then, in September 1787, Shays Rebellion in Massachusetts caused many with property interests, who might have otherwise been indifferent, to become concerned about the tendency of the legislatures of the sovereign States to pass "unwise" laws. They began to see advantages in a National legislature. As a result, the lack of general support for a national government which was prevalent in 1785 changed in 1786 and 1787 to a generally felt need to consider a National government as the solution to a variety of problems which were rapidly growing in intensity.

When the delegates to the Constitutional Convention convened in Philadelphia in the summer of 1787, the question, therefore, for most of the delegates was not whether to create a stronger national union, but how. The challenge was how to structure the National union to protect the people of the States against each other. Interestingly, one of the approaches most frequently proposed during the Convention was to utilize the stature and abilities of the National judiciary to act both as a prior restraint on the national legislature and as an advisor to the Executive. The delegates extensively debated whether the traditional limited role for the judiciary, which had been developed in the colonies during a century and one half of broad self government, should be abandoned in favor of judicial participation in the legislative and executive functions. By contrast, they appeared to feel little need to debate the role of the judiciary as to matter "of a judiciary nature."

While none of the proposals to give the National judiciary legislative and executive functions were adopted, it may be that more attention should be paid to the impact of these proposals both as a means of persuading the States to send delegates to the Constitutional Convention and in achieving agreement in 1787 upon a national constitution which those delegates could transmit to Congress as that "which appears to us the most advisable."

A Consideration of Extra-Judicial Activities in the Pre-Marshall Era

by David Eisenberg

Legalists and laymen both have long shared misgivings over the propriety of extra-judicial activity. Conventional wisdom has frequently maintained that judges, particularly Supreme Court justices, cannot satisfactorily perform their duties as impartial adjudicators without first cloistering themselves from the society in which they live. What has been too often forgotten is the simple but poignant fact that Supreme Court justices are people, too.

None have realized this better than the justices themselves. Indeed, the roster of extra-judicially active Supreme Court Justices spans the length of the Court's history. John Jay, Oliver Ellsworth, David Brewer, Louis Brandeis and William Howard Taft are but a few of the numerous jurists whose boundless energies and talents could not be entirely contained within courtroom walls.

Yet even some of the most active justices have acknowledged limits to their activities. Such voluntary restraints have entailed difficult line-drawing, especially for the early justices who had no precedent to follow. Failure to articulate a comprehensive set of reasons to explain what makes some or all extra-judicial conduct improper has made the task especially enigmatic. Yet, perhaps by examining some of the precedents set by the first justices, those in the pre-Marshall era, it is possible to formulate a rational standard for reviewing nagging questions of extra-judicial propriety.

A look at the early Court justices' attitudes towards off-the-bench activities can hardly be all-inclusive given the limitations of time and space. Accordingly, I have selected what I believe are four representative examples: Chief Justice Jay's participation on the Sinking Fund Commission; the Justices' role in the invalid pension cases; their response to President Washington's request for an advisory opinion on foreign relations; and Chief Justice Jay's diplomatic mission as envoy extraordinary to Great Britain.



Library of Congress

When President Washington organized his cabinet, he offered John Jay (above) the position of Secretary of State. Jay declined, and Washington named him Chief Justice of the new Supreme Court.

Chief Justice Jay's membership on the Sinking Fund Commission marked one of the earliest instances of extra-judicial conduct. Jay served on the Commission pursuant to Congressional legislation authorizing purchases of the national debt under the direction of the Vice President, the Chief Justice, the Secretaries of State and Treasury, and the Attorney General.¹ While Jay apparently saw nothing necessarily wrong with a justice's participation in this particular nonjudicial activity, he would not let his work on the Commission interfere with his Court duties. Jay made this clear when Vice President Adams requested his attendance at an important Commission meeting.² Writing to Treasury Secretary Hamilton, Jay explained that he must decline the request, lest he miss the next session of the New York circuit.³ Considering his "Duty to attend the Court as



Justices James Wilson (left) and John Blair (right) sitting on the Pennsylvania Circuit, protested Congress' pension review plan claiming it gave the courts a non-judicial duty.

being in point of legal Obligation primary, and to attend the Trustees as secondary," Jay could "conceive that the Order would be sometimes inverted if only the Importance of the occasion was considered."⁴ The Chief Justice's firm stance induced his fellow commissioners to accept a written opinion from the absent member.⁵

Congress' invalid pension scheme provided another opportunity for more than one justice to flex his judicial muscles. Under the plan, the various circuit courts were to "examine into the nature of the wound, or other cause of disability" of each eligible pension applicant and, if satisfied as to the case's merit, were to recommend to the Secretary of War a suitable compensation award.⁶ The Secretary of War would thereupon be entitled either to place the applicant on the pension list, or to withhold the applicant's name and notify Congress "in any case where the said Secretary shall have cause to suspect imposition or mistake."⁷

Not all the circuit judges accepted the new duties that Congress thrust upon them. Sitting on the Pennsylvania Circuit, District Judge Peters and Supreme Court Justices Wilson and Blair submitted to President Washington a list of reasons as to why they could not abide by the Act. First, they observed that its scheme "forms no part of the power vested by the constitution in the courts of the United States." Second, the judges noted that the legislative and executive departments' ability

to revise and control the court's decisions was "radically inconsistent with the independence of that judicial power which is vested in the courts, and, consequently, with that important principle which is so strictly observed by the constitution of the United States."⁸

Similarly, on 8 June 1792, members of the North Carolina circuit court wrote the President to express their objections. In their letter, Supreme Court Justice Iredell and North Carolina District Judge Sitgreaves informed Washington that the "courts cannot be warranted . . . in exercising . . . any power not in its nature *judicial*, or, if *judicial*, not provided for upon the terms the constitution requires."⁹ Like the Pennsylvania circuit judges, Iredell and Sitgreaves criticized the Act for permitting the executive branch to review court decisions. On this score they argued that appellate courts "must consist of judges appointed in the manner the constitution requires, and holding their offices by no other tenure than that of their good behavior, by which tenure the office of Secretary of War is not held." With regard to legislative review, they added that:

no decision of any court of the United States can, under any circumstances, in our opinion, agreeable to the constitution, be liable to a reversion, or even suspension, by the Legislature itself, in whom no judicial power of any kind appears to be vested but the important one relative to impeachments.

Iredell and Sitgreaves would carry out the Act's provision only if the statute could be construed to authorize them to perform "personally in the character of commissioners." However, the judges doubted the Act could be so interpreted: "The power appears to be given to the court only, and not to the judges of it."¹⁰

Sitting on the New York circuit court, New York District Judge Duane, Associate Supreme Court Justice Cushing and Chief Justice Jay harbored no such doubts as to the interpretation of the Act. Agreeing to "execute this act in the capacity of commissioners," the judges at the same time cautioned that "by the constitution of the United States, the Government thereof is divided into three distinct and independent branches; and that it is the duty of each to abstain from and to oppose encroachments on either." As commissioners, the judges deemed themselves "at liberty to accept or to decline that office."¹¹

More problematic was the question of advisory opinions. In some situations the Supreme Court justices seemed willing to advise executive branch members, whereas in other instances they expressed a reluctance, if not a downright unwillingness, to doing so. When it came to advising the president on the defects of the Judiciary



Architect of the Capitol

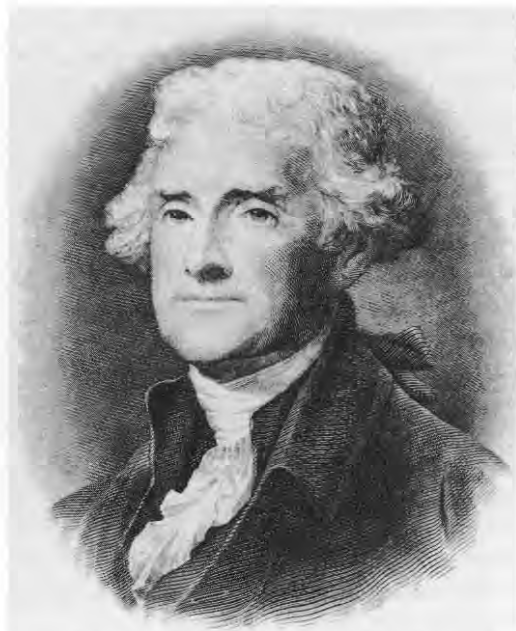
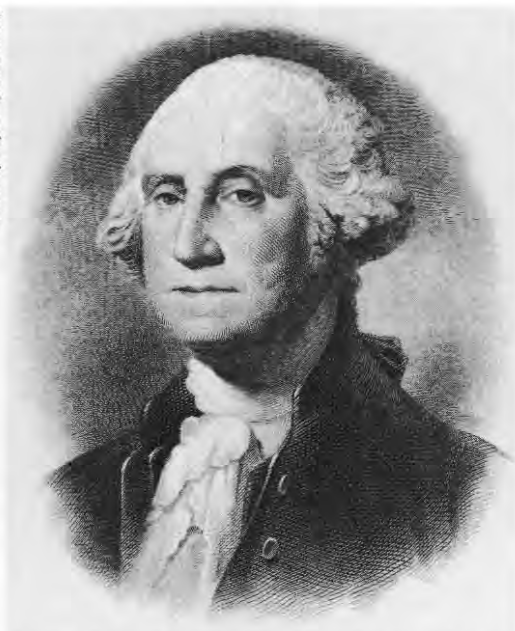
Alexander Hamilton served as the first Secretary of the Treasury from 1789-1795. Under his direction the first national currency was issued and the Bank of the United States was established.

Act, the justices made not the slightest hesitation: In their letter of 9 August 1792 discussing the rigors of circuit riding, they bitterly complained of "existing in exile from our families, and of being subjected to a kind of life on which we cannot reflect without experiencing sensations and emotions more easy to conceive than proper for us to express."¹² Chief Justice Jay hardly batted an eyelash when Treasury Secretary Hamilton requested advice on various matters: On 8 September 1792 he wrote Hamilton to advise on how the president and other chief figures in the national government should handle the rebellions in western Pennsylvania;¹³ and on 11 April 1793 he went even so far as to send Hamilton a drafted neutrality proclamation for the president, as the Treasury Secretary had requested.¹⁴

Yet when the North Carolina circuit judges rendered their advisory opinion as to the constitutionality of the invalid pension Act, they did so only reluctantly. Iredell and Sitgreaves were willing to make an exception "in the present instance, as many unfortunate and meritorious individuals . . . may suffer very great distress even by a short delay . . ." However, they recognized "the necessity of judges being, in general, extremely cautious in not intimating an opinion in any case extra-judicially, because we well know how liable the best minds are . . . to a bias which may arise



Justice James Iredell while on Circuit duty in his home state of North Carolina, also protested the pension plan.



In 1790 George Washington (left) sought advice from the Supreme Court on foreign relations through his Secretary of State, Thomas Jefferson (right).

from a preconceived opinion, even unguardedly, much more deliberately given."¹⁵

President Washington was to learn that court advisory opinions were indeed the exception and not the rule. On 18 July 1793 Secretary of State Thomas Jefferson submitted to the justices a list of twenty-nine questions concerning American foreign relations in light of treaties and other laws.¹⁶ Jefferson explained that the President:

would be much relieved if he found himself free to refer questions of this description to the opinions of the judges of the Supreme Court of the United States, whose knowledge of the subject would secure us against errors dangerous to the peace of the United States, and their authority insure the respect of all parties.

The President, he wrote, understood that the justices must first decide "whether the public may, with propriety, be availed of their advice on these questions."¹⁷

The justices cited three reasons for declining to render the advice sought. First, they noted that "the lines of separation drawn by the Constitution between the three departments of the government" were "in certain respects checks upon each other." Second, they regarded themselves as "judges of a court in the last resort." Finally, they believed that the president's constitutional power to request opinions from department heads applied only to advice from *executive* departments.¹⁸

If the president could not always rely on the justices for advice, then at least he could depend on them for diplomatic service. This Washington discovered shortly after nominating the Chief Justice to serve as envoy extraordinary to Great Britain, on 16 April 1794.¹⁹ In deciding whether to accept the appointment, Jay apparently gave little or no thought to possible conflict between the new post and his judicial office. For instance, in a letter to his wife dated 15 April 1794, while his nomination was still pending, Jay admitted to "find[ing] myself in a dilemma between personal considerations and public ones"²⁰ — though strangely enough, not between two public ones. Similarly, the Chief Justice wrote his wife following the nomination to tell her that "to refuse [the appointment] would be to desert my duty *for the sake of my ease and domestic concerns and comforts*" (emphasis added).²¹ And in a letter written the following month, Jay assured his wife that the Philadelphia Democratic Society's recent resolutions condemning such an extra-judicial use of his services "give me no concern."²²

Perhaps beneath Jay's nonchalant exterior lay a resetting of priorities. It will be recalled that Jay, in declining to attend a meeting of the Sinking Fund Commission, had considered the possibility that his Court duties might not always be his primary obligation. If ever another calling could assume preeminence over judicial functions, it

might arguably be the appointment as envoy, coming as it did at a time when many Americans thought war with Britain inevitable. Given his prior diplomatic experience, most notably in negotiating a peace treaty with Britain to end the American Revolution, Jay might well have deemed himself among those best capable of averting war with the former enemy. Whatever Jay's reasons for accepting the post, he no doubt set a precedent for Chief Justice Oliver Ellsworth, who under similar circumstances accepted President Adams' appointment as envoy to France in 1799.

What emerges from the justices' attitudes towards extra-judicial conduct is a dizzying patchwork of ad-hoc justifications. As historian Russell Wheeler has remarked, "It is at bottom a question of discretion whether the judge can maintain judicial independence while serving the nation off the bench."²³ This observation, despite its accuracy, little explains the seeming contradictions inherent in the justices' behavior.

Those wishing to reconcile the irreconcilable can turn to Solomon Slonim's well-conceived theory.²⁴ Slonim proceeds to explain the justices' actions by means of a carefully formulated "separation of powers" rationale. Distinguishing be-

tween the "separation of institutions" and the "separation of personnel,"²⁵ Slonim argues that the constitutionally enshrined "separation of powers" doctrine was intended to require only the former.²⁶ Thus he maintains that the justices acted perfectly consistently in undertaking some extra-judicial duties as individuals while turning down others "addressed to the judiciary, as an institution."²⁷

Slonim seeks to *explain* the justices' conduct, not to judge it. He concludes as follows:

Having said all this, it could hardly be maintained that it is a salutary practice for judges to be engaged in extra-judicial activities. Serious questions of propriety, or even conflict of interest, are too often present. These, however, are matters for the statutory or ethical codes: they do not impinge on the constitutional principle which seeks to ensure the separation of the three functions of government, as this principle was instituted in the Federal Constitution, interpreted by the courts, and applied in practice.²⁸

Further discussion of the "separation of powers" and related constitutional theories may be found in *The Federalist Papers*.²⁹ In Paper Number 47, James Madison attempts to clarify the "separation of powers" concept in response to the critics' argument that the various federal branches "are distributed and blended in such manner as at once to . . . expose some of the essential parts of the edifice to the danger of being crushed by the disproportionate weight of other parts."³⁰ Citing the philosopher Montesquieu, whom he regards as the chief authority on the subject, Madison insists that the Frenchman:

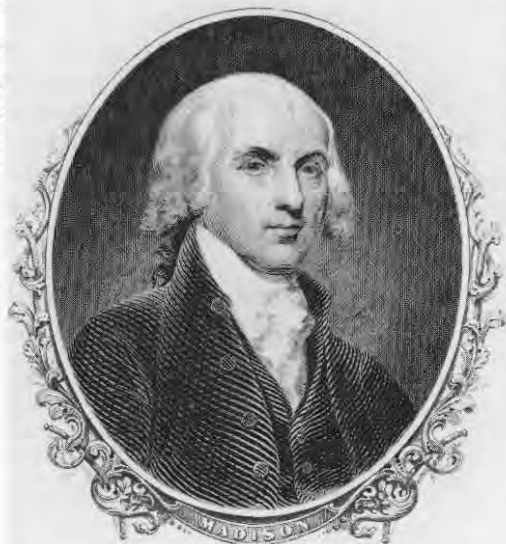
did not mean that [the legislative and executive] departments ought to have no *partial* agency in, or no *control* over, the acts of each other. His meaning . . . can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted.³¹

Far from conceding to the critics, Madison maintains that the new federal system remains ever faithful to Montesquieu's "fundamental principles":

The magistrate in whom the whole executive power resides cannot of himself make a law, though he can put a negative on every law; nor administer justice in person, though he has the appointment of those who do administer it. The judges can exercise no executive prerogative, though they are shoots from the executive stock; nor any legislative function, though they may be advised with by the legislative councils. The entire legislature can perform no judiciary act, though by the joint act of two of its branches, the judges may be removed from their offices, and though one of its branches is possessed of the judicial power in the last resort. The entire legislature, again, can exercise no executive prerogative, though one of its



When Chief Justice Oliver Ellsworth (above) accepted an appointment from President Adams to serve as an envoy in France in 1799, he was following the precedent set by John Jay in 1794.



