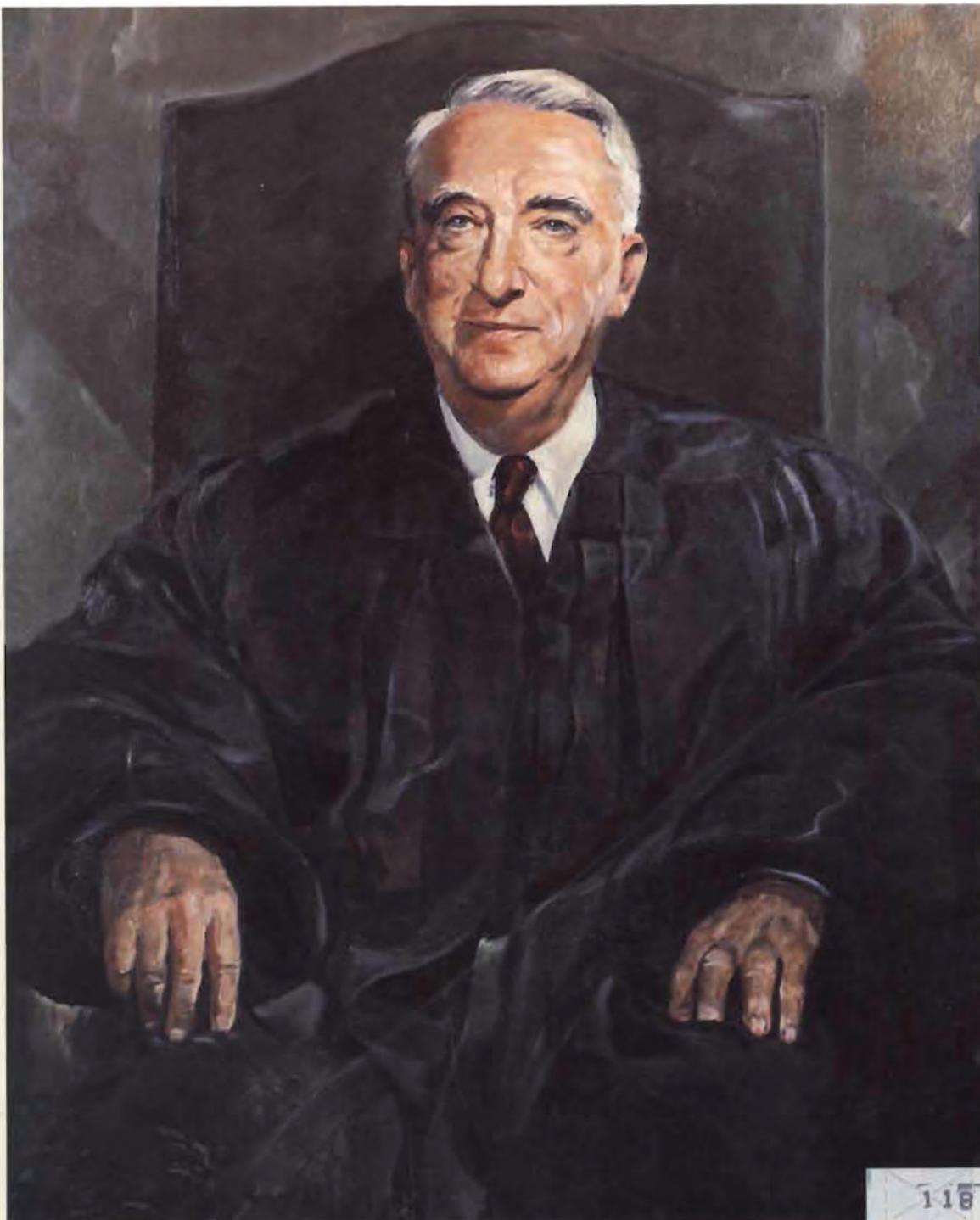


# YEARBOOK 1986

SUPREME COURT HISTORICAL SOCIETY



FRED MOORE VINSON  
THIRTEENTH CHIEF JUSTICE, 1946-1953





# YEARBOOK 1986

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# YEARBOOK 1986

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# In Memoriam: Justice Potter Stewart

by Lewis F. Powell, Jr.\*

Potter Stewart took his seat as an Associate Justice of the Supreme Court at the beginning of the October Term 1958. Shortly afterwards, he was asked whether he was a judicial "liberal" or "conservative." He replied with a characteristic distaste for simplistic labels, "I really can't say, except that I like to be thought of as a lawyer."<sup>1</sup> At a press conference held more than twenty-two years later, and shortly after the announcement of his retirement from the Court, Justice Stewart was asked how he wished to be remembered. He answered, "[A]s a good lawyer who did his best."<sup>2</sup>

Potter Stewart was displaying his usual modesty. He will be remembered not merely as a "good lawyer," but as a lawyer who personified those attributes necessary to success as a member of the judiciary. At the press conference marking his retirement, Justice Stewart identified the qualifications of a good judge: a high degree of legal competence, a judicial temperament, character, and diligence. These characteristics accurately describe Justice Stewart's own career on the Supreme Court. He was gifted as a legal scholar, had an admirable capacity for detachment, and, of course, possessed to a high degree the qualities of character and diligence.

Judges, and particularly Supreme Court Justices, are known to the public and the bar largely by their written opinions. Justices do not explain or defend their decisions outside the Court. Members of the Court, however, see one another in a more intimate way, and personal qualities not known to the public are important to us. Potter Stewart was a congenial, thoughtful, and generous colleague, always willing — despite the pressures under which we work — to assist or confer with other Justices. He also had a high sense of institutional responsibility, recognizing that the Court itself — and not its temporal members individually — inspires the respect and con-



*Office of the Curator, Supreme Court*

Associate Justice Potter Stewart  
(1958-1981)

fidence so necessary to its role.

One is often asked about the strong feelings expressed in dissenting opinions. Any Supreme Court Justice, when distressed by a Court opinion with which that Justice sharply disagrees, may write in terms that seem to reflect on the good sense as well as the judicial competence of the Justices who joined the opinion. Potter Stewart accepted with good humor this tradition of vigorous dissent, recognizing that professional conflicts are an inevitable part of our work and should never be confused with personal animosity. He put it this way: "I hope one of the first things that a lawyer learns is that personal differences, or likes or dislikes, have nothing whatever to do with professional differences."<sup>3</sup> This lesson is as true for judges as it is for lawyers who represent opposing parties. Justice Stewart liked and respected — though perhaps in

different degrees — each of the Justices with whom he served over the course of almost twenty-three years.

Justice Stewart's personality was displayed in public in the courtroom. Oral argument before the Supreme Court offers each litigant the opportunity to present his contentions and to respond to his adversary's position. Justice Stewart used oral argument to add an extra dimension to the Court's consideration of a case. Often he would lean forward on the bench and, through careful inquiry, force counsel to explain the underpinnings and confront the weaknesses of their reasoning. He skillfully used oral argument as a means of ensuring the kind of clarity of thought that exemplified his own writing.

The ability to express oneself in a simple but precise manner is, after all, one of the primary skills of a lawyer or judge. Justice Stewart wrote with a talent for phrasemaking that helped to convey complicated ideas in a few memorable words. Because he is weary of being reminded of his famous definition of obscenity,<sup>4</sup> I will cite a less publicized, but

equally forceful, example. In *Walker v. City of Birmingham*,<sup>5</sup> in which the Court held that an injunction must be attacked through legal proceedings and may not simply be ignored, Justice Stewart stated the essence of the rule of law in a single sentence: "[R]espect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom."<sup>6</sup>

Potter Stewart's ability to combine crisp language with precise reasoning was demonstrated by his contributions to the jurisprudence of the fourth amendment. His opinion for the court in *Katz v. United States*<sup>7</sup> revitalized fourth amendment analysis. Before *Katz*, the federal courts had been prone to view the fourth amendment solely as a limitation of physical trespass by law enforcement officials. But Justice Stewart's opinion swept away the artificial distinctions upon which earlier fourth amendment decisions had rested. The Court held that persons who stand in public telephone booths, no less than persons who sit in their homes, are entitled to assume that their private conversations will

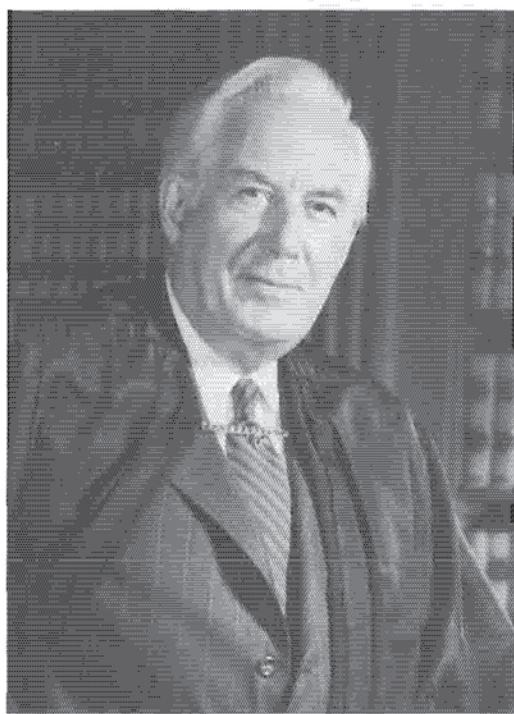


Justice Stewart at work in his chambers.

vote, then adopts, rejects or modifies those recommendations.

Conference committees are created by the Conference and persons are appointed to those committees by the Chairman. Though members of the Conference may and have served on committees, the vast majority of the committees are formed of nonmembers. The committees on Rules and the Ad Hoc Committee on American Inns of Court include lawyers and law professors. Circuit Judges, District Judges, Senior Circuit and Senior District Judges, Bankruptcy Judges, and Magistrates serve on the Standing, Special, Advisory, and Ad Hoc committees and subcommittees of the Conference. The Executive Committee, of course, is formed of members of the Conference.

Though many committee recommendations have provoked lively debate during the fourteen years I have served under Chief Justice Burger's leadership in the chair, I cannot recall a single instance in which any member of the Conference or a reporting committee chairman was denied an opportunity to speak. On the contrary, the Chairman's patience and respect for the work of the Conference committees, for the hard working



Chief Justice Burger presided over the Judicial Conference from 1969 to 1986.

between Conference meetings, the Chairman took care to obtain the advice and concurrence of the Executive Committee. The work involved in his oversight of the Legislative Affairs Office is indicated by the number of public laws recommended by the Conference and adopted by the Congress. Between his advent in 1969 and the creation of that office in 1977, twenty-one such laws were adopted. Between 1977 and September 1986, one hundred and seven public laws recommended by the Conference were adopted by the Congress.

When Chief Justice Burger met for the last

time with the Conference, there was no member of the Conference he first chaired who remained a member. Many District Judges and Chief Circuit Judges served for varying times during his seventeen years as Chairman. Those still living will not forget his devotion to the Conference as an institution and his unfailing courtesy to all who had anything to do with its operation. Throughout his service as Chairman of the Judicial Conference of the United States, the Honorable Warren E. Burger has preserved intact the honor and stature of the Conference, and of its Chairmanship, for transmission to his worthy successor.

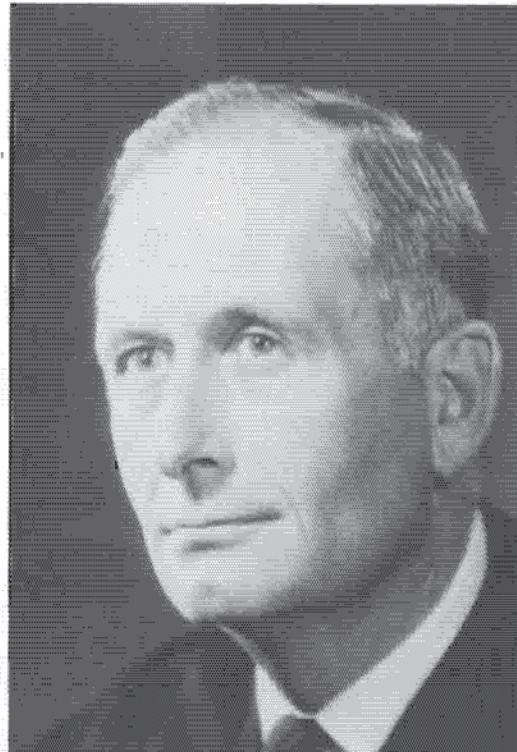
# Chief Justice Burger and the National Center for State Courts

by Paul Reardon

One of the greatest contributions of the retiring Chief Justice has been his unremitting zeal in seeking to strengthen the state courts. It is in these courts that well over ninety-five percent of all litigation, criminal and civil, is tried. While the great bulk of the civil cases to be found in that percentage are small cases—not all of them are. Certainly the most serious criminal cases have their resolution largely in the state courts. Thus, these are the courts where the American people touch the law in by far the largest numbers. Their state of health, their efficiency, their strength, their performance is of prime importance. The quality of their judges and attendant personnel determines to what extent state and federal constitutional guarantees of fair trial are being complied with by them.

The twentieth century has been witness to the efforts of many competent and hard working individuals seeking to improve the delivery of justice in the state courts. Quite a number of them, now deceased, who played major roles in bettering state judicial administration, were known principally to those with whom they worked in their own states or in burgeoning national cooperative efforts. There are four names, however, which must be remembered when one considers just who it was who over the last eight decades sought to provide muscle to the state tribunals.

The first of these was Roscoe Pound. In his far reaching 1906 address—which needs no further advertising here—he pointed out that “a . . . perennial source of popular dissatisfaction with the administration of justice may be found in the popular assumption that the administration of justice is an easy task to which anyone is competent.”<sup>1</sup> No one had done much thinking about that before. What he detected as a young lawyer he later tackled as a law school dean, in doing what he could to remedy some of the ills to which he had earlier called attention.



Judge Paul Reardon

The second was Arthur T. Vanderbilt, lawyer, teacher of law and Chief Justice of New Jersey. Dean Wigmore had labelled the 1906 Pound speech “the spark that kindled the white flame of progress.”<sup>2</sup> Vanderbilt, in his work of revamping and modernizing judicial administration in New Jersey, demonstrated that many of the problems to which Pound had alluded years before could be isolated and overcome. Beyond that, he was the catalyst in first bringing together the chief justices of the states and territories at St. Louis in 1949. There the Conference of State Chief Justices was born, an organization which has grown in strength and prestige since, all to the great benefit of the state court system.

The third was Justice Tom C. Clark. While on the United States Supreme Court he was

the main force in the creation of the National Conference of State Trial Judges in 1957 and later the Conference of State Appellate Judges. His major contribution, however, came in 1971 when the newly elected Governor of Virginia, now the President of the Supreme Court Historical Society, Linwood Holton, assisted by Dr. William Swindler, Professor of Law at William and Mary, asked Justice Clark to lead a national conference on the judiciary. As Chairman of that conference he brought to it the President of the United States, the Chief Justice and the Attorney General, and hundreds of other state judicial and legal officials. Seven years later when a new building, home of the National Center for State Courts, was being dedicated in Williamsburg, Chief Justice Burger said, "No dedication of this building would be complete without recalling the remarkable contributions of my late colleague, our beloved friend, the late Justice Tom C. Clark, not simply to the National Center but to the causes of justice. His imprint can be found on virtually every important improvement in justice in the last 15 years."<sup>3</sup>

We thus come to the fourth individual, Warren E. Burger, who in the latter years of this century (1) has been principal in tying together concepts for improvement in state courts earlier voiced and worked upon by Pound, Vanderbilt, Clark and others and (2) through his unflagging interest and support of a states court center has given those courts both incentive and hope.

Chief Justice Burger's interest in state courts, their problems and their needs, was not of recent origin. Shortly after his appointment, in a December 1970 interview with *U.S. News and World Report* in answer to a question "Do you need a central agency to serve all the states?" he replied "Yes, definitely — a clearinghouse of information — very important information, available to all courts. We need some kind of national judicial center."<sup>4</sup> He then evinced recognition of the fact that while various echelons of state judicial systems were separately corresponding in an exchange of ideas on procedures and operation, no strong central body was as yet in being to study each of these systems as an entity. He later employed the 1971 National Conference of the Judiciary, to which reference has already been made, to express his ideas for progressive

change in the following language:

"The time has come, and I submit it is here and now at this Conference to make the initial decision and bring into being some kind of national clearinghouse or center to serve the states and to cooperate with all the agencies seeking to improve justice at every level. The need is great and the time is now, and I hope the conference will consider creating a working committee before you adjourn. I know that you will do many important things while you are here to the benefit of our common problems, but if you do no more than launch the much-needed service agency to the state courts, your time and attendance here would be justified.<sup>5</sup>

Without in any way attempting to dictate the form of organization of the center he contemplated, he yet pointed the way for the creation of the National Center for State Courts. His suggestions received the hearty endorsement of the President of the United States speaking to the Conference. A steering committee went to work and by resolution unanimously adopted before its adjournment, the Conference endorsed the Burger proposal and requested "the Executive Council of the Conference of Chief Justices to carry this resolution into effect within a period not to exceed ninety days."<sup>6</sup> Articles of Incorporation prepared by the Steering Committee were signed at a luncheon given by the Chief Justice at the Supreme Court on June 15, 1971. Thereafter, the Incorporators met on August 14, 1971 at the 1749 Courthouse in Plymouth, Massachusetts where John Adams had argued cases on circuit in early days, and elected the first directors of the Center, all state judges. In his remarks at Williamsburg in March 1971, the Chief Justice had offered the full cooperation of the facilities of the Federal Judicial Center and the Administration Office of the United States Court at the same time stating that "bearing in mind my own concepts of federalism I will participate only when you ask me to do so."<sup>7</sup> Since then his helpful interest in this young and somewhat uncertain organization at its beginning has never flagged nor waned. Year by year, without being obtrusive, he has backed and assisted the growth and work of the Center. Its financing, doubtful at first, was aided greatly by grants from the Law Enforcement Assistance Administration and

by the creation of a committee of the nation's business leaders, chaired originally by George A. Stinson, Chief Executive of National Steel and later in succession by other heads of national corporations. Every year the annual meeting of this important adjunct to the Center has been addressed by the Chief Justice. Those who labored to build and make the Center strong will never forget the innumerable and largely unknown acts of assistance which came from the hands of the Chief Justice.

And thus it was that in March 1978 a Second National Conference of the Judiciary was held again at Williamsburg to dedicate a new headquarters building, again attended by some 500 judicial leaders including the Chief Justices of all the major English speaking countries and all the states and territories. In this most attractive and practical building, at the ground breaking for which the Chief Justice attended and spoke, has since been developed a host of projects designed to streamline state court systems and update their operations. The good work which has come from the Center headquarters and its satellite offices on the east and west coasts and in Washington has been of incalculable benefit to the state courts. In his "Year-end Report on the Judiciary" released on December 28, 1981, Chief Justice Burger stated that the Center "is one of the most important developments in the administration of justice in this century." To those who have kept close tabs on the state courts since the days of Arthur Vanderbilt, this was no overstatement. The states themselves, and large segments of the bar, aided by responsible business leaders and many foundations, in realization of the worth of the Center, have proceeded to give it a much more

solid financial base and its present potential for future good is quite impossible of measurement.

Noting the sum total of what he had done for the state courts over the years, the Conference of State Chief Justices at its 38th annual meeting in Omaha on August 7, 1986 passed a resolution extending "in warm fashion its appreciation and admiration for Chief Justice Warren E. Burger, the Chief Justice of the United States, who has done more to improve the administration of justice in the state courts of this country than all of his predecessors combined."

The language of this resolution is not over generous in acknowledging the debt which state court justice owes Warren E. Burger. It is often overlooked that the draftsmen of all American constitutions had much in mind that the purest principles of the law of which we are heirs required more than mere statement.

That these constitutional principles should be alive, that justice in accord with them should be delivered fairly and promptly to the citizens of the states, was of major concern to those who wrote our state and federal constitutions. Chief Justice Burger during his tenure has not only thought about that fact, and talked about it, but for all the years of his tenure in the high office which he held, as his other duties permitted, and as Chief Justice of all the United States, he did something about it. Without his constant interest and help it is doubtful that the National Center could have survived and commenced to prosper. With that interest and help the National Center for State Courts is alive and well and the states and their people are better for it and for him.

#### Footnotes

<sup>1</sup>46 J. Am. Jud Soc. 3 p 58 (August 1962)

<sup>2</sup>20 J. Am. Jud Soc. 176 (1937)

<sup>3</sup>State Courts — A Blue Print for the Future  
Proceedings of Second National Conference on the  
Judiciary — National Center for State Courts — Aug.  
1978 p. 288

<sup>4</sup>U.S. News and World Report, Dec. 14, 1970 p. 42

<sup>5</sup>National Conference on the Judiciary, March  
1970, West Pub. Co. p. 20

<sup>6</sup>Id. p. 261

<sup>7</sup>Id. p. 21

# Warren E. Burger and the American Bar Association

by Justin A. Stanley

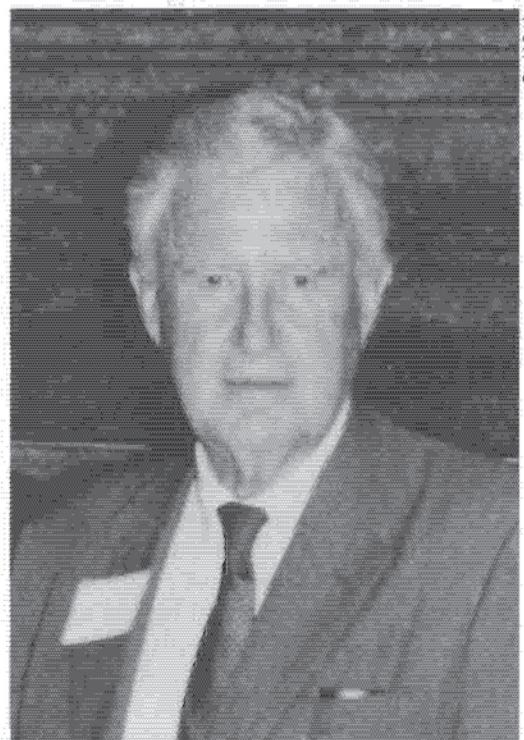
Definitive articles and books about Warren E. Burger and his role as Chief Justice will come at a later date when, with the passage of time, a better appraisal can be made of him and his place in history. Even so, it is appropriate at this time for his contemporaries to make some comments as he retires after seventeen years of service on the Court.

Those of us who have been privileged to work closely with him over the years in matters not involving the running of the Court or its opinions, have invariably been impressed with the extent of his interest in and his support of efforts to improve the administration of justice in both the state and federal courts. In many of these efforts he has been the leader or at least a prime catalyst.

In retrospect, what he has done should not seem surprising. At his confirmation in 1969 he said that the Chief Justice "has a very large responsibility to try to see that the judicial system functions more efficiently. . . . He cannot do it alone, of course . . . I would think it was the duty of the Chief Justice to use every one of . . . [the] tools [available] to make our system work better. And I would expect to devote every energy and every moment of the rest of my life to that end should I be confirmed."<sup>1</sup>

He has kept his word. In the process he has demonstrated his ability to get groups to act and change to be effected.

Warren E. Burger is a prodigious worker and a very practical man. When he became Chief Justice there was no Institute for Court Management,<sup>2</sup> there was no National Center for State Courts, there were no State-Federal Judicial Councils. These, and others, have come into being and prospered with his support and direction. He has supported and strengthened the Conference of Chief Justices, the Judicial Conference of the United States and the Federal Judicial Center, and he was a moving force in the creation of the State Justice Institute.



Justin A. Stanley

Faced with an unprecedented expansion of litigation, the Chief Justice has pressed for needed additional federal judges, he has supported attempts to increase judicial salaries and he has administered the expanded federal judicial system which has grown from approximately 340 district judgeships in 1969 to 575 in 1986 and from 97 circuit judges in 1969 to 168 in 1986.

It is probably fair to say that the relationship between state and federal judges was strained in 1969. Primarily as a result of efforts of the Chief Justice, working with the Conference of Chief Justices, the State-Federal Judicial Councils and the National Center for State Courts, among others, that relationship is much improved.