Along with Alexander Hamilton and John Jay, James Madison (above) wrote "The Federalist Papers," a series of political essays which strongly supported the Constitution.

branches constitutes the supreme executive magistracy, and another, on the impeachment of a third, can try and condemn all the subordinate officers in the executive department.³²

Although confident that his constitutional theory passes muster by Montesquieu's standards, Madison prudently takes to explaining, in subsequent papers, why some blending of powers is in fact necessary to the federal scheme.

To Madison, blending is the system's safeguard, not its undoing. In Federalist Number 48 he warns that "unless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government can never in practice be duly maintained."³³ Madison particularly fears the national legislature, which "is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex."³⁴ Therefore, while the Virginian wants none of the three branches "to possess, directly or indirectly, an overruling influence over the others,"³⁵ he believes "it is against the enterprising ambition of [the legislature] that the people ought to indulge all their jealousy and exhaust all their precautions."³⁶

For such checks and balances to remain effective, "each department should have a will of its own" To achieve such independence, Madison proposes that each branch "be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others" In addition, "the members of each department should be as little dependent as possible on those of the others for the emoluments annexed to their offices."³⁷ Most important, each department should be endowed with "opposite and rival interests" to give it the incentive "to resist encroachments of the others."³⁸

It is Hamilton, however, who addresses the problems peculiar to the judiciary. Noting that the judiciary, unlike the other government branches, "has no influence over either the sword or the purse," Hamilton considers the judicial department "the least dangerous to the political rights of the Constitution." By the same token, however, he admits that the court system will pose no danger to the people's liberty only "so long as the judiciary remains truly distinct from both the legislature and the Executive."³⁹ To prevent the vulnerable judiciary from "being overpowered, awed, or influenced by its coordinate branches," measures must be taken to ensure its "firmness and independence."⁴⁰ These measures should include permanent tenure⁴¹ and fixed salaries⁴² for the judges. Significantly, Hamilton's proposals do *not* include a ban on extra-judicial service: While Hamilton wishes the Supreme Court to be a "distinct body" as opposed to "a branch of the legislature,"⁴³ he ventures no opinion as to the propriety of an individual judge's off-the-bench activity.

However, the delegates at the Constitutional Convention of 1787 devoted ample time to considering the issue, albeit in a limited context. On several occasions throughout the spring and summer, the statesmen weighed the merits of uniting the judiciary and executive departments in a so-called Council of Revision. The proposed council was to be granted a qualified veto power over legislative bills. Although the Convention voted down judicial participation no less than three times, numerous arguments on both sides fueled lively debate.

Proponents of the revisionary council argued that only through the executive and judiciary's combined efforts could the mighty legislature's encroachments be thwarted. Madison, Oliver

Ellsworth and George Mason believed that the judiciary's participation on the council would imbue the executive branch with the wisdom, firmness and confidence it needed to challenge questionable legislation.⁴⁴ Mason further argued that unless the judiciary could serve on the council, the judges would, when deciding cases, have to acquiesce in every law not plainly oppressive or pernicious.⁴⁵ John Francis Mercer deemed it only fair that the judiciary play a role in revising legislation in its preliminary stages; for in his view, the judges could not void a bill once duly passed.⁴⁶

Opponents of the plan could cite abundant arguments of their own. Elbridge Gerry, an especially outspoken critic, insisted that the judiciary need not join hands with the executive to protect itself from legislative encroachment. Not only would the judiciary's exposition of the laws furnish an adequate check;⁴⁷ but a combination of the judiciary and executive would in fact overpower the legislature.⁴⁸ Gerry even feared an ill effect on the executive, which might succumb to "the sophistry of the Judges."⁴⁹ Others, namely Nathaniel Gorham, Caleb Strong, John Rutledge, Charles Pinckney and Roger Sherman, thought that the judges, if allowed to help draft the laws, might possess an improper bias when it came to interpreting them in court.⁵⁰ Luther Martin argued that the Supreme Court would lose the people's confidence if it attacked popular bills.⁵¹ Martin, along with Gerry and Gorham, also maintained that the judges were ill-equipped to second-guess the legislature's public policy choices.⁵²

Records of the early Congressional debates evidence little of the resistance which had marked the Convention's approach to extra-judicial duties. Of course, this is not to say that Congress always stood prepared to assign out-of-court tasks to the Supreme Court justices. The House, in April 1790, voted down a provision which would have given the justices power to determine the compensation to be awarded inventors for their patents.⁵³ Nevertheless, the *Annals of Congress* supply no evidence⁵⁴ to suggest that the issue played any role in the debates preceding adoption of the Sinking Fund Commission, the invalid pension scheme, or the Mint Act of 2 April 1792.⁵⁵ However, the public clamor surrounding Chief Justice Jay's appointment as envoy extraordinary to Great Britain would soon demonstrate that questions of extra-judicial propriety still remained to be resolved.

Contemporary newspapers reflect mixed views of the Jay mission. Supporters of the envoy appointment were quick to point to Jay's unique personal qualifications for the job. One writer insisted that Jay was the American best able to "dovetail a treaty with the existing laws and the country's present state."⁵⁶ Another described him as "indisputably a great civilian, an able negotiator, persuasive, though firm in his manners, irresistible in his eloquence and finished in his personal accomplishments."⁵⁷ Still others endorsing the appointment agreed that the strength of Jay's talents and integrity made successful negotiations likely.⁵⁸

Proponents of the Jay trip gave numerous reasons to explain why the envoyship was not incompatible with the chief justiceship. Some supporters argued that the urgency of a particular situation may sometimes justify an exception to the general rule against plural officeholding.⁵⁹ In fact, claimed another, Jay's Chief Justiceship would bolster his credibility in Britain.⁶⁰ A persistent writer who signed his letters "A. B." noted that the law did not require the chief justice's presence in Court at all times, and that the justices had never all been present at Supreme Court sessions anyhow.⁶¹ Moreover, the envoy mission would last only a short time, permitting Jay to return to America in time for the court's February term.⁶² Even assuming a constitutional incompatibility between the chief justiceship and a simultaneous envoyship, there would still be no impropriety in Jay's filling the envoy position, as he would simply no longer be regarded as Chief Justice.⁶³ In any case, it was no more improper to appoint Jay envoy extraordinary than it was to nominate James Monroe, a United States senator, to serve as minister to France.⁶⁴

Like the proponents of the appointment, the critics rested their case on a wide variety of arguments. Some based their objections upon an antagonism towards any envoy mission, or towards Jay's personal views, rather than towards extra-judicial activity as such.⁶⁵ A good many believed that employing a chief justice as a diplomat would hurt the federal government as a whole as well as the judiciary branch. If the nation could make do with the chief justice's absence from the Court, asked one individual, why not do away with the chief justiceship altogether and save the government \$4,000 a year? Or conversely, if a justice's presence in the Court is necessary at all sessions, then how could the Court manage during Jay's



In accordance with the Jay Treaty of 1794, the British withdrew from the Northwest Territory depicted here in the evacuation of Fort Ontario by the British, July 15, 1796. In exchange for British withdrawal, the U.S. in turn promised not to aid privateers hostile to Britain.

absence?⁶⁶ Others complained that to assign multiple offices to a single individual callously overlooked the talents of others who held no offices at all.⁶⁷ In addition, many invoked the separation of powers principle.

The various separation of powers arguments cited basically acknowledged the importance of keeping the judiciary independent from the other government branches. Some opponents of Jay's envoy appointment, alarmed over a union of judicial and diplomatic functions, stressed that a judge should not make treaties that he may later have to expound and apply in a courtroom setting.⁶⁸ Of perhaps greater concern to critics, however, was the judiciary's susceptibility to undue executive control. Some argued that the temptation of lucrative offices subordinate to the executive would rob the judiciary of its independent judgment.⁶⁹ Assigning a chief justice to an overseas duty could seriously impede an impeachment proceeding against the president, at which the chief justice's presence and impartiality would both be required.⁷⁰ One writer observed that the president's act of sending away a justice, though not explicitly prohibited by the constitution, nevertheless "violates a fundamental and essential principle in every free government."⁷¹

This last argument raises an important point: The Constitution may embody, by implication, concepts or propositions not appearing expressly therein. The challenge is to determine whether the Constitution implicitly embodies any given principle. To meet that challenge, it is necessary to formulate a working definition of a "constitutional principle."

In keeping with the constitution's chief purpose, namely, to provide an operational framework for American self-government, a constitutional principle may be defined as any concept which, when applied, will help enable the federal system and its various components to function smoothly and in a manner befitting a republican form of government. This definition is sufficiently encompassing to permit us to treat two great American staples, "separation of powers" and "checks and balances," as constitutional principles, even though they nowhere expressly appear in the Constitution. The definition is also broad enough to embrace virtually every argument voiced either for or against specific examples of extra-judicial activity during the pre-Marshall period.

But how can two conflicting sets of concepts both be constitutional? The answer lies in a bal-

ancing test. Two sets of interests must be weighed against one another: Article III interests, and those of the federal system as a whole.

With respect to Article III, two major interests are at stake: that of maintaining the integrity of the judiciary as an independent branch, and that of safeguarding the justices' credibility and effectiveness as impartial adjudicators. There exist two means by which to satisfy the first interest, those being the separation-of-powers principle (under the Montesquieu-Madison-Slonim formulation) and the concept of checks and balances. These means also do much towards satisfying the second interest. Yet something more is needed. Given that the Court in and of itself possesses virtually no power to enforce its judgments, much of its effectiveness depends upon the voluntary cooperation of the parties arguing before it. The Court will stand little chance of receiving this cooperation if its justices do not behave in a manner commanding respect. Thus the Justices often must go a step beyond technical compliance with the "separation of powers" and "checks and balances" principles; to satisfy the second Article III interest, they must avoid even the *appearance* of impropriety.

Under the balancing test, an extra-judicial activity could at times be justified even where Arti-

cle III interests have been violated. For by this standard, the injury which performance of the activity will inflict upon Article III interests must be weighed against the harm which non-performance will send upon the rest of the federal system. This balancing technique may have been the approach that Jay and other justices took when assuming tasks conflicting to some degree with Article III duties. Of course, only the least drastic means necessary should be used to satisfy the overriding interest — as when Jay and his colleagues on the New York circuit court consented to comply with the invalid pension scheme, but only as willing commissioners and not as coerced judges.

Striking the proper balance always poses difficulties, and we need not assume that the early justices always made correct choices. Today, after nearly two centuries of government under our Constitution, we may feel less need to rely on extra-judicial activity than did the pioneer justices and their contemporaries, who lived at a time when the federal system was more an experiment than a reality. Nevertheless, we should always give heed to the competing interests we forfeit as we make each choice. To do otherwise would be to thwart our Constitution in spirit, if not in letter.

Footnotes

¹ Act of 12 Aug. 1790, ch. 47, Section 2, 1 Stat. 186.

² Adams to Jay, 21 Mar. 1792, 11 H. Syrett, *The Papers of Alexander Hamilton* 159-61 (1962).

³ The Judiciary Act of 24 Sept. 1789, ch. 20 Section 4, 1 Stat. 74-5, required the Supreme Court Justices to ride circuit.

⁴ Jay to Hamilton, 23 Mar. 1792, 11 H. Syrett at 172-3.

⁵ 11 H. Syrett at 193-4.

⁶ Act of 23 Mar. 1792, ch. 11, § 2, 1 Stat. 244.

⁷ *Id.*, Section 4.

⁸ 1 *American State Papers* (Misc.) 50-1.

⁹ *Id.* at 52.

¹⁰ *Id.* at 53.

¹¹ *Id.* at 49-50.

¹² *Id.* at 52.

¹³ 3 H. Johnston, *The Correspondence and Public Papers of John Jay* 448-9 (1890).

¹⁴ *Id.* at 473-7.

¹⁵ 1 *American State Papers* (Misc.) 53.

¹⁶ 3 H. Johnston at 486; 33 J. Fitzpatrick, *The Writings of George Washington from the Original Manuscript Sources 1745-1799* 15-19 (1940).

¹⁷ 3 H. Johnston at 486-7.

¹⁸ *Id.* at 488-9.

¹⁹ 33 *Fitzpatrick* at 332.

²⁰ Jay to Mrs. Jay, 15 Apr. 1794, 4 H. Johnston at 3.

²¹ Jay to Mrs. Jay, 19 Apr. 1794, *id.* at 5.

²² Jay to Mrs. Jay, 12 May 1794, *id.* at 21.

²³ Wheeler, "Extra-judicial Activities of the Early Supreme Court," *The Supreme Court Review* 123, 131 (1973).

²⁴ Slonim, "Extra-judicial Activities and the Principle of the Separation of Powers," 49 *Conn. Bar Journal* 391 (1975).

²⁵ *Id.* at 395-6.

²⁶ *Id.* at 408.

²⁷ *Id.* at 409.

²⁸ *Id.* at 410.

²⁹ One should note, however, that *The Federalist* is not a formal treatise but a political document to be read accordingly.

³⁰ *The Federalist* No. 47, at 138-9 (J. Madison)(R. Fairfield ed. 1966).

³¹ *Id.* at 140.

³² *Id.* at 140-1.

³³ *Id.* No. 48, at 146 (J. Madison).

³⁴ *Id.* at 147.

- ³⁵ *Id.* at 146.
- ³⁶ *Id.* at 147.
- ³⁷ *Id.* No. 51, at 159 (J. Madison).
- ³⁸ *Id.* at 160.
- ³⁹ *Id.* No. 78, at 227 (A. Hamilton).
- ⁴⁰ *Id.* at 228.
- ⁴¹ *Id.* at 228.
- ⁴² *Id.* No. 79, at 235 (A. Hamilton).
- ⁴³ *Id.* No. 81, at 242-4 (A. Hamilton).
- ⁴⁴ 2 M. Farrand, *The Records of the Fed. Convention* 74 (rev. ed. 1937).
- ⁴⁵ *Id.* at 78.
- ⁴⁶ *Id.* at 298.
- ⁴⁷ 1 *id.* at 97.
- ⁴⁸ 2 *id.* at 78.
- ⁴⁹ 1 *id.* at 139.
- ⁵⁰ 2 *id.* at 75, 79, 80, 298, 300.
- ⁵¹ *Id.* at 77.
- ⁵² *Id.* at 73, 75, 76.
- ⁵³ 2 *Annals of Cong.* 1519 (1790).
- ⁵⁴ Incomplete records of early House, and especially Senate, proceedings make it hazardous to draw sweeping conclusions from what does *not* appear in the extant materials.
- ⁵⁵ The Mint Act of 2 April 1792, ch. 16, Section 18, 1 Stat. 246, 250 provided for the Chief Justice's assistance in inspecting the gold and silver used for minting coins.
- ⁵⁶ "Philadelphia," *General Advertiser* (Philadelphia), 25 April 1794.
- ⁵⁷ "United States — Halifax, (N. Caro.) May 28," *Gazette of the United States and Evening Advertiser* (Philadelphia), 6 June 1794.
- ⁵⁸ *A Friend to Peace*, "For the Baltimore Daily Intelligencer," *The Baltimore Daily Intelligencer* (Baltimore), 24 April 1794; "New York, May 10," *The Daily Advertiser* (New York), 10 May 1794.
- ⁵⁹ "From the General Advertiser," *Gazette of the United States and Evening Advertiser* (Philadelphia), 30 April 1794; "Philadelphia," *General Advertiser* (Philadelphia), 25 April 1794.
- ⁶⁰ "United States — Halifax, (N. Caro.) May 28,"

Gazette of the United States and Evening Advertiser (Philadelphia), 6 June 1794.

⁶¹ A. B., "Philadelphia, June 6," *Gazette of the United States and Evening Advertiser* (Philadelphia), 6 June 1794; A. B., "For the Gazette of the United States," *Gazette of the United States and Evening Advertiser* (Philadelphia), 13 June 1794.

⁶² A. B., "For the Gazette of the United States," *Gazette of the United States and Evening Advertiser* (Philadelphia), 13 June 1794.

⁶³ *Id.*; A. B., "Philadelphia; From a Correspondent," *Gazette of the United States and Evening Advertiser* (Philadelphia), 11 June 1794.

⁶⁴ A. B., "Philadelphia, June 6," *Gazette of the United States and Evening Advertiser* (Philadelphia), 30 May 1794; "From the General Advertiser," *General Advertiser* (Philadelphia), 3 June 1794.