Illustrative of this are the remarks made by

Vincent L. McKusick, Chief Justice of the Supreme Judicial Court of Maine on September 15, 1983 when Burger was presented with the Freedom Foundation's George Washington Award. Speaking for those who had recommended the Chief Justice for that honor, Chief Justice McKusick said:

In the view of his state judicial colleagues, Chief Justice Burger has done more than any other single person in history to improve the operations of all of our nation's courts. We of the national awards jury are proud that on our verdict the Freedoms Foundation is tonight entering judgment recognizing the Chief Justice's contribution to the quality of American life.

Burger has sought to lighten the loads of the Supreme Court and the lower federal courts by making all reviews by the Supreme Court discretionary, by providing for a second level of circuit courts to handle certain appeals and by eliminating diversity jurisdiction. He has also asked Congress to require judicial impact statements to accompany legislation which creates additional burdens on the federal courts. Unfortunately, none of these has been adopted by Congress.

He realized, as he said at his confirmation hearing, that he could not do the job alone. Accordingly, in addition to seeking support from Congress and from certain interested federal and state entities, he turned for help to the American Bar Association. That Association was then, as it is now, the largest voluntary bar association in the United States and undoubtedly the one which possesses the most national influence. One of its stated purposes is "to promote . . . the administration of justice."<sup>3</sup> It has the same broad goals as the Chief Justice in improving the administration of justice, but it had not had a good working relationship with his predecessor, who had resigned from the Association. The fit, both for the new Chief Justice and for the Association, was good.

Establishing friendly communications at the highest level of the Association, the Chief Justice made it plain that he was always available to the President of the Association. The first with whom he worked was Bernard Segal, of Philadelphia, who was as anxious for reform as the Chief Justice and who turned out, over the years, to be a good friend. In some

cases, incoming Presidents of the Association would meet with Burger and review their programs with him. Those sessions were intended to give information rather than to seek the blessing of the Chief Justice.

Both the Association and Burger recognized that there would be differences between them, and there were. For example, the Association opposed both the elimination of diversity jurisdiction and the creation of a National Court of Appeals. On the other hand, it supported the request for judicial impact statements.

To more than one ABA President, the Chief Justice gave assurance that, although he expected criticism with respect to some of the things he said and did, he would never take offense. There, too, he has kept his word. At one point, following Burger's suggestion that up to fifty percent of the lawyers appearing before the federal courts were incompetent and required special training, the Illinois State Bar Association introduced a motion in the House of Delegates of the ABA requesting the Chief Justice to "publicly repudiate" his statements. The motion failed on a voice vote,<sup>4</sup> and Burger, who had witnessed the debate, then sat down with the Illinois delegation in an attempt to restore understanding between them.

In May of 1977, the ABA held, at Columbia Law School in New York, the first national conference on alternative dispute resolution processes. It obviously came at one of the busiest times of the Court year. Nevertheless, because of his deep interest in the subject and his desire to support the Association in its efforts, Burger came to New York from Washington, sat through a morning session and addressed the conference at lunch. By doing so, he added substantially to the momentum of the movement.

In August 1969, Chief Justice Burger first addressed an annual meeting of the ABA. It was held in Dallas and the Chief Justice had a lot to say.

He urged improvement in the administration of the courts. He pointed out that two reasons for the delays in litigation were "the lack of up-to-date effective procedures and standards for administration or management, and the lack of trained managers."<sup>5</sup> At the time, the Senate was considering legislation to

provide for administrators for the federal courts. Burger pointed out that "If the legislation were passed at once we could not begin to fill the positions."<sup>6</sup> Accordingly, he urged the ABA to take a leadership role in training administrators.

The Association responded affirmatively and in December, 1969 its board approved the creation of The Institute for Court Management.<sup>7</sup> The partnership had begun to function.

In August of 1970 at the annual meeting of the Association in St. Louis, the Chief Justice delivered his first State of the Judiciary Message to the Association. Although these messages may have seemed misnamed and were later given other titles, such as the "Annual Report" in 1981 and the "Annual Message on The Administration of Justice" in 1985, they were faithfully given each year. Often they were supplemented by other visits and other talks.

Invariably his messages brought suggestions, they gave recognition to the Bar for its good work and sometimes they contained sharp criticisms directed at the legal community. In all cases, however, the spirit was friendly and the tone was that of one partner engaged in a major and continuing joint undertaking speaking to the other partner.

At one ABA meeting a group of protesters was outside the building where the meeting was to be held. The protesters were urging that a case then pending before the Supreme Court be decided in the way they wanted it to be decided.

The Chief Justice was not disturbed. He talked to some of the protesters and asked them whether or not if a case involving their lives were before the Court they would like to have it decided on the basis of the size of and noise made by a protest group outside the Supreme Court building. They indicated a preference for the deliberative process.

One of the Chief Justice's favorite projects, and one which is certainly related to improvements in the administration of justice, is The Supreme Court Historical Society. It was founded in 1974 at the suggestion of the Chief Justice and it received much early support from its first President, Elizabeth Hughes Gossett, and her husband, William T. Gossett. Mrs. Gossett was the daughter of Charles



Chief Justice Burger (second from right) and Mrs. Burger (far left) pose with two of the Society's most ardent supporters Mr. William T. Gossett (second from left) and the late Elizabeth Hughes Gossett (far right).

Evans Hughes and Mr. Gossett was the ninety-second President of the American Bar Association.

Having observed that there was a great need to preserve the history of the Court and that public funds for that purpose had not been forthcoming, the Chief Justice directed that the Society be established as a not-for-profit corporation with authority to solicit funds for its support, publish books and a significant *Yearbook*, acquire artifacts, hold meetings and otherwise encourage interest in the history of the Court.

The Society is doing increasingly important work and is flourishing. It has had the warm and ongoing support of leaders of the American Bar Association. It will undoubtedly serve as a monument to the Chief Justice and to Elizabeth Hughes Gossett.

On appropriate occasions the Chief Justice is offered honoraria for speaking engagements. Invariably he sees to it that those honoraria go either directly or indirectly to the Society, thus providing important support for its work.

One of the outstanding undertakings shared by the Chief Justice and the American Bar Association, along with the Conference of Chief Justices, was the Pound Revisited Conference held in St. Paul seventy years after the delivery there of Roscoe Pound's famous lecture: *The Causes of Popular Dissatisfaction With the Administration of Justice*.<sup>8</sup>

The idea was the Chief Justice's, but it was enthusiastically supported by ABA President Lawrence E. Walsh. The implementation was

provided largely by the Association with the support of the Conference of Chief Justices. However, Burger had a part in every important decision from beginning to end, and he gave the opening lecture.

Academics, practicing lawyers, judges, sociologists and others gathered in St. Paul to consider broadly the system of justice, its strengths and its weaknesses. Their thoughtful seminal papers have been published by West Publishing Company in the Federal Rules Decision<sup>9</sup> and are thus preserved.

Burger's final appearance before the ABA as Chief Justice came this year in New York. He reiterated his opposition to advertising by lawyers, even to advertising that satisfied the constitutional requirements specified by the

Court. He praised ABA efforts to address the problems of professionalism facing the Bar and he noted that its Commission on Professionalism had provided a good diagnosis. He urged the Bar to act on that diagnosis.

Thus, the Chief Justice ended as he began: intensely interested in improving the system of justice, looking to the future, and urging his partner of seventeen years, the American Bar Association, to take action.

His kind does not come along often. Interests of Chief Justices differ, their emphases differ. Perhaps that is as it should be. But he will be missed, and the task of the ABA will be more difficult without Warren E. Burger there to lend leadership, encouragement, and support.

#### Footnotes

<sup>1</sup> Nomination Hearing Before The Senate Committee on The Judiciary, 91st Congress, 1st Sess., (1969).

<sup>2</sup> Now merged into the National Center for State Courts.

<sup>3</sup> ABA Constitution, Article I, Sec. 1.2.

<sup>4</sup> 103 Reports of the American Bar Association, 205-6, (1978).

<sup>5</sup> *Lincoln Law Review*, 1, 2 (1969).

<sup>6</sup> *Id.* at 4.

<sup>7</sup> Proceedings of The ABA Board of Governors, February 19-20, (1970).

<sup>8</sup> 40 *American Law Review*, 729 (1906), 35 FRD. 273.

<sup>9</sup> 70 Federal Rules Decisions, 70 et seq., (1976).

# Chief Justice Burger's Contribution— To American Jurisprudence

by Kenneth W. Starr

*Frequent tributes to Chief Justice Burger for his administrative leadership were capped by the unanimous resolution in August 1986 of the Conferences of Chief Justices of the several States declaring that he had done more to improve the administration of justice than all of his predecessors combined. This record, which included vital roles in the establishment of the National Center for State Courts, the Institute for Court Management, the State-Federal Councils and other institutions and projects, such as prison reform, was appropriately heralded by Congressman Robert Kastenmeier of Wisconsin and Senator Howell Heflin of Alabama in statements to the House of Representatives and the Senate.*

*The plaudits are especially pleasing to those of us who were first-hand witnesses to the energetic and innovative capacities of our Nation's thirteenth Chief Justice, who wrote as many signed opinions as any of his colleagues while carrying on an extraordinary range of programs and activities to improve the work of the courts. His distinguished record in the administration of justice, so befitting the concept of the title of the office described in the Judiciary Act of 1789, "Chief Justice of the United States," should not, however, deflect us from a focus on the significant number of major opinions authored by Chief Justice Burger during his seventeen-year term.*

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The writing of opinions by any single Justice, including the Chief Justice, occurs against the backdrop of the entire Court's work. An examination of that workload is revealing, for in contrast to the first century and a half of the Supreme Court's history, the present-day docket consists overwhelmingly of the interpretation of statutes passed by Congress and the construction of the Constitution and its various amendments.

It is the latter task that constitutes the



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glamorous and most challenging work of the Court. It is the task that most directly affects the lives of the American people. It is also the task for which we largely remember our Chief Justices, perhaps best exemplified by John Marshall's *Marbury v. Madison* and Earl Warren's *Brown v. Board of Education*. After Chief Justice Marshall, however, no Chief Justice has been called upon to wrestle with so many nettlesome constitutional issues as the Nation's fifteenth Chief Justice.

John Marshall's landmark constitutional opinions laid the legal foundation for our government, particularly in establishing the primacy of judicial review and the powers of the central government over the several States. Chief Justice Burger followed in this tradition, fashioning opinions that confirmed the integrity of the basic pillar of our constitutional system: the principle of separation of powers. That doctrine, drawn by the Framers from



Office of the Curator, Supreme Court

This snapshot shows the Burger Court on its annual visit to the White House in 1979. Standing in the front row are (left to right): Associate Justice Potter Stewart, Chief Justice Warren E. Burger, President Jimmy Carter, and, Associate Justice William J. Brennan, Jr. Standing in the back row (left to right) are: Associate Justices Harry A. Blackmun, William H. Rehnquist, Thurgood Marshall, Louis E. Powell, Jr., Byron R. White, and John Paul Stevens.

particularly in First Amendment cases. For example, the guarantee of personal and family liberty embodied in the First Amendment was the focus of his opinion in *Wisconsin v. Yoder*, 405 U.S. 205 (1972), upholding the liberty of a small religious minority to carry on their traditions free from state compulsion. The same principle, which circumscribes the power of government to intrude on protected freedoms, was furthered in his seemingly minor cases, such as the New Hampshire "Live Free or Die" decision, as well as in his better known opinions vindicating First Amendment freedoms.

In continually returning for guidance to the enduring text of the Constitution, the Chief Justice often had to grapple with clearly stated constitutional rights that conflicted. Reconciling the First Amendment grant of freedom of the press with the Fifth and Sixth Amendment rights to a fair trial before an impartial jury, for example, is one of the most vexing tasks that a conscientious judge must face. In such in-

stances, the Chief Justice inevitably resorted to first principles. His opinions reflect an abhorrence of prior restraints, *see, e.g., Organization for a Better Austin v. Keefe*, 402 U.S. 417 (1971), even when they are employed to protect competing constitutional claims, *see, e.g., Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976). Indeed, *Nebraska Press* began a line of decisions authored by Chief Justice Burger, in which the Supreme Court protected press freedoms against weighty, competing claims of individuals accused of crime. The openness of criminal trials to the public, including the press, was sustained by the Chief Justice's opinion for the Court in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). The powers of the States to punish the publication of information deemed to be highly sensitive or confidential were likewise circumscribed sharply by the Chief Justice's opinions for the Court in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978), and *Smith v. Daily Mail Publish-*

ing Co., 443 U.S. 97 (1979). And a pivotal issue, the state-imposed right of access to the print media, was resolved unanimously in favor of the press in the Chief Justice's landmark opinion in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). There, the Chief Justice took careful note of the emergence of newspaper monopolies and other factors animating the Florida legislature to enact a mandatory access statute, but concluded by returning to basic principles of the Constitution:

The Florida statute operates as a command in the same sense as a statute or regulation forbidding [the newspaper] to publish specified matter. Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers.

This belief in first principles surfaced in other areas. The Chief was a vigorous defender of religious liberty, as reflected in his opinions upholding legislative chaplaincies, *Marsh v. Chambers*, 463 U.S. 783 (1983), and erection by a municipality of a creche in a park owned by a nonprofit organization, *Lynch v. Donnelly*, 465 U.S. 668 (1984), and in his opinion striking down a state provision barring clergymen from serving as delegates to a state constitutional convention, *McDaniel v. Paty*, 435 U.S. 618 (1978). But at the same time he was sensitive to the strictures of the Establishment Clause and, indeed, was the principal architect of modern Establishment Clause jurisprudence with his seminal opinions in *Walz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970), and *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

Consistent with his reverence for the text of the Constitution and his dependence on it to discern first principles, the Chief Justice refused to cheapen the basic liberties enshrined in that document and its amendments by reflexively bestowing constitutional protections in profligate fashion. To Chief Justice Burger, the Constitution was not value-free. On the contrary, basic human decency inhered in liberty. The Chief Justice stated as much in his leading opinion on obscenity, in which he spoke eloquently of "the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself." *Paris Adult Theatre I*

v. *Slaton*, 413 U.S. 49, 58 (1971). And in another leading obscenity decision, he invoked Chief Justice Warren's memorable observation that there is a right of the Nation and of the States to maintain a decent society. *Jacobellis v. Ohio*, 378 U.S. 184, 199 (1964) (dissenting opinion). These opinions reveal the Chief Justice's keen sense that ours is a system of ordered liberty, not libertinism.

Although solicitous of basic freedoms and aware of the importance of Article III courts in protecting basic freedoms, the Chief Justice declined to exalt the third Branch above the two coordinate Branches by virtue of a profound respect for the judgment of the politically accountable branches. Throughout his lengthy career as an Article III judge, he remained mindful of the constitutional and prudential limitations on judicial power that derive from a government of separated powers. He profoundly understood the inherent limitations of the unelected judiciary, intended by the Framers to be the "least dangerous" branch. Judges were not to run the country. A free people must be able to govern themselves, consistent with the constraints of law.

This principled humility, grounded in his comprehensive grasp of the judiciary's role in the National Government, can be seen in Chief Justice Burger's opinion in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), upholding a Congressionally mandated minority set-aside program. Sensitive to the use of race as a permissible criterion for governmental line-drawing, evidenced by his positions in *Bakke* and *Weber*, the Chief Justice nonetheless concluded that the Court should permit this presumptively suspect activity because it represented the considered action of the political branches:

Here we pass, not on a choice made by a single judge or a school board, but on a considered decision of the Congress and the President.

[*Id.* at 473.]

Consistent with his respect for Congress' approach to troublesome racial issues, Title VII of the landmark 1964 Civil Rights Act received a hospitable reception from the Court under Chief Justice Burger's leadership. His opinion for a unanimous Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), is a

U.S. 222 (1971), where the Court circumscribed *Miranda's* reach and permitted the use of *Miranda*-barred statements for impeachment purposes. The Chief Justice's overarching concern for integrity in the justice system was aptly encapsulated by his closing observation in *Harris*:

The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances.

[*Id.* at 226.] A *Miranda* violation would not excuse perjury, but neither would *Miranda* itself be overruled. Chief Justice Burger accepted, in the venerable tradition of Anglo-American law, and as successor to the stewardship of the Court, the legitimacy of decisions that had become part of the fabric of the law. Thus, while his disaffection for the exclusionary rule was well known, as reflected by his eloquent dissent in *Bivens*, the Chief Justice faithfully followed the demands of Fourth Amendment jurisprudence, as illustrated by his opinion for the Court in *United States v. Chadwick*, 433 U.S. 1 (1977). Stability

in the law obviously ranked high among his jurisprudential values, indicated by the Court's reaffirmation of *Massiah v. United States*, 377 U.S. 201 (1964), through the Chief Justice's opinion in *United States v. Henry*, 447 U.S. 264 (1980).

The Chief Justice's contribution to our law is thus not that he led a "revolution" or spearheaded a "counterrevolution." He presided with great dignity, wisdom, and grace for almost two decades of our Nation's life, and through the many thousands of cases that came before him, the fifteenth Chief Justice was unremittingly faithful to the basic principles embodied in the Constitution itself. He was mindful throughout of the vital importance of the structure of government, which was itself the principal assurance given at the Founding that we would live as a free people. The legacy of Chief Justice Burger is one of fidelity to freedom under the Constitution, a system of ordered liberty, with careful preservation of the integrity and strength of representative institutions against the danger of excess and hubris of the branch least accountable to the people.

Immediately after the announcement of her death, President Kennedy telephoned and invited me to accompany him on Air Force One to Mrs. Roosevelt's funeral at Hyde Park.

While enroute to the funeral ceremonies, President Kennedy was gracious enough to invite me to sit with him on this rather sad flight. Needless to say, our conversation during the flight in no way related to the business of the Court. However, President Kennedy did voice his resentment that Chief Justice Warren did not acknowledge the President's presence on the occasion of my swearing-in.

After listening to this President's grievance I told him, in all candor, that I was of the view that Chief Justice Warren acted properly and without courtesy in not specifically acknowledging the presence of the President of the United States. I reminded him that he had been seated in the most preferred position in the judge's box. Further, I presumed to remind the President that the federal judiciary is one of the three co-equal branches of our government and that it is always important to

demonstrate, for public perception, that the Supreme Court, in particular, is not an adjunct of the Executive. Finally, I pointed out that the government is a litigant in the Supreme Court and in light of this, undue obsequiousness to the President is unseemly. President Kennedy reflected upon this for sometime and finally said, "you are right" and that Chief Justice Warren's swearing-in procedure was most appropriate. Parenthetically, Chief Justice Warren was a great admirer of President Kennedy.

There is another rather interesting sidelight on the momentous day, at least to me, of my swearing-in. When I took my seat on the



*Office of the Curator, Supreme Court*

**Associate Justices Oliver Wendell Holmes, Jr. and Louis D. Brandeis — When Justice Goldberg took his seat in 1962, he found in the drawer in front of his place at the Bench, a well-worn and annotated copy of the Constitution. This copy had been marked and used by Justice Holmes during his service on the Bench 30 years earlier, and became the legacy of each succeeding occupant of the seat.**



**President John F. Kennedy attended Justice Goldberg's installation on the Supreme Court Bench on October 1, 1962.**

extreme left of the Bench as the junior associate justice, I opened the drawer on the Bench adjacent to my chair to obtain some note paper. To my surprise and delight I found an old dog-eared copy of the Constitution bearing the personal signature of that great Yankee from Olympus, Justice Oliver W. Holmes, Jr. Needless to say, this finding made a considerable emotional impact on me. To sit on the seat on the Bench once occupied by that great justice was a singular honor. To find a copy of the Constitution inscribed by Justice Holmes was doubly so.

My first inclination was to remove the copy and preserve it as part of my family archives. On reflection, however, I came to the conclusion that it was most inappropriate of me to do so. Not only was the copy part of the Court's archives but, also, I conceived, it would be of great moment for any new justice occupying this seat, to find in the drawer a copy of the Constitution signed by Justice Holmes.

I can only hope and trust that as long as the Court sits, this treasured copy of the Constitution will remain where I found it.

# Lamar to the Court: Last Step to National Reunion

by Daniel J. Meador

On January 18, 1888, a new justice took his seat on the Supreme Court of the United States. He was Lucius Quintus Cincinnatus Lamar. No other justice in the history of the Court has carried such ponderous Roman names, and few justices, if any, have had more controversial and colorful backgrounds. The seating of Lamar on the court is important in American history because it was the last step toward national reconciliation and reunion in the long aftermath of the Civil War. It was an event of great symbolic significance, but it came about only after a difficult struggle over Senatorial confirmation. Had Lamar's nomination to the Supreme Court been defeated, as it almost was, the "bloody shirt" tactics—that is, the political use of sectional antagonism stemming from the war—would have continued as a factor in American political life. I propose here to tell the story of the contest over Lamar's confirmation.

The story opens in 1887. Grover Cleveland, the first Democratic president since the Civil War, was serving his first term in the White House. For over a decade ex-Confederate officers had been in the Senate and the House of Representatives, and they now sat in the Cabinet. However, no Southerner had yet been placed on the Supreme Court, an institution viewed as being peculiarly sensitive because of its ultimate authority to interpret the Constitution. But now President Cleveland proposed to take this last step toward restoring Southerners to the councils of the nation by putting forward a man who had played a leading part in the "rebellion," as the secession movement was called in the North.

*Professor Meador presented a condensed version of this article as the Annual Lecturer of the Supreme Court Historical Society in the restored Supreme Court Chamber in the U.S. Capitol on May 12, 1986.*



Associate Justice Lucius Q. C. Lamar  
1888-1893

L. Q. C. Lamar was an unusual figure, even on the crowded and colorful stage of the 19th century. He was born in Georgia, the son of a judge and a member of a large and talented family. After graduating from Emory college, he studied law and was admitted to the Georgia Bar. He later moved to Oxford, Mississippi, and was elected to Congress shortly before the Civil War. At the outbreak of the war he was commissioned a Colonel in a Mississippi regiment and was in command of troops at the Battle of Williamsburg in May, 1862. Jefferson Davis then appointed him Confederate Minister to Russia, but because of the international political climate he never reached St. Petersburg. Instead, he spent several months in London and Paris working with the Confederate diplomatic missions to secure recognition of the Confederacy. Returning to America he undertook various

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Colonel L. Q. C. Lamar commanded Confederate troops at the Battle of Williamsburg in May, 1862.

political assignments and then became a judge on a military court and was with the Army of Northern Virginia at its surrender at Appomattox Courthouse. He went back to Oxford and became Professor of Law at the University of Mississippi for several years. He then reentered the House of Representatives and was later elected as United States Senator from Mississippi. President Cleveland appointed him Secretary of the Interior at the beginning of his term in 1885.

Lamar's personality was a mixture of contrasting elements. Over the years observers described him variously as dreamy, gloomy, warm, generous, detached, aloof. One woman spoke of the "witchery of his presence." At times he could be gregarious and friendly; at other times he would be distant, scarcely recognizing those whom he encountered. He had a marked oratorical ability; he could hold a crowd spellbound. He was what we in the late twentieth century would probably call charismatic.<sup>1</sup>

Lamar burst on to the national scene shortly after he was reelected to Congress in the early 1870's. The occasion was the death of Charles Sumner, a Senator from Massachusetts. Before the war Sumner had been among the most outspoken of the abolitionists, and after the war he had been a leader in the

congressionally imposed Reconstruction, a program that displaced the more lenient program of President Andrew Johnson.

Few, if any, men were more disliked in the South than Sumner. In the memorial proceedings held in the House of Representatives shortly after his death, Lamar rose to speak. He startled the assemblage by not voicing the standard Southern criticism of Sumner but rather by praising the man. He lauded Sumner's intellect and his desire to extend human freedom to all. He proceeded then to call on the North and the South to put old sectional animosities behind and to move forward together toward a new day. He closed with a statement widely quoted thereafter: "My countrymen, know one another and you will love one another."<sup>2</sup> This speech had an electrifying effect across the North and Midwest, and it established Lamar as a leading spokesman for reconciliation and reunion, a theme that he pursued throughout the remainder of his public career.