⁶⁵ See, e.g., "From a Correspondent," *General Advertiser* (Philadelphia), 28 April 1794; *The Daily Advertiser* (New York), 29 July 1794; *Greenleaf's New York Journal*, & *Patriotic Register* (New York), 14 May 1794.

⁶⁶ "From a Correspondent," *General Advertiser* (Philadelphia), 28 April 1794.

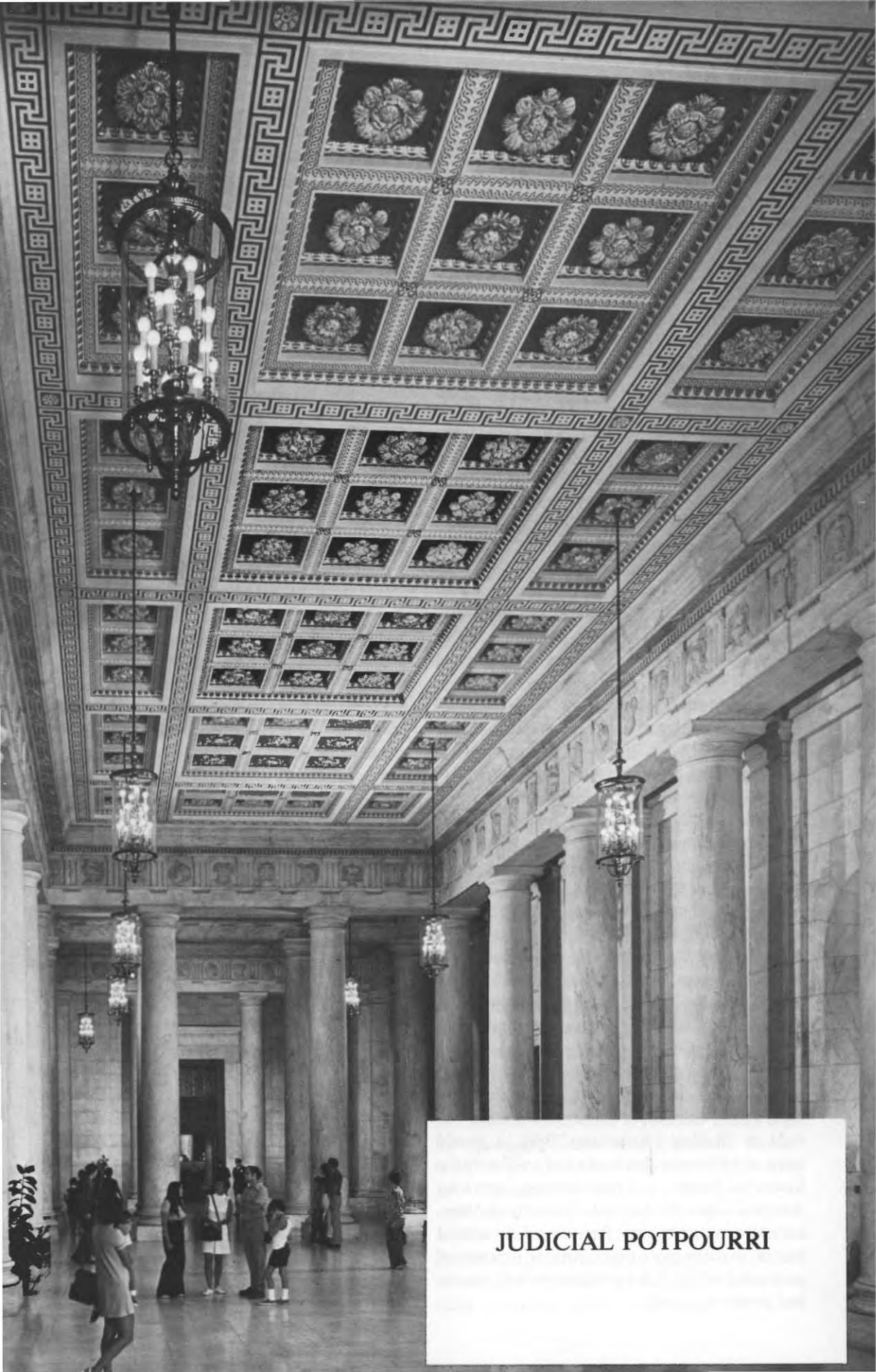
⁶⁷ "From Correspondents," *Independent Chronicle and the Universal Advertiser* (Boston), 28 April 1794; *The Daily Advertiser* (New York), 29 July 1794.

⁶⁸ "From Correspondents," *Independent Chronicle and the Universal Advertiser* (Boston), 28 April 1794; *Greenleaf's New York Journal*, & *Patriotic Register* (New York), 14 May 1794.

⁶⁹ "Observations to C. J. Jay's appointment," *General Advertiser* (Philadelphia), 29 April 1794; *Greenleaf's New York Journal* (New York), 14 May 1794.

⁷⁰ *Greenleaf's New York Journal* (New York), 14 May 1794; "From a Philadelphia Correspondent; American National Cockade," *Greenleaf's New York Journal* (New York), 10 May 1794; "Observations to C. J. Jay's appointment," *General Advertiser* (Philadelphia), 29 April 1794.

⁷¹ "For the Chronicle," *Independent Chronicle and the Universal Advertiser* (Boston), 29 May 1794.



JUDICIAL POTPOURRI

The Judicial Bookshelf

by D. Grier Stephenson, Jr.¹

The Supreme Court, Thurman Arnold reminded us a half-century ago, "is our most important symbol of government. It should be the concrete dramatization of the ideal that there is a power which prevents government action which is arbitrary, capricious, and based on prejudice."² The ideal was an extension of President Washington's belief that "the true administration of justice is the firmest pillar of good government, . . . essential to the happiness of our country and the stability of its political system."³ The ideal justified James Madison's conviction that constitutional supremacy "without a supremacy in . . . exposition and execution . . . would be as much a mockery as a scabbard put into the hands of a soldier without a sword in it."⁴ Yet, Arnold maintained, "neither faith in the notion that truth is revealed to judges, nor trust in the personal expertness of any individuals sitting as judges, is congenial to our ways of thinking today. We still think as Newton thought, . . . that our governmental institutions must be rational."⁵

Public scrutiny and understanding are therefore essential to public confidence in the Court. This confidence in turn undergirds judicial power and effectiveness. Judicial independence and the absence of direct political accountability make possible the "concrete dramatization" of the constitutional ideal. That same judicial independence in a democratic system makes necessary a unique and unending examination of the justices and their work. Justice Stone characterized such oversight as "fearless commentary."⁶ So, it should come as no surprise that books and articles on the Court, the Justices, and their decisions have long occupied a special place in the literature of American political institutions. For study of the judicial process involves more than satisfying curiosity of author and reader. It is a public service to citizens and government alike.

The Justices

In the second edition of *Justices and Presidents*,⁷ Henry J. Abraham sees the past dozen years as "characterized by the continuing recognition of the verities of the Court's role as a policymaker, of its tripartite role as a legal, a governmental, and, yes, a political institution." The time lapsed since the first edition appeared in 1974 has demonstrated "that, contrary to the expectations, hopes, or fears of those who profess to understand the Court and its role best, the Burger Court . . . did not — with the arguable exception of aspects of the realm of criminal justice — 'undo' the jurisprudence of the Warren Court. . . ." Rather, Abraham finds a Court continuing its embrace of "an activist role, of judicial legislating, of law-making, of judicial activism."⁸

It is because of the Court's historic policymaking role that the subject of Abraham's book merits the attention he gives it. From President Washington's appointment of John Jay in 1789 to President Reagan's nomination of Sandra Day O'Connor in 1981, Abraham traces the politics of presidential efforts to fill the Supreme Bench. What criteria have Presidents employed in selecting justices? To what degree have presidential expectations for nominees been realized in their decisions? Criteria and expectations are important because they have acutely concerned almost every president. "[F]ar more than any other nominations to the federal bench, those to the highest tribunal in the land are not only theoretically, but by and large actually, made with a considerable degree of *scienter* by the Chief Executive."⁹

Regarding the first question, Abraham identifies "a quartet of steadily occurring criteria. . . ." They include merit, personal friendship, "balance" or "representation" on the bench, and political and ideological acceptability. While

most appointments have involved more than one of these factors, the fourth has most frequently been the overriding consideration.¹⁰ One might add "luck" as well, as did Justice O'Connor: "that decision from the nominee's viewpoint is probably a classic example of being the right person in the right spot at the right time."¹¹

As for fulfilling presidential expectations, the record is mixed. The list of 102 justices contains more than a few "surprises." "You shoot an arrow into a far-distant future when you appoint a justice," Alexander Bickel observed, "and not the man himself can tell you what he will think about some of the problems he will face."¹² Even senators, asked for their "advice and consent," may feel the same way. ". . . I believe we should caution the electorate that even if they want us to apply a litmus test, . . . it is not something we can do very well," opined Senator Biden during the debate over the O'Connor nomination. "[O]nce a justice dons that robe and walks into that sanctum across the way, we have no control. . . . [A]ll bets are off."¹³

Aside from examining expectations and their fulfillment, Abraham wades into what some might see as the murky waters of merit. How, actually, is one supposed to assess judicial merit? Are there standards sufficiently clear to separate good appointments from bad ones? Nominations

to the Court almost always generate positive and negative reactions that derive from partisan or ideological views, but does the historical record suggest objective criteria which can be used to rate merit? Furthermore, are there similar criteria by which to judge on-bench performance? Abraham believes that such criteria exist, demonstrating "a remarkable degree of agreement."¹⁴ Attesting to common measurement are the similarities among several rankings of Supreme Court "greats." "[T]here is something closely akin to consensus among . . . observers who represent the gamut of the socio-political and professional spectrum," he contends. This consensus in turn means that presidents and their advisers are now in a position to "opt for merit" while presumably not overlooking other considerations which may fairly enter into the politics of selection.¹⁵ From this vantage, Abraham proceeds to offer an assessment of both appointment and performance which fills most of the volume, a book brimming with both facts and anecdotes.

While *Justices and Presidents* contains biographical data on all who have sat on the Court, Philippa Strum's *Louis D. Brandeis*¹⁶ is devoted, as the title suggests, to the life of one of them. Publication of a judicial biography is always a noteworthy event, for it is from such studies that so much of the current knowledge about the Supreme Court has been gleaned. As Frankfurter himself advised, before his own elevation to the bench, "the work of the Supreme Court is the history of relatively few personalities. . . . To understand what manner of men they were is crucial to an understanding of the Court."¹⁷

Even though Brandeis retired from the bench nearly five decades ago, Brandeis' career as a lawyer and a jurist remains appealing to scholarly investigation. A flurry of studies has appeared in recent years.¹⁸ Moreover, publication of the important set of Brandeis' *Letters* is now apparently complete.¹⁹ The reason for this on-going attention seems clear. Some of it undoubtedly springs from interest in the Court during the time Brandeis sat as a justice, but more of it probably comes from the attraction Brandeis himself presents. Strum's book is a good example of the latter. She does not get to Brandeis' nomination by President Wilson until page 291, in a book with 417 pages of text. It is all but certain Brandeis would today still be regarded as a major American figure even if he had never been appointed to the Court. Indeed, it helps in an assessment of Brandeis' life to re-



Associate Justice Sandra Day O'Connor

member that his twenty-three Court years did not begin until he was sixty.

Brandeis, after all, was part of virtually every major social and economic movement in the United States during his long life of service. One cannot delve far into labor questions, Wilson's New Freedom, Franklin Roosevelt's New Deal, women's suffrage, Progressivism, civil liberties, "trust-busting," or Zionism without meeting Brandeis. All of these topics, and more, find a place in Strum's study. Hers stands out as the most thorough treatment of Brandeis since publication of Alpheus Thomas Mason's *Brandeis*²⁰ four decades ago. Certainly Strum's *Brandeis* is the most comprehensive account in print.

Even though Brandeis was known as one who jealously guarded his privacy, Strum seems to have gone far toward her goal of displaying Brandeis the man in his many facets as thinker, doer, teacher, and Justice. She sees many "puzzles" in Brandeis' life that call for examination and explanation. For example, what were the origins of his attraction to "smallness?" How did the Jewish son of German immigrants gain acceptance at Harvard and in Brahmin Boston? How could he earn so much money from law practice and still be known as the "people's attorney?" What influence did Brandeis have on sociological jurisprudence, especially alongside the contributions of Roscoe Pound and Justice Holmes? Why were facts more important to him than legal principles in the judicial process? Did his many battles for many public causes color his views and influence his decisions as a justice? How did he manage to be so involved extra-judicially during much of his tenure on the Court and yet avoid charges of impropriety? The last question is significant because one of the criticisms hurled at Brandeis in the 1916 fight over his confirmation was that he lacked "judicial temperament."²¹

Strum is careful when probing the extent of Brandeis' influence on the New Deal. While honored as "Isaiah" by the soldiers of the New Deal, she concludes that they paid no attention to the heart of Brandeis' thought. "The New Dealers thought they owed many of their important policies to him," she writes, "and that they rejected only those that would have attempted to return to the economics of the nineteenth century." But Brandeis had strictures against centralized power. Because they misunderstood his teachings, the New Dealers missed their chance. They could have "revitalized the democratic process and ex-



Associate Justice Louis Dembitz Brandeis

tended it to industry." They could have created "an industrialized society based as much on liberty and equality as it is today on technology and machines." If the New Dealers asked how best to control "corporate giantism," Brandeis would not have accepted "the legitimacy of the question."²²

As for Brandeis' work on the Court, Strum enriches what is known about his style as a justice and his relationships with Holmes and the other brethren. Contributing to his intellectual leadership on the Court was his use of the memorandum as a device to crystalize the thinking of others as well as his own and to change minds too.²³ Surprisingly, Brandeis regarded his own style as "nonpolitical," in contrast to Van Devanter's which looked too much like lobbying. Strum notes, however, that Brandeis' "courtesy and self-restraint served the same end, getting other judges to alter or moderate their views." Indeed, she rates him (on the bench and elsewhere) a "first-rate teacher and politician."²⁴

If Brandeis' tenure on the Court marks one era in judicial history, Hugo L. Black's marks another. Just as one encounters Frankfurter in a study of Brandeis' life, Frankfurter is invariably a powerful presence in any account of Black's. Indeed, Frankfurter can be seen as a crucial figure in at least two "generations" of justices. So it should come as no surprise to find a newly published volume with Black and Frankfurter form-

ing the centerpiece.

Mark Silverstein's *Constitutional Faiths*²⁵ appeared halfway between the centennial anniversaries of the births of Felix Frankfurter and Hugo Black.²⁶ As Supreme Court justices, each wrestled with a dilemma bequeathed by the framers: freedom from direct accountability to the electorate has invited rule by judges, but this independence has also worked a constraint. Even before their appointments to the Court by Franklin Roosevelt, Frankfurter and Black were acutely aware of the tensions that abrogation of the popular will entailed. Each attempted over a long judicial career to construct an elaborate resolution which helped to define constitutional jurisprudence for a third of a century. And the reverberations of the debate between these giants continue.

Constitutional Faiths is not a judicial biography, but it is more than a study of contrasting theories of constitutional interpretation.²⁷ According to Silverstein, understanding judicial decisions cannot come without appreciation of role, which in turn follows from basic political values. So, judging is more than legislation while wearing a robe. "Judges are different because . . . the operation of key personal values tends to limit rather than expand the range of discretion" judges possess.²⁸ The author does not explain exactly why judges are different from legislators or why judg-

ing is different from making law. It may be that role is just as important for decision makers *outside* the judiciary. It may be that judicial discretion is rather a function of one's sense of official purpose: results, cost-benefit analysis, doctrinal faithfulness, or whatever.

With Black and Frankfurter, Silverstein's thesis linking decisions to role and role to values is convincing because both men were unusually consistent. Frankfurter came to the bench with an "unrelenting faith in education, expertise, and elites. . . ."²⁹ Even in the administrative state, individual liberty would flourish, Frankfurter thought, because "scientific training . . . would allow men to employ public power in a disinterested fashion to control private power."³⁰ Here was Brandeis' influence: a belief in the power of education, facts, and knowledge, all working to overcome the weaknesses of an individual's limitations. The judicial role could be narrow, therefore, since judges could trust others to make the correct decisions. This conviction enabled Frankfurter to favor civil liberties, to be sure, but not *judicial* protection of them. That would not be necessary with the proper leadership in place. So, in the first flag-salute case, Frankfurter argued for deference to the Minersville school directors, just as he argued a decade later for deference to Congress in the *Dennis* case.³¹ Yet Frankfurter, according to Silverstein, was never successful in explaining how his disinterested judicial judgment could be practiced by another, because there were situations such as the released-time cases³² where Frankfurter was more than willing to substitute his policy choices for those made by school boards or legislatures. Frankfurter was not always persuasive in removing the *self* from self-restraint.