Lamar was serving in the President's Cabinet when in May, 1887, Supreme Court Justice William B. Woods died. Woods, a native of Ohio, had served in the Union Army as a Brigadier General and had settled in Alabama after the war, where he practiced law and tried his hand at cotton planting. Grant had ap-



President Grover Cleveland (top row, second from left) was the first Democrat to occupy the White House after the Civil War. He selected Lamar (bottom, center) to serve as his Secretary of the Interior. Other members of the Cleveland administration shown here are (clockwise from Cleveland): Vice President Thomas A. Hendricks; Secretary of the Treasury Daniel Manning; Secretary of the Navy William C. Whitney; Attorney General Augustus H. Garland; Lamar; Postmaster-General William F. Vilas; Secretary of War William C. Endicott; and Secretary of State Thomas F. Bayard.

pointed him United States Circuit Judge for the Fifth Circuit, and Hayes had elevated him to the Supreme Court where he sat for seven years until his death.<sup>3</sup> Woods was viewed as holding a "Southern seat" on the Court, though he was recognized as not being a genuine Southerner. Thus, it was widely assumed that the vacancy would be filled by someone from the deep South, particularly since the White House was occupied by a Democrat for the first time since the war.

Geography almost dictated this. The Court was then composed of Chief Justice Waite of Ohio and Associate Justices Miller of Iowa, Field of California, Bradley of New Jersey, Harlan of Kentucky, Matthews of Ohio, Gray of Massachusetts, and Blatchford of New York. Political realities being what they were, the appointment of anyone but a Democrat from the South was hardly to be expected. And in 1887 a southern Democrat of sufficient age and standing to be given serious consideration would almost certainly have been active in the Confederacy.

This reality was tacitly recognized around the country, and in the weeks following Woods' death there was no outspoken opposition to such an appointment. After all, two

former Confederates — Lamar himself and Augustus H. Garland, a former Senator from Arkansas — had been in the Cabinet for over two years and were generally respected. It was known that Garland wanted the appointment,<sup>4</sup> and as Attorney General he appeared a likely prospect.<sup>5</sup> There were, of course, many others put forward. The Mississippian prominently urged at first was Senator James Z. George, perhaps the most powerful man politically in the state at that time. He had the desirable background of an extensive law practice and service as Chief Justice of the Mississippi Supreme Court. Lamar, as a Senator in 1877, had urged President Hayes to appoint George to the vacancy created by the resignation of Justice David Davis. Lamar had represented to Hayes that George was a "man of vast legal requirements . . . a profound jurist" and that he stood at the head of the legal profession in Mississippi. He knew few men, Lamar said, "so admirably fitted to that exalted position."<sup>6</sup> No evidence has been uncovered, however, to indicate that Lamar ever spoke to Cleveland about the appointment of George, and Cleveland seems to have shown no interest in the idea.

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President began to think of the vacancy after Woods' death, the person he had most in mind was Lamar. The first public "leak" seems to have come in early June, some three weeks after Woods' death. Congressman William C. Oates of Alabama had talked to the President at that time and thereafter told the newspapers that the Supreme Court appointment would go to the South. Oates said, "I feel quite certain that if Secretary Lamar desired the position he could get it. The President, I know, has the very highest opinion of Lamar. He told me so himself. I heard him say that Secretary Lamar had the clearest and most comprehensive intellect that he had ever known."<sup>7</sup> The suggestion of Lamar for the Court was picked up by the press and was commented on favorably during the summer months of 1887. However, Cleveland made no public statements on the matter. During much of 1887 he was absorbed with the tariff problem and the preparation of his message to Congress on that subject to be delivered at the opening of the session in December. In July he was in New York State for a while, and he was preparing for an extensive western and southern trip in the fall.<sup>8</sup>

Lamar meanwhile carried on at the Interior Department. Cleveland had not yet spoken to him about the Court vacancy. He had been told, however, by persons who had talked with the President that his intention was to offer Lamar the appointment.<sup>9</sup> Lamar also had learned that Garland, who considered himself a candidate, was objecting to Lamar on the ground that he was "not a practical lawyer and not fit for the ordinary business and drudgery of the position."<sup>10</sup> Senator George Vest, a Democrat from Missouri, was also making what Lamar considered "a very good objection" — that at 62 he was too old.<sup>11</sup>

Whether Lamar really wanted the appointment is not clear. He was not altogether happy as head of the Interior Department. Beset by office seekers, working long hours every day, including many holidays, he was being worn down by the administrative responsibilities. It has been suggested that he desired to go on the Court simply as an escape.<sup>12</sup> He was not campaigning for the Court, however, and he even wrote one of his friends to discourage his getting others to write the President. "If the position is offered me, I wish it done from the

promptings of the President's free and unconstrained choice, and in accordance with the spontaneous and unsolicited manifestation of public opinion."<sup>13</sup> His feelings appear to have been mixed. He had misgivings because he did not feel himself "fully equipped to be a Judge of the Supreme Court."<sup>14</sup> But Lamar underrated his own abilities throughout his life and often considered himself a failure. One suspects that by midsummer, after hearing indirectly for weeks that he was to be Cleveland's choice, Lamar had become enamored with the idea of going on the Court and that he would have been disappointed had he been passed over. In any event, at the end of July he confided to his close friend and former law partner, Senator Edward C. Walthall, that he was inclined "to think that the President's mind has been pretty well made up to offer me the place."<sup>15</sup>

On the morning of August 17 Cleveland talked with Lamar and told him directly for the first time, as Lamar related it, "that he was considering gravely the propriety of offering me the Judgeship on the Supreme Bench."<sup>16</sup> Such a move, however, would create a problem for Cleveland — the selection of a new Secretary of the Interior. He and Lamar discussed this and they agreed that the best choice would



Senator Edward Cary Walthall (Mississippi), a close friend and one-time fellow officer in the Confederate Army was privy to Lamar's personal aspirations to join the Court.

be William F. Vilas, then Postmaster General. At Cleveland's suggestion, Lamar was to communicate with Vilas, who was at his home in Wisconsin, and get his reaction to this shift in cabinet positions. This Lamar did, carrying on correspondence from Bethlehem, New Hampshire, where he had gone for a vacation after his conversation with Cleveland. It was September 10 before Lamar could write back to Cleveland with word that Vilas would be willing to take over the Interior Department.<sup>17</sup> This in turn raised for Cleveland the further question of a new Postmaster General, a perplexing matter which caused him to wonder whether he should leave the vacancy on the Court unfilled for a while.<sup>18</sup>

Because the Senate had not been in session since March, and would not convene again until December, Cleveland could have put Lamar on the Supreme Court under a recess appointment.<sup>19</sup> Nothing indicates whether this was given any consideration, however, and in any event it was not done even though the Court was convening in October with only eight Justices and a docket approaching flood tide, a condition resulting four years later in the Evarts Act, creating the circuit courts of appeals.<sup>20</sup>

By late September it was generally understood that Cleveland had settled on Lamar as his Supreme Court nominee and that his name would be sent to the Senate when it met in December. This was not really news because it had been rumored all summer. Confirmation seemed almost a formality in light of the favorable reaction registered thus far in the press. Moreover, almost half of the Republican Senators had congratulated Lamar on his selection and indicated their support.<sup>21</sup> After all, he had already been confirmed for the Cabinet and that, in a sense, had pulled the sting of his Confederate background.

But then politics entered the picture. It seems to have occurred to persons within the Republican Party that Lamar's nomination presented a potential issue worth exploiting. A presidential election would take place in the following year, 1888, and it was none too soon to begin looking ahead. The tactic to be adopted was, in short, the "bloody shirt." This had worked over and again for the Republicans for two decades, with the exception of Cleveland's election three years before. But

apparently that election was not convincing evidence that the "bloody shirt" had lost its efficacy. There had been a recent fresh eruption of this sentiment in June when Cleveland had entered an order for the return of captured Confederate battle flags to the Southern states. The adverse emotional outburst which that provoked across the North lent support to the view that there was still political mileage in the Civil War. In September, for the first time, editorials began to appear in Republican newspapers, notably the *New York Tribune*, attacking the Lamar nomination. These continued desultorily throughout the fall. The full-scale assault was to be mounted after Congress convened. The prospects of a straight party fight were indeed threatening to the Lamar appointment because of the extraordinarily close division in the Senate: thirty-eight Republicans, thirty-seven Democrats, and one Independent.

The Fiftieth Congress opened on December 5, 1887. A week later the President sent to the Senate a group of nominations. At the head of the list: "Lucius Q. C. Lamar, of Mississippi, to be associate justice of the Supreme Court of the United States, in place of William B. Woods, deceased."<sup>22</sup> Also included were nominations of Vilas to be Secretary of the Interior and Don M. Dickinson of Michigan to be Postmaster General. The President had evidently stood by his conclusions reached in September. If the newspaper campaign against Lamar during the fall had impressed him at all, it had not been sufficient to change his mind. Chances are that he dismissed it as simply party politics on the eve of an election year. From the first, Cleveland had determined that the Supreme Court appointment would go to a Southerner, and Lamar had probably been his first choice from the outset, a decision from which he was not likely to be shaken.

When Cleveland was in Atlanta in October, he and Henry Grady, editor of *The Atlanta Constitution*, had chatted about Lamar. Grady said that Lamar was the best equipped man the South had given to the public, living or dead. Cleveland agreed that he was "certainly the best of the living men." Then Cleveland paid Lamar what comes close to being the ultimate tribute by one man about another's judgment: "His temperament is such that when he considers a question he is obliged

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Henry W. Grady, editor of *The Atlanta Constitution*, reaffirmed Cleveland's own high opinion of Lamar in a conversation he had with the President in October 1887.

to decide it right. I have never seen this quality so marked in any other man. The truth is, his mind and his heart are right, and he cannot decide anything wrong.”<sup>23</sup>

In the Senate Lamar’s nomination was referred routinely to the Judiciary Committee, made up of five Republicans and four Democrats. The chairman was George F. Edmunds of Vermont who had been in the Senate since the close of the war. Edmunds was an unwavering Republican, and the lines had been clearly drawn between him and Lamar on numerous issues in the Senate. Yet he had a warm feeling personally for Lamar. When Lamar’s first wife had died only three years before, Edmunds had written two touching notes of sympathy. In one he commented to Lamar that “Such men as you have great duties, for they are given great powers which they have no right to leave unused.”<sup>24</sup> On the confirmation issue, however, Republican Party policy would control his position. The other Republicans on the Committee were J. J. Ingalls of Kansas, George F. Hoar of Massachusetts, James F.

Wilson of Iowa, and William M. Evarts of New York. Lamar had served in the Senate with all of them except Evarts, who by this time had become a preeminent member of the bar, representing large business interests.

The Democrats on the committee had also been in the Senate with Lamar and knew him well. They were James L. Pugh of Alabama, Richard Coke of Texas, George G. Vest of Missouri, and J. Z. George of Mississippi. It seems to have been taken for granted that the Democrats would be solidly for Lamar. Though Vest had voiced initial objection on the ground of age, once the nomination was made, a united front was presented. Thus the question was whether the Republicans would likewise stick together.

There was no problem on either side of the aisle about other Senators’ being acquainted with Lamar. Nearly all of them knew him personally, as he had left his seat there less than three years before. His closest friends were, of course, Democrats — men such as Wade Hampton of South Carolina, John T. Morgan of Alabama, Daniel W. Voorhees of Indiana, and his successor and former law partner, Edward C. Walthall of Mississippi. But Republican votes were needed. There were some that could pretty clearly be counted against him, men such as John Sherman of Ohio. On the other hand, there was a good deal of respect for Lamar in the North, and unless the party line could be laid down rigidly, he could expect some Republican support. After all, in September, before the attack against him had been launched, he had been assured of backing from nearly half. The margin seemed comfortable then. But as the year 1887 drew to a close and the issue was becoming more sharply focused, the margin was shrinking. In the end, every vote would count. For confirmation Lamar would need all the Democratic votes plus two more.

Attention was naturally focused on the one Independent, Harrison Holt Riddleberger of Virginia. A lawyer from Woodstock, he was a product of the “Readjustor” movement which swept Virginia in the seventies and eighties, and he was elected to the Senate on that ticket in 1881. The Administration’s hope was that he could be counted on because he, like Lamar, was a Confederate veteran and had been a Democratic elector on the Tilden ticket in

1876. But as December wore on he had not committed himself. Even with Riddleberger at least one Republican vote would be necessary to break a tie in favor of confirmation.

The majority of the Judiciary Committee was in no haste to act. The Democrats suspected that time was being allowed for the Lamar opposition to build up steam. The newspaper campaign was apparently beginning to take effect. Letters and resolutions began to come into the committee from the North and Midwest. The Garfield Club of Columbus, Ohio, resolved that Lamar's nomination "is disrespectful to every man who fought for the preservation of the Union."<sup>25</sup> The Lincoln League of Kokomo, Indiana, recited in its resolution that Lamar had often declared "that the success of the Union arms in suppressing that rebellion was a triumph of force, and not of right" and that "he has always refused and still refuses to recognize the validity of the Amendments to the Constitution adopted since the war, and which as a member of the Supreme Court he would be called upon to construe."<sup>26</sup> Most of the Republican arguments against Lamar were summed up in a resolution sent in by a Republican club in Warren, Ohio, opposing confirmation because Lamar "has but limited experience at the bar, and has shown clearly an utter lack of loyalty to the constitution and Union of the states by joining with its foes in open rebellion, by maligning wantonly the beloved patriot Lincoln, and recently from his seat in the United States Senate, which he held through suppression of votes, by pronouncing ecomium upon the unrepentant traitor, Jefferson Davis, and further by his refusal to sustain by his vote the validity of the 'war amendments' to the constitution."<sup>27</sup>

Numerous other resolutions and letters of the same tenor can be found today in the Judiciary Committee files, including a joint resolution of the Ohio General Assembly. Newspaper clippings were also sent to the Committee. One from an Urbana, Illinois, paper laid it out frankly, stating that the Senate should say to the President: "No Confederate can ever wear the judicial ermine of the Supreme Court while a republican majority exists in the Senate."<sup>28</sup> A news report in late December that several Republicans might vote for Lamar provoked this letter

from a member of the Party in Tennessee: "I do not know who the republicans are that will vote to confirm ex-rebels . . . If they had to contend with insults, direct and indirect that we do, they would vote for the devil as soon as an ex-rebel."<sup>29</sup> Individual Senators were getting letters from constituents to the same effect. Many of them can be seen in the papers of John Sherman, John C. Spooner, and William E. Chandler.

Favorable endorsements were also received by the committee, though they were fewer. When the National Veterans' Rights Union in the District of Columbia submitted a resolution against confirmation on the ground that Lamar, as Secretary of the Interior, had violated laws for the protection of disabled Union veterans,<sup>30</sup> another group, the local Union Veterans Union, took issue and wrote the next day asking confirmation, stating that "Sect. Lamar has always recognized the true soldier."<sup>31</sup> The McClellan Veterans Club in Chicago resolved that "we recognize in the Hon. L. Q. C. Lamar a thoroughly reconstructed citizen of our united country and that he is entitled to the confirmation by the Senate."<sup>32</sup> A United States district judge in Tennessee



Senator Harrison H. Riddleburger (Virginia), as the Judiciary Committee's only Independent, was the focus of both the pro- and anti-Lamar factions.

urged that as a mere matter of politics "the Republican Party can do nothing better calculated to commend it to public opinion that to support the Lamar nomination."<sup>33</sup> A former Republican postmaster in Mobile wrote that Lamar was "the finest & most liberal man we have in the South."<sup>34</sup>

As the confirmation fight took shape, five grounds of objection emerged. They will be dealt with here in ascending order of importance, proceeding from the most trivial to the most significant: (1) the Mary McBride episode; (2) the disbarment incident; (3) age; (4) alleged lack of legal experience; and (5) the real objection—concerns rooted in secession, war, and the race problem.

### I. The Mary McBride Episode

This episode caused a brief flurry of interest in the press but in the end played little or no part in the confirmation debates. In retrospect, it seems more amusing than anything else. It began with a postcard from Mississippi, bearing a signature but no return address, received by Senator Edmunds at the time Congress convened in early December. "If you will send for Col. W. P. Wood and Col. J. Q. Thompson," the card read, "they will let you know the relations which existed between Mr. Lamar and Miss Mary McBride, now under indictment for setting fire to a house on 11 St. N.W. to collect the insurance money. Mr. Van H. Manning, of Miss., might also be made to tell how Lamar paid him a retainer to defend the said Mary."<sup>35</sup> Manning was a former Mississippi Congressman then practicing law in Washington. Precisely what was done with this tip, and by whom, has not been brought to light. But the New York *Evening Telegram* for December 22 came out with these headlines: "Lamar Accused — Serious Charge Against the Secretary of the Interior — A Lady in the Case—Alleged Relations With a Woman Accused of Arson — Mrs. McBride's Boasted Influence." The accompanying article said that Lamar had secured a position for Mary McBride in the Government Printing Office and later transferred her to the Pension Office, which was under the Interior Department. She had often boasted of her influence over the Secretary, according to the account, and "openly laughed at the idea that she would

ever be brought to trial on this charge or any other as long as Mr. L. was powerful in official life."<sup>36</sup>

In early January a letter signed by Mary J. McBride was received by the Senate Judiciary Committee. She denied that Lamar had secured her position in the Printing Office. She had come to Washington from Mississippi in 1877 as a stranger to Lamar, she said, and indeed as a Republican, and had obtained a position in the Treasury Department on Republican endorsements. The letter denied any influence of anyone in connection with the Larson indictment. However, there was no denial that Lamar had her transferred to the Pension Office, and there was an implication that Lamar had done her some favor, for the letter stated that if this is "permitted to go unheeded, a menace lies to every man who either from duty or generous impulse may extend to needy womanhood the helping hand of his official or friendly aid."<sup>37</sup>

All of the facts concerning Lamar's relationship with Mary McBride will probably never be known. Another piece of evidence, not then known to the Judiciary Committee, is an 1885 letter from Lamar to Daniel Manning, the Secretary of the Treasury, asking that Manning "... grant Miss McBride a personal interview. I don't believe that she has been fairly represented to you. At any rate I would be much obliged if Miss McBride can be restored."<sup>38</sup> This is at least consistent with her story that she worked in the Treasury; it also shows that Lamar did know Miss McBride and took some interest in whatever her problems were. In any event, little seems to have been made of this whole incident during the confirmation fight. After all, every senator had probably helped a female constituent at some time and would not look unfavorably on efforts to draw adverse inferences from such activity.

### II. The Disbarment Incident

The one undisputed fact about this event is that Lamar had been briefly disbarred in 1871 by Judge Robert A. Hill in the federal district court in Oxford, Mississippi. Otherwise, the facts leading up to this action are confused. Ku Klux Klan trials were in progress and tempers were on edge. Lamar was in the courtroom as

attorney for some of the defendants. By one account, a spectator who had been drinking started toward Lamar menacingly. Other observers said that Lamar and a Deputy U.S. Marshal fell into a dispute and Lamar was angered by the judge's failure to reprimand this official. In any event, the Chief Marshal, J. H. Pierce, intervened and Lamar knocked him down with his fist. A melee ensued in the courtroom, and federal soldiers, then stationed in Oxford, entered to restore order. Thereupon the judge ordered Lamar's name stricken from the role of attorneys allowed to practice in the federal court.<sup>39</sup> But two weeks later, on motion of the United States Attorney, the court ordered him restored.<sup>40</sup> Lamar apologized to the court and to Pierce, explaining that he did not realize that Pierce was the person he was striking.

The *New York Tribune* and others were asserting that this incident demonstrated unfitness for the highest court in the land. Disbarment might normally be considered in itself a disqualification for appointment as a Supreme Court Justice. Lamar is the only member of the Court to have had that dubious distinction, but in this case, because of the unique circumstances and Lamar's quick reinstatement the point did not carry much force. Its harmful impact was probably blunted most effectively by a letter to the Judiciary Committee written at the end of December by J. H. Pierce himself, the marshal who had been the victim of Lamar's attack. He described the disturbance in the courtroom, indicating that Lamar was not the initial aggressor and that he did not intentionally assault a federal marshal. Pierce, though a Republican, said that he had thereafter supported Lamar for Congress and that Lamar's "influence was always on the side of good order, good government, and the protection of all persons in their rights as citizens."<sup>41</sup>

### III. Age As A Factor

Lamar's age was one of the chief non-political grounds of objection — one that Lamar himself had conceded to be well taken. He was then sixty-two. There was a certain appeal to this point because no Justice in the history of the Court had been older at the time of appointment. Three others had been the

same age, however — Samuel Blatchford, who was still there, and, in the recent past, Hunt and Strong.<sup>42</sup>

The adverse effect of Lamar's age was strengthened by a mistake of fact. Lamar was being talked of as being sixty-seven. This mistake was based on a book published unofficially in 1857 containing biographical sketches of Congressmen, which erroneously stated Lamar to be five years older than he was. Wanting to correct this, Lamar wrote his sister in Oxford just before Christmas, asking that she have his birth record in the family Bible transcribed and certified.<sup>43</sup> In prompt compliance she took the Bible before the clerk of the federal court in Oxford and executed an affidavit setting forth that the date of Lamar's birth recorded in the Bible was September 17, 1825.<sup>44</sup> The affidavit was transmitted to the Judiciary Committee.

Lamar's physical condition, though apparently not mentioned openly, might have provided a better argument against him than age per se. Through the years he had had more than one attack of apoplexy and was sometimes disabled for weeks thereafter. Since joining the Cabinet he had suffered intermittently with illness, though nothing as serious as apoplexy. Just the previous spring he was, as he put it, "*Hors du Combat* with a severe case of neuralgia."<sup>45</sup> His letters to the President and others in the two years before the Court nomination were dotted with comments that he was "quite unwell,"<sup>46</sup> that he had "a very nervous headache,"<sup>47</sup> that he was in bed with a cold,<sup>48</sup> that he was "suffering very much from a heavy attack of catarrhal cold and fever,"<sup>49</sup> and that he was prevented by sickness from doing various things.<sup>50</sup> At Christmas the year before, he had scribbled on a note: "I am so sick & broke down that my son-in-law has come to take me to Miss."<sup>51</sup>

That spell must not have been too serious, however, for within a month Lamar was getting married to an attractive widow, his first wife having died two years earlier. In fact much of his talk of illness was probably exaggerated by his periodic despondency. He was a moody, dreamy type, often out of contact mentally with people around him. Living as a widower following the death of his wife was not apt to have improved his spirits or his health. It was partly for health reasons that

he and the new Mrs. Lamar went to the White Mountains in New Hampshire in August, after his talk with Cleveland about the Court appointment. He reported back that the air was a "little too fresh" and that "its breath from the mountain snow gives me a cold or rather makes more pronounced the cold that I have been having for the last two years." He hoped, however, that he would become accustomed to the chill and would emerge in more vigorous health.<sup>52</sup>

Lamar's work at the Interior Department never seemed to suffer materially from these sicknesses. He put in long hours and showed no aversion to difficult, exacting tasks. He had doubts, as usual, about his ability to measure up to the high standards he set for public officials, but he showed no lack of effort and diligence. "With reference to the work and drudgery necessary for the Bench," he said, "I have no fear whatever of that."<sup>53</sup> On the whole, poor health alone would hardly have been a justifiable ground on which to refuse confirmation. But it could have been made a legitimate matter of discussion. However, Lamar was significant as a symbol, and the health of a symbol is not a controlling factor.

#### IV. Alleged Lack of Legal Experience

The other ground of opposition apt to attract support on its merits was that Lamar lacked sufficient experience at the bar. This point had been brought to Cleveland's attention by Garland when Lamar's name was first under consideration. It was now being said publicly that Lamar was not a "lawyer of eminence."<sup>54</sup> Senator Spooner of Wisconsin summed up this attitude when he said that he had come "to the conclusion that I could not find in the career of Mr. Lamar, as a lawyer, anything which warranted the belief that he possessed the abundant knowledge of principles, of practice, and of decided causes, that one should beyond any doubt possess to be confirmed to such a position, however distinguished he might justly be for fullness of general learning, literary culture, and oratorical ability."<sup>55</sup> That view, being fostered by the Republican press, was based, at least in part, on faulty information and on a faulty premise.