By contrast, Hugo Black feared concentrations of public as well as private power, holding little faith in experts as the heralds of progress. Proclaiming absolutes and thereby fixing restraints on judicial judgment were his way of limiting the Court's influence on government. If the justices were not accountable to the people, they would still have to be accountable to the supreme voice of the people — the Constitution. Otherwise, judges were simply another elite which might strangle the popular will, as concentrations of corporate power and unresponsive political institutions had done. This did not mean that Black rejected the need for judges. He did seem, after all, to agree with Madison that abuses of power would more often than not be abuses of a minority in



Associate Justice Felix Frankfurter



Associate Justice Hugo L. Black

accord with the wishes of a majority.³³ But Black's view of the judicial role barred him from accepting the open-ended invitation to govern implicit in Justice Cardozo's opinion in *Palko v. Connecticut*,³⁴ a position Frankfurter reasserted in his concurring opinion ten years later in *Adams v. California*.³⁵ Black fought against what he considered judicial license even late in his career as his dissent in *Griswold v. Connecticut* attests.³⁶ Here he was determined to distinguish between the power of judicial review (which he thought the framers intended and which therefore was legitimate) and the *revisionary* power (which the framers rejected and which he thought the majority was practicing in the birth control case).

Even with the power of role perception, Silverstein acknowledges that role is a product of more than political values in a vacuum. These values are themselves honed on the complexities of "personality and personal relations," a signal that the book continues, but hardly concludes, the exploration of the dynamics between these two men. Indeed, the full story of the personal and professional relationship between Black and Frankfurter has yet to be captured in book form.

The Work of the Court

The focus on personalities in studies of the Court is important because of the knowledge

gained about how the Court works. Equally important in understanding the Court is examination of what the justices do—their decisions. If constitutional interpretation is the pre-eminent (although certainly not the only) task of the Court, then it is important to remember that constitutional interpretation manifests itself through a progression of cases. To comprehend the former requires study of the latter.

Fred W. Friendly and Martha J. H. Elliott have written a series of constitutional vignettes for their volume *The Constitution: That Delicate Balance*.³⁷ Their book is intended as a companion for the television series of the same name produced for the Public Broadcasting System. While undoubtedly useful in that setting, the book has its own merit and can stand alone.

"Case analysis," Walter Murphy and Joseph Tanenhaus have said, "is basically both textual analysis — scrutiny of the internal structure and implications of judicial reasoning — and contextual analysis — examination of the setting in which the problem arose and . . . the effect a decision may have had."³⁸ Friendly and Elliott provide sixteen short analyses, each designed to illuminate the development of a particular area of constitutional law. Beginning with "Barron's Wharf" during the time of the Marshall Court and the case of *Barron v. Baltimore*,³⁹ the volume concludes with "The Sacking of Greytown,"⁴⁰ a war-powers controversy in the Pierce Administration with echoes that continue today.

This arrangement of chapters is symbolic of American constitutional interpretation. Some questions do have definite answers, and the answers can settle a dispute for a very long time. So, Chief Justice Marshall's explanation that the Fifth Amendment was not a constraint on state power was not only true to the historical record but remained largely unchallenged until it was made irrelevant by ratification of the Fourteenth Amendment in 1868 and subsequent decisions like *Chicago, B. & Q. R. Co. v. Chicago*.⁴¹ Yet, other constitutional questions do not easily make way for firm and lasting answers. The on-going debate between the president and Congress over the War Powers Act of 1973 and the expansive executive prerogative to which it responded are typical of issues of balance and relative influence that do not quickly lend themselves to solution by judicial decision.

Friendly and Elliott properly conclude that the "1787 version [or the 1791 version, for that mat-

ter] of the Constitution was only the first draft of what we now call the law of the land."⁴² By this they mean that the Constitution of the late twentieth century is a hybrid of the text of the document and the hundreds of court decisions which have sought to discover its meaning. "A parade of disparate claims brought by citizens and non-citizens demanding their day in court has made all the difference." Viewed in this manner, "these heroes and scoundrels, winners and losers, may have had as much to do with the writing of the Constitution as the drafters."⁴³ Indeed, it is through court cases that the Constitution seems not so much a legal document as it does a human document. As Professor Frankfurter once claimed, the words of the Constitution "are so unrestricted by their intrinsic meaning or by their history or by tradition or by prior decisions that they leave the individual justice free, if indeed they do not compel him, to gather meaning, not from reading the Constitution, but from reading life."⁴⁴

The authors go out of their way through prodigious research to display the personalities of the litigants involved in the cases that comprise the meat of the volume. Indeed, some of this information is not easily available elsewhere. Their selection of cases reflects their interests. Most of the cases involve the Bill of Rights and, of these, most concern the First Amendment. They make no pretense of covering all parts of the Constitution. So only one chapter strictly examines presidential power (the Greytown incident), and one does double duty for both congressional power and federalism (the *Dartmouth College* case and the *National Bank* case).⁴⁵ Their selection of cases also reflects the way in which Americans have come to understand constitutional safeguards. For Madison and other framers, protection of individual liberty was a key objective of government, an objective to be reached by "contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places. . . ." "A dependence on the people," Madison wrote, "is, no doubt the primary control on the government, but experience has taught mankind the necessity of auxiliary precautions." The policy would be achieved by "supplying by opposite and rival interests, the defect of better motives. . . ." ⁴⁶ It is fair to say that this arrangement is what the framers meant by "that delicate balance."

Americans since Madison have enlarged on these "auxiliary precautions." And even Madison, at Thomas Jefferson's urging, soon saw the connection between judges, a Bill of Rights, and individual liberty.⁴⁷ Thanks in part to Chief Justice Marshall and judicial review, judges supply their own checks in the context of cases interpreting the strictures of the Constitution. Americans have come to look not just to what Hamilton called "the vibrations of power" for protection against abuse of power but to a Bill of Rights in the hands of an independent judiciary.

Alice Bartee's *Cases Lost, Causes Won* ⁴⁸ is also a collection of case studies. While case studies in *The Constitution* demonstrate the growth of constitutional theory, Bartee's case studies demonstrate the importance and influence of events and circumstances at particular stages in the progress of a case from beginning to end. That is, Bartee's purpose is not to show the evolution of the Constitution but to understand more fully the decision-making process itself.

To this end Bartee employs systems theory, ⁴⁹ although one does not have to be a devotee of this approach to the study of government and politics to find her book a highly useful and informative one. In the five dollar words of systems theory, one looks for (a) *inputs* (the facts, beginnings, and development of a case in the courts), (b) *conversion* (the actual process of deciding the case), (c) *outputs* (the majority opinion, with any dissents and concurrences), (d) *impact* (compliance and implementation of the decisions), and (e) *feedback* (reaction from the public and other political institutions). As Bartee applies systems theory to the study of the Court, different stages or steps take on varying degrees of importance for each case.

Using this model and four Supreme Court decisions, Bartee attempts "to secure a unique perspective on the judicial process at work."⁵⁰ At the outset, she chooses *Frohwerk v. United States*⁵¹ to demonstrate input variables, especially the crucial role of counsel in shaping a case. Frohwerk had been charged with violating the Espionage Act of 1917 because of his part in publishing a German-American newspaper. One of his attorneys was Joseph Shewalter whose behavior was so self-aggrandizing, according to Bartee, that he virtually drove Justice Holmes and the rest of the Court to a decision upholding the conviction. Whatever chance Frohwerk might have had otherwise in winning his case was lost once he hired

Shewalter to defend him. Bartee's account of counsel's performance must be read in order to be believed.

The "conversion" stage is illustrated by *Minersville School District v. Gobitis*,⁵² the first flag salute case. Here Justice Frankfurter spoke for an eight-justice majority upholding the validity of the school rule. Justice Stone was the lone dissenter. Students of constitutional interpretation have wondered why it took Justices Black, Douglas, and Murphy, all three ardent liberals, so long to announce their error in joining Frankfurter's opinion. The answer, claims Bartee, lies in confusion at conference when *Gobitis* was decided, in a breakdown in communication among the justices, and in a "misperception of attitudes and beliefs." According to Bartee, there was little discussion at conference and Chief Justice Hughes did not even take a vote. "Stone was not quick . . . and . . . had assumed that a vote would be taken. Unable to adjust . . . he lost the opportunity to voice his opposition. . . ." She believes that a thorough debate in conference might not have produced a victory for the *Gobitis* children but probably a five-to-four split, "definitely a weaker decision."⁵³

As an "output" Bartee selects the complex case of *Walker v. Birmingham*,⁵⁴ a product of the civil rights movement in the South. Five justices agreed to uphold convictions for contempt of court, where demonstrators had defied an *ex parte* injunction against further marches without first having sought a permit. The closely divided Court produced four opinions (including three dissents) which Bartee finds revealing of "how and why justices decide as they do. . . ." In the longest chapter of the book, she concludes that there was one critical set of factors in the decisions of the case: "the attitudes of the nine judges who made the decision." For the majority (Justices Stewart, White, Clark, Black, and Harlan) and minority (Chief Justice Warren and Justices Douglas, Brennan, and Fortas), different questions were important. One side queried whether the Constitution compelled Alabama to allow the demonstrators to violate the injunction without any attempt to obtain a parade permit. The other side asked whether the Constitution required state laws violating the First Amendment to be struck down. "Given the facts obviously assumed by each question," writes Bartee, "it is easy to see why the Court would be divided in its decision."⁵⁵

Demonstrating "impact" is the dramatic and tragic *White v. Texas*, the Bob White Case.⁵⁶ White was black and an accused rapist. The victim was white. After the first conviction was overturned by a Texas appeals court, the second conviction was set aside by the United States Supreme Court. Like *Chambers v. Florida*,⁵⁷ White's case involved a coerced confession. As might be expected, the dominant community reaction to White's second legal victory was extremely hostile. At the beginning of the third trial, as the jury was being impaneled, the husband of the victim reportedly walked up to the defendant and killed him instantly with a pistol shot. Not only was the Supreme Court effectively overruled by murder but the district attorney urged acquittal when the accused killer was himself brought to trial six days later. "I have always said that I would never ask a jury to do anything that I wouldn't do myself," he explained to the jurors. After two minutes of deliberation, they agreed. Outraged reaction by civil rights groups throughout the nation brought no redress. The Justice Department refused to act. The Court was left powerless, in Bob White's case at least.⁵⁸

The final chapter reviews "feedback," illustrating the influence of each case on the development of the law. The justices eventually changed their minds on the questions at issue in *Frohwerk*, *Gobitis*, and *Walker*. With *White* the Court later legitimized expansive federal intervention to secure civil rights for blacks, including criminal convictions when local justice had broken down.⁵⁹ "Each case generated new demands and the feedback cycle operated to systematically [*sic*] channel these demands back into the system. The judicial process," she writes, "is thus seen in its totality — ongoing with incremental changes."⁶⁰

Changes, both incremental and abrupt, wrought by the Supreme Court over the past two and a half decades have been faithfully chronicled and analyzed by *The Supreme Court Review*.⁶¹ The latest annual volume, for 1983, is the thickest yet, with a title page displaying twelve chapters. Their topics span the "live" issues in constitutional law, from division of powers among the branches to federalism and personal freedom. Claiming three chapters, religious liberty receives the greatest emphasis. Space permits one to be surveyed here: Michael E. Smith's "The Special Place of Religion in the Constitution."⁶²

Smith first seeks the justification for the special

constitutional place religion enjoys today. The answer is not "interpretism" (or emphasis on the specific reference to religion in the First Amendment). Rather, religion's place is due to "present-day policy reasons," instead of language or history. After all, religious liberty enjoyed no special constitutional place in Supreme Court decisions before 1937. "Before that time, the Supreme Court readily upheld government actions . . . that seem highly problematic by present standards."⁶³ Smith accepts Justice White's assessment that the Constitution and history have left the courts "a wide choice among many alternatives. . . ." Choosing has meant carving out what the judges "deemed to be the most desirable national policy governing various aspects of church-state relationships."⁶⁴

Smith next explores the Justices' "articulated" and "underlying" justifications for religion's special place. What, after all, encourages a Justice to regard a particular religious claim favorably or unfavorably? For articulated justifications, he looks mainly to judicial opinions in the cases; for the underlying ones, he relies on biographical and autobiographical material as well as the opinions. The cases fall into two groups, concentrated in the years 1940-1952 and 1960 to the present. He labels the former "first generation" cases (and justices) and the latter "second generation" cases (and justices).

For "first generation" justices, the potential for social harm in religion was important. "Justices Black and Douglas . . . thought that much of corporate religion [presumably established, mainline, traditionally religious bodies] is socially harmful. It is apt to be greedy, totalitarian, and politically and scientifically backward."⁶⁵ There was also fear that government aid to corporate religion might lead to persecution of minor groups. So, they tended to link support for corporate religion with a supposed tendency to foster social conflict. By contrast, when small sects (what Smith terms "individual religion") were involved in cases, emphasis switched from the possibility for social harm to the desirability of personal freedom. "Accordingly, their view of religion was no longer unfavorable but indifferent and even favorable." Smith links such views with Justice Rutledge as well. In contrast, Frankfurter seemed "to have had an unfavorable view of religion generally. . . . He cherished it mainly as a barrier against the threat of corporate religion."⁶⁶

The "first generation" justices did not originate

these ideas. Smith finds their roots in the formative years of the American Republic. "Two of the most potent forces in American religious life were Enlightenment rationalism, typified by Thomas Jefferson, and the free church Protestants, heirs of Roger Williams."⁶⁷ They joined in hostility to established churches and in an individualistic view of religion. Moreover, such thinking was prevalent in some quarters during the two decades before these "first generation" cases were decided.⁶⁸

Among "second generation" justices (excluding of course "first generation" justices who were still sitting after 1960), Smith finds "substantially different" views toward religion. The emphasis on social harm has largely disappeared, with Justice Fortas' opinion in *Epperson v. Arkansas*⁶⁹ the only recent example of the older hostility. "Concern about persecution has also largely disappeared . . . [and] some . . . have even begun to question the claim that corporate religion contributes to social disunity."⁷⁰ However, in cases involving public aid for sectarian schools, a few justices have worried about the tendency for such support to spark disunity and strife.

There has even been recognition in recent cases of social benefits of corporate religion, including religion's "contribution to social diversity, to public welfare programs, and to the development of good moral character."⁷¹ And these cases have not involved small sects or individuals but "mainline" religious groups. Paired with this more favorable attitude toward corporate religion is less sympathy for individual religion, although Smith cautions against overstating the extent of this shift among "second generation" justices. The most outspoken among them have been Chief Justice Burger and Justices Stewart and White, with their views characterized by a "moderate social conservatism . . . [that prefers] corporate religion that is not highly disciplined and expansionist."⁷² Again, their ideas do not diverge from dominant thinking during the 1940s and 1950s, when "Americans overwhelmingly approved of corporate religion."⁷³

The Court at Work

An important but largely unseen part of the judicial process that precedes the decision in a case is of course the *selection* of a case for review. Since passage of the Judiciary Act of 1925, the Supreme Court has enjoyed discretionary review over much of its docket. Even the obligatory part

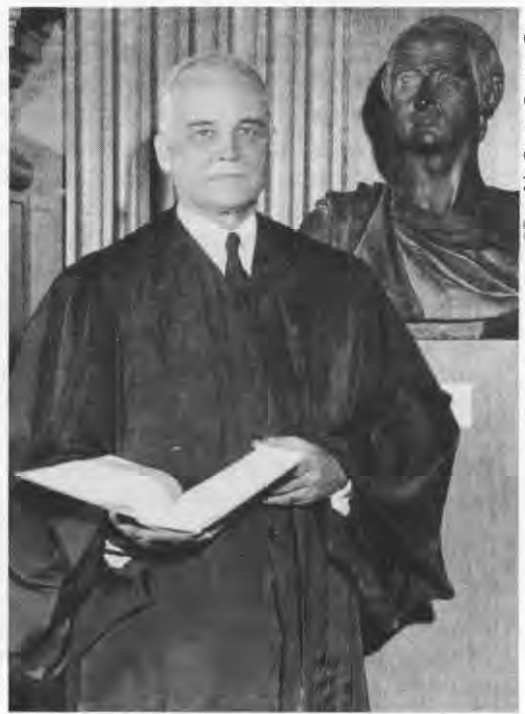
of its jurisdiction now appears, more often than not, to be discretionary in practice. The result is a situation familiar to anyone aware of recent reports on the workload of the Supreme Court: a docket where the number of filings has multiplied sharply over the past three decades, but where the number of decided cases has increased only moderately. This ratio invites research.