It is surprising how few of the actual facts



Senator J.C. Spooner (Wisconsin) opposed the Lamar appointment on the ground that the candidate lacked sufficient legal experience.

about Lamar's law practice and legal talent were brought out. He had been admitted to the Georgia bar at the age of twenty-two and had practiced in Macon and Covington for a few years before the war. Though he engaged in only a small amount of prewar practice in Mississippi, beginning in the late 1860's he went at it seriously for several years. After being elected to Congress he continued to practice law on a part-time basis with an Oxford law firm. The demands of Congress in that day did not approach those of the twentieth century, and a Congressman could spend several months of the year at home. In the postwar period Lamar was involved in a substantial amount of litigation in the federal court for the Northern District of Mississippi. The docket books and case files for that court contain over fifty cases, both civil and criminal, between 1868 and 1877 in which Lamar appeared as counsel.<sup>56</sup> In most of them he was associated with one or two other lawyers. It is difficult to determine just how active Lamar himself was in these cases, but occasional notes and bits of correspondence indicate that in most of them his appearance was more than nominal. He seems to have been more actively involved in federal litigation than in state court matters. Apparently he argued only one case in the Mississippi Supreme Court.<sup>57</sup>

Despite this legal experience, statements were being made such as the one in a letter from a lawyer opposing confirmation, that Lamar was not "at all the proper man for the place, never having been engaged in the active practice of the law, that I have ever known."<sup>58</sup> However, Wiley P. Harris, considered the leading member of the Mississippi bar, wrote to Senator Walthall that he was surprised at the opposition to Lamar on this ground; he spoke of Lamar's "strength as a lawyer."<sup>59</sup> Walthall, who had been Lamar's law partner for a year right after the war, hastened to circulate this letter among the Senators.

One reason for the widespread impression that Lamar was not "a real lawyer" resulted from the standard by which he was being judged. In the late nineteenth century, particularly to the Republican mind, the eminent lawyers were such men as Joseph H. Choate, James Coolidge Carter, and William M. Evarts — lawyers who represented vast business interests, argued important business cases in the Supreme Court, and belonged to the fledgling and exclusive American Bar Association.<sup>60</sup> Lamar did not fit this pattern; his efforts had been devoted largely to public office. He was not unsympathetic to those interests, but it is understandable that Evarts, for example, a member of the Judiciary Committee, having just entered the Senate, would look on Lamar as not being in his league as a lawyer. Lawyers with that perspective were evidently unable to recognize that a man could be an able, experienced lawyer, even though he did not represent the financial titans of the East.

This criticism of Lamar's qualifications also stemmed from the faulty premise that long experience either in the practice of law or on some court was the best, and indeed an indispensable, preparation for the Supreme Court. The period was one in which Justices in the recent past had been drawn more from the practicing bar or bench and less from political life than in either earlier or later periods in our history. Of the sitting members of the Court, only Matthews had served in Congress, whereas Lamar had spent sixteen years there. Five of the Justices had some prior judicial experience, but Lamar had none except four months as a judge on a military court. Measured by this standard, it is understandable that

a person could in good faith question Lamar's fitness for the Court. We recognize more fully today that no particular type of experience necessarily renders a person fit or unfit to serve on the Supreme Court. Indeed, a broad experience in public life, such as Lamar's, can be an excellent background, though this is perhaps more the case today than then because the Court has become far more of a public law forum.

In assessing Lamar's legal ability and experience, his critics failed to take account of his numerous speeches and debates in which legal questions were ably discussed. For example, in the 1858 House debate over the legitimacy of the so-called Lecompton Constitution in Kansas, Lamar demonstrated a knack for dissecting and analyzing a legal problem. He skillfully invoked an analogy to the law of principal and agent to support his argument that delegates to a state constitutional convention, as agents of the people, had power to bind the people.<sup>61</sup> In 1864 he delivered a speech several times to persuade the public that the suspension of the writ of habeas corpus by the Confederate government was constitutional.<sup>62</sup> Again he showed real ability in presenting a difficult legal point in a clear, forceful manner. In fact most of his speeches reveal this talent.

Moreover, as Secretary of the Interior,



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Private practitioners like Joseph H. Choate (above), who had made himself prominent in the profession representing the interests of large business, were considered by many as being more qualified to serve on the Supreme Court Bench than men like Lamar who had spent much of their legal career in public service.

Lamar had many legal problems to wrestle with and quasi-judicial duties to perform. Patents, pensions, and land claims made up the bulk of this business. Yet this substantial body of very recent experience was apparently glossed over. Lamar's work at the Interior Department particularly brought to light the quality that is perhaps as important as any other in a judge — judicial temperament. A Republican lawyer in Philadelphia wrote Lamar toward the end of December, when confirmation was beginning to look doubtful, asking Lamar to accept "a word of good cheer, and believe that there are many, like myself, who are contributing what we can to your confirmation." He could do this with good heart, he said, "because, having been at the bar for thirty years, and having a professional income exceeded by but few lawyers if any in the United States, I can truthfully say that I prefer to argue a case before you rather than any other judge I have ever addressed."<sup>63</sup> Senator Spooner acknowledged that as Secretary of the Interior Lamar had evidenced "clear and well defined notions of the law, and the courage of his convictions . . . No one questions that he is a man of great intellectual ability."<sup>64</sup> Word was going around that the late Justice David Davis had had "a very high estimate" of Lamar's legal ability, the two having served together on the Senate Judiciary Committee.<sup>65</sup> Finally, we would surely deem it relevant today, on the question of legal qualifications, to note that Lamar had served for four years as Professor of Law at the University of Mississippi, but this experience was never mentioned.<sup>66</sup>

#### V. The Real Objection — Concerns Rooted in Secession, War, and the Race Problem

Beyond all the arguments directed to age and qualifications it was clear, and becoming clearer as December waned and the year 1888 began, that at bottom the clamor against Lamar was based on his connection with the secession movement and the Confederacy. As A. T. Britton, the Philadelphia lawyer, put it bluntly to Lamar: "Under whatever pretexts your opponents may pretend to speak, the true motive is to defeat the confirmation of any ex-Confederate to the Supreme Bench."<sup>67</sup> This was the theme that repeatedly surfaced in

correspondence to and from Republican Senators and in the Republican newspapers.

There were essentially three charges being made against Lamar:

*First*, a claim that Lamar had actively worked to bring about the secession of the Southern states, that he had given energetic support to the "rebellion" throughout the war, and that he still believed the South to have been right.

*Second*, a claim that Lamar did not recognize the legitimacy of the 13th, 14th, and 15th Amendments to the Constitution, and that he could not be trusted as a Supreme Court Justice to sustain their validity or to construe them fairly.

*Third*, a claim that Lamar had defended the institution of slavery and that since the war he had worked to deprive blacks of their rights, particularly the franchise. The essential features of these charges and the responses to them will be sketched here.

As to participation in secession and the war, the answer on behalf of Lamar was what common lawyers would call a plea of confession and avoidance. True, he did actively promote secession in 1860. He believed that a state had a right constitutionally to withdraw from the Union and that the circumstances made it appropriate for that right to be exercised. He drafted the Mississippi Ordinance of Secession. During the war he enthusiastically supported the Confederacy as an army colonel and a diplomat in Europe, as well as on the home front. But for two decades before his nomination to the Court he had been equally firm that the war had settled finally the issue of secession; he accepted the result unequivocally. In his address at the dedication of the John C. Calhoun monument in Charleston, only a few months before the confirmation fight, Lamar made the point again. Were Calhoun still here, Lamar said, he would say to South Carolina "that, the great controversy being closed at the ballot box, closed by the arbitrament of war, and above all, closed by the constitution . . . she sacrifices no principle and falsifies no sentiment in accepting the verdict . . . a people who in form surrender and profess to submit, yet continue to secretly nurse old resentments and past animosities and cherish delusive schemes of reaction and revenge, will sooner or later



A few months before his Senate confirmation hearings, Lamar spoke at the dedication of the John C. Calhoun monument in Charleston, South Carolina. In his address he reaffirmed his acceptance of history's verdict on states' right to secede.

degenerate into baseness and treachery and treason".<sup>68</sup> Lamar's conduct in House, Senate, and Cabinet evidenced that this was his genuine belief. If he were to be barred from the Court on this score, it meant there could be no atonement for a participant in the Confederacy, and that was precisely the position of some people.

With others there were lingering doubts about the genuineness of Lamar's reconciliation, despite his record of national public service. It was said, for example, that Lamar had openly defended Jefferson Davis in later years. Lamar did have a strong personal loyalty to Davis. He and Davis were in precisely the same position, Lamar said, and "no man shall in my presence call Jefferson Davis a traitor without my responding with a stern and emphatic denial."<sup>69</sup> At the same time, Lamar alone among the Democratic senators, had voted with the Republicans to make ex-President Grant eligible for military retirement.<sup>70</sup> He also gave ten dollars in a popular subscription drive to erect a monument to Grant.<sup>71</sup>

Nevertheless, there were recurrent charges of duplicity. Back in 1876, Adelbert Ames, the young brigadier general from Maine who had been made Reconstruction governor of Mississippi, said that Lamar was "devoted to a

policy of deceit for the purpose of misleading the North."<sup>72</sup> He was one thing in his home state and quite another in Washington, so Ames reported. One story was that Lamar himself had said that when he went on to the floor of the House the day of the Sumner memorial proceedings, he had two speeches with him — one was a bitter attack on the North, the other the reconciling speech he actually gave. Circumstances were to determine which he would deliver. His decision to give the latter was reached after he saw the response to other speakers.<sup>73</sup> But this story came from Lamar's opponents and is not corroborated. Another long-time political enemy, James R. Chalmers, cautioned Senator Chandler, while the Court nomination was pending, about the ingratitude and duplicity of Lamar.<sup>74</sup> Chalmers asserted that there were several occasions on which Lamar had pretended to support certain persons for government jobs when in fact he had not done so.

Lamar's position on the War Amendments was another large bone of contention. The charge against him went back to an episode in 1879 in the Senate. Edmunds had offered a resolution which would put the Senate on record as declaring that the 13th, 14th, and 15th Amendments had been *legally ratified*. Lamar had refused to vote for that resolution and had supported instead a resolution by Morgan that the Amendments were binding as part of the Constitution. The distinction reflected in the Southern position to which Lamar subscribed was that the Amendments had to be recognized in fact as an outgrowth of the war, though they had been adopted under duress and by legislatures not of the people's choosing. Contrary to widely circulated reports, Lamar did not take the position that the Amendments were legally invalid. The Republican attitude on this was, as expressed by Spooner, that the Amendments "could not be legally a part of the Constitution unless they were *legally ratified*, and that a mental or other reservation upon that question, or an adverse opinion upon it, is abundant foundation, when the time comes, for declaring them not binding."<sup>75</sup> It was also suggested with horror that because of his view on this matter Lamar, as a Supreme Court justice, might even vote to sustain the constitutionality of an act to compensate former slave holders for the loss

of their slaves if a Democratic Congress should pass such a measure.<sup>76</sup>

The most emotional of all the Civil War-related arguments against Lamar's confirmation concerned the race question. The standing Republican accusation against the Southern Democrats was that they suppressed the black vote and the Republican Party in the South. Lamar had played a central role in carrying out the "Mississippi Plan" in 1875 which resulted in the state's finally ridding itself of the carpetbag government and installing the Democrats. The contest had been bitter. Ames and the Republicans had accused Lamar, George and their followers of "intimidation, fraud and murder."<sup>77</sup> In return, the Republicans were accused of corruption and of having used military force to put themselves into office.

The matter had been the subject of endless disputation through the years as part of the general argument over Reconstruction and its aftermath. In that extraordinarily turbulent period of Southern history, the truth is indeed difficult, if not impossible, to get at. There are, however, a few facts relating to Lamar that can be pinpointed. He spoke publicly numerous times against a "white line." At a Democratic convention during the 1875 campaign, for example, he sponsored a resolution stating that "We are opposed to the formation of parties among the people of this State founded upon differences of race or color, and we cordially invoke the union of good citizens of every race and color in patriotic efforts to defeat at the next election the present state administration. . . ."<sup>78</sup> In 1879, as a contributor to a symposium in the *North American Review*, he supported Negro suffrage.<sup>79</sup>

One student of the period concluded that Lamar was guilty of less hypocrisy than has been charged, on the theory that he and the class he represented had little to fear from the Negro and much to gain from establishing themselves as his protector.<sup>80</sup> Black Republicans regularly received federal patronage through Lamar and his colleagues in Congress. Lamar personally moved the confirmation of the former black Senator, Blanche K. Bruce, as Register of the Treasury. All this, however, was alleged by the white Republicans to be a scheme to keep the Republican Party as a Negro party and thereby maintain the



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Although raised as a slave, Blanche K. Bruce later attended college, became a planter, and with the help of Congressman Lamar, received a federal patronage job in the 1870s. He was elected as a Republican to the US Senate in 1881.

Democrats in power by their appeal as the white man's party.<sup>81</sup>

Anxious to provide ammunition against Lamar on this count, one Wilson Vance, a former Senate committee clerk, scribbled a note to Senator Edmunds the very day Cleveland sent Lamar's nomination to Capitol Hill. Vance reported that Charles Foster, a former Ohio Congressman and Governor, had once told him that Lamar had stated in a private conversation that "whether by fair means or by foul" we will "not permit the Negroes to gain the ascendancy." Vance suggested that Foster be telegraphed to "enquire whether he is willing to depose upon oath that Mr. Lamar said any such thing."<sup>82</sup> Edmunds followed this up by writing to Foster,<sup>83</sup> and Foster promptly replied. The talk with Lamar, Foster said, was held at the suggestion of President-Elect Garfield and was confidential; therefore, he would not now permit its public use. Nevertheless, Foster proceeded to outline Lamar's comments. Lamar had "deprecated murder and Ku-Klux methods, and expressed the belief that the white people of the South would not continue such methods." But Lamar had also said, "Negro government was necessarily ignorant, and ignorant government was necessarily vicious and bad." The white people "would control their own affairs

... their personal safety and financial interests required it." Foster concluded his letter with a comment of his own: "I am very clear after a good deal of thought (for I like Lamar personally) that he, nor any one else entertaining the sentiments he does, should become a United States Judge."<sup>84</sup>

Apart from these emotional issues of section and race, the Republicans had good reasons to be favorable to Lamar. He had not always fought them, and in fact had joined them at times against a majority of the Democrats and contrary to substantial sentiment in his home state. On the silver bill, for example, he voted in line with the eastern gold interests, thereby disobeying explicit instructions from the Mississippi legislature and almost committing political suicide.<sup>85</sup> His support of the bill authorizing military retirement for President Grant is another illustration. And in the Compromise of 1877, which resulted in Hayes becoming President over Tilden, Lamar played a significant, cooperative role. For years he had been much involved with the railroads, a major Republican concern. After the war he was on the board of directors of the Mississippi Central Railroad, later absorbed by the Illinois Central, and in the House he was chairman of the Pacific Railroads Committee. Just two months before his Supreme Court nomination went to the Senate, Lamar, as Interior Secretary, had ordered 200,000 acres of land restored to the Chicago, St. Paul Minneapolis, and Omaha Railroad. This caused speculation thereafter that the two Republican Senators from Wisconsin, who were much interested in that road, would vote for Lamar's confirmation.<sup>86</sup> On other occasions, however, Lamar ruled against the railroads on land questions. On the whole, Lamar was not unfriendly to railroads and the financial interests radiating from them, all of which were influential in the Republican Party. Henry Adams, the New England historian who had impeccable Republican credentials, came to know Lamar well during his Senate years and described him as being at that time "one of the calmest, most reasonable and most amiable Union men in the United States, and quite unusual in social charm."<sup>87</sup>

One of Lamar's most interesting positions as a legislator was his support of federal aid to

education. This point was relevant at the time of the confirmation fight, though it was evidently not mentioned, because the major question under debate in the Senate in January, 1888, was again a bill to provide federal funds for the "common schools." Such a bill had never been enacted although it had passed the Senate twice before. Lamar had made a leading speech for it in 1884. There he first disposed of the constitutional objections; he saw none. The Land Grant Act had long been in effect, and Lamar was unable to grasp "the refinements and subtleties about the distinction between the granting of land and an appropriation of money for educational purposes. . . . It is not the kind of aid granted . . . but the purpose for which it is granted, that is to be considered." He did "not see any entering wedge, as it is called, in this bill toward Federal intervention in the jurisdiction of the State over the education of its children."

In his speech, Lamar then moved to the reasons why he supported the federal education bill: "In my opinion, it is the first step, and the most important step, that this government has ever taken, in the direction of the solution of what is called the race problem; and I believe that it will tell more powerfully and decisively upon the future destinies of the colored race in America than any measure or ordinance that has yet been adopted in reference to it — more decisively than either the thirteenth, fourteenth, or fifteenth amendments, unless it is to be considered, as I do consider it, the logical sequence and the practical continuance of those amendments." Basically Lamar's position was that the enormous task of educating the suddenly freed slaves was a national responsibility; it could not and should not be borne solely by the former slave states. His speech was a perceptive discussion of the history of public education and its place in American society. Some people were mistaken, he said,

as to the state of feeling in the South with reference to the education of the negro. The People of the South find that the most precious interests of their society and civilization are bound up in the question of his education, of his elevation out of his present state of barbarism. . . . For my part, I say that I would leave no legitimate effort unused and no constitutional means unemployed which would give to every human being in this country that highest title to American citizenship: virtue, knowledge, and judgment."<sup>88</sup>

For those who reflected dispassionately on Lamar's nomination for the Supreme Court there were few grounds of real substance on which it could reasonably have been opposed —unless, of course, there was to be an absolute bar to former Confederates. Some of his political opponents conceded this. A Republican attorney wrote that "if some Democrat has to be confirmed" — and that was no doubt the case — it should just as well be Lamar, for he would do nothing but what he conceived right and he was superior to others who might be nominated.<sup>89</sup> But a decision had been made within the controlling councils of the Republican Party that confirmation must be defeated as a matter of party policy.

Throughout December the Judiciary Committee took no action. Senator Wilson, being away at Christmas and not wishing to miss any development, wrote a note instructing Edmunds to cast Wilson's vote against confirmation if the committee met before his return.<sup>90</sup> But the committee majority was waiting for more opposition to develop and the Republican ranks to close. As the new year of 1888 dawned, there were reports that various Republican Senators would buck the party and vote for Lamar. Among those mentioned were Spooner and Sawyer of Wisconsin, Chandler of New Hampshire, Steward and Jones of Nevada, and Stanford of California.<sup>91</sup> There was still a question mark around the Independent, Riddleberger of Virginia. The Democrats were evidently united. The outcome, therefore, appeared to hinge on two votes.

On January 2 an event far from the capital city, and not directly involving Lamar, played into the hands of his opponents. The city of Jackson, Mississippi, held a municipal election on that day. Reports immediately reached the Republican senators of intimidation of black voters. Letters and newspaper clippings began coming into the Judiciary Committee. A Jackson paper, the day after the election, had reported: "Not a negro voted in this city yesterday, which is the first instance of the kind since the war. We learn that two attempted to vote . . . but were prevented by the judges."<sup>92</sup> It was also reported that the Democrats held a mass meeting beforehand and resolved "that in the election to be held on Monday next none but white men will vote,

the negroes having voluntarily agreed to stay away from the polls."<sup>93</sup> It was claimed that the United States Attorney, an appointee of the Democratic Administration, had engineered the whole thing. The effort was to link it to Lamar. A Republican in Jackson wrote Senator Sherman that "If you wish to defeat the confirmation of Mr. Lamar, which ought to be done, here is now abundant material upon which to do it."<sup>94</sup> Thus the whole racial issue was heated up by a fresh episode. It hung in the air for a week before inevitably reaching the Senate floor in the form of a resolution proposed by Chandler that the Judiciary Committee be instructed "to inquire into the suppression of the votes of the colored citizens of Jackson, Miss., at the recent municipal election," particularly the alleged participation of certain federal officials, and to report the facts to the Senate.<sup>95</sup>

Meanwhile, Lamar had decided to resign from the Cabinet. The delay over his confirmation was complicating the administration of both the Interior and Post Office Departments. And the controversy over Lamar was embarrassing to the administration. Lamar felt that by severing all connections with the government he would "leave before the Senate in its final judgment upon my nomination the sole question of my fitness for the position, dissociated from any other nomination and unaffected by any other considerations."<sup>96</sup> Accordingly, on January 7 he submitted a letter of resignation to the President.<sup>97</sup> A response came from the Executive Mansion the same day. The President, in a personal note, accepted the resignation with "the most profound and sincere regret," effective at noon on January 10.<sup>98</sup> A New York paper commented: "This act of his will fix the eyes of the country upon his judges; and the people . . . will require that the Senate do not injustice in this case."<sup>99</sup>

January 8 was a turning point. It was then that the Republican Senator from Nevada, William M. Stewart, released to the press a letter to a constituent in which he stated that he would support the confirmation of Lamar. The issue had been so framed, said Stewart, that the rejection of Lamar would be construed as a declaration that being on the losing side in the war was a disqualification for the Supreme Bench. "It is unreasonable," he con-



Republican Senator William Stewart of Nevada (left) broke with his party to support the Lamar nomination. Many speculated that Senator Stewart's vote was influ-



enced by his wife, Annie Elizabeth Foote Stewart (right) whose father was a former Mississippi senator and governor.

*Library of Congress (L) and Nevada Historical Society (R)*

cluded, "to expect that the people of eleven states of the Union shall, during all the present generation, be excluded from participation in the judicial determinations of the highest court of the United States."<sup>100</sup> Here was a break in the Republican ranks. The question was whether there would be others. Just three days before, Spooner had reported that sentiment was very strong against Lamar.<sup>101</sup>

What motivated Stewart is speculative. He was a rugged product of the mining frontier—a massive figure, with flowing beard and long silver hair, who had accumulated and disposed of several large fortunes. He was hardly a man to pay much attention to party discipline. His wife was the daughter of Henry S. Foote who had been a senator from Mississippi and governor of the state before the war, and it was said that she exerted influence for Lamar.<sup>102</sup> But this report must be taken with caution because Foote and Lamar had been political opponents. Stewart was active on behalf of the Pacific railroads, and he may have found Lamar's record in that connection appealing. Moreover, the far western senators were less sensitive to the sectional issue. Some years later, recalling the episode, Stewart said that objection to confirmation had come down simply to the fact that "Mr. Lamar had

borne arms against the United States." His position was, as he later recounted, that when the Southern states were restored in the Union and amnesty granted, all persons who accepted the conditions in good faith, as he was convinced Lamar had, "were entitled, other things being equal, to hold any office to which any citizen of the United States is eligible."<sup>103</sup>

The report of the Senate Judiciary Committee was submitted shortly thereafter. The committee had divided 5-4 on party lines, the Republican majority rendering a report adverse to confirmation on the grounds of age and lack of legal experience.<sup>104</sup> This committee position had been an open secret since shortly after New Year's Day. In fact, the votes of the majority had been predictable from the time Congress convened, with the possible exception of Evarts who might have been expected to be somewhat less partisan. Hoar was later to confess that he made a mistake.<sup>105</sup>

The critical breakthrough came on the twelfth of January. Ingalls was in the chair as President Pro Tem of the Senate. He was vehemently against confirmation, having given a statement that Lamar "represents everything that is bad in the past, dangerous in the present, and menacing in the future."<sup>106</sup> He now brought before the Senate the matter

by which the Republicans hoped to forestall any further defections—Chandler's resolution calling for an investigation of the Jackson election. Debate opened on the question of agreeing to the resolution, and Chandler led off. He presented a series of letters and newspaper clippings telling of Democratic suppression of black voters. The clerk of the Senate read them, one after another. Chandler then argued that with a presidential election coming up the question was one of national importance. It was a matter of concern, he said, whether that election would be decided by a fair vote of all who are constitutionally entitled to vote or by the disenfranchisement of the million and a half black voters "in pursuance of this policy which we have seen deliberately adopted in the capital of the State of Mississippi, which state seeks today to furnish an associate justice to the Supreme Court of the United States to aid in passing upon the validity of the constitutional amendments."<sup>107</sup> Here was a clever and subtle use of the "bloody shirt" technique—a linking of Lamar to the Jackson election when there was no evidence of any such connection.

Riddleberger, the independent from Virginia, was on his feet immediately. "Mr. President," he began, "there can be no longer any concealment as to the purpose of the debate. . ." As anyone could tell, he said, the whole proceeding was aimed at the rejection of Lamar. After pointing out, correctly, that under existing Senate rules the Lamar nomination should be dealt with only in executive session and not in open debate, Riddleberger made his dramatic announcement: "If it be allowable to have this kind of debate in open session, then it becomes me, sir, to say that I will vote for Lamar."<sup>108</sup> Here was the second of the two non-Democratic votes necessary for confirmation. Assuming that the Democrats held fast, the issue was settled. Stewart and Riddleberger, plus all the Democratic Senators, added up to a one vote majority.

As analyzed by one contemporary political observer, Riddleberger's support for Lamar came as a reaction to the Republican effort "to make participation in the rebellion a test;" Riddleberger himself being an ex-Confederate. This tactic showed a "lack of sagacity" on the part of the Republican leadership, the observer thought. "Opposition on

the ground of age and unfitness would have kept the majority in the Senate solid, and perhaps secured support from the Democratic minority."<sup>109</sup>

Confirmation came four days later. After a three-and-a-half hour executive session on the afternoon of January 16, the Senate reopened, and confirmation of three Presidential nominations was announced: Lamar to the Supreme Court, Vilas for Secretary of the Interior, and Dickinson for Postmaster General.<sup>110</sup> It was anticlimactic because of the Riddleberger and Stewart announcements. But Lamar, forever gloomy, that very morning sitting alone as a private citizen at his home on K Street, wrote a note to a friend thanking him for some books and adding: "I can now say that I do not expect ever to have occasion to use them as a Judge of the Supreme Court—for I think the Senate has become united on the Republican side to defeat my confirmation."<sup>111</sup>

The Senate was indeed almost united on the Republican side. Though the proceedings were in closed session, the vote was generally reported to have been 32 to 28 for confirmation.<sup>112</sup> Apparently, 16 senators had not voted. In addition to Riddleberger and Stewart, one more Republican vote had been picked up at the last—Leland Stanford, the railroad titan and lackluster Senator from California.<sup>113</sup> Stewart, his long-time friend and advisor, had gone to Stanford's home to secure his support, and after a full discussion Stanford agreed to vote for confirmation.<sup>114</sup> It was rumored that if any more Republican votes had been necessary to put Lamar over, they would have been forthcoming.<sup>115</sup> Evidently the party leadership sensed that the fight was lost, and the idea of a Republican caucus to bind all members of the party was abandoned before the vote.<sup>116</sup> The opposition "was more apparent than real," commented one newspaper.<sup>117</sup>

The confirmation was announced at the capitol at 4:30 in the afternoon. The news spread quickly. In the lamplight of early evening, congratulatory messages and telegrams—many addressed to "Mr. Justice Lamar"—were pouring into 1204 K Street. The sad-eyed and dreamy Lamar was receiving them and numerous callers with obvious gratification.<sup>118</sup> Walthall was there, along with Vilas and others. The next morning came a

note from Chief Justice Waite. He had just heard "the good news" and wrote:

Come to us as soon as you can, for we want you. I wish you could be on the Bench today, when we take up some Arkansas bond cases, which are important in amount at least. By Thursday we shall reach an interesting California land case, in which I hope we may have your help.

You will have a hearty welcome from us all; and don't keep away from us any longer than is absolutely necessary.<sup>119</sup>

There was no reason for delay. Lamar had already disengaged himself at the Interior Department. He told a reporter: "The Supreme Court really needs another member at once. A tie may now frequently occur on important questions, and it is eminently desirable that such a state of affairs should not exist."<sup>120</sup>

And so it was that on January 18, 1888 L. Q. C. Lamar was sworn in as a justice on the United States Supreme Court. The irony is indeed great. Here was a man who had actively participated in leading the Southern states to secede from the union, had worn the Confederate gray, had borne arms against the United States. Yet here he now sat, robed in black, on the Supreme Court, that holy of holies of American civil government, charged with final authority to interpret the Constitution. Lamar lived only five more years, not long enough to make a substantial contribution to the Court's jurisprudence, although he participated in some significant cases. The importance of the appointment lies rather in its symbolism. It signified a fully reunited nation. The symbolism would not have been effective had the appointee not been one who had actively participated in secession and the war and had fully shared in the disastrous defeat of the Lost Cause. The absolution could be achieved only through an appointee with that background, yet one who had une-



Associate Justice Lucius Quintus Cincinnatus Lamar was confirmed by the Senate on January 16, 1888.

quivocally accepted the verdict of history and had spoken for reconciliation and a new day.

Lamar's contribution to history was perhaps best summed up in a statement made by Attorney General Warren Olney during the memorial proceedings in the Supreme Court following Lamar's death. Olney, speaking as Attorney General and for the Bar of the Court, said this of Lamar:

[T]o him more than to any other one man, North or South, is due the adoption by both the victors and vanquished of those counsels of moderation, magnanimity and wisdom which have made the edifice of our constitutional Union more impregnable to all assault than ever before.<sup>121</sup>

For this reason Lamar was, in my opinion, the man best fitted in his time and place for the historic role of symbolizing in living flesh on the Supreme Bench a truly reunited nation.

#### Footnotes

<sup>1</sup> Lamar has been the subject of three book-length biographies: Mayes, *Lucius Q. C. Lamar — His Life, Times and Speeches* (1896) (cited hereafter as *Mayes*); Cate, *Lucius O. C. Lamar — Secession and Reunion* (1935) (cited hereafter as *Cate*); and Murphy, *L. O. C. Lamar — Pragmatic Patriot* (1973). *Mayes* contains the full text of numerous letters, speeches, and newspaper articles that are otherwise unavailable.

<sup>2</sup> 2 Cong. Rec. 3410, 43rd Cong., 1st sess., (April 27, 1874).

<sup>3</sup> William Burnham Woods, 20 *Dictionary of American Biography*, 505-06 (1936); *In Memoriam, William B. Woods*, 123 U.S. 761 (1887).

<sup>4</sup> *Cate* 471.

<sup>5</sup> Augustus H. Garland, 7 *Dictionary of American Biography* 150-51 (1936).

<sup>6</sup> Lamar to Rutherford B. Hayes, Oct. 8, 1877,

Hayes MSS., Rutherford B. Hayes Library, Fremont, Ohio (cited hereafter as Hayes MSS.).

<sup>7</sup> Mayes 518-19.

<sup>8</sup> Nevins, *Grover Cleveland: A Study in Courage* 315-20, 367-82 (1932).

<sup>9</sup> Lamar to J. F. King, July 7, 1887, printed in Mayes 520.

<sup>10</sup> Lamar to E. C. Walthall, July 9, 1887, printed in Mayes 520-21.

<sup>11</sup> *Ibid.*

<sup>12</sup> Hill, L. Q. C. Lamar, 5 *The Green Bag* 153, 161 (1895).

<sup>13</sup> Note 9 *supra*.

<sup>14</sup> Lamar to E. C. Walthall, July 30, 1887 printed in Mayes 521.

<sup>15</sup> *Ibid.*

<sup>16</sup> Lamar to William F. Vilas, Aug. 17, 1887, Vilas MSS., Wisc. Historical Society.

<sup>17</sup> Lamar to Grover Cleveland, Sept. 10, 1887, Cleveland MSS., Vol. 176, Manuscript Division, Library of Congress (cited hereafter as Cleveland MSS.).

<sup>18</sup> Cleveland to W. F. Vilas, Sept. 14, 1887, *Letters of Grover Cleveland* 156 (Nevins ed. 1933).

<sup>19</sup> U.S. Const., Art. II, § 2, clause 3.

<sup>20</sup> Act of March 3, 1891, 26 Stat. 826.

<sup>21</sup> Lamar to Mrs. Kate W. Freeman, Dec. 23, 1887, printed in Mayes 461.

<sup>22</sup> 19 Cong. Rec. 36, 50th Cong., 1st Sess. (Dec. 12, 1887).

<sup>23</sup> Henry W. Grady to Lamar, Oct. 29, 1887, printed in Mayes 521.

<sup>24</sup> G. F. Edmunds to Lamar, Jan. 15, 1885, printed in Mayes 521.

<sup>25</sup> Resolution of the Garfield Club, Columbus Ohio, Jan. 14, 1888, Files of Senate Judiciary Committee — Lamar Nomination, National Archives, Washington, D.C. (cited hereafter as Judiciary Committee Files).

<sup>26</sup> Resolution of Kokomo Lincoln League, Kokomo, Ind., Jan. 2, 1888, Judiciary Committee Files.

<sup>27</sup> Resolution of Giddings Republican Club, Warren, Ohio, Jan. 1, 1888, Judiciary Committee Files.

<sup>28</sup> *Champaign County Herald*, Urbana, Ill., Dec. 14, 1887, Judiciary Committee Files.

<sup>29</sup> S. L. Griffith to unspecified addressee, Dec. 31, 1887, Judiciary Committee Files.

<sup>30</sup> Resolution of National Veterans' Rights Union of Dist. of Col., Dec. 10, 1887, Judiciary Committee Files.

<sup>31</sup> H. J. Crouch, Union Veterans Union, to Chairman, Judiciary Committee, Dec. 11, 1887, Judiciary Committee Files.

<sup>32</sup> Resolution of McClellan Veterans Club, Jan. 4, 1888, Judiciary Committee Files.

<sup>33</sup> Eli Shelby Hammond to Sen. Edmunds, Dec. 27, 1887, Judiciary Committee Files.

<sup>34</sup> Jas. E. Slaughter to Sen. Edmunds, Jan. 1, 1888, Judiciary Committee Files.

<sup>35</sup> J. W. Hubbard to Sen. Edmunds, Dec. 8, 1887, Judiciary Committee Files.

<sup>36</sup> *The Evening Telegram*, New York, Dec. 22, 1887, Judiciary Committee Files.

<sup>37</sup> Mary J. McBride to Senate Judiciary Committee, Jan. 9, 1888, Judiciary Committee Files.

<sup>38</sup> Lamar to D. H. Manning, July 17, 1885, Manning MSS., Vol. I, Manuscript Division, Library of Congress (cited hereafter as Manning MSS.).

<sup>39</sup> Minute Book No. 6, June 23, 1871, U.S. District Court, N.D. Miss. (Book 90, Federal Records Center, East Point, Ga.).

<sup>40</sup> Minute Book No. 6, July 5, 1871, U.S. District Court, N.D. Miss. (Book 90, Federal Records Center, East Point, Ga.).

<sup>41</sup> J. H. Pierce to Senate Judiciary Committee, Dec. 31, 1887, Judiciary Committee Files.

<sup>42</sup> See Ewing, *The Judges of the Supreme Court, 1789-1937* 64 — 68 (1938).

<sup>43</sup> Lamar to Mrs. Mary A. Ross, Dec. 21, 1887, printed in Mayes 524.

<sup>44</sup> Affidavit of Mrs. Mary A. Ross, Dec. 24, 1887, Judiciary Committee Files.

<sup>45</sup> Lamar to D. H. Manning, March 23, 1887, Cleveland MSS., Vol. 152.

<sup>46</sup> Lamar to Cleveland, April 8, 1887, Cleveland MSS., Vol. 155.

<sup>47</sup> Lamar to "Gussie," Oct. 5, 1886, Lamar MSS., Letter Book 3, Miss. Dept. of Archives, Jackson, Miss. (cited hereafter as Lamar MSS.).

<sup>48</sup> Lamar to David Longstreet, March 29, 1886, Lamar MSS., Letter Book 2.

<sup>49</sup> Lamar to Mrs. Mary H. Jackson, July 6, 1885, Lamar MSS., Letter Book 1.

<sup>50</sup> E.g., Lamar to T. C. McRae, April 5, 1886, Lamar MSS., Letter Book 2.

<sup>51</sup> Lamar to Daniel Manning, Dec. 20, 1886, Manning MSS., Vol. 3.

<sup>52</sup> Lamar to Lamont, Aug. 29, 1887, Cleveland MSS., Vol. 174; Lamar to Henry Muldrow, Aug. 29, 1887, Lamar MSS., Letter Book 4.

<sup>53</sup> Lamar to E. C. Walthall, July 30, 1887, printed in Mayes 521.

<sup>54</sup> John C. Spooner to Frank A. Flower, Dec. 31, 1887, Spooner MSS., Letter Book 4, p. 362, Manuscript Division, Library of Congress (cited hereafter as Spooner MSS.).

<sup>55</sup> Spooner to Frank Avery, Jan. 7, 1888, Spooner MSS., Letter Book 4, p. 443.

<sup>56</sup> Records and Case files for U.S. District Court, N.D. Miss., Federal Records Center, East Point, Ga.

<sup>57</sup> *Daily v. Swope*, 47 Miss. 367 (1872).

<sup>58</sup> E. E. Baldwin to Sen. Chandler, Dec. 29, 1887, Chandler MSS., Vol. 76, Manuscript Division, Library of Congress (cited hereafter as Chandler MSS.).

<sup>59</sup> W. P. Harris to E. C. Walthall, Dec. 26, 1887, Judiciary Committee Files.

<sup>60</sup> See Twiss, *Lawyers and the Constitution* 93-122, 142-47 (1942).

<sup>61</sup> *Cong. Globe*, 35th Cong., 1st Sess. pp. 280-81 (Jan. 13, 1858).

<sup>62</sup> The speech is printed in Mayes 646-51.

Hayes MSS., Rutherford B. Hayes Library, Fremont, Ohio (cited hereafter as Hayes MSS.).

<sup>7</sup> Mayes 518-19.

<sup>8</sup> Nevins, *Grover Cleveland: A Study in Courage* 315-20, 367-82 (1932).

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<sup>18</sup> Cleveland to W. F. Vilas, Sept. 14, 1887, *Letters of Grover Cleveland* 156 (Nevins ed. 1933).

<sup>19</sup> U.S. Const., Art. II, § 2, clause 3.

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<sup>31</sup> H. J. Crouch, Union Veterans Union, to Chairman, Judiciary Committee, Dec. 11, 1887, Judiciary Committee Files.

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<sup>36</sup> *The Evening Telegram*, New York, Dec. 22, 1887, Judiciary Committee Files.

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<sup>38</sup> Lamar to D. H. Manning, July 17, 1885, Manning MSS., Vol. 1, Manuscript Division, Library of Congress (cited hereafter as Manning MSS.).

<sup>39</sup> Minute Book No. 6, June 23, 1871, U.S. District Court, N.D. Miss. (Book 90, Federal Records Center, East Point, Ga.).

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<sup>47</sup> Lamar to "Gussie," Oct. 5, 1886, Lamar MSS., Letter Book 3, Miss. Dept. of Archives, Jackson, Miss. (cited hereafter as Lamar MSS.).

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<sup>55</sup> Spooner to Frank Avery, Jan. 7, 1888, Spooner MSS., Letter Book 4, p. 443.

<sup>56</sup> Records and Case files for U.S. District Court, N.D. Miss., Federal Records Center, East Point, Ga.

<sup>57</sup> *Daily v. Swope*, 47 Miss. 367 (1872).

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<sup>61</sup> *Cong. Globe*, 35th Cong., 1st Sess. pp. 280-81 (Jan. 13, 1858).

<sup>62</sup> The speech is printed in Mayes 646-51.

<sup>63</sup> A. T. Britton to Lamar, Dec. 20, 1887, printed in *Mayes* 524. The statement might be discounted a bit by the fact that Lamar had decided a case for Britton and had congratulated him on his argument. Lamar to A. T. Britton, Sept. 1885, Lamar MSS., Letter Book 1.

<sup>64</sup> Spooner to W. D. Parker, Dec. 30, 1887, Spooner MSS., Letter Book 4, p. 347.

<sup>65</sup> Spooner to Frank Avery, Jan. 7, 1888, Spooner MSS., Letter Book 4, p. 443.

<sup>66</sup> This phase of Lamar's career is described in Meador, Lamar and the Law at the University of Mississippi, 34 *Miss. L. J.* 227 (1963).

<sup>67</sup> A. T. Britton to Lamar, Dec. 20, 1887, printed in *Mayes* 523.

<sup>68</sup> An Oration Delivered Before the Ladies' Calhoun Monument Association and the Public, at Charleston, S.C., April 26, 1887, printed in *Mayes* 779, 784.

<sup>69</sup> 16 *Cong. Rec.* 627, 48th Cong., 2nd Sess. (Jan. 12, 1885).

<sup>70</sup> *Mayes* 738.

<sup>71</sup> Lamar to Wm. Dow, July 5, 1887, Lamar MSS., Letter Book 4.

<sup>72</sup> A. Ames to J. G. Blaine, Feb. 15, 1876, Ames MSS., Letter Book D, p. 241, Miss Dept. of Archives.

<sup>73</sup> *Ibid.*

<sup>74</sup> J. R. Chalmers to W. E. Chandler, Dec. 26, 1887, Chandler MSS., Vol. 76.

<sup>75</sup> Spooner to George C. Ginty, Jan. 10, 1888, Spooner MSS., Letter Book 4, p. 486.

<sup>76</sup> Bowen to John Sherman, Dec. 30, 1887, Sherman MSS., Vol. 420, Manuscript Division, Library of Congress (cited hereafter as Sherman MSS.).

<sup>77</sup> Note 72, *supra*.

<sup>78</sup> *Mayes* 251.

<sup>79</sup> *North American Review*, March, 1879, reprinted in *Mayes* 719.

<sup>80</sup> Woodard, *Origins of the New South* 209 (1966).

<sup>81</sup> *Id.* at 103-04; Kirwan, *Revolt of the Rednecks* 10-16 (1951).

<sup>82</sup> W. Vance to Sen. Edmunds, Dec. 12, 1887, Judiciary Committee Files.

<sup>83</sup> G. Edmunds to C. Foster, Jan. 3, 1888, Sherman MSS., Vol. 422.

<sup>84</sup> C. Foster to Sen. Sherman, Jan. 5, 1888, Sherman MSS., Vol. 421.

<sup>85</sup> This episode is the basis of a chapter in Kennedy, *Profiles in Courage* 152-77 (1955).

<sup>86</sup> Fowler, *John Coit Spooner: Defender of Presidents* 84-85 (1961).

<sup>87</sup> Adams, *The Education of Henry Adams* 185 (1918) (Houghton Mifflin 1961 ed.).

<sup>88</sup> The speech is printed in *Mayes* 774-79.

<sup>89</sup> E. E. Baldwin to Sen. Chandler, Dec. 29, 1887, Chandler MSS., Vol. 76.

<sup>90</sup> J. F. Wilson to Sen. Edmunds, Dec. 26, 1887, Judiciary Committee Files.

<sup>91</sup> Notes 74, 29, 86, *supra*; *Mayes* 525.

<sup>92</sup> *Daily Advertiser*, Jackson, Miss., Jan. 3, 1888, Judiciary Committee Files.

<sup>93</sup> W. H. Gibbs to Sen. Sherman, Jan. 4, 1888, Sherman MSS., Vol. 421.

<sup>94</sup> *Ibid.*

<sup>95</sup> 19 *Cong. Rec.* 341, 50th Cong., 1st Sess. (Jan. 10, 1888).

<sup>96</sup> Lamar to Cleveland, Jan. 7, 1888, printed in *Mayes* 526.

<sup>97</sup> *Ibid.*

<sup>98</sup> Cleveland to Lamar, Jan. 7, 1888, printed in *Mayes* 526-27.

<sup>99</sup> *New York Herald*, Jan. 9, 1888, printed in *Mayes* 527.

<sup>100</sup> Letter from Sen. Stewart printed in *Mayes* 533.

<sup>101</sup> Spooner to E. A. Calkins, Jan. 5, 1888, Spooner MSS., Letter Book 4, p. 437.

<sup>102</sup> Note 29, *supra*.

<sup>103</sup> *Reminiscences of Sen. William M. Stewart of Nevada* 308 (George R. Brown ed., 1908); William Morris Stewart, 18 *Dictionary of American Biography* 13-14 (1936).

<sup>104</sup> *Mayes* 534. A copy of this report has not been located.

<sup>105</sup> *Cate* 483.

<sup>106</sup> Ingalls to The Young Republican Club, Lawrence, Kan., printed in *Mayes* 523.

<sup>107</sup> 19 *Cong. Rec.* 404, 50th Cong., 1st Sess. (Jan. 12, 1888).

<sup>108</sup> *Ibid.*

<sup>109</sup> W. H. Smith to R. B. Hayes, Jan. 14, 1888, Hayes MSS..

<sup>110</sup> 19 *Cong. Rec.* 475, 50th Cong., 1st Sess. (Jan. 16, 1888).

<sup>111</sup> Lamar to W. H. Phillips, Jan. 16, 1888, Phillips — Pers. MSS., Manuscript Division, Library of Congress.

<sup>112</sup> *N. Y. World*, Jan. 16, 1888, reprinted in *Mayes* 534-35.

<sup>113</sup> Leland Stanford, 17 *Dictionary of American Biography* 501-05 (1935).

<sup>114</sup> *Reminiscences of Sen. William M. Stewart of Nevada* 309 (George R. Brown ed., 1908); William Morris Stewart, 18 *Dictionary of American Biography* 13, 14 (1936).

<sup>115</sup> Note by W. H. P. on letter from Lamar to W. H. Phillips, Jan. 16, 1888, Phillips — Pers. MSS., Manuscript Division, Library of Congress.

<sup>116</sup> Note 112 *supra*.

<sup>117</sup> *The Richmond Whig*, reprinted in *Mayes* 537.

<sup>118</sup> *N. Y. World*, Jan. 16, 1888, reprinted in *Mayes* 538-39.

<sup>119</sup> M. R. Waite to Lamar, Jan. 17, 1888, printed in *Mayes* 538.

<sup>120</sup> Note 118, *supra*.

<sup>121</sup> *In Memoriam, Lucius Quintus Cincinnatus Lamar*, LL.D., 148 U.S. 707, 709 (1893).

signed for broad audiences. They did reveal a few "secrets" in their course but none of them was sufficiently popular in approach to come close to making a best seller list.

My selfish reason is that I have the desire to tell a story in confidence and perhaps to receive from this eminent group opinions regarding whether I should continue to withhold it from public knowledge. I trust that each of you will respect my confidence and not publicly discuss the details of the peek behind the velvet curtains of the Supreme Court I am about to afford.

This story is, of course, based upon my experience as a law clerk to that fine gentleman, Justice Stanley F. Reed, during the 1953 term of the United States Supreme Court. Thanks largely to the late Dean Wesley Sturges, I had the good fortune not only to be appointed to what then was agreed was one of the better clerkships on the Court (the difference being the status accorded to a clerk by the different Justices; whereas a Frankfurter clerk, for example, was a researcher and an outsider, many Reed clerks were favored with the full confidence of the Justice and participated in large measure in the Justice's share of the work of the Court). Thanks to fate I served my clerkship during one of the most momentous terms of the Court. In addition to the case I shall discuss in some detail, it was a term of several other important decisions, but the primary reason it was a momentous term was that it was the first term for a new Chief Justice and a realignment of factions was occurring.

Having been the first clerk selected by Justice Reed for the 1953 term, I was requested to report for duty promptly after being graduated and taking the bar exam. Accordingly, I arrived at the Court in June 1953 within a few days after the Court concluded the work of the 1952 term including a special hearing with respect to the Rosenberg case. Most of the Justices departed from the Washington area promptly after that session and I only had a couple of hours with Justice Reed before he took off for his annual medical check-up at Duke Medical Center and his sojourn at his farm in Kentucky. The Justice told me that my predecessor would be with me for a month to show me around and introduce me to my duties. He informed me of his planned itinerary for the summer recess which included

stopping briefly in Washington on his way from Maysville to Oyster Bay, N.Y., where he planned to spend the month of August. He indicated that he would be in contact during his absence and that he would be back on the job before Labor Day. He told me a little about my co-law clerk whom I had never met and who would be reporting for work on August 1st after finishing a year with Judge Fahey of the D.C. Court of Appeals. It was my responsibility to pass on to such fellow worker, George Mickum, what I learned from my predecessor and to allocate a portion of the work to George.

Toward the conclusion of our discussion the Justice casually asked me how familiar I was with the segregation cases. I candidly admitted that my knowledge was pretty slim; that, as he knew, I had not really been a civil rights activist in law school (although I coauthored with Ralph Brown three law journal articles on loyalty and security programs); and that my main interests at law school were the bread and butter courses. The Justice pointed out a shelf containing the records in the segregation cases that were then pending and suggested that I use any "spare" time getting familiar with them.