If what the justices decide is worthy of study, and if the justices will decide only a comparatively small number of cases each term, it becomes a matter of some interest to understand the process of case selection. Explaining this process is the objective of Doris Marie Provine's *Case Selection in the United States Supreme Court*.⁷⁴ But explanation encounters barriers at the outset. The Court's own Rule 17 on the granting of *certiorari* does not adequately account for those large numbers of cases each term that are turned away at the door.⁷⁵ The rule can really do no more than suggest some of the characteristics of a case that will be taken into account. Further complicating the research task is the secrecy within which the selection process operates. Moreover, justices typically do not explain publicly why review is or is not granted. While the number of dissents to denials of *certiorari* has been on the increase in recent years, such dissents remain relatively uncommon and, when they occur, do not necessarily speak for everyone who preferred to grant review.

Provine skirts these barriers by making use of Justice Burton's papers in the Library of Congress. Burton was on the Court from the 1945 through the 1957 terms and used his docket books to record each justice's vote on each case that came before the Court. While papers of many justices are open for inspection, Burton's are special because no other collection, Provine maintains, contains records on case selection during the years since 1925.⁷⁶

Provine's book is thus a case study of case selection. Its validity depends on the accuracy of Justice Burton's records. On this Provine expresses little doubt, concluding not only that his case record is complete but that as a person he was "careful and precise," and that "he kept accurate, exhaustive records."⁷⁷ Its usefulness outside the years 1945-1958 depends on whether her findings can be generalized to most justices, or whether they were to a large degree unique to those who served during this time.

Like others who have studied the selection process but who did not have access to the Burton



Associate Justice Harold H. Burton

data, Provine supports their underlying premise: "that subjective considerations lie at the heart of case selection."⁷⁸ But her conclusions differ from others in finding that the "justices' perceptions of a judge's role and of the Supreme Court's role in our judicial system significantly limit the range of case-selection behavior that the justices might otherwise exhibit." From a high percentage of unanimous votes on the question to review, Provine concludes that a "high degree of consensus exists within the Court" on the role the Court should play as the tribunal of last resort in the federal system.⁷⁹

Of course, there were plenty of cases where the justices disagreed on review. These divisions "reflect differences in how they weigh the fundamental responsibilities of the Court against the circumstances of actual cases" as well as how the justices viewed the merits of the claims petitioners made for relief.⁸⁰ Some justices were much more inclined than others to consider the outcome in the lower court as relevant to whether the cases deserved review. Some justices tended to be very "review-prone" while others were consistently "review-shy."

Her research also suggests two reasons why some litigants are more successful than others in gaining access to review in the Supreme Court: awareness of "the conception the justices hold of

the proper work of the Court," and "the differences that exist in the petitioning expertise of litigants." As expected, the United States Government was the most successful petitioner during the years Provine studied. Why? "In case selection and preparation, the solicitor general cultivates the image of an officer of the court, rather than an ordinary litigant eager to win, no matter what." Also important is the ability of the solicitor general "to anticipate and articulate the Court's fundamental concerns." These concerns involve the efficiency and power of the national government and suggest that here the justices feel a special responsibility.⁸¹

Provine worries lest the continued emphasis the justices place on enlarging their discretion to take cases gives undue advantage to "sophisticated and experienced petitioners, especially the U.S. government."⁸² If present practices favor frequent litigators, does that not further increase the influence of organized interests in American politics? In any event, the data show that the popular perception of taking a case "all the way to the Supreme Court" is false. The legal merits of a case hardly explain why one case is chosen while many others are not. But survival of this popular perception must mean, Provine believes, that the justices accept "enough disputes of concern to the public to sustain its image as an available forum."⁸³

Most significantly for the integrity of the Court, she concludes, "[N]one of the Burton-period justices was so anxious to see his preferences for one outcome over another become law that he routinely voted in case selection to advance that objective." Shared beliefs on appropriate judicial behavior seemed to prevent the Burton-era justices "from simply voting their policy preferences in case selection." Perception of role thus became a "variable" between a justice's policy preferences and the same justice's vote to review.⁸⁴

To the extent that this conclusion applies to justices other than those who sat during the Burton era, scholars have a lesson to learn from Provine's work. Of course, the cases the Court receives make it a very *political* institution in the sense that the outcomes of those cases affect the allocation of power. This is why no president takes a vacancy on the Court lightly. But to say this is not to say that judges are either legislators who wear robes or bureaucrats cloaked in other guise. Constitutional interpretation is surely political jurisprudence, but it is still jurisprudence. "Any accurate

analysis of judicial behavior must have as a major purpose a full clarification of the unique limiting conditions under which judicial policy making proceeds."⁸⁵

In contrast to the secrecy which normally surrounds the selection of cases, judicial scholars have always had available the published opinions of the justices explaining their views of decided cases. These opinions have been vital in understanding the Court because it is what the justices *say* about the Constitution that distinguishes the Court from the other branches of national government.

Heretofore, research on a particular justice or on several required a painstaking cataloging of opinions simply as preparation to work. It is as if a student of literature had to sift through dozens of books and volumes of bound periodicals in search of essays and articles penned by a certain author. (And to make the analogy exact, one would have to assume that the indexes and contents pages had all been removed!) No one who has done very much judicial research takes for granted an index to periodicals. To be sure, computer services have lately eased the effort, but even for the time periods they cover they can sometimes be both clumsy and expensive, generating alternately either too much or too little information.

Filling this void in a very important way are the two volumes of *Supreme Court of the United States 1789-1980: An Index to Opinions Arranged by Justice*,⁸⁶ as edited by Linda A. Blandford and Patricia Russell Evans in a project sponsored by the Supreme Court Historical Society. The editors see their work as a useful supplement to computerized services and as an indispensable aid to those students of the Court who do not have instant access to legal data banks. Using the FLITE data base of the United States Air Force, Blandford and Evans have cataloged all opinions written and published by all justices from 1789 through the end of the 1979 term in September of 1980. The volumes are organized chronologically, by Justice. This means that volume one begins with Wilson and Jay and concludes with McKenna; volume two begins with Holmes and ends with Stevens.

The editors have grouped opinions into seven classifications: *majority opinions*, *concurring opinions*, and *dissenting opinions*, *opinions announcing judgment*, *separate opinions* (such as those concurring and dissenting as well as the early *seriatim* opinions), *opinions as Circuit Jus-*



Associate Justice Robert H. Jackson

tice (before 1969 these were not published in the *United States Reports*), and *statements* (where these are written by the Justice in third person, or otherwise express the Justice's views, and announced through the reporter of decisions). Where two or more justices jointly authored an opinion, the word "joint" appears, but it should be noted this designation does not include the far more common situation where one justice joins an opinion authored by another. With one exception, the index understandably includes no classification by subject matter "because of the technical and substantive difficulties involved."⁸⁷

While one must be cautious in drawing conclusions from lists alone, the index of opinions suggests several comments about the Court. First, while the practice of *seriatim* opinions was common before John Marshall became chief justice, the "opinion of the Court" predated his appointment. Significant perhaps is the list of 11 majority opinions authored by Oliver Ellsworth, Marshall's predecessor. The practice of having the chief justice speak frequently for the Court — a hallmark of the Marshall Court — was at least underway by the time of Marshall's arrival, even if it was not yet firmly established. Second, Marshall was not only the chief spokesman for his Court, especially early in his tenure, but dissenting opinions were relatively rare. Between 1801 and 1835, only 42 are recorded, and 18 of these are credited

to William Johnson, aptly called "the first dissenter."⁸⁸ Third, among justices who served mainly in the nineteenth century, the first Justice Harlan was by far the most prolific writer of dissents. No one else seems to come close. Fourth, dissenting opinions appear far more frequently today. For example, Justice Rehnquist — to single out a current member of the Court — wrote more dissenting opinions between 1971 and 1980 (the years of his service included in the index) than Justice Harlan did during his entire time on the Court, from 1877 until 1910. Even as late as the Brandeis era on the Court, dissents were rather uncommon. For Brandeis himself, a justice remembered for noteworthy dissents, dissenting opinions counted for only a small part of his on-bench writing — 454 of his 528 opinions were written for the majority.

The Constitution and Judicial Review

The Justices' opinions are objects of study not just because they explain who won and who lost but also because of what they reveal about the justices' attitudes toward the Constitution and judicial review. Even in the earliest years of the Court, controversy swirled from time to time over the reach of judicial power. *Chisholm v. Georgia*⁸⁹ landed the justices in controversy because the judicial view of the Constitution did not square with dominant opinion. So one of the first exercises of judicial power became the first instance in which the Supreme Court was overruled by constitutional amendment (the Eleventh). In *Chisholm*, the Court was *activist*, superimposing its views of correct policy on others. Political forces in Congress and the state legislatures would have much preferred *restraint* or deference. So was born the debate between judicial activism and judicial restraint. What do these terms mean? Which one should the Court follow? Has the Court adhered to one more than the other?

Answers to these questions and others are pursued in *Supreme Court Activism and Restraint*.⁹⁰ Editors Stephen C. Halpern and Charles M. Lamb have brought together 15 original essays which explore the topic of judicial activism and restraint in its historical, normative, and behavioral dimensions. Publication of such a book in the 1980s is itself testimony to the fact that the debate over activism and restraint has neither diminished or gone away. The reach of the volume is

wide. "Rather than advancing one point of view," say the editors, "the book illuminates the fundamental issues in the debate over the Court's power by providing provocative and conflicting perspectives on those issues."⁹¹ The hope is to offer fresh insight into an enduring problem. The editors succeed. Their project is the most all-inclusive resource on the subject to appear in a decade.⁹²

Four of the essays can be briefly discussed here. The first is the introductory or conceptual essay to the volume, "Judicial Restraint on the Supreme Court," by Charles M. Lamb.⁹³ The term "restraint" denotes a collection of attitudes which comprise an ideal of what judging (especially *constitutional* judging) means in a democratic political system. Justices who advocate a limited role for the Court have done so for two basic reasons, Lamb finds. First, they believe that "judicial policymaking conflicts with the very essence of a democratic society." By its nature judicial power runs counter to popular power as expressed through the people's elected representatives. Second, they believe courts are simply not institutionally equipped to make wise policy. "Compared to a legislature, a court lacks the staff, financial resources, and power to hold hearings with multiple witnesses presenting myriad facts and points of view."⁹⁴



Chief Justice John Jay

These reasons in turn have inspired several "maxims" of restraint. Accordingly, justices should: 1) "abide by the intent of the framers of the Constitution and statutes, and . . . not read their own personal preferences into law;" 2) "pay deference to the legislative and executive branches of the federal and state governments by seldom overruling their policies, and then only on strictly 'legal' grounds;" 3) rely upon statutory rather than constitutional construction wherever possible;" 4) "accept for decision only 'cases and controversies' where the litigants have standing to sue in live issues;" 5) issue no advisory opinions; and, 6) answer no political questions.⁹⁵

After extensive review of each, Lamb admits that the term "restraint" is both relative and subjective. The term does not easily lend itself to precision. "In some cases a particular justice may appear to be an advocate of restraint; in others he may not, . . . or may display in one opinion traits of both . . ."⁹⁶ Even the injunction against judicial legislation offers no useful measurement. "Every Justice," observed Robert H. Jackson, "has been accused of legislating and every one has joined in that accusation of others . . ."⁹⁷

Conceptual weakness, however, does not lead Lamb to urge abandonment of the term. There is really nothing to put in its place. For all its problems, "restraint" is still a useful code word. Although many justices "have not practiced the restraint they preach," rejection of the concept would make it difficult to generalize about the work of the Court. In addition, the term has merit "because more than a glimmer of hope remains for its continued use . . . There is a strong possibility that rigorous analyses and applications of the term can clarify the confusion. . . ."⁹⁸ Indeed, he sees this volume as a step in that direction.

In the normative section of the collection is a "defense" of judicial restraint and a "defense" of judicial activism. Lino A. Graglia authors the first, and Arthur S. Miller authors the latter. Graglia's is not a classic defense, but is at heart a bold and "back-to-basics" attack on activism. Indeed, his article strikes out against most recent (and some not so recent) manifestations of judicial power in America.⁹⁹ Even most of the Court's own apostles of judicial restraint — Justices such as Holmes, Frankfurter, and Harlan II — appear excessively activist by Graglia's yardstick.

"[W]e now have a system of government by unelected judges holding office for life," asserts

Graglia. "If tyranny describes government in which the governors are not regularly subject to the control of the governed, this system qualifies for the description." Graglia views the present place of courts in the political system a radical departure from the framers' intentions. Moreover, the departure is unwelcome since the nation had been founded "on the revolutionary principle that the people are capable of governing themselves. . . ." ¹⁰⁰

Rule by judges, says Graglia, means that it is the judges who speak, not the Constitution. This truth is demonstrated by changing decisions that interpret a text that has undergone no relevant change. "In an intellectually respectable discipline, the possibility of reaching conflicting results on the basis of a single theory is taken as proof that the theory is invalid, but in constitutional law, as in astrology, this presents no serious difficulty." ¹⁰¹ Graglia might well have quoted the argument Robert Yates made against ratification of the Constitution nearly two centuries ago, when he feared that the Supreme Court would be the "sleeper" in the new government. "This power in the judicial," wrote Yates, "will enable them [the judges] to mould the government, into almost any shape they please. . . . In short, they are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself. . . ." ¹⁰²

Just as Yates anticipated in 1788, Graglia finds few practical limitations on judicial power today. Legal traditions do not really limit, asserts Graglia. Neither does he have confidence in the efficacy of time-honored checks such as constitutional amendment, standing, congressional control of jurisdiction, impeachment, or even presidential appointment. For varying reasons each fails to achieve popular control of the judiciary. "Judges have simply been too successful in inculcating the myth that an attack on them is an attack on the Constitution." ¹⁰³ The people, in whom Graglia has much faith, have been duped and do not really know what is happening.

Just what constitutional place does Graglia believe judges should occupy? He accepts a system of judicial review where judges act "pursuant to fairly definite and specific constitutional provisions" and where judicial decisions can be more easily overturned by constitutional amendment or by simple legislative act. ¹⁰⁴ There should be a reasonably clear conflict with a provision of the

Constitution before judges could set aside a statute. For examples he points to the illustrations Chief Justice Marshall used in *Marbury v. Madison*, ¹⁰⁵ each of which involved violation of a specific provision. Judicial review in such cases would entail "only a very limited intrusion on democracy. . . ." But Graglia is quick to reject Marshall's use of judicial review in *Marbury* itself. Marshall, he claims, "reached his conclusion that the statutory provision supposedly involved in *Marbury* was unconstitutional by first finding in the statute something that was not there, and then finding a logical inconsistency with the Constitution that did not exist." ¹⁰⁶ Graglia does not address the point, but with provisions lacking specific meaning (the so-called "open-ended" phrases like "due process of law") presumably there would be no judicial review at all.

Arthur S. Miller's "In Defense of Judicial Activism" is as radical in one direction as Graglia's missive against judicial activism is in the other. ¹⁰⁷ If one must regard activism and restraint only on the terms they propose, neither option may prove especially attractive to practicing jurists.

The principal deficiency in judicial activism, according to Miller, is its timidity. There should be more activism, not less. Yet, both Miller and Graglia agree on the extensive power the Court currently enjoys in the political system. While the latter sees this as a faithless departure from the intentions of the framers, the former sees the Court's influence as an opportunity. Still, Miller is not as quick to see the Court as all powerful. He admits that the justices "cannot long be out of step with the dominant political forces of the nation." ¹⁰⁸ So, he does not expect the Court to place barriers in the way of policies chosen by the rest of government to meet the pressing needs of the day. But this limitation only means that the justices must work harder at the challenges facing them. "Supreme Court activism," writes Miller, "is the one reed — the one frail reed — that enables Americans . . . to rise above the petty tyrannies of everyday life and see the world whole." ¹⁰⁹ Justices "must not only see wrongs that should be corrected; they must also be ready to develop new remedies." ¹¹⁰

Miller calls for a bold judicial future because of the evolution of American government. The nation is now beginning what Miller calls its fourth constitution, the Constitution of Control. ¹¹¹ "Crisis government" is becoming the norm, and the trend in America, as elsewhere, is toward in-

creasingly authoritarian government. The Court can be a necessary check, providing "moral leadership to a populace that knows not where it is or where it is going. The developing consciousness of the country deserves an institution that can speak and act with miracle, mystery, and authority."¹¹² To avert disaster, hope lies therefore with the justices. "The Supreme Court may be a poor example of Plato's philosopher-kings, but we have no substitute."¹¹³ National leadership, if there is to be any, must come from the justices. "With life tenure and time for reflection, the justices are in a better position than politicians to erect standards toward which the nation could aspire."¹¹⁴ The Court should see itself as the "Delphic Oracle" of America.¹¹⁵

It does not trouble Miller that the Court is an undemocratic institution because the so-called democratic institutions of government — state and national — are not democratic either. "[I]t is idle, even mischievous" to label them so. Where Graglia has nearly boundless confidence in people to govern themselves through their elected representatives, Miller has almost none. Here lies the error in the thinking of those who have advocated restraint, claims Miller. Their mistake comes in "thinking . . . that the political process was sufficient to the need." The consequence of American pluralism is that the national interest becomes whatever the "groups with the greatest political clout" happen to choose.¹¹⁶

Rather than explore restraint and activism in the abstract, Harold J. Spaeth and Stuart H. Teger have undertaken a review of restraint as a driving force in Supreme Court decisions. Their "Activism and Restraint: A Cloak for the Justices' Policy Preferences" surveys the Burger Court's record on federal regulatory commissions, federalism, and access to the courts in the years 1969-1977.¹¹⁷ With the commissions and the states, the justices are in a position to "defer" to the judgments of others. With cases involving access to the courts, voting to deny access is a way of leaving the resolution of certain disputes to other parts of the government.