I believe it is fair to say that beginning that first day of my tenure as a law clerk and continuing through the day I departed the marble halls thirteen months later, I was embroiled in the school segregation problem to as great an extent as any person at the Court with the exception of the nine Justices themselves.

Each justice had a suite of three spacious rooms — a large office with fireplace for himself, and offices on either side, one occupied by law clerks and the other by his secretary and messenger and used as a reception room. By the third day after I moved in with my predecessor I had completed several "cert. memos" to his satisfaction and he began dropping hints that he would like to get away sooner than scheduled. Like most law clerks after a year of hard work and strain, he was anxious to turn over the reins and get some vacation before starting work with a large Washington law firm. He had the added reason that he had gotten married only a short time before. In any event, I think he probably would have started his terminal vacation

about four days after I arrived except for the fact that a letter arrived from Durham. Before the Justice had departed he had asked Bob to prepare for him a tabulation of state laws relating to segregation of any kind. Bob had finished a compilation which he had sent to Maysville along with a note reporting on his plan to begin his vacation forthwith.

Justice Reed's letter from Duke read as follows:

"Dear Bob —

Another help for segregation, please.

I want an analysis of all S. C. cases for decade 1943-1952 terms in which it was contended due process was denied by a *State*. There should be two groups:

1. Where the contention was sustained.
2. Where it was denied.

Notice I said State. *Johnson v. Zerbst* would not qualify. It was U.S. Ct. *Chambers v. Florida* would; it was state court.

In each group the cases should be subgrouped into several subgroups, e.g. confession claimed to be coercive(sic); confrontation of witnesses, like Knauff; procedural — like *Stein v. N.Y.* or *Wolf v. Colorado*.

Do the same for the federal cases. I think McNabb claimed denial of due process. *Carlson v. Landon*, too.

Each case should have a short paragraph, head note style on summary facts and ruling with precise page reference. *E. G. Gallegos v. Nebraska*: prisoner detained by State officers without prompt production before a magistrate; confession after \_\_\_\_ days; no denial of due process.

The purpose is to summarize actions held denial of due process or in accordance with due process, so as to conclude whether segregation is or is not a denial of due process.

All goes well. Will leave for Maysville soon.  
Regards to all.

Yours,  
Stanley Reed"

With noticeable lack of enthusiasm, Bob began the project assigned. By the beginning of my second week I was beginning to make good progress on the appeals and petitions for cert. and therefore I was a setup for Bob's entreaty that I finish his project so that he could resume his honeymoon. Bob had not only departed the Court but also the country by the time the Justice's second note of the summer arrived. Accordingly, the letter was delivered to me by the Justice's secretary and I inherited another project.

This second letter dated July 9, 1953, read as follows:



Associate Justice Stanley Foreman Reed  
(1938-1957)

"Dear Bob —

I am leaving for Kentucky this morning. Here is another chore for Aug. I use at D.C.

I want to make a comparison of crime among whites and negroes between cities where segregation is practiced and where it is not.

I want to eliminate the vast metropolitan areas like N.Y., L.A., Chicago, Phila., Jersey City, Boston, Detroit.

Do not use figures earlier than 1930 or later than 1949. Earlier are out of date. Later would be touched with present segregation controversy. Myrdal's American Dilemma may help. There is a D.C. Crime Commission (Phil Graham knows about it). F.B.I. is a good source. Clegg there is a friend who would tell you whom to see.

There are papers among the briefs in the S.C. case showing psychological effects of segregation. Here I want to see about crime.

not realize that the Court had specified that reargument should deal with the following specific questions:

1. What evidence is there that the Congress which submitted and the State legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?
2. If neither the Congress in submitting nor the States in ratifying the Fourteenth Amendment understood that compliance with it would require the immediate abolition of segregation in public schools, was it nevertheless the understanding of the framers of the Amendment
  - (a) that future Congresses might, in the exercise of their power under section 5 of the Amendment, abolish such segregation, or
  - (b) that it would be within the judicial power, in light of future conditions, to construe the Amendment as abolishing such segregation of its own force?
3. On the assumption that answers to questions 2 (a) and (b) do not dispose of the issue, is it within the judicial power, in construing the Amendment, to abolish segregation in public schools?
4. Assuming it is decided that segregation in public schools violated the Fourteenth Amendment
  - (a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or

Linda Brown (above, later Mrs. Charles D. Smith of Topeka, Kansas) gained national prominence when her father charged that his state's segregated schools were inherently discriminatory. The Court's decision in *Brown v. The Board of Education of Topeka* 1954 overturned the court's separate but equal ruling of *Plessy v. Ferguson* (1896) and affected 21 states with segregated schools such as the one below.



*Brian Lanker, Topeka Capital-Journal (above) and Larry Knightley and Larry Wolff, Black Star (below)*

(b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?

5. On the assumption on which questions 4 (a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4 (b),

- (a) should this Court formulate detailed decrees in these cases;
- (b) if so, what specific issues should the decrees reach;
- (c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;
- (d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?"

I was growing a little concerned at this juncture about being able to do the work I wanted on the segregation projects and also having time to complete a substantial batch of cert. memos to give to the Justice on August 1st to take with him to New York. I was therefore pleased when my fellow clerk George showed up in the middle of July and indicated he was ready to come to work a couple of weeks early if that wouldn't upset the organization. Virtually before he had completed the sentence I had him beginning to read a petition for certiorari.

I found little problem in preparing the tables of due process cases, but I ran into considerable difficulty in trying to get comparative statistics between Negroes and whites. An afternoon in the Library of Congress with one of the Supreme Court librarians was unrewarding and I finally turned to the FBI. J. Edgar Hoover provided some vague figures, but I was astounded that more complete figures apparently were not available anywhere.

While the Justice's first two letters demonstrated a wide range of inquiry related to the segregation questions, they gave no clear indication of his disposition regarding the outcome of the controversy. I, of course, attempted to learn from Bob the Justice's position on the subject as well as the positions of the other Justices. I was somewhat surprised that he indicated that the Justice had not discussed the question with him. Bob obviously harbored no doubt that Justice Reed

was in favor of segregation and Bob was so dogmatically uncharitable to such view I quickly understood why the Justice probably would not attempt to engage in a discussion of the subject with him.

The Justice's third note—the one criticizing Bob's list of state statutes—seemed to me to confirm at least to some extent Bob's conclusion regarding the Justice's position. However, I was intrigued by the diversity of angles from which the Justice was attempting to view the questions. I discussed the project with George and he indicated no concern about the implications—an attitude that troubled me somewhat, but which I attributed to his having been born and raised in southern Maryland. All of the law clerks ate lunch together each noon in a dining room in the basement of the court—obviously designed to enable the clerks to discuss court work without danger of outsiders overhearing conversations. While it appeared to me that all of the new clerks for other Justices were strongly in favor of the Court overruling *Plessy v. Ferguson*, the 1896 decision that held that the Equal Protection clause of the 14th Amendment is satisfied as long as separate but equal facilities are afforded different races, it also appeared that none of the Justices had confided in their clerks on the happenings behind the scenes in the pending cases.

Justice Reed stopped at the Court for a brief visit early in August. He did not stay long enough to do any work or to enable us to engage in any extended discussion regarding the segregation discussion. However, I did report regarding the problems we had run into in attempting to get statistics on crime and delivered the "due process" memo and the revised memo regarding state segregation provisions. The Justice also took with him several briefcases filled with cert. memos and petitions.

It quickly became apparent that the change of environment and the diversion of the "certs" had not entirely diverted Justice Reed's cogitations from the segregation cases. A letter addressed to his own Chambers at the Supreme Court Building "Attn: Law Clerks" which had been posted at Oyster Bay on August 14th was delivered to me by one of the court's messengers (Justice Reed's own mes-

senger doubled as his chauffeur and general factotum and was with him in New York). It read:

"Dear Colleagues —

For the segregation cases I am interested in understanding the attitude of other nations on that subject.

The UN is working on a Declaration & a Covenant on Human Rights i.e. due process. They are different — the Declaration is a hope — the Covenant an agreement.

A few years ago I looked at the progress as you will see from the enclosed 'yellow' notes.

My impression was that the 'Nations' expressed no interest in the abolition of segregation.

Will you please bring the work on the 'Declaration' & 'Covenant' down to Sept. 1953.

I am interested in any expression by any official representative of any country.

I must depend for authority & citation on *action* by any committee either as a recommendation or adoption of an attitude.

'Segregation' as now presented does not mean 'discrimination' to me — i.e. no right to vote — denials of equal protection — variable salary by race, or private social exclusions but the traditional separate but equal facility by law. Please examine the U.N. actions by that definition.

The enclosed memo refers to certain U.N. publications and is self-explanatory. Get them for further light.

In D.C. on Mass. at DuPont Circle there is a U.N. information center than can assist you with publications and information. Perhaps the Cong. Library also but U.N. are specialists.

I repeat only official publications are authoritative.

Please return this letter and the enclosures with the exhibits and information you obtain. Thanks  
Hope all goes well on the Potomac.

Regards to all,  
Stanley Reed"

The "yellow notes" referred to in the letter made obvious the use to which the authorities to be assembled were going to be put. It read:

"While, of course, alien cultures can be used only for illustration in determining whether segregation violates our Constitution, the attitude of the rest of the world toward segregation is worthy of consideration. The occurrences of the past decade have brought us to a clearer realization that our category of fundamental rights does not differ markedly from those of other nations. #(Cite Declaration of Human Rights) For example, the general acceptance of the outlawry of slavery #(Cite D. of H.R. Art. 4) or the right of all to participate in the functions of government #(Cite D. of H.R., Art. 21) point to the fact that permitting the one or denying the other would be a violation of our Constitution. In this carefully considered Declaration, there is no suggestion that equal but separate educational or other public facilities would deny fundamental human rights to the individual. #(Discriminations because of race are denounced but not segregation. For example, [quote 1st paragraph of Art. 2 and Art. 7]. It is inconceivable that the problem of segrega-

tion was not considered. #(The draft of June 11, 1947 contained these suggestions [Insert Art. 45 and 46]. The Report of the Commission on Human Rights 12/17/47 has this. [Insert 2 paragraphs of §39.] This was considered. [Insert last paragraph of Art. 31] Yet, in the Declaration intended not so much as a rule of law as an ideal for future attainment, there is no effort to put segregation beyond the pale. Nor do the constitutions of any states examined by me, and I have made a thorough search, contain any Bill of Rights or any clauses denouncing segregation as violative of human rights."

Visits to the Library of Congress and the U.N. Information Center produced a fairly impressive collection of books and pamphlets having some bearing on the attitude of other nations and the United Nations toward segregation. Thus I was able within a day of receiving the Justice's letter to send him the materials he wanted.

The Justice returned to the District prior to Labor Day and from the day he returned until the day court recessed the following June he was in his office at the Court six, and sometimes seven, days a week including most of the holidays. Needless to say, except on rare occasions George and I both arrived at the Court earlier than the Justice and did not leave until he was also on his way. Saturdays were a particularly difficult day because the Court was then still holding conferences starting at noon on Saturday. Many times such conferences did not conclude until after six o'clock, and I always liked to get a report on what had occurred promptly thereafter. I also have vivid recollections of several Saturday evenings when Justice Frankfurter stormed in to see the Justice while he and I were conversing to continue some debate that Felix had lost in conference. One time in particular, Justice Reed had to make a dinner and he left Justice Frankfurter and me to argue for 15 minutes about procedures for en banc hearings in Courts of Appeals. Apparently we got rather loud because Miss Gaylord, Justice Reed's secretary, and George were having a hard time controlling their mirth when Felix finally gave up trying to convert me (and I guess he hoped Justice Reed) to his view.

I did not keep a diary so, although I made notes while my memory was still fresh, it is difficult for me to place the exact sequence of events from the date of Justice Reed's return until May 17, 1954, the day the segregation decisions were announced. However, I vividly



As Justice Frankfurter acknowledged in a letter to Justice Reed after the Court's unanimous opinion was handed down in *Brown v. The Board of Education*, as late as the Summer of 1953 Justice Reed might have reasonably expected Associate Justice Robert Jackson (left) and Chief Justice Fred Vinson (right) to join in a possible dissent.

recall the first extended discussion we had very shortly after he returned from New York. It started when, after discussions of the various summer projects, I asked the \$64 question: was the Court going to meet the issue of the continued vitality of *Plessy v. Ferguson* head on. Justice Reed did not evade the question but promptly replied in the affirmative, adding "they know *they* have the votes and they are determined to resolve the issue."

During the long conversation that ensued I added one of the Justice's favorite words to my vocabulary. In response to my observation that it seemed to me that the result *they* sought to achieve was desirable, he said he did not conceive that to be the Court's function. He then inquired whether I believed in "krytocracy." When I confessed my ignorance of the definition of such term he directed me to one of his favorite sets of books, The Oxford English Dictionary, from which I learned that krytocracy means government by the Judges.

During this conversation Justice Reed indicated that he did not expect to be a lone dissenter in the segregation cases. He believed the Chief — Fred Vinson — was with him and

he felt that at least one other Justice would join him when the chips were down. It was my impression that he felt that Justice Jackson was not sold on overruling *Plessy* and he had some idea others might join his dissent. On the other hand, he obviously was convinced that there was a solid majority against him.

During the ensuing week the Justice and I had several additional discussions regarding the segregation cases. Justice Frankfurter's law clerk of the prior term, Alex Bickel (now a Professor at Yale), had spent several months researching regarding the intent of persons connected with the drafting and ratification of the Fourteenth Amendment regarding its effect on segregation. Justice Frankfurter circulated copies of Alex's lengthy memo (which subsequently formed the basis for a law journal article) so that the entire Court would have the benefit of the work. During a discussion of such memorandum Justice Reed and I first had a vigorous discussion regarding the validity of his view that the cases presented solely an issue of "due process" and that the "equal protection clause" was not controlling. An interesting aspect to me of developments

tion in the District of Columbia; and the third to assemble evidence from the legislative history of the amendment in Congress showing that there was not a common understanding that the amendment would require an alteration of segregation practices.

At about this same time the Justice also suggested that he would like to see any materials that might be available indicating the attitude of the Catholic church through the years toward segregation. On this latter project I sought the aid of George since he had attended Georgetown and was a Catholic and he promptly came up with copies of the several pronouncements of his Church on the subject.

I was too busy to afford the luxury of attending but a small portion of the rearguments of the cases. There are cubicles on the side of the courtroom in front reserved for clerks and court personnel or guests of the Justices which made it possible for us to enter the Court for a few minutes and leave unobtrusively, and they also had the advantage of being in a position that enabled one to hear what was going on. Nothing in the oral arguments persuaded the Justice that he should change his position. However, it had become apparent to him by this time that he no longer could expect to have anybody join his dissent. He told me that the new Chief was with the majority and he was alone. We had several discussions about the propriety of one man dissents during which I took the position that a sole dissent not only would be a useless gesture but a disservice to the Court as an institution. One effect of these discussions appears in an otherwise insignificant decision which was handed down in January, 1954. Justice Reed wrote a short solo dissent in *U.S. v. Lindsay* which opened with a justification as follows:

"An emphasis by dissent upon the Court's departure from precedents of statutory construction will not be useless if it arouses the attention of statutory draftsmen to the necessity of more explicit language. . . ."

I agreed that such a dissent could serve a purpose but pointed out that such consideration would not be present in the segregation cases.

Any idea I might have had that the Justice was giving up on his dissent was shattered

when the Justice gave me another "footnote project." He asked me to prepare a memorandum regarding segregation in the armed forces which he indicated he would use to support the statement that in an area where the executive branch of the federal government clearly had power to prohibit segregation, it did not act until recently and then sought to accomplish integration by a gradual process. I have a copy of the memo I submitted — the original went into a folder marked "segregation" which the Justice kept in his locked files.

By this time I had become an ardent advocate. On several occasions somewhat in jest the Justice needled me about my apparently having become as sure of the error of his ideas as were some of his colleagues. He also remarked about the fact that he hadn't even found it worthwhile discussing the subject with his clerks of the prior term since they were so adamant in their convictions on the subject.

During the Court recess in February I first actually saw a draft of the dissent the Justice planned to write. I do not know whether such draft had just been written or was written during the summer or the prior term, but I suspect it was prepared during the summer. I also do not know how many other drafts or notes had been written by the Justice. What happened was that the Justice handed me some yellow sheets containing his writing and asked me what I thought of it. I immediately took the sheets to my typewriter and made a copy on legal paper triple spaced. I then made comments on the sheet which I used in our later discussion of the draft which I returned to him. This is my copy and as far as I know this represents the totality of what was written of the proposed dissent:

If "equal protection," in fact and now, is accepted as a true touchstone by which to judge the constitutionality of segregation, the argument is finished. There are so many places in the South that have not carried out their responsibility to give separate but equal educational facilities that Negro residents of these communities would have and would receive constitutional remedies as do the citizens of S.C. case. But, of course, equal protection is not the touchstone. It would not bring school integration to the District of Columbia. It would not through the coercion of the Constitution make all white or integrated rural schools equal white and integrated urban schools; it would not put the white schools of a slum ward on a par with those more favorably considered by certain school boards. The Equal



Amongst its first tasks, and perhaps its most remembered, was the 1953 Warren Court's decision in *Brown v. The Board of Education*. The decision ultimately handed down by the Justices on May 17, 1954 was unanimous.

Protection Clause does not assure by constitutional command equal public facilities to all citizens whether State or Nation. If it did, many of our ideals would be achieved, all families would have available gas, water and electricity, would live "out of the mud" and would have a job. What the clause does do is to give each citizen an opportunity to obtain facilities substantially equal to his neighbor for himself. That right has been fully protected and equipped by this court. (cite with catch word explanation Sweatt — McLaren — Equal salary equal money per pupil — Canada. Examine equal protection cases in other lines.) Equal protection and due process have many close associations. (cite cases instances which say not much difference) *but the issue in segregation is whether segregation violates due process*. Define civilized Adamson.

Public policy is declared by Congress (Reeds case on Mo purchase) not this court. If we could declare policy we might have decided that due process commanded no capital punishment, no legal prohibition of labor unions (Carmack Amendment), universal suffrage, outlawry of liquor. Provide a striking down of private property based on Das Kapital etc. short 200 words or less.

During our discussion I told him that his

reasoning was unclear to me and particularly his transition from equal protection to due process. I argued that just because only due process was involved in the D.C. case (the equal protection clause only applies to states), it did not seem to me that he could avoid meeting the issue whether separate but equal schools violate equal protection. I told him that while I felt a logical and persuasive argument based on historical materials could be made to support the separate but equal doctrine, his approach seemed to me to evade the key issue.

During the course of this discussion I referred to the importance of a decision rejecting segregation to our country's position in the community of nations. I do not recall the Justice's exact words, but the substance of his reply was that he had been hearing considerable on that subject and it was causing him much thought although it should be irrelevant.

As I think back on the period involved, I recall that the Justice was obviously very tired and was feeling the weight of his position. He had just celebrated his 15th anniversary on the court and he was only months away from his seventieth birthday after which he would be eligible to retire at full pay.

If the Justice ever wrote another sentence of his proposed dissent, I never saw it or heard of it. While the subject of the segregation cases was mentioned on several occasions thereafter prior to the publication of the Court's opinions — as when he got a letter from the head of a Kentucky school board requesting advance information on how the cases were going to be decided because he needed time to make plans — none of the discussions related to the proposed dissent. Justice Reed never discussed the form of the Court's opinions with me prior to their issuance nor did any of the clerks reveal that other Justices had discussed drafts of opinions with them.

Justice Jackson suffered a heart attack on March 30, 1954. It came as a complete surprise to all of us since he appeared to be in his usual good humor immediately before it occurred. I believe the heart attack delayed delivery of the segregation decisions; in any event, he left the hospital to be present on May 17th and it is my impression they were held up until Justice Jackson was able to be present. However, the timing of issuance of the opinions was such a well kept secret that I am not certain any unplanned delay occurred. The law clerks and secretaries usually knew after each Saturday conference what decisions would be handed down the following Monday. However, the Justices were so careful not to reveal their plans with regard to the segregation decisions that most of the law clerks and secretaries were not alerted that the decisions would be handed down on May 17 and many of my colleagues missed the occasion. The courtroom was crowded as the Justices strolled through the velvet curtains and assumed their distinctive seats that historic Monday. However, I feel certain that no one in the crowd — including the government attorneys and newspaper writers — had any knowledge what was about to occur.

All of you I am sure are familiar with the decision in *Brown v. Board of Education* — a very appropriate title — and *Bolling v. Sharpe*,

the former dealing with the cases from Virginia, Delaware, South Carolina and Kansas and the latter decision dealing with the D.C. case where the petitioners were forced to rely solely on the due process clause. The spectators even though amazingly silent had to strain to hear Earl Warren's words as he read the text of the two opinions overruling *Plessy v. Ferguson* and holding that school segregation violates not only the equal protection clause but also the due process clause.

Editorialists, reporters, commentators, and alleged experts on constitutional law had a field day analyzing the decisions and such analysis and criticism continues. While the facts that the opinions were signed and delivered by the new Chief Justice was no great surprise in view of his prerogative, being in the majority, of selecting the author, the fact that only the two opinions were filed was a surprise not only to the press and students of the Court but to most of the secretaries and law clerks. The absence of both concurring and dissenting opinions was virtually unpredicted. In my view, the unanimity of the Court on the decisions was far more significant than the substantive aspects of the decisions on which the commentators spent most of their efforts.

May 17th did not conclude the Supreme Court's work on the segregation cases. One significant aspect of the decisions was that they merely announced the law, but ordered further argument during the following term on the issue of the scope of the decrees to be entered. At the Justice's request I had the librarian order newspapers from a selected group of cities for the weeks immediately following the decisions and I collected all comments regarding the decisions. He also requested certain other reading materials dealing with problems involved in accomplishing integration. He particularly mentioned he would like to see any reports regarding the effect of integration on Negro teachers since he felt integration must have a particularly severe impact on Negro teachers. I scanned several loads of materials produced by the very efficient library and selected those I thought the Justice might like to peruse. However, I guess the Justice had had enough of the subject because he did not attempt to examine the collected materials prior to departing from Washington shortly after the end

of the term.

We did have a further discussion before he departed regarding the remaining question and on this issue we were in agreement — we both felt that time was important and that the problem differed in different communities and sections. A few days before he departed the Justice informed me that he had told the Chief of our collection of materials and he asked me to make the materials available to the Chief. He also stated that the Chief indicated he would like to discuss the cases with me. I had had several innocuous conversations with the Chief during the term, but during such term it was common knowledge that Warren, unlike some other justices, carefully avoided letting himself be exposed to discussions of cases with other justices' clerks.

My remaining work on the segregation cases is summarized in a memo I prepared for the Justice before I departed for New Haven. It reads:

Memo to Justice Reed re Integration Materials:

Upon the top shelf of this rack are all the available articles from periodicals upon the integration problem. These articles shed light on the court's problem only insofar as they demonstrate that the problem in different communities is different, that such communities have tried to solve their problems in varying ways, and that the process of desegregation in schools is only a prelude to further problems regarding teachers, social facilities, housing and such.

The two books dealing with past experience with integration are more helpful than the articles. In particular, Ryan, *Public Schools Without Segregation*, which has not yet been published but which the author was kind enough to send a mimeographed manuscript, includes the widest variety of case studies including all of the areas in which you were particularly interested. Chapter 8 of Ashmore, *The Negro and the Schools*, is also in point but not as inclusive as the other book. The CJ has borrowed both of these books for his own use and the use of one of his clerks, Mr. Gruenthaler, who is going to work on the problem.

Before the CJ departed for California I discussed at length with him the problem of framing appropriate decrees in the segregation cases. As I understood it, his inclination at this time, with which I agree, was to send the cases back to the trial courts for the entry of appropriate decrees. Such action would have the dual advantages of allowing more time for compliance and also would better allow for local variations in the mode of compliance depending upon the intensity of the problem in the area. I take it that he agreed that reasonable attempts to start the integration process is all the court can expect in view of the scope of the problem, and that an order to immediately admit all negroes in white schools would be an absurdity because impossible to obey in many areas. Thus, while total immediate integra-

tion might be a reasonable order for Kansas, it would be unreasonable for Virginia, and the district judge might decide that a grade a year or three grades a year is reasonable compliance in Virginia. The problem, therefore, would be framing this court mandate so as to allow such divergent results without making it so broad that evasion is encouraged. I suggest remand with orders to the district judges to hear evidence as to how integration can be achieved in the area in question in the minimum possible time, taking into consideration such problems as the availability of physical facilities, and the financial burden on the community, and in the face of such evidence to enter appropriate decrees looking to the most expeditious implementation of this court's decisions.

Two problems are immediately suggested by this procedure: first, can the district judges be relied upon to achieve the desired result more easily than, e.g., special masters. I think so, not only because they are closer to the problems, but because they are more likely to be cooperated with since they won't be thought of as carpetbaggers. The fact that this court has already accepted their responsibility for the end of segregation may result in the district judges being able to work reasonably free from pressures and vituperation.

The second problem involves the individual petitioners in the cases. Must they be immediately admitted to the white schools regardless of the pattern of compliance approved for the class they have represented? While it may be contradictory to say that they have a constitutional right but that they must wait for relief, that is what probably must be done as to the class, and at least it would not be inconsistent to force the individuals also to await their turn in the process. I see no reason myself why special instructions as to the individuals need be included in the orders to the district courts.

The CJ is going to have several law clerks working on this project later in the summer after I have departed. (What they will be doing I frankly do not know since it seems like a problem where research must be unrewarding and that only policy decisions are required.) In any event, I was sure you wouldn't object to their using these materials so they may be borrowing them before you return.

On the bottom shelf are the newspaper reports which Miss Newman collected for you.

Gordon Davidson knows his way around and is deep into the certs. Joel Kozol arrives on the 16th of August to join him so I expect they will have things all ready for you when you arrive.

I want to thank you again for a wonderful year, and to extend my best wishes for a happy vacation and a pleasant 1954 term.

JDF

As you all know, after further argument and passage of another year the Court on May 31, 1955, entered decrees remanding all of the cases (except that from Delaware where immediate integration had been ordered by the State Court) to the several lower courts involved with directions to accomplish integration "with all deliberate speed" taking into consideration local problems. This action was

again unanimous.

During the few weeks of the term between May 17th and adjournment early in June Justice Reed avoided becoming involved in any detailed discussions regarding the considerations that led to abandonment of his dissent and his joinder of the Court's opinions. It was not until almost three years later after his retirement from the Court when I visited the Justice that he and I had a really frank discussion about such subject. Being in Washington on other business, I dropped by the Supreme Court and met the Justice in his new suite in the front of the marble palace. He was much involved with problems arising from his recent and very temporary appointment by President Eisenhower as Chairman of the newly created Civil Rights Commission. The Justice reminisced about all the work we had done on the segregation dissent and I asked him if he regretted having abandoned it. He replied that he did not and that it would have been very bad not to have had a unanimous decision. I suggested that he would have been a hero to a lot of people and he replied only that he still thought he had the better of the argument on the law but that it was more important that there be unanimity in view of the importance of the decision.

I asked him if he felt the segregation decisions were the most important decisions during his tenure on the Court — which covered the dynamic years from 1939 through 1956. He replied that there was no question in his mind but that *Brown v. Bd.* so ranked and he added that if it was not the most important decision in the entire history of the Court, it was very close to that position. I believe that most historians will agree with the Justice's evaluation.

I also feel that Justice Reed's action on the decision was an act of judicial statesmanship. The question that concerns me is whether it is desirable that the story as I have told it to you should remain unpublished. During the twelve years since the decisions were announced a story has been circulating that full credit for the decisions and the unanimity of the Court is due Chief Justice Warren. Particularly in the community of law teachers and students have I found such view propagated. I generally visit Yale Law School as a moot court judge each year and have on several such

occasions listened with some dismay to comments by students regarding the Warren Court and almost inevitably he is credited with marshalling the Justices to unanimity in the segregation cases. The very fact that some last ditch segregationist groups and the Birchers have chosen Warren for their primary target on the Supreme Court has advanced the myth that he somehow coerced the other Justices to unanimity.

It is undoubtedly true that there have been occasions since the Supreme Court first convened when its reported decisions did not accurately reflect divisions of the Court. President Jefferson accused Chief Justice Marshall of deceiving the public as to unanimity on his court by curtailing individual opinions. It is also well known that Chief Justice Hughes sometimes voted for decisions with which he disagreed in order to avoid an appearance of conflict on his Court. And disclosures contained in books regarding other Justices provide evidence that other Justices on occasions have succumbed to pressures from their brethren or their Chief Justice and allowed their votes to be announced as in favor of decisions with which they disagreed.

The myth growing about Chief Justice Warren necessarily involves the contention that he somehow coerced or persuaded Justice Reed and other potential dissenters into making the decisions unanimous. I think it fair to assume that Chief Justice Warren will not dispel such myth, especially while he remains on the Court. Similarly, it would seem highly unlikely that the three other veterans of the 1953 term remaining on the Court (Justices Black, Douglas and Clark) would find it appropriate to discuss the segregation cases, even if they remember or ever knew the details of what occurred.

Four of the Justices comprising the Court which decided *Brown v. Bd.* are now deceased — Justice Frankfurter, Jackson, Minton and Burton. To my knowledge the only one of such quartet who made a public statement regarding the cases prior to his death was Justice Minton. In an interview on the tenth anniversary of the decision he stated that the decisions were "inevitable" and were "coming for a long time" but he gave no clue regarding what occurred behind the scenes.

I think it likely that a version of the facts

exists in papers of Justice Frankfurter and I know that Justice Reed was interviewed at length regarding his career by a professor from Columbia University. The Justice indicated to me he had imposed the condition on the Columbia project that all information provided be held confidential for fifteen years after his death. The Justice noted that he had been quizzed about people he had known in government but he did not indicate whether he had discussed the segregation cases or, if so, how much he revealed.

Justice Reed has never told me that it is his desire that the facts I have related to you be forever confidential. It was, of course, understood by all law clerks that during their tenure they should keep confidential everything that went on at the Court.

On the other hand, no rule of the Court, nothing in the clerks' oath or employment agreement, and no request by Justice Reed dealt with the propriety of revelation of information regarding the Court after such information has passed into the realm of historical material. At the end of my tenure, I considered asking the Justice whether he wanted my folder marked "segregation" but I had the feeling that such would result in destruction of the materials and I had doubts such irrevocable result was desirable. In short, I had the feeling that it might be desirable if such materials were preserved for history by a person outside the Court. Accordingly, I took the file with me and a couple of years after beginning practice I spent several winter evenings recording the details which I turned to in preparing for my talk tonight.

The main reason I never asked Justice Reed about his feelings regarding my eventual publication of the whole story was fear that he would indicate he preferred that the truth never be revealed. His secretary told me he destroyed most of his own collection of files relating to Supreme Court work after retiring from the Court and I would guess that my records are more complete than his anyhow. Having harbored the foregoing concern about the Justice's attitude, I was considerably astonished in 1957 to receive a letter from the Director of the Rutgers University Press reading as follows

April 22, 1957

Dear Mr. Fassett:

I have been in correspondence with Mr. Justice Stanley Reed, who was for a summer a neighbor of mine on South Mountain Road in New City, New York. The subject of our correspondence has been a book manuscript which two professors in the Law School of our University are just completing. The book is called *Desegregation and the Law* and is an attempt to explain to the non-legal reader the background of Brown vs. Board of Education and the other cases and, indeed, how the whole American system of constitutional law operates. The book is a nonpartisan book as far as it can be made so. We had hoped that Justice Reed might review the manuscript as soon as it has been retyped with an eye to catching any inaccuracies or inconsistencies of interpretation. He has replied that it would not be proper under the circumstances for him to do so even, as we have intended all along, without the fact of this reading becoming in any way public. He has, however, suggested that you might be willing to read the manuscript and says that you are thoroughly familiar with the background of the decision.

The purpose of this letter is to ask whether there is any possibility of your going over it for our usual somewhat modest honorarium and giving us any criticism which would be useful to the authors. We very much hope that you will be able to do this for us since it is very important that a book in such a field be as correct as possible.

Hopefully and sincerely yours,  
William Sloane  
Director  
(Rutgers University Press)

While I believe I could have construed this development (which I confirmed by contacting the Justice) as giving me a free hand to reveal whatever I felt appropriate, I did not in 1957 feel that it was appropriate that any of the inside story be told. Accordingly, I agreed to review the manuscript only for factual errors and only on the condition it would not be expected that I reveal any additional information I possessed regarding the decisions or point out errors in analysis of what occurred at the Court. Justice Reed's role with respect to the Rutgers Press Book has led me to wonder on several occasions whether he has counted on me eventually putting the record straight.

In any event, until tonight I had never told this full story — and tonight I tell it with the trust that it will remain confidential and with the expectation that you gentlemen will give me the benefit of your wisdom regarding whether and when it should be revealed. Actually, I reserve little doubt that eventually the true facts should be available to historians, even if not until long after I am gone. So the

question that really concerns me is "when?"

For many years I felt that revelation of the facts would result in a setback to the civil rights movement by giving new ammunition to the segregationists. In short, publication might eradicate at least some of the benefits that unanimity in the decisions had attained. After twelve years such seems less likely and maybe it would be desirable to provide an example of statesmanship for some of the leaders on both sides of the civil rights movements to attempt to emulate.

I recently clipped a newspaper article wherein Ted Sorensen was quoted as stating that the reason he wrote *The Kennedy I Knew* was "to dispel myths about the late President." Is it really any more desirable that myths be dispelled about a president dead less than two years than about one of the most important judicial decisions in the history of man? Gentlemen, tell me if you will.

**Editor's Note:** When the author delivered his talk in 1966, he was concerned that Justice Reed's consideration of a dissent in *Brown v. The Board of Education* might have been construed as providing moral support to segregation. This concern was put to rest by the release of the following correspondence between Justices Frankfurter and Reed in May, 1954.

Dear Stanley:

History does not record dangers averted. I have no doubt that if the *Segregation* cases had reached decision last Term there would have been four dissenters—Vinson, Reed, Jackson and Clark—and certainly several opinions for the majority view. That would have been catastrophic. And if we had not had unanimity now inevitably there would have been more than one opinion—for the majority. That would have been disastrous.

It ought to give you much satisfaction to be able to say, as you have every right to say, "I have done the State some service." I am inclined to think, indeed I believe, in no single act since you have been on this Court have you done the Republic a more lasting service. I am not unaware of the hard struggle this involved in the conscience of your mind and in the mind of your conscience. I am not unaware, because all I have to do is look within.

As a citizen of the Republic, even more than as a colleague, I feel deep gratitude for your share in what I believe to be a great good for our nation.

Very sincerely yours,

Felix Frankfurter

Dear Felix:

Your note in regard to the *Segregation* cases was appreciated by me.

While there were many considerations that pointed to a dissent they did not add up to a balance against the Court's opinion. From Canada through Smith and Allright, Sweat, Morgan, Steel to Jay Bird the factors looking toward a fair treatment for Negroes are more important than the weight of history. While "due process" seemed a better ground to me, there really isn't much difference. Equal protection comes close in this situation.

Stanley Reed

# Justice Van Devanter's Remarks to the Montana and Wyoming Bar Associations in 1937

## Justice Van Devanter on the Old West:

Mr. Toastmaster, Ladies and Gentlemen: Words hardly enable me to tell you how happy I am to meet you here tonight; how happy I have been to participate in this joint session of the Bar Associations of Montana and Wyoming. These two states, here upon the apex of the continent, are peopled by those who are of the same character and of the same purpose and engaged in the same occupation. I am proud to have come from the Rocky Mountain region, I am proud to be one of you.

The toastmaster indicated to me that the time was limited, and I would have known it even if he had not said so, but I would like to tell you a few things about this country when it was young.

Down at Evanston, they had a prosecuting attorney whose name was Garbonetti. If he was an Italian, it was a long time before. The fellow was an American in every sense. When arguing a case, he sometimes did not put in all of his evidence. One time when he was prosecuting a man arrested for grand larceny, for stealing tobacco from some store, he proved everything up pretty well, except the value of the tobacco. Of course, if the value was not proven, it was petty larceny; and if the value was proven and it was over twenty-five dollars, it would be grand larceny and the penitentiary was the place the defendant would go.

Finally, when he announced that his evidence was in, the defendant's attorney asked the Court to instruct the jury that they could not find the defendant guilty of anything except petty larceny; that there was no evi-



Willis Van Devanter began his legal career as an attorney and later became Chief Justice in the Territory of Wyoming.

dence of value of the goods stolen. Garbonetti arose and pleaded to be allowed to reopen the evidence and prove the value. The Judge told him that he would do it that time, but he would not do it any more, although the Judge always did, just the same. When they called the tobacconist to the stand Garbonetti said: "You remember you are the owner, and you remember the names of these tobaccos; won't you repeat them again?" And he said, "Little Joker, Old Judge" and some other brands that

he named. "You know their values, do you?" He said "Yes, I know their values." "Well, you may commence now and give their values." The witness, a little bit abashed, said, "I don't know just where to begin. Which one shall I begin with?" When Garbonetti said with a little smile, "You may begin with the Old Judge first," the gray haired man with whiskers up on the bench said, "No, Mr. Witness, we will take a little joker first."

Your toastmaster worked a dog into his remarks. I think that my story about a dog is better than his. Down at Laramie, they had quite a devout minister who took an interest in all children. He became almost a parent to them. One day he came around a corner where half a dozen excited little lads were quarreling. He said, "Boys, boys, what is the matter? What is this disturbance?" One of them replied, "This is a strange dog here and they are trying to see who shall have him." The minister said, "Well, how are you going to determine it?" The boy said, "The boy that tells the biggest lie gets the dog." The minister said, "Boys, boys, boys, don't do a thing like that. When I was little like you, I never told a thing like that." "The dog's yours, the dog's yours," a little fellow said.

When I came to this country, Jacob Beeson Blair was an Associate Justice of the Supreme Court of the Territory of Wyoming. He had been in that office some little time and he had letterhead on which he had the scales with the blind goddess and under that it said "Equality under the Law." He did not know a great deal of law, but he was a man with a very good share of that uncommon thing that we call common sense. I practiced before him a great deal, and I sometimes lost and was aggrieved, and sometimes won and was surprised. But it evened up fairly well.

After I went to Washington [and was] on the Supreme Court, I think it was perhaps the first day that I sat on the Court, the Chief Justice said that the next case was the State of Virginia against the State of West Virginia. An array of counsel for each State came up to the bar, and the case started. But before it did, they asked for additional time to submit it, because two states were involved.

The question concerned West Virginia and its separation from Virginia at the time of the Civil War. Virginia was an old state and had a large debt and many public buildings and improvements. At issue was whether or not



The Evanston Courthouse in Evanston, Wyoming.

Wyoming State Archives, Museums and Historical Dept.

Wyoming State Archives, Museums and Historical Dept.



Jacob Beeson Blair served in Congress representing that portion of Virginia which became West Virginia in 1863.

West Virginia should pay a part of that old debt, and if so, how much. When they admitted West Virginia into the Union, they did so in a little bit of a hurry, and they did not give as much attention to the matter of debt at the time as they might have done. The compact between the two states, as approved by Congress, only indicated that West Virginia should pay a fair proportion of the debt of Virginia.

The argument before the Supreme Court continued, and before long, one of the attorneys produced a speech by Jacob Beeson Blair. Jacob Beeson Blair had been the representative in Congress from that part of Virginia that became West Virginia, and he was very anxious for the admission of West Virginia. At the time admission was being debated, a question was raised as to whether or not this clause concerning debt obligations was sufficiently definite. Somebody said that it was so indefinite that it did not amount to anything. So Congressman Blair delivered himself on the subject, saying it was a very reasonable provision, and as explicit as the situation admitted; that any court of common sense would be able to arrive at how much West Virginia should pay. Well, we took Blair at his word and

assessed West Virginia four and one half million dollars. But I thought that it was really quite a coincidence that the speech of a man who had been a Justice here in this territory of Wyoming when I came here, and who later took his seat in Congress, was produced as the chief argument in favor of Virginia against his own West Virginia at the time that I was on the Supreme Court.

It has been a very great pleasure to me to see all of you. I am proud of the Bar of Montana and I am proud of the Bar of Wyoming and my association with both.

#### **Justice Van Devanter on Russia:**

Mr. President, Ladies and Gentlemen; I ought not to take your time, yet I could not resist the appeal of your chairman that I say something to you this afternoon. To those who were here yesterday, I expressed my sense of appreciation of the privilege and pleasure of being present; and to those who were not here then but are here now, I repeat that sense of appreciation.

I have listened with a good deal of interest to the addresses that were made today. The one about Russia, and the new Russian Constitution interested me. It is not called "Russia," but the "United States of Soviet Russia."

I have but recently been in Russia and while I will not enter into an extended discussion of the situation there, I could not help but completely agree with the paper which said that things in Russia were a mystery, and why this constitution was ordained by the ruling power, not the people, was a mystery.

About all that I saw in Russia was a mystery. The things that occur in Russia, and that are of daily occurrence, could not occur here at all. That is one of the questions that I have found as I go here and there. The great body of the Russian people have been serfs or semi-serfs for many centuries. They have been receiving orders and obeying them; and that is what they are doing today. They have not changed at all.

Of the class called the intelligentsia, some are in Siberia; some are dead from execution; and some are restaurant waiters and guides in the principal European cities of the world. It is a term of opprobrium to speak of anyone in Russia as belonging to the intelligentsia, as

educated, as having taken the courses that our very esteemed and able friend Dr. Clark has taken.

Most of the work in Russia is done by women. They are less dissipated. They have for centuries given attention to work involving much detail.

There is an electric plant in Moscow. Moscow is a city of four and one half million people, and ninety-five percent of the people in that electric plant are women. That is because their work is more efficient, because better results are obtained from the labor of women. Unexpectedly, and it was not intended that it should be so, I witnessed about five hundred women building a railroad. It was an additional track, built just as well as we build railroads. They had a good fill, well made, and then they had broken rock on top of that, just the same kind that we ballast our roads with; and then ties such as we have, and then the rails. And those women, without shoes or stockings, strong looking women, a great many of them expectant mothers—that was obvious—were using picks and shovels and packing stone under the ties, and between

the ties, and driving the spikes that would hold the rails to the ties. They were not scattered over a vast area. They were in a small space. And off about a hundred feet, were men seated with rifles to see that they did not shirk. Now then, you can't tell me that that is a free country. (Rapping his knuckles on the table.) You can't tell me that that is a country in which they respect and protect personal privilege. They don't.

There are no private automobiles. There are not many automobiles. They are all owned by the government. If you want one, you rent it from the government and you get your chauffeur from the government and the government prescribes the pay. You cannot select your chauffeur. You take the one that is assigned to you, and you take the guide that is assigned to you. To say that that is a land of opportunity; that that is a land where you may, by your own effort, work out your own advancement; to say that is to run contrary to the actual facts.

Everywhere you go, you see women hard at work. I do not care whether it be a depot or whether it be a streetcar—it is women who are performing the work. By the way, the streetcars are all run by women. They are electric streetcars, and the women run them. The women sweep the streets. All over, in the great cities of Moscow and what used to be St. Petersburg, there is dilapidation. The present regime is favoring Moscow to the detriment of St. Petersburg, which was the home of the nobility. It had been a beautiful city, a wonderful city, but it is now being neglected, very greatly neglected.

Now, one other thing; in St. Petersburg there is a great church. As you approach it, you wonder at its magnificence, at the perfection of the building, and as you look at it, I care not whether you are a member of a church and particularly attached to some religious sect, you are particularly affected with the thought that that is a place for the worship of God and it would not be adapted to anything else. But where you go in, there is a side show and a great banner up high which says, "He who believes in God is an enemy of the Soviet state." No doubt about it. There isn't any question of translation or anything of the kind. Although it says it in the Russian tongue, it says it very plainly. That is St. Petersburg.

I was in one other church. It was across from



Russian women serving as engineer and fireman on a Soviet train—"Most of the work in Russia," said Justice Van Devanter, "is done by women."

the Kremlin in Moscow. It is the oldest church in Russia. It is not particularly attractive because of the magnificence of its construction, but it is attractive because it is the oldest church in Russia—that is, the oldest one now standing—and because it is of a time architecturally that would make it of especial interest now. And the same banner was there.

Now, we do not want, of course, under our tradition, to force any particular religion upon any one; but rather, to accord them the fullest

freedom in that respect. But in a country where they say that he who believes in God—and they say that on the tabernacles that are erected for the worship of God, "That he who believes in God is an enemy of the Soviet state," that is the case of a mill turning backward. It won't grind. The product of it won't wear.

You go across the border into Germany. The Two countries are not friends now. There are reasons for that, but in Germany they have, for



The Church of St. Basil in Moscow was visited by Justice Van Devanter.

reasons that you would well understand, taxed everybody until the ordinary sources of taxation are largely exhausted; or so greatly reduced that the volume of tax raising is wholly inadequate. And therefore, they tax things that you would never dream of. (Rapping on the table.) I paid a tax of many marks for the funeral service for my wife there. [Editor's Note: Justice and Mrs. Van Devanter travelled to Europe in 1937. They went first to Russia and then crossed over into Germany. While travelling, Mrs. Van Devanter, nee Dollie Burhans, died in Wiesbaden, hence Justice Van Devanter's remarks about the death taxes which he had to pay in Germany for the funeral services held there for his wife.]

I tell you that countries which follow those lines don't offer good examples for us. They are headed in the wrong direction. We are a different people, differently constituted. Perhaps we would resent being taken in such a direction quicker than other countries would now, but we must not drift into any such direction as that. We have to go on, and go forward along our own lines; and our lines are pretty well marked out in our own constitution.

#### JUSTICE VAN DEVANTER ON THE SUPREME COURT

I am delighted to be here. It is a great pleasure, and it is a pleasure not only in the personal sense, but it is deeply gratifying to see the substantial development in these Western parts. Wyoming and Montana were both territories when I came West. I can remember that a few years later I attended a meeting of the American Bar Association in Boston, and as I look around here now there were not as many members present at that meeting as there are here today. And yet that Association has come now to include thousands, and its attendance at meetings runs into the thousands.

I have no doubt that you would be glad to have me say something about the Supreme Court of the United States. I shall be very glad to say something about it, but I shall not talk about the phase of it that has recently been of the most interest. To me, that would be inappropriate and I therefore shall let it go unmentioned. All that I might say in that connection would be by illustration or recita-

tion of a story.

There was a literary character, Rupert Hughes, who recently dealt with the life and character of President Washington, the Father of our Country. And he gathered together all that any enemy of Washington had ever said, garnished it some, and put it into a book. It is not worth reading. Then he got somebody to take him to the President, Mr. Coolidge, and present him, and so he was presented to the President. He had not said anything about it, but he had a copy of his book wrapped up and under his arm, and he said to Mr. Coolidge, "I have taken some liberties in describing your first predecessor." And Mr. Coolidge, in his way, said, "Yes, I know." Then Rupert Hughes said, "I have taken the liberty of bringing you a copy of the book," and Mr. Coolidge said, "I have read it." But Rupert Hughes did not stop with that, but went on to say, "Well, what do you think of it?" And Mr. Coolidge said, "If you will, just step with me to the window here I will give you the result." He pulled the portieres to the side at the window that opened on the south expanse of the White House, and said, "I came over here when I finished, and I looked out there and I saw the Washington monument, and I saw that its foundations were not disturbed, and it was standing there as a mark by the American people to the greatest man that ever lived in America." That was their whole conversation. (Applause).

The foundations underlying the Supreme Court have not been disturbed. And after a while the flurry that we have had will be forgotten.

But now, let me say something about the Court in other ways. It won't be instructive. It won't be what I would like to say to you. But the first time that I was ever in the court room, Matthew Carpenter, a Senator from Illinois, was arguing a case; and he was having uphill work. A Justice over here interrogated him, and the interrogation indicated that the argument was not a strong one. And the answer did not help. Somebody over there interrogated, and after a while Mr. Carpenter gave up and sat down. Then the gentleman on the other side rose, and he was a bit deaf, and the Chief Justice leaned forward a little bit in a very polite way and he said, "Did you specially wish to be heard?" (Laughter) And the man did not catch it quite and he said, turning to

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Chief Justice Edward Douglass White (left) and Associate Justice Joseph McKenna (right) shared the High Bench with Justice Van Devanter through much of his tenure on the Court.