They find that, at most, "judicial deference is a sometime thing."¹¹⁸ More important in explaining votes are the justices' approval or disapproval of the policies challenged in the cases. The authors do not express surprise at the results of their research. "If not to decide is to decide (and it surely is), then even the restrained jurist is promulgating policy decisions when he defers."¹¹⁹

Do Americans really expect justices to submerge their political values "entirely to vague notions of judicial restraint?" "Justices, like most mere mortals, defer to the ideas and institutions of which they approve. We would not want them on the Supreme Court otherwise."¹²⁰ For Spaeth and Teger, concepts of activism and restraint are useful only in trying to maintain the myth that judges find, but do not make, law. They doubt whether many still accept that ideal explanation as truth, and wonder whether it has not "now gone the way of the flat earth and phlogiston."¹²¹ The authors do not take time to pursue the question their findings raise: what then becomes the justification for judicial review?

In his significant monograph *The Supreme Court and Constitutional Democracy*,¹²² John Agresto examines this question and one closely akin to it: the proper place of the Court in the American political system. Confronted with the fact of judicial power, Graglia retreats and Miller advances to one of two extremes. Agresto places positions such as theirs in a historical context. "The fear of judicial autocracy led Jefferson to minimize the potential value of the Court almost to insignificance," he writes, "to reduce its effective place within the scheme of checks and balances. The opposing and more prevalent view begins with the notion of judicial independence" and removes the Court from that scheme. But the latter view "finds itself without defenses against the dangers and the reality of judicial imperialism."¹²³

Agresto adopts a middle position which begins with the *fact* of an active judiciary. And this is a judiciary that has been active in recent years in a way previously unknown. The Court is not just a nay-sayer to other people's policies but is itself "legislative in the fullest sense: creating categories of expectation and entitlement, ordering the expenditures of great sums of revenue, creating new rights and with them new sanctions."¹²⁴ This state of affairs he might not prefer, but Agresto is not launching an anti-Court crusade. Rather, his thesis is that "constitutional interpretation is not and was never intended to be solely within the province of the Court. . . ." He would rejuvenate the Madisonian system of checks and balances, making the Court not just one of the "checks," but also a "check" subject to "balances." "We should see the American political system not as a pyramid, with the Court at the top as the ultimate authority," he suggests, "but rather as an

interlocking system of mutual oversight, mutual checking, and combined interpretation."¹²⁵ Recognizing the importance of an active judiciary, Agresto believes that "a Court that is both checked and active may well be the optimal constitutional solution." If judicial supremacy is intolerable, thorough-going restraint is a mistake.¹²⁶

How then does one accomplish this "solution?" The first step is a rejection of the doctrine of judicial finality — the view that the Court's interpretation of the Constitution is the "last word." The second step is recognition that several presumed restraints on the Court are sometimes unwise and usually not very workable. Correcting the Court by amending the Constitution is not only exceedingly difficult, but "makes the Constitution the shield and security for exactly that kind of autonomous political activity we sought to protect ourselves against."¹²⁷ Neither are appeals to self-restraint effective. Generally, the call to self-denial has been in vain, and besides, the framers did not intend the several branches to check *themselves*. Agresto also opposes quick resort to impeachment or routine change in the number of justices. Each carries with it "serious political liabilities" which outweigh possible benefits. Also not recommended is Congressional withdrawal of jurisdiction since that would foreclose further inquiry into the constitutional legitimacy of particular legislative acts.¹²⁸ Besides, these are blunt and heavy weapons, not easily wielded for routine political conflict.

The third step comes in accepting the propriety of a dialogue between the Court and the rest of the

political system. Agresto stresses Congress' "unquestioned ability to rewrite voided legislation in order to pass judicial scrutiny."¹²⁹ Agresto believes there is a respected tradition behind this view. As Corwin said, "[W]hile the Court can and must decide *cases* according to its own independent view of the Constitution, it does not in so doing fix the *Constitution* for an indefinite future."¹³⁰ This was Lincoln's position in the wake of *Dred Scott*: "Were I in Congress and a vote should come up on a question whether slavery should be prohibited in a new territory, in spite of that *Dred Scott* decision, I would vote that it should."¹³¹

Agresto predicts that such a dialogue would be relatively easy and might well prove effective. At the very least, rewriting rejected statutes and developing ways to limit the impact of a judicial holding would make it clear that a large body of opinion believed the Court to be in error in its reading of the Constitution. Compared to many proposals for "curbing the Court," Agresto's is modest. It would mesh judicial power with the natural tensions the Constitution contains, to gain the full benefit of popular government under higher law.

Throughout the literature surveyed here, each author attests to the fact that the Court is not ignored. Their efforts demonstrate the importance of the Court in the political system and point to continued interest in what the Court does. If the Court continues to engage other political institutions in dialogue, there is another important dialogue as well — between the Court and its students.

Footnotes

¹ Listed alphabetically below are the books surveyed in this article.

(a) Abraham, Henry J. *Justices and Presidents: A Political History of Appointments to the Supreme Court* (New York: Oxford University Press, 2nd ed., 1985). Pp. xiv, 430.

(b) Agresto, John. *The Supreme Court and Constitutional Democracy* (Ithaca, N.Y.: Cornell University Press, 1984). Pp. 182.

(c) Bartee, Alice Fleetwood. *Cases Lost, Causes Won* (New York: St. Martin's Press, 1984). Pp. xiii, 207.

(d) Blandford, Linda A., and Patricia Russell Evans, eds. *Supreme Court of the United States*

1789-1980: *An Index to Opinions Arranged by Justice* (Millwood, N.Y.: Kraus International Publications, 1983). 2 vols. Pp. xxv, 1126, plus appendices.

(e) Friendly, Fred W., and Martha J. H. Elliott. *The Constitution: That Delicate Balance* (New York: Random House, 1984). Pp. xii, 339.

(f) Halpern, Stephen C., and Charles M. Lamb, eds. *Supreme Court Activism and Restraint* (Lexington, Mass.: D. C. Heath, 1982). Pp. xi, 436.

(g) Kurland, Philip B., Gerhard Casper, and Dennis J. Hutchinson, eds. *1983 The Supreme Court Review* (Chicago: University of Chicago Press, 1984) Pp. viii, 626.

(h) Provine, Doris Marie. *Case Selection in the*

United States Supreme Court (Chicago: University of Chicago Press, 1980). Pp. ix, 214.

(i) Silverstein, Mark. *Constitutional Faiths: Felix Frankfurter, Hugo Black, and the Process of Judicial Decision Making* (Ithaca, N.Y.: Cornell University Press, 1984). Pp. 234.

(j) Strum, Philippa. *Louis D. Brandeis: Justice for the People* (Cambridge, Mass.: Harvard University Press, 1984). Pp. xv, 508.

² T. Arnold, *The Symbols of Government* 196 (1935).

³ Letter to Edmund Randolph (Sept. 27, 1789). 10 *The Writings of George Washington* 34 (J. Sparks, ed., 1834).

⁴ Letter to N. P. Trist (Dec. 1831). 9 *The Writings of James Madison* 476 (G. Hunt, ed., 1910).

⁵ Arnold, *supra* n. 2, at 50.

⁶ Letter from Stone to T. R. Powell (Nov. 15, 1935). Quoted in A. Mason, *Harlan Fiske Stone* 398 (1956).

⁷ Abraham, *supra* n. 1.

⁸ *Id.*, vii.

⁹ *Id.*, 7.

¹⁰ *Id.*, 5.

¹¹ Remarks of May 19, 1983. Quoted in *id.*, 7.

¹² Quoted in *Time Magazine*, 24 (May 23, 1969).

¹³ Quoted in A. Mason, W. Beane and D. Stephenson, *American Constitutional Law* 12 (7th ed., 1983).

¹⁴ For Abraham, "greatness" on the bench was best expressed by Blaustein and Mersky: "Scholarship; legal learning and analytical powers; craftsmanship and technique; wide general knowledge and learning; character, moral integrity and impartiality; diligence and industry; the ability to express oneself orally with clarity, logic, and compelling force; openness to change, courage to take unpopular decisions; dedication to the Court as an institution and to the office of Supreme Court justice; ability to carry a proportionate share of the Court's responsibility in opinion writing; and finally, the quality of statesmanship." A. Blaustein and R. Mersky, *The First One Hundred Justices: Statistical Studies on the Supreme Court of the United States* 50-51, n. 11 (1978). With these criteria, the rub comes not from knowing what they are but in finding individuals who will probably live up to them.

¹⁵ Abraham, *supra* n. 1, at 11.

¹⁶ Strum, *supra* n. 1.

¹⁷ Frankfurter, "Mr. Justice Brandeis and the Constitution," 45 *Harvard Law Review* 33, 33 (1931).

¹⁸ The list includes: Leonard Baker, *Brandeis and Frankfurter: A Dual Biography* (1984); Nelson Lloyd Dawson, *Louis D. Brandeis, Felix Frankfurter, and the New Deal* (1980); Bruce Allen Murphy, *The Brandeis/Frankfurter Connection: The Secret Political Activities of Two Supreme Court Justices* (1982); Lewis J. Paper, *Brandeis* (1983); and Melvin I. Urofsky, *Louis D. Brandeis and the Progressive Tradition* (1981).

¹⁹ M. Urofsky and D. Levy, eds., *Letters of Louis D. Brandeis*, 5 vols. (1971-1978).

²⁰ A. Mason, *Brandeis: A Free Man's Life* (1946).

²¹ A. Todd, *Justice on Trial: The Case of Louis D. Brandeis* (1964). Brandeis' extra-judicial activities were of course the focus of part of Bruce Allen Murphy's controversial *The Brandeis/Frankfurter Connec-*

tion, *supra* n. 18. Given the wealth and range of citations in Strum's volume, it is striking that there is apparently none to Murphy's book. She does make reference to another recent study, Nelson Lloyd Dawson's *Louis D. Brandeis, Felix Frankfurter, and the New Deal*, *supra* n. 18.

²² Strum, *supra* n. 1 at 409, 410.

²³ His friend Professor Frankfurter made similar use of the memorandum during his years on the Court. Frankfurter was sworn in as a Justice on January 30, 1939, just before Brandeis retired on February 13.

²⁴ Strum, *supra* n. 1, at 371.

²⁵ *Supra* n. 1. Silverstein's selection of a title is significant. Three lectures Black gave at Columbia University in 1968 were published as *A Constitutional Faith* (1968).

²⁶ Frankfurter was born in Austria in 1882; Black was born in Alabama in 1886.

²⁷ See W. Mendelson, *Justices Black and Frankfurter: Conflict in the Court* (1961).

²⁸ Silverstein, *supra* n. 1, at 20.

²⁹ *Id.*, 87.

³⁰ *Id.*, 16.

³¹ *Minersville School District v. Gobitis*, 310 U.S. 586 (1940); *Dennis v. United States*, 341 U.S. 494 (1951).

³² *McCullum v. Board of Education*, 333 U.S. 203 (1948) (concurring opinion); *Zorach v. Clauson*, 343 U.S. 306 (1952) (dissenting opinion).

³³ Writing to Jefferson on Oct. 17, 1788, Madison said that "the invasion of private rights is chiefly to be apprehended, not from acts of government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents. This is a truth of great importance, but not yet sufficiently attended to. . . ." Quoted in Mason, Beane, and Stephenson, *supra* n. 13 at 503.

³⁴ 302 U.S. 319 (1937).

³⁵ 332 U.S. 46 (1947).

³⁶ 381 U.S. 479 (1965).

³⁷ Friendly and Elliott, *supra* n. 1.

³⁸ W. Murphy and J. Tanenhaus, *The Study of Public Law* 47 (1972).

³⁹ 32 U.S. (7 Peters) 243 (1833).

⁴⁰ See A. Schlesinger, Jr., *The Imperial Presidency* 56 (1973).

⁴¹ 166 U.S. 226 (1897).

⁴² Friendly and Elliott, *supra* n. 1, viii.

⁴³ *Id.*

⁴⁴ F. Frankfurter, *Law and Politics* 30 (E. F. Pritchard and A. MacLeish, eds., (1939).

⁴⁵ *Dartmouth College v. Woodward*, 17 U.S. (4 Wheaton) 518 (1819); *McCulloch v. Maryland*, 17 U.S. (4 Wheaton) 316 (1819).

⁴⁶ *The Federalist*, No. 51.

⁴⁷ On March 15, 1789, Jefferson wrote Madison: "In the arguments in favor of a declaration of rights, you omit one which has great weight with me, the legal check which it puts into the hands of the judiciary." When placing the proposed Bill of Rights before the House of Representatives on June 8, 1789, Madison said: "If they [the amendments] are incorporated into the constitution, independent tribunals of justice will

consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights." Quoted in Mason, Beaney, Stephenson, *supra* n. 13, at 504-505.

⁴⁸ Bartee, *supra* n. 1.

⁴⁹ Systems theory was first used generally to analyze politics and government in David Easton's *The Political System* (1953) and his "An Approach to the Analysis of Political Systems," in 9 *World Politics* 383 (1957), even though the term "political system" is considerably older than systems theory itself. Systems theory offers a framework for selecting, organizing, and analyzing political data, and Bartee thinks of the judicial process as a system itself. Systems theory suggests a model of why things happen and, like any model, is an abstraction from reality. The utility of any such model comes only of course from increasing our understanding of the subject that is being studied and in advancing other research. Walter F. Murphy's *Elements of Judicial Strategy* (1964) is an early example of systems theory as applied to courts and judges.

⁵⁰ Bartee, *supra* n. 1, at 7.

⁵¹ 249 U.S. 204 (1919).

⁵² 310 U.S. 586 (1941).

⁵³ Bartee, *supra* n. 1, at 60, 69.

⁵⁴ 388 U.S. 307 (1967).

⁵⁵ Bartee, *supra* n. 1, at 135.

⁵⁶ 310 U.S. 530 (1940).

⁵⁷ 309 U.S. 277 (1940).

⁵⁸ Bartee, *supra* n. 1, at 159.

⁵⁹ *United States v. Guest*, 383 U.S. 745 (1966); *United States v. Price*, 383 U.S. 787 (1966).

⁶⁰ Bartee, *supra*, n. 1, at 189.

⁶¹ Kurland, Casper, and Hutchinson, *supra* n. 1.

⁶² *Id.*, 83-123.

⁶³ *Id.*, 86.

⁶⁴ *Committee for Public Education v. Nyquist*, 413 U.S. 756, 820 (1973) (dissenting opinion).

⁶⁵ Kurland, Casper, and Hutchinson, *supra* n. 1, at 105.

⁶⁶ *Id.*, 110.

⁶⁷ *Id.*, 113.

⁶⁸ Professor Smith may know that he is not the first to inquire into the underlying views of the Justices on religion. In the papers of the first Justice Harlan in the Library of Congress, there is a letter to Harlan from a J. H. McCulloch of The American Sunday-School Union in Henderson, Kentucky, dated August 5, 1891. "Some infidels through this section boldly assert 'That every judge now on the bench of the U.S. Supreme Court is either an atheist or infidel, all deny the truth of the Christian religion.' I have denied this charge as a slander and a lie. Will you please inform me as far as you may be able, How many judges of the Supreme Court are professing Christians?" In Justice Harlan's handwriting are notes for a reply: "Assured that all were communicants in a Christian church — that if I was mistaken in that I was not mistaken in saying that no one of them is an infidel or atheist & that all believe the truths that are commonly regarded as fundamental in the Christian religion."

⁶⁹ 393 U.S. 97 (1968).

⁷⁰ Kurland, Casper, and Hutchinson, *supra* n. 1, at 114.

⁷¹ *Id.*, 117.

⁷² *Id.*, 118.

⁷³ *Id.*, 120.

⁷⁴ Provine, *supra* n. 1.

⁷⁵ It was Rule 19 when Provine did her research. See 28 U.S.C. Appendix (1982 ed.).

⁷⁶ Burton's papers were opened to the public after his death in 1965. Provine accurately points out that the Morrison Waite Papers at the Library of Congress contain Chief Justice Waite's docket books, which have detailed voting records. Waite was on the Court from 1874 until 1888, long before the Judges' Bill of 1925. Stephenson, "The Chief Justice as Leader: The Case of Morrison Remick Waite," 14 *William and Mary Law Review* 899 (1973).

⁷⁷ Provine, *supra* n. 1, at 4.

⁷⁸ *Id.*, 6. Published research goes back well over two decades. See, for example, G. Schubert, *Quantitative Analysis of Judicial Behavior* (1959) (chapter 4, especially, on "The Certiorari Game"); Tanenhaus *et al.*, "The Supreme Court's Certiorari Jurisdiction: Cue Theory," in G. Schubert, ed., *Judicial Decision Making* (1963); Ulmer *et al.*, "The Decision to Grant or Deny Certiorari: Further Consideration of Cue Theory," 7 *Law and Society Review* 637 (1972); Brenner, "The New Certiorari Game," 41 *Journal of Politics* 649 (1979).

⁷⁹ Provine, *supra* n. 1, at 6.

⁸⁰ *Id.*, 7.

⁸¹ *Id.*, 86-88.

⁸² *Id.*, 175.

⁸³ *Id.*, 176.

⁸⁴ *Id.*, 7.

⁸⁵ Pritchett, "The Development of Judicial Research," in J. Grossman and J. Tanenhaus, eds., *Frontiers of Judicial Research* 42 (1969).

⁸⁶ Blandford and Evans, *supra* n. 1.

⁸⁷ Blandford and Evans, *supra* n. 1, xxi. The exception comes with the standard opinion on the death penalty used jointly by Justices Brennan and Marshall where the Court denies review in capital cases. These recurring opinions are marked accordingly.

⁸⁸ D. Morgan, *Justice William Johnson; The First Dissenter* (1954).

⁸⁹ 2 U.S. (2 Dallas) 419 (1793).

⁹⁰ Halpern and Lamb, *supra* n. 1.

⁹¹ *Id.*, xi.

⁹² See D. Forte, *The Supreme Court in American Politics: Judicial Activism v. Judicial Restraint* (1972).

⁹³ Halpern and Lamb, *supra* n. 1., at 7-36.

⁹⁴ *Id.*, 9, 12.

⁹⁵ *Id.*, 15-21.

⁹⁶ *Id.*, 22.

⁹⁷ R. Jackson, *The Supreme Court in the American System of Government* 80 (1955). Even Justice Douglas, rarely counted in the ranks of the judicially modest, could use the language of restraint. "We do not sit as a super-legislature to determine the wisdom, need and propriety of laws that touch economic problems, business affairs, or social conditions." *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

⁹⁸ Halpern and Lamb, *supra* n. 1, at 28.

⁹⁹ *Id.*, 135-166. The views in the chapter are generally consistent with the author's frequently cited critique of judicial policy-making with respect to integration of the public schools. L. Graglia, *Disaster by Decree: The Supreme Court's Decisions on Race and Schools* (1976).

¹⁰⁰ Halpern and Lamb, *supra* n. 1, at 135.

¹⁰¹ *Id.*, 140.

¹⁰² Quoted in Mason, Beaney, and Stephenson, *American Constitutional Law* 44 (7th ed., 1983).

¹⁰³ Halpern and Lamb, *supra* n. 1, at 154.

¹⁰⁴ *Id.*, 156.

¹⁰⁵ 5 U.S. (1 Cranch) 137 (1803).

¹⁰⁶ Halpern and Lamb, *supra* n. 1, at 157.

¹⁰⁷ *Id.*, 167-199.

¹⁰⁸ *Id.*, 169.

¹⁰⁹ *Id.*, 192.

¹¹⁰ *Id.*, 188.

¹¹¹ *Id.*, 168. According to Miller, the Articles of Confederation constituted the first. The "Constitution of Limitations" was the second, from 1789 to 1937. The New Deal brought the third, the "Constitution of Powers," as the late Professor Edward Corwin said.

Now, the fourth, the "Constitution of Control" is overlaying the third.

¹¹² *Id.*, 192.

¹¹³ *Id.*, 184.

¹¹⁴ *Id.*

¹¹⁵ *Id.*, 188.

¹¹⁶ *Id.*, 178-182.

¹¹⁷ *Id.*, 277-301.

¹¹⁸ *Id.*, 296.

¹¹⁹ *Id.*, 297.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Agresto, *supra* n. 1.

¹²³ *Id.*, 101-102.

¹²⁴ *Id.*, 11.

¹²⁵ *Id.*, 10.

¹²⁶ *Id.*, 134.

¹²⁷ *Id.*, 108.

¹²⁸ *Id.*, 121.

¹²⁹ *Id.*, 126.

¹³⁰ E. Corwin, *Court Over Constitution* 74 (1938).

¹³¹ 2 A. Lincoln, *Collected Works* 495 (Basler ed.) (1953).

Comparative Law: The Federal Constitutional Court of Germany and the Supreme Court of the United States

by Karl-Heinz Millgramm



Federal Constitutional Court

The Federal Constitutional Court of the Federal Republic of Germany.

Some differences between the Supreme Court of the United States and the Federal Constitutional Court of the Federal Republic of Germany (FCC) are quite obvious: While the Supreme Court acquired a large marble building that looks like a greek temple for its work, the residence of the Judges of the FCC is rather modest, looking in many ways like an office building outside, with much similarity to the interior of an ocean steamer inside. On the other hand the robes the judges wear in Court sessions look very much like the scarlet robes of high officials of the Vatican while the Justices of the Supreme Court prefer — compared with this — a modest black robe.

Each Court was instituted as highest constitutional guardian, but for a different society with a different culture and history. In spite of these differences which can only be mentioned but not examined broadly, both Courts may be subject to comparative examination.

While the Supreme Court acts as one deciding body, consisting of nine justices, the FCC is organized as a Twin-Court, consisting of two independent deciding bodies, called "Senates," of eight Judges each. Only in rare instances of high constitutional importance the FCC acts en banc as a plenary body with all judges of the Court.

Although the election and nomination-process

for the members of the courts is not the same, political implications are here and there obvious. While the appointment of a Supreme Court justice is a problem to be solved by the Senate and the President of the United States, this process is in Germany rather difficult. Some of the judges are elected by the Parliament, the other by the Council of the States. Three judges of each Senate have to be selected from the judges of all Federal Superior Courts. All candidates must be at least 40 years of age. They are elected for a term of 12 years, and reelection is not possible. At the age of 65 a judge retires, regardless of whether his 12-year-term is completed at this time or not. By the way, some critics feared that allowing reelection and the publishing of separate opinions would bear the danger that a judge would not write in dissent but for his reelection. This points out the problem of influence of political parties. Their influence is quite obvious in the appointment process.

Once a judge is appointed there might be a chance that he will be influenced by basic political ideas of his party, but there has never been a case of a judge who did decide according to a party order or even a "desire." Nevertheless in order to provide for sufficient majorities the parties deal about the positions, thus sometimes one party may nominate a person, while next time it will be the other party's turn, etc.

However, both courts are courts of law. Therefore, every member of these courts must always be aware of the duties of his court and must never forget them, even if his election or confirmation-process had been full of political implications. It makes no difference at all if his nomination was just a sort of gift of his political party. Both courts are — the Supreme Court at least first of all — constitutional courts. Within their power they apply constitutional law to legal issues and construe this law, binding other courts. Although there are political ties in many cases argued before and decided by these courts, this may not lead to the misconception, both courts were just political institutions.

Everyone has — of course within the frame of law — the right to appeal to both courts. *Certiorari* cases and — on the other hand — constitutional complaints are the kinds of cases which represent the main burden of the work of both courts. This burden is very high and demonstrated by a permanent increase of filed petitions or complaints. There are critics — even among members



Federal Constitutional Court

Unlike the imposing marble facade of the Supreme Court of the United States, the Federal Constitutional Court of Germany occupies a building not unlike many other office buildings in Germany. The Court's location is marked by a sign outside.

of both courts — who demand measures in order to lessen this increase. But, this pressure should, perhaps, be reviewed with a skeptical eye. As Justice Brennan¹ once stated, to get along with such an increase is first of all a question of doing routine work quickly and not a question of doing, in all cases, highly qualified research work. No wonder that most decisions in the first screening stage of the process are rendered unanimously. Justice Douglas² once added that he mistrusted a demand which in effect wants to keep cases away from the Supreme Court. There are — especially from the point of view of a German — some positive aspects of the increasing work load which are real and should not be forgotten:

First of all the increase proves that more and more people accept both courts as necessary constitutional institutions whose doors are — in the frame of law! — open to everyone if he or she cannot obtain relief otherwise. This was the intention of Brown, Gideon and others who brought their cases to the Supreme Court, in hopes of es-

tablishing a landmark precedent. There are already instances like these in the short history of the FCC: Just recently a law student and hundreds of other petitioners successfully attacked the government's plan of a nationwide census (*Volkszählung*). If one had to give a report on constitutional justice in schools or other assemblies of non-lawyers, one would — probably not without the desire to provoke astonishment — mention similar cases. The popular book *Equal Justice Under Law*, edited by a board of the Supreme Court Historical Society, tells the history of victories of small people over branches of government or other big forces in society. These people consider both courts as supreme institutions which have power over any force which influences social life and their individual rights. Screening case by case means being in touch with various problems of society, thus providing a kind of control which should be considered as an imminent factor of constitutional justice. However, in order to get along with the problems caused by the heavy work load, both courts have established — the Supreme Court by court rules, the FCC by an Act of Parliament — a screening-process which takes place before the full conference reviews the cases.

While the justices of the Supreme Court are free to select any case they wish for plenary consideration, the judges of the FCC do not enjoy the same latitude. They have to grant a petitioner the requested relief if there is anticipated a decision which may solve serious constitutional problems or if the petitioner otherwise had to suffer serious damages. But the selection process of both courts, too, differs from each other: While every justice takes part in this process, this is not the case in the FCC. There each Senate forms several groups consisting of three judges each. Any case this so-called "Three-Judges-Commission" does not want to take, is barred from plenary consideration; however, the decision of this commission must be unanimous. On the other hand, these commissions do not decide the question, whether a case will be decided on its merits. This decision is up to the Senate. Thus the commissions filter out nearly 97 percent of all filed petitions. The Supreme Court rejects "only" 70 percent in the screening phase in which all justices may take part. The decision of the Supreme Court to reject a case, that is to say, to deny a petition, is simply made by not transferring a case from the conference agenda which includes all petitions, to the "discuss list" which consists of all cases at least

one justice wants to discuss in conference. Even if cases have reached that level in both courts, the conference or the Senate still has the power to reject it. While — by tradition — a case needs four votes to receive plenary consideration on its merits by the Supreme Court, a case in the FCC needs at this stage a quorum of two judges only.

Before looking at the process of decision making in both courts, one should first of all accept that neither Supreme Court nor FCC functions as a kind of permanent constitutional convention. The phrase "constitutional convention," once uttered by Justice Jackson,³ prior to his appointment, was not meant in order to take pride in the existence of such a court. It is understood best as a reminder of the simple fact that even the highest constitutional court is first of all a court of law. That means it is subject to the same basic requirements which are incumbent upon every court. The main duties of a court are to apply law to cases, solve "actual controversies" and to render decisions which are lawful and just.

The process of decision making, that is to say of deciding a case on the merits, is in both courts complicated and time-consuming. While every justice prepares every case which made the "discuss list" for the conference, the situation in the FCC differs here, too. According to a plan one judge will prepare the case alone. He functions in conference as a reporter. He is the one who prepares later on the draft of the judgment which is in the FCC always a *per curiam* opinion. However, each judge receives copies of the briefs submitted — not printed as it is the case in the Supreme Court — and may, if he wishes to do so, prepare himself for discussion in conference like he were the reporter of that case. By the way: writing in dissent does not free a reporter from his duty to prepare the draft of the judgment. It happens from time to time that a judge fulfills both duties. Since the justices of the Supreme Court write "opinions," often written like a personal letter, it is a rare event — Justice Douglas once told of one instance — that a justice writes both the opinion of the Court and a separate opinion. However, in the sense Justice Brennan and other justices understand this term, it happens from time to time, too.

The members of both courts have a certain number of law clerks available. The kind of work they have to do depends on the justice or the judge. Help and — in many ways — assistance is thus available, since all law clerks have been selected from a group of highly qualified lawyers.

This offers advantage and danger as well. The danger lies in an attack against the purpose of a multi-person court. The "lawgiver" wanted for several reasons, not one single justice or judge but that a group of them should decide cases filed with the court. That means that he thought of all advantages a group can offer: close relationship between the members, group-goals, cooperation etc. But, if a court member has his or her own group of assisting persons available it should not be overlooked that this means forming little groups within the superior group called court. Thus the effect is that a justice or judge may have closer relationship to this little group of assistants and may even feel obliged to them because of good work they may have done in a certain case. Thus it is throughout possible that he or she could be reluctant in conference if the majority of the court is tending to a point of view which is in opposition to this court member's and his or her assistant's view. No justice or judge will admit this, and of course there will be no reason to reject this denial as not honest, since he or she feels obligations and duties as a court member. But a discussion of a group of justices or judges more or less well prepared by their law clerks and may be even convinced by their suggestion and opinions is not the same as a conference of court members who did their homework alone. These are speculations, of course. They are mentioned, however, since they include a warning: if such dangers are imaginable, why should they not become real? Free discussions, willingness to admit mistakes, in brevity: all aspects Chief Justice Earl Warren mentioned in his report on the deliberation process in *Brown*,⁴ are things a third person expects, who is — because of the secrecy of the deliberation — only able to speculate. Is the inflation of separate opinions in the Supreme Court a result of lack of willingness for free discussion? Only the justices can answer that question. Nevertheless this question should be asked. Only a very young person without any experience — such persons are law clerks — can be proud of such effective things like a "steno-graphic pool" which tears off the individualities of a single case and reduces it to an amount of "relevant" facts, issues and presses these remains in the narrow frame of precedents. Thus a person who is familiar with the judiciary for a long time may — on the other hand — find some sympathy with justices like Justice Brennan who, according to the sources,⁵ reviews every case himself, leaving only subsidiary work for his law clerks. Any

law clerk should be aware that "special trust and confidence" is reposed in the "wisdom, uprightness, and learning" of the justices. To help and assist a justice wherever this is necessary is a just desire for a law clerk who always knows that his or her justice bears the final responsibility for his opinions and actions.

The situation in the FCC is somewhat different, since this court recruits its law clerks from judges of lower courts, state attorneys, officer-lawyers of authorities etc. who mostly look back at a ten-year-legal-education and some experience in office. Sometimes they are selected from research assistants of the law schools. However the same thoughts which are described above are applicable to the FCC.

Beside law clerks there are other dangers which may disturb the deliberation process, namely lack of cooperation and of willingness to discuss any problem without regard to one's own reputation. Even the simple fact of a group of highly qualified lawyers who used to be leading officials, professors, powerful partners in law firms etc. can be a hindrance, since none of the court members has ever had the chance to select the persons who should become his colleagues. Last but not least the wide language of constitutional terms which gives room for construction and many opinions does not make deliberation easier.

In order to provide for an effective discussion among the court members the deliberation process must be entirely secret. Therefore the measures Chief Justice Warren E. Burger undertook⁶ when this secrecy had been breached once, were proper and just. Whoever dares to disturb this secrecy has to expect sharp reactions and there is no right, not even such as the right of a free press, that could be superior to the imminent necessity of any multiperson-court, namely the demand of an undisturbed and thus free and open-hearted deliberation. It is therefore self-evident that the FCC protects the secrecy of its deliberations the same way the Supreme Court does. However, the FCC has — from time to time — to suffer from "anticipated" announcement of judgments of the Court by the media. It always puts the Court in a bad light if the newsman on TV tells the people in the evening news what the Court will announce in the morning, regardless of whether this "prophecy" turns out right or wrong. Both courts decide cases on the merits either after or without oral argument. German observers would probably be astonished about the formalities of the oral argu-



The opening ceremony of a *Volksgerichtshof* (People's Court) session on August 7, 1944.

ment in the Supreme Court. The loud “oyez”—cry of a Marshal and things like a gavel are not to be found in the FCC or any other German court. Instead of this a court officer will announce the coming of the judges with the words: “The Federal Constitutional Court!” This might probably already be an adoption from the Supreme Court, like many things which—in the term of the *Yearbook* of the Supreme Court Historical Society—belong in this book’s chapter “de minimis.” Fifteen years ago there was a movement in Germany to abandon symbols like robes, formalities etc. The motto was: “Under the robes lies the dust of ages!” The presumption was that symbols which have no meaning anymore should not further exist simply because they were always there. On the other hand—to speak with Justice Frankfurter—the significance of a symbol lies in what it represents;⁷ symbols are pointing at ideals, maybe never reached by anyone. But symbols make it easier to find out whether the person, e.g. the judge, using these symbols is on his way toward the ideal which is illustrated by them. Otherwise the symbols would make it clear that the judge’s behavior is inconsistent. We here in Germany had a time with bad memories: In the Nazi era, Hitler used a board which was called *Volksgerichtshof*, in English: “People’s Court” to label the murder

of people as a lawful measure, ordered by a court. The significance of the symbols of the judiciary Hitler used were that strong, that our highest appellate court, the *Bundesgerichtshof*, still considers the members of this board as “judges” and their institution as “court.” However, there are some signals that this court is going to change its mind. Thus, symbols which were so misused in many ways in the Nazi period, have a weak place in Germany. This can be an explanation e.g. for an American lawyer who visits German court sessions and wonders why there are not as many symbols and ceremonies like in American courts.

While the procedure in oral arguments of the Supreme Court is strongly governed by the court rules, the Judges of the FCC decide in each case how oral argument is organized. For example, they will decide whether a time limit should be fixed for the attorney of each party or the *amici curiae*, experts etc. The most significant difference between both courts is, however, that the number of oral arguments is very high in the Supreme Court while in the FCC oral argument is a rare event which takes place about ten times a year.

One chapter covers *stare decisis*. This principle has—as Justice Douglas stated once—little place in constitutional law,⁸ however it is even

here of some importance. It allows the disposition of routine cases to be quick and easy. On the other hand, permanent ambivalence of constitutional positions and opinions, also changes in society — constitutional law is a reflection of this — protects constitutional courts from — as Justice O. W. Holmes said⁹ — “blind imitation” of what was said long ago. As far as opinions of both courts have a guardian function for other courts and lawyers, *stare decisis* is still a factor which should not be underestimated. However these goals are not reached if the court members try to reach unanimity for the price of rendering an ambiguous decision or interpretations while important questions are excluded and postponed for later cases in order to save unanimity. *Brown v. Board of Education*¹⁰ bears — as D. Hutchinson¹¹ described — a lesson.

It is rather fitting that, in order to provide a clear opinion of the court, court members who cannot — as Justice Blackmun said¹² — after serious self-examination either concur in the result or in the reasoning, render a separate opinion, thus allowing the majority to render a stringent reasoned decision which leaves no doubt about its meanings.

The tradition of publishing separate opinions is rather of American than of English origin. It is a creation of the Supreme Court under Chief Justice John Marshall (1801-1835). However, rendering separate opinions secretly has always been familiar to German judges. The right to publish them was, since 1945, a privilege of judges of some state constitutional courts. Since 1970 the judges of the FCC have had this right, too. Political reasons and aspects were the main reasons for the invention of this right — either declared openly or masked by the allegation that there were serious procedural reasons. Thus, these procedural reasons which had been rejected so many times before, suddenly became very important. Politicians wanted to “enforce the personality of the judges of all multiperson-courts” thus to provide a more “constitutional understanding” of the position of a judge. The pressure-groups had success. The 1970 Parliament gave our FCC-judges the right to publish their separate opinions. The year 1971 brought 20 separate opinions. However, this number decreased in the following years to an average of seven per year. Although the number of separate opinions in the Supreme Court is extremely high, it should not be overlooked that



Oral arguments before the Federal Constitutional Court's Second Senate.

most cases in the screening phase are decided unanimously.

Another questions, which functions the opinion of the court and the separate opinion have. While the opinion of the court or the reasoning of the decision has to show the facts of the case, the legal basis and aspects which led the court to the decision, the dissenter — on the other hand — has to show that he has taken part in the decision finding-process as a colleague to all of the court members. He shall also state the reasons which made his separate opinion necessary.

The practice of the FCC of reporting all legal points of view of both groups of judges in cases of an equally divided Court in the reasoning of the decision, is not free of doubt, since a provision of the Court Act provides that in such cases the group of Court members have to form the minority who would decide in favor of the petitioner. This rule should be respected.

The right to write in dissent does not suspend the dissenter from his duties as a justice or judge. He has to take part in the deliberation process, and it is self-evident that he has to discuss all legal aspects which he has in mind and considers important. Thus, separate opinions should be a result of the deliberation process. Therefore it would be a misunderstanding of the duties of the dissenter if he were obliged to write his dissent like he were the only justice or judge who had to decide the case. The time of *seriatim* announced opinions has gone since John Marshall's time, and there should be — in spite of the inflation of separate opinions in the Supreme Court — no revival. Separate opinions which are not just political statements but reach a philosophical level may support discussions of legal aspects and problems, like this is the case with any other legal publication of a higher standard. However, the dissenter should have in mind the parties of the case in which he rendered his opinion. There is no advantage for them in prophecies which are addressed to the future. It is rather important to promote legal progress here and now. It is hard to believe that a Court which is well-known because of an increase in separate opinions, is reaching for the ideals of a multiperson-court. Separate opinions rather give the impression that enmity is a permanent guest in this court. The judges of the FCC therefore consider the opportunity of writing in dissent as a right which is more valuable if it is seldom used. From 1971 to 1982 (January) there were only 93 separate opinions. But this is not the

whole truth. Statistics show that four judges of the Second Senate of the FCC wrote nearly half of all counted separate opinions. Statistics also show that in this time the First Senate had 19 separate opinions only, whereas the Second Senate had the remaining 74. One cannot say that there were certain groups of dissenters, only in some cases several judges wrote together in dissent.

A lot of concurring opinions can at least be suspected as being superfluous. This is the case if a concurring opinion just repeats what the majority already said in the opinion of the court. Therefore all concurring opinions which consist of nothing but such statements which do not show any significant difference to the court opinion or are nothing but plain commentaries and dictas rejected by the majority, which should be avoided.

It is not the function of a separate opinion to enforce the personality, especially the prestige of its author. Such thoughts are irrelevant. After all, relatively few people actually read court and separate opinions. Is it worth writing a dissenting opinion just for the sake of the newsperson on TV saying in the evening news: "Over the dissents of Justice/Judge NN the Supreme Court/FCC ruled . . . ?" Up to vol. 412 U.S. the Supreme Court rendered 21,428 opinions while there were 5,392 dissents. Even if one agrees that there were a group of justices who later became great or even prophetic dissenters, the chance to gain such a label is minimal. E.g. the *Brown*-decision cannot be labeled just as a fulfilling prophecy of the late Justice Harlan.¹³ However, his ideas were valuable reminders and it took great changes in the American society until the situation Harlan wished became truth at last. The chance to become a philosophic dissenter like O. W. Holmes, Jr., who relatively wrote only few dissents, is small. Every dissenting member of the court should keep in mind that a separate opinion first of all bears a confession; namely, that he was overruled by his colleagues. Since some use for legal science and research cannot be denied, the publication of separate opinions is justified. It is thoroughly possible that separate opinions may influence the deliberation process. One may think e.g. that the court members take more effort in this process if one member declares his intention to write separately. However, such an announcement could also be fatal: The announcement of the dissenters in the *Dred Scott* — case to discuss federal issues instead of leaving the case to the involved states and their law, as precedents said, had the



Federal Constitutional Court

Wilhelm Leuschner (standing, center) on trial for his life in a People's Court presided over by Chief Judge Roland Freisler. Leuschner was sentenced to death and executed September 29, 1944.

result, that the Court discussed federal issues, however, the decision was, as we know, fateful for the slaves and their demand to become free citizens. On the other hand, the chance of significant influence of an announcement to write in dissent is small if dissenting opinions are something that happens very often, day by day.

There is a relation between majority and minority opinions. A separate opinion may lead to a better understanding of the views of the majority. But it may also disclose, as Roscoe Pound¹⁴ showed, personal animosities among the court members. The examples he mentioned should be a warning. Separate opinions may also lead to a misunderstanding of the opinion of the court. All members of the courts should therefore take efforts which exclude any misinterpretation. This instance also shows that even a dissenter has to take part in the whole deliberation process until it is completed. If, however, a dissenter refuses to take part in these efforts, it is rather the duty of the other court members to take care for clarity in their opinion. It is — on the other hand — also self-evident that an opinion is neither the place to shout at each other, nor to report on statements given in the privacy and secrecy of the conference. Throwing "poisoned footnotes" at each other should be avoided. Publicity is also a motive which should not be a reason for opinion writing at all. Finally a sepa-

rate opinion is not the place to discuss *obiter dicta*-aspects since the dissenter — like all the other court members — is obligated to discuss such problems only which are relevant to the decision.

A highly qualified dissent will be regarded in later cases and — however there is a small chance — the Court may later on change its views according to the separate opinion in an earlier case.

A last problem shall be mentioned, namely whether all judges of lower German multiperson-courts should have the right to publish separate opinions. Since the exchange of legal thoughts functions very well — some say: too well — in Germany there is — though demanded by a minority — no need to exceed this right to other Courts as the FCC and state constitutional courts.

This essay could not include a deeper insight in the German experience with the separate opinion. The former president of the FCC, Ernst Benda, stated once: "(Separate opinions delivered in cases of great social and political conflict) reflect a modern democratic society split between various ideologies and ideas. Generally one can say that — after some initial over-stressing — the dissenting or concurring opinion in German constitutional jurisprudence has not been misused and has fulfilled its function."¹⁵

There might be some doubts whether there

never was a case of misuse of the right to publish separate opinions. Besides that there is nothing to add to Judge Benda's statement.

Acknowledgments

When I started my dissertation project in 1979, from which this essay has been taken,¹⁶ I first of all visited the Supreme Court in Washington, D.C. The first officer I contacted there was Assistant Clerk Edward C. Schade from whom I received valuable information during this visit and later on in the following years. Such help I also obtained from the Supreme Court Library. With kind permission of the Court Administration I was allowed to work in this library. When the main

part of this dissertation had been written, Christopher W. Vasil, Deputy Clerk of the Supreme Court, was so kind to discuss the Court procedure with me, especially the way the Supreme Court handles Cert-Petitions. I also received much help through my membership in the *Supreme Court Historical Society*.

Some American friends of mine, especially Noel Higginson, B.A., of Norristown, PA, contributed to this book by proofreading the English Summary. To mention *all* the people in the U.S.A. who helped me to do this project, would mean to write a long list, but it would also prove an example of good relationship between Americans and Germans, for which I am very grateful.

Footnotes

¹ Brennan, in: *Grossman/Wells*, p. 218 f.

² Douglas, *Court Years*, p. 391.

³ See Douglas, *Court Years*, p. 37.

⁴ Warren, p. 2, 285.

⁵ *Stern/Gressman*, p. 8; Brennan, in: *Grossman/Wells*, p. 218 f.

⁶ *Grossman/Wells*, p. 251.

⁷ *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (662) (1943) — Diss. Opinion.

⁸ Douglas, *We the Judges*, p. 429.

⁹ Holmes, in: *Leftar*, p. 26.

¹⁰ 347 U.S. 483 (1954) et 349 U.S. 294 (1955).

¹¹ Hutchinson, p. 35 f.

¹² *Polk County v. Dodson*, 454 U.S. 312, 328 (1981).

¹³ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

¹⁴ Pound, p. 794.

¹⁵ Benda, *Constitutional Jurisdiction in Western Germany — Some Recent Developments*, speech delivered in Washington, D.C., 1980 (ABA-meeting), quoted from p. 2 of the typewritten manuscript, Library of the FCC, Karlsruhe, Fed. Rep. of Germany. More detailed information on the FCC is available by a publication, issued by the INTER NATONES Office, POB, 5300 Bonn 2, West-Germany, the title is "*Law on the Federal Constitutional Court (Documents on Politics and Society in the Federal Republic of Germany)*," Editor: Dr. Gotthard Wöhrmann, Stock-No. 720 Q 5516.

¹⁶ This is also a summary of the dissertation *Separate Opinions of Justices and Judges of the Supreme Court of the United States and the Federal Constitutional Court of Germany*. Berlin: 1985. Duncker & Humbolt.

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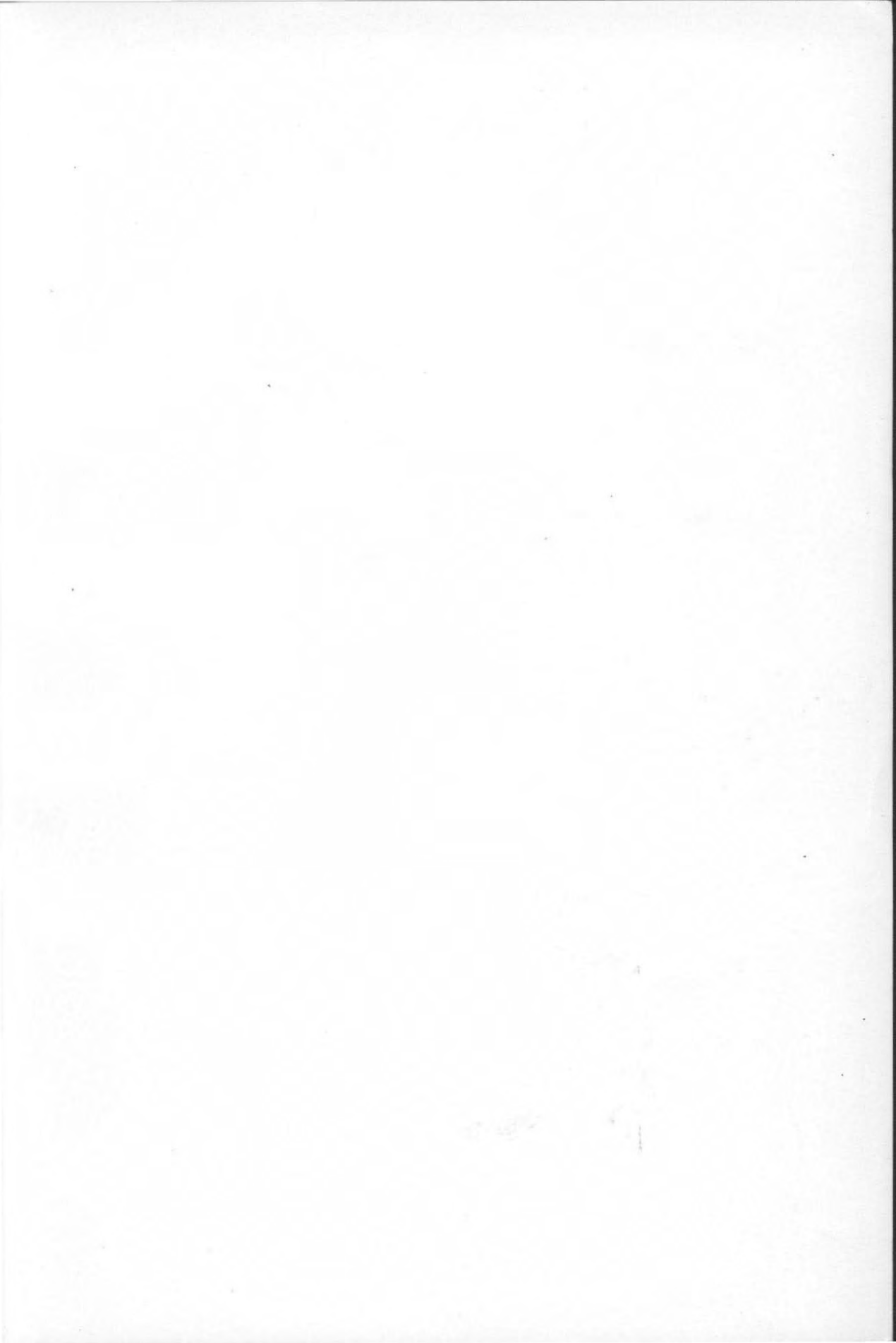
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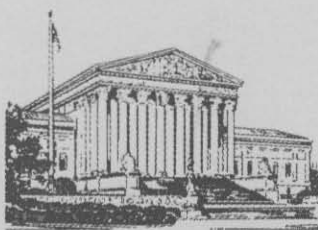
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