Mr. Carpenter, who was sitting there, "Tell me, please, what the Chief Justice said. I do not hear so well." And in a voice which you could hear all over the room, which was not large, Carpenter said, "He said he would rather decide the case in your favor, rather than to hear you." (Laughter)

Now, that is about the largest laugh that I ever heard in court. There was a lawyer from Idaho who came to us once, and he illustrated his argument by telling a story which was particularly humorous; and I cannot remember the story, but I do remember that he upset everybody, and those are the only two occasions that I remember that mirth took possession and had its full swing.

When I went on the Court, Chief Justice White was there. He was nominated for Chief Justice about the same day that I was nominated for Associate Justice. Indeed, I was nominated to be his successor. Now, he had been a Justice of the Supreme Court of Louisiana. He had been conspicuous in the Tilden-Hayes controversy respecting the presidency; and he had been in the Senate. Mr. Cleveland had sent the nomination of Wheeler H. Peckham, from New York, to fill the vacancy caused by the death of Justice Blatchford. And Mr. Hale exercised his pre-

rogative in the Senate and opposed confirmation. Then Mr. William B. Hornblower, of New York, was nominated and that nomination suffered the same fate.

The President, Mr. Cleveland, then sent for Senator White, and he told him that he was about to send his name to fill the vacancy. And the response was, "Why, Mr. President, I do not feel quite equal to that; I hesitate to give my assent, and besides, that is a vacancy from the great Northeast, and it would seem to me that the Empire State would be entitled to the nominee." The President said to him, "I have tried to give it to the Empire State, and I have nominated two excellent men. Now I am going just as far from the Empire State as I can go." And so he sent Senator White's name in and it was confirmed the next working day, as was the rule in those days.

Senator White was a large man. He was a fine civil lawyer. He knew nothing about the common law, and it was a little difficult for him to accommodate himself to common law terms and common law principles; but as he went along he found that each had in it the prototype of what was in the other and that he could get along very well. He was a man of great natural ability and a very practical man. He was a worker and he succeeded admirably as a Chief Justice. He sometimes would soliloquize. Walking on the street he would think of some opinion he was writing. He would think about some difficulty he had just encountered in the course of reading the opinion, and oftentimes he would forget and just burst out and say something. And one of his expressions was, "God help us!" And so, one day in Court some lawyer was arguing a case and he had stated the case and stated the principles he relied upon and the points, and the Chief Justice had weighed all of that, but the attorney proceeded as though it was his duty to occupy all the time that he could, and finally he got to orating some, and the Chief Justice quit him and commenced to thinking about some case, and just then—just then, the attorney announced some proposition that was monstrous, but he brought his fist down on the table. And just as he did that, why, the Chief Justice kind of came to and he said, "God save us!" (Laughter)

Justice Harlan was the Senior Associate when I went on the Court, and one of the odd

things was that White, the Chief Justice, had been in the Confederate Army. Justice Harlan had been a Brigadier General in the Union Army, and they sat side by side in the Court. Harlan was a very tall man. He was very well educated as a lawyer. He was a great story teller. He had never had any judicial experience before coming on the Court, nor any other official experience except his experience in the Army. But that had served him well. It had taught him how to deal with men. He was a man with a big heart and liberal views. He had fought on what he thought was the Negro's side. He not only fought to save the Union, but he fought to free the Negroes. And every case that came up, where there was a decision affecting a Negro, if the decision was not in favor of the Negro, he dissented. (Laughter) They were his friends. On the other hand, off the Court, he used to be a professor in Columbia University and so was on the faculty in the law school. And some Negro young men came there and wished to come in, and the matter was submitted to the faculty. Justice Harlan asked that it not come to a vote and he said, "Send those young men to me; have them come to my office tomorrow morning at nine o'clock." Or he said, "Come to my house and I will talk with them, and I will report it to you." I do not know what was said, but you can draw your own inference. They withdrew their applications. That was his way of dealing with such questions. But he was a strong character, a man of great individuality, and he made a wonderfully good Justice.

After him, came Justice McKenna, who seemed in some ways effeminate. I think that he never in his life said aught that hurt anybody, and yet he was an upstanding man of courage, and of real convictions. His primary education had not been as good as those I have mentioned, but he was a very, very high-toned man, a man who was born to be a gentleman, without going to some school to get it. He served a very, very long time.

It may interest some of you to know that he was a Catholic. His name suggests it. He was a devout Catholic. He believed in his church, but I never saw him say or do anything for a moment that would indicate he was trying to do anything for the church; and in litigation, I would say that he was as far removed from any consciousness of purpose to serve the church

or those in it as anybody could be. He was intrinsically a fine man.

And then there was Justice Day, who was a strong man in many ways. He came from Ohio. His father was a judge in Ohio. He had been a common pleas judge himself. He had also been Circuit Judge, and he had also been Secretary of State. He had had a rich experience in respect to judicial and administrative matters, and that qualified him splendidly for the Court at that period. He had a great deal to do with the treaties and laws that related to the Philippines and Hawaii, and the Canal Zone and all that; and he understood the spirit of all that, and he was always a very steady and very helpful associate. He was given to joking, and sometimes he would say things that were exceedingly interesting. I remember Justice Harlan came into the conference room one day shrugging his shoulders. It was raining and cold, sleet probably, and Harlan said with some emphasis that this was a very bad day, and no one responded. Then he spied Justice Day sitting there, and he made that same remark to him, and Justice Day said, "Yes, but it is all we have got."

Next after that came Justice Lurton. He had been Chancellor of his State; he had been



*Office of the Curator, Supreme Court*

Despite his frail physique, Associate Justice William R. Day (1903-1922) was, said Justice Van Devanter, ". . . a strong man in many ways."



*American Image Gallery (L) Office of the Curator, Supreme Court (R)*

President Lincoln and his own son "Tad" in 1864—Lincoln's sympathy for an anguished mother's plea led to the release of captured Confederate soldier Horace Lurton (right). Barely more than a boy himself at the time, Lurton eventually joined the Supreme Court in 1910.



United States Circuit Judge, and had had wide experience. He was almost sixty-six when he was appointed. He was a very, very industrious man, a great student, and went forward with his work efficiently. He was a Southerner. He had been in the Confederate Army.

And now, it is of interest to all, that the Supreme Court has a human side, not different from others. Lurton spent quite a bit of time at the War Department. He had been captured and was taken up on Lake Erie to some federal prison; he contracted what they thought was tuberculosis. His father was a Tennessean and would not interfere. He would not ask for the boy's discharge. He would not take any step. He was so much for the Confederacy that he would not ask any favor. But the mother came to Washington, and she went to see Mr. Lincoln, and of course, she was denied admittance. She persisted and finally she saw the President and she told him about her son, that the Confederacy ran out of men and they had to take boys. There were a good many boys in the Northern Army, for that matter, but not such a large proportion; and she told the President about her boy up on Lake Erie and those cold winds, and that he had contracted tuberculosis in a federal prison. The President

told her that he sympathized greatly with her, but that he could not do anything; that the Confederacy was dealing harshly with the prisoners from the North, and it was difficult to get them exchanged on fair terms; and that his own country was criticizing him very severely for his liberality towards Confederate prisoners in the North. Her heart broke, and she staggered toward the door; and as she got to the door and looked back at him, he said, "Oh, madam, come back." He could not stand it. He took a paper and said to the Secretary of War, "This lady must have her son. I want this reported to me." And she took that note, I do not know where, but I expect to the War Department and the result was that Justice Lurton was released to his mother and she took the boy home. Justice Lurton wanted that paper, and he thought that some officer must have gotten it and made a return on it, and, oh, he wanted that paper with the President's handwriting on it. And while he was a Democrat, and a Southern Democrat, Mr. Lincoln's faith was to him just like the sunlight. That was his recollection.

Next after him came Mr. Hughes, who had been Governor of New York and then was appointed to the Court. I am going to surprise

all of you. He did not want to run for the presidency at all. Now, just catch that; he did *not* want to run for the presidency at all. I know that. We all knew it. He had been a candidate before, at the last convention. He felt that he could not announce that he would take it, that it had not been offered to him, and that he, who had sought it, could not be ugly about it, and his hope was that they would not nominate him. So he prepared a telegram to send to the convention. But he was dissuaded from that, and very greatly against his own will.

He is back on the Court now as Chief Justice, and he is a great worker. He is a very able man. I was the next appointee after him, and on the same day that I was sworn in, Joseph Rucker Lamar of Georgia, was also sworn in as an Associate Justice. There is a little bit of personal interest attached to that, as far as I am concerned. He and I were members of the same college fraternity, and in 1877, we journeyed from Cleveland to Detroit to attend a fraternity convention. We went over on the same vessel. We had never met before, and when we found that we were both delegates to that convention we became very well acquainted. I think it is fair to say that each liked the other. I never saw him again until we went into the court room to take our oaths. He had been a Justice of the Supreme Court of Georgia. He was a Southern gentleman. He was independent. It did not make any difference about the South or politics or anything else. It was with him always, always, always principle. I am mighty sorry that he could not have lived until today. He was a wonderful man.

After him came Justice McReynolds. He is still living and on the Court, and I shall therefore say nothing.

And then came Justice Pitney. He had been Chancellor of New Jersey, and had been a Congressman, he was highly educated and one of the hardest workers I ever saw. Killed himself with his work. One day word came over that he had been stricken with paralysis, and that was the same thing that took Justice [Joseph R.] Lamar.

And after that came Justice John Clarke, and the work became too hard for him and he resigned. Then came Justice Brandeis and the others whom you know.

But now, let me tell you something about the

work of the Court. When I became a member of the Court, the cases were over eighteen months to two years behind. The docket was that much in arrears. The only way that a case could be resurrected from that heap, except by waiting in turn, was a motion to advance. A state having a case could usually get it advanced. The United States could get some cases advanced, but the United States had so many that it could not advance them all, and once in a while private cases would be advanced because they involved so many issues and affected so many interests but every time you advanced a case it set the ordinary run of the docket back one. It became a great problem as to what we should do. Something was said here this afternoon, by one of your very interesting speakers, about devising methods of improvement in practice. That worried all of the Justices. The burden of those things falls a little more on the Chief Justice than on anybody else, but it worried all of us. Quite often, I don't mean in the majority of cases, but in a great many cases, one of the parties had died before the case could be reached. It probably had been occupying the time of the



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Associate Justice Willis Van Devanter (left) and Chief Justice Charles Evans Hughes (right).

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Office of the Curator, Supreme Court

Associate Justice Willis Van Devanter (left) and Chief Justice Charles Evans Hughes (right).

courts for some time before it ever got to our Court.

It was decided to revise the rules, to revise the equity rules and the rules of our own Court. Our Court made the equity rules for all the federal courts in the United States. And those were revised, and we had to revise them pretty severely.

It became my difficult task to take a hand in that work, and a good deal of work of the committee was put on me. I never devoted more interesting time to anything than I did to that; with the result that suggested rules were adopted with very few changes.

They helped immensely. Then the bankruptcy rules needed revision. Unhappily, I got into that, and then into the admiralty rules, but others were free to help and glad to help. The result of it was that within 18 months we had cases where we were only about six to nine months behind, and for the last five years the Court has been up to date. I don't mean that when it adjourns there is no case on the calendar. I don't mean that. But I mean that every case that is due for argument, due for hearing, has had time for printing the record and filing briefs, when that time is past, the case will have been heard before we adjourned — heard and decided.

My retirement took effect on the last day of this last term. There were no cases carried over. Perhaps I should qualify that this way; there were two or three cases in which one of the judges could not sit, and the vote in the cases was four to four and the feeling was that it was not proper since that would operate as a confirmation of the lower court. So the cases were restored to the docket for reargument, under the assumption that the new Justice might solve the problem in some way, or offer something that would help.

But, the work of the Supreme Court is enormous. It is interesting. It is absorbing. But it is a grind. Eyes give out frequently, and when they don't, you don't get the sleep that you need. In 1925, we concluded that there ought to be a change in the legislation relating to the cases that the Supreme Court should select.

I would like to speak to you about that, because I think it is not known, it is not understood and it is not appreciated. Prior to that, every case in the state court of last resort, and every case in a Circuit Court of Appeals

that had a federal question in it could come to us, as of right. Well, that would mean that a great many cases could come that did have a federal question, but the federal question had been decided rightly and had been decided so often that it was time-worn, that is, the main question was. And cases would be brought to us by the unsuccessful litigant, sometimes because he was mad and wanted to succeed, and sometimes because he wanted to wear his opponent out. It furnished an opportunity of putting the one who had succeeded below to great expense, and to great delay. And so, we conceived the thought that if most of the cases were presented to our Court by a petition for certiorari — [now, you for all practical purposes call it a petition for an appeal] so that, we would go over them first to see whether any case was "colorable," and if it was, grant the petition. That way we could weed out a large number of would-be cases. If the case was not colorable, the petition would be denied. In that way you saved enormous expense to litigants, and also an enormous amount of time.

For example, here are two men or two institutions, and they have been litigating until pretty nearly everything they have is involved in that litigation. One has won in the trial court of the state and then won in the Supreme Court of the state; maybe it is in the trial court of the federal court system, and a U.S. Court of Appeals. And yet, he would not get the fruits of his victory, notwithstanding it was obvious that the judgment, when it was confirmed, would not result in any change.

You have no idea of how many criminal cases come to us in that way. Almost everybody who was sentenced to be hung conjured up some question that he had been denied some constitutional right, or that a jury trial had been denied. Well, the Constitution of the United States does not guarantee a trial in the state court. It does guarantee a trial by jury in federal court. I could go ahead with many, many instances, but I think that the result of that has been that now, notwithstanding increases in litigation, the cases that actually get to the Supreme Court are not more than sixty percent of what used to actually go there. That helps to keep everything up-to-date, and does save the litigants a very, very great deal.

It seems to be persistently thought that the

petitions for certiorari are parceled out, and that those, for instance, of this circuit would go to the justice assigned to this circuit; that he would simply report to the conference, and the conference would follow what he recommended. Now, that is not so at all; and when I say it is not so at all, I want you to understand it is not so in any form. No kind of situation justifies that statement. The petitions are divided into bundles and every petition for certiorari, with the briefs on both sides, and the printed record, goes to every Justice and there are lists of the cases that are going to be called the next Saturday—the conference day—and each Justice gets this list about ten days before the conference and prepares for the meeting. He dictates or writes a little memorandum of what he thinks about it, and the cases are called. The petitions for certiorari are called, for example, and the Chief Justice states the case as he understands it, and what he would do with it. Then he calls on the next man. Of late, it was I because I was the Senior Associate Justice, and it goes on down the line. If three judges would distinctly ask that the petition be granted, it is granted, although it would take five for a majority. It was thought that if three or four judges were influenced by a petition to think that it should be heard, we should resolve the doubt in favor of the petitioner. And as a result, I want to say to you that the Justices were always prepared in those cases.

On occasion, if for one reason or another, the Chief Justice could not open, perhaps because he could not be present at conference, or for some other reason, he would call on somebody else to open that case. They were always prepared and always did. And so I say to you that those petitions for certiorari get very serious consideration by every single member of the Court, and the result is that when a petition for certiorari is denied it means that it would not have had a shadow of a chance if it had come to argument. Now, the man who took it there, he might think it had, you might not be able to convince him, because maybe he thought there was a federal question, but the Court might think otherwise.

Now, there might be a situation like this: although the time was ninety days in which to file a petition for certiorari, just about one-

fifth of them were filed after the ninety days, notwithstanding. The printing might be two thousand pages. Oftentimes, the briefs would tell you all about a federal question, and would not point to the record to show where they had raised the federal question, and you would look at the record and read your eyes out and would not find any, and you would not find that the Supreme Court of the state dealt with the federal question. But they conjured up one to meet the situation.

And so I want to say to you, with the very greatest candor, and with real emphasis, that the work of the Supreme Court is carefully done, it is thoughtfully done, it is done as well as it could be by the men who do it, and those men are drawn from all quarters of this country, and they are drawn from different walks of life, and the result is that you get a consensus of opinion there that is striking. And if you were to sit in at the conference, or sit through a conference, and see those cases come, the way they are discussed, and so on, you would just marvel at the understanding that the judges have of the cases and the way they have advanced their reasons, and so on.

It is true that there are divisions, but there are not more than five percent of the cases in which there is any division at all. You do not ever hear of the cases where there is no division, and there are not more than two and one-half percent in which there is a dissent by as many as three.

Now, of course, there are some five to four. Numerically there are very few. The class of the case is very likely to be one that will be heralded through every news channel, and maybe that is the only case decided that day that you hear anything about; and sometimes people think that the Court only deals with that kind of case, and with that kind of decision, but of course that is not so.

It is impossible to avoid division. You have heard it suggested that courts should adopt a rule, not a universal rule, but a rule that they recognize and adhere to, of having no dissents. But that would not do. The dissent gives a Justice who does not agree to a prevailing opinion the opportunity to express his views, to express his individuality, and if it was not that way, there would be a good deal of smothering. Just in the course of nature, there would be a good deal of smothering of opin-

ion, and that is not a good thing, and we don't want that. It would be an unhappy situation and it is better to let the public know what is thought and let every judge exercise his individuality. That is very much better in its consequences than any other rule that I can think of.

And if I had the words and the time, I would try to paint for you a picture of the Supreme Court in which I would make it the cornerstone, the foundation stone of our government; and I would say that the days of its necessity were never greater than now. (Applause, all standing)

PRESIDENT JAMESON: In one respect,

at least, the Montana Bar Association is obliged to give full credit and honor to the Wyoming Bar Association in connection with this meeting.

JUSTICE VAN DEVANTER: (interposing) Let me tell you something, please. Something was said about which name would be used first, Wyoming or Montana. There is no opportunity for choice. The states are known according to their seniority. Montana was admitted to the Union before Wyoming. Montana is the senior. Never mind about the alphabet or anything else. Montana is the senior. (Applause)

# Imagining the Marshall Court

by G. Edward White

For the past few years I have been in the process of writing a history of the later Marshall Court for a series, commissioned with funds from the estate of Justice Oliver Wendell Holmes, whose goal is the production of "authoritative" histories of the Supreme Court of the United States. The result has been that I have read a great many old cases, sought to decipher early nineteenth-century calligraphy, collected a number of obscure treaties whose bindings have weakened with time and use, and produced a lengthy manuscript whose bulk and denseness will probably deter most people from reading it.

There has, however, been one consolation for this task: I have been able at times to transpose myself back into time, and to feel what it must have been like to be a justice of the Supreme Court in the early nineteenth century. But while that feeling has been strong and satisfying, I suspect that it will be obscured by the academic analysis of my forthcoming volume. So before the feeling dissipates, I have tried to capture it in some vignettes of the Marshall Court.

The information on which these vignettes are based is accurate, and could have been documented. But I have invented the conversations, settings, and thoughts of some characters. The "inside history" of the Marshall Court is largely a process of extrapolation; most of its internal decisions were made by judges who lived together in a boardinghouse and kept no records of their deliberations. To recreate the Marshall Court one has to start very far from its center, with scraps of letters and the official language of opinions, then try to peel away layers of legalistic prose and circumspect correspondence until one gets a feel for how the justices responded to one another and what weighed heavily on their minds. Ultimately one has to imagine.

\* \* \*

Brockholst Livingston was seated in the library of his house in lower Manhattan in

mid-afternoon of a January day in 1820 when a servant approached and announced that Judge Joseph Story was at the door, having arrived on the Boston stagecoach. Livingston arose and greeted Story warmly, indicating that he was in time for dinner. Story replied by launching into a lengthy discussion of his journey south from Salem, in the course of which he had endured sleet, a stagecoach that slipped a wheel and consequently ran five hours late, a tavern where he was forced to share a bed with a "yeoman" who reeked of stale clothes and ale, and the company, inside the coach, of a "high-necked vestryman who took snuff between his prophecies of decay and corruption." Livingston, who suspected that the vestryman had been amply paid back for his indulgences by having been seated near one of the most tireless stagecoach monologuists he had known, smiled and offered Story a chair near the fire.



*Office of the Curator, Supreme Court*

Associate Justice Henry Brockholst Livingston  
1807-1823

Office of the Curator, Supreme Court



*Joseph Story*

Associate Justice Joseph Story  
1812-1845

The next morning the two justices walked to the terminus of Manhattan Island to begin their journey to Washington for the opening of the Court. Their route would take them by ferry and stage to Trenton, then over the Delaware Bay to Havre de Grace, Maryland, where they would board coaches to Baltimore and subsequently to Washington. Normally they would disembark for overnight stops at Trenton, Havre de Grace, and Baltimore, but if the weather was clear and the roads smooth they would sometimes press on. On this occasion the packet from Trenton to Havre de Grace was becalmed, and Livingston and Story spent the night in the Four Roses tavern, where they managed to secure upstairs rooms and thus avoid the communal quarters of the ground floor. They were served the standard fare, for that season, of venison, turkey, corn meal, sweetbreads, ale, and port, with a mince pie for dessert. Over dinner the justices talked about the problem of piracy, which they both regarded as serious and complicated. Story was incensed at the disruptions pirates and dubiously commissioned privateers were making in the New England trans-Atlantic trade; Livingston joked that at least piracy and

privateering provided work for shipwrights, for suddenly a number of old schooners left over from the days before the war of 1812 had become rejuvenated in the service of the "Republics of Carthagena and Buenos Ayres."

Four days after they left New York the justices arrived in Washington, and headed for the Capitol Hill boardinghouse where they would spend the next six to eight weeks. Story would be sharing rooms in the boardinghouse with the Court's Reporter, Henry Wheaton; Livingston had his own room. Both men had not brought many clothes with them: they had had to carry their own baggage in transit and they were accustomed to wearing their staple outfits, which consisted of frock coats and knee breeches, for days on end. The linen cravats they wore at their necks needed to be changed regularly, but two or three suits of clothes would do for the duration of a term. The rooms in the boardinghouse were heated by fires and had pitchers and bowls for washing; there were no tubs or showers, and privies were outside the house in its rear yard. A communal breakfast was served at 8 a.m., followed by dinner, served after the justices returned from court about 4:30. A light supper was available at 8 in the evening.

On arriving at the boardinghouse Livingston and Story encountered the remaining five justices, who filtered in, one by one, from their respective homes. Thomas Todd and William Johnson had the longest distance to travel, and their arrival in Washington was sometimes delayed: one term Todd ran into such bad weather that he never reached Washington at all. Bushrod Washington, Gabriel Duvall, and John Marshall had comparatively short journeys, Washington coming from his residence at Mount Vernon, sixteen miles down the Potomac, Duvall from "Marietta," his Maryland plantation located about fifty miles from Washington, and Marshall from Richmond. This particular term all the justices arrived before February 1 without incident, and all quartered at the boardinghouse, as they had since the early days of the Marshall Court. Each of the justices had been on the Court since at least 1811: they knew each other well.

On the whole relations among the justices, at this point in the Court's history, were good.



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The Phoenix Line ran its coaches between Baltimore and Washington in about five hours, one of the shortest journeys Justices attending Court in Washington were called upon to make.

Johnson and Story, antagonists over the scope of admiralty jurisdiction, the power of the federal courts to decide nonstatutory criminal cases, and related sovereignty issues, were often at loggerheads, and Johnson's relations with the rest of the justices, save Marshall, were sometimes prickly. Story, despite his garrulosity and pugnacity, enjoyed good relations with Todd, Washington, and especially Livingston and Marshall. Duvall, whose hearing had begun to fail, had a quiet, courtly manner and rarely took strong stands on issues; the other justices regarded him with affection and solicitude. Washington's earnestness, Todd's practicality, Livingston's wry, satiric humor and Marshall's consummate charm made the Court's internal relations, at this period in its history, markedly amiable. The remarkable term of 1819, in which *McCulloch v. Maryland*, *Dartmouth College v. Woodward* and *Sturges v. Crowninshield* had been decided, was a reminder of the Court's increased power and visibility, and the negotiated and invisible compromise that the justices had fashioned in *Sturges*, the bankruptcy case, testified to their strong commitment to the appearance of harmony and the suppression of public dissents.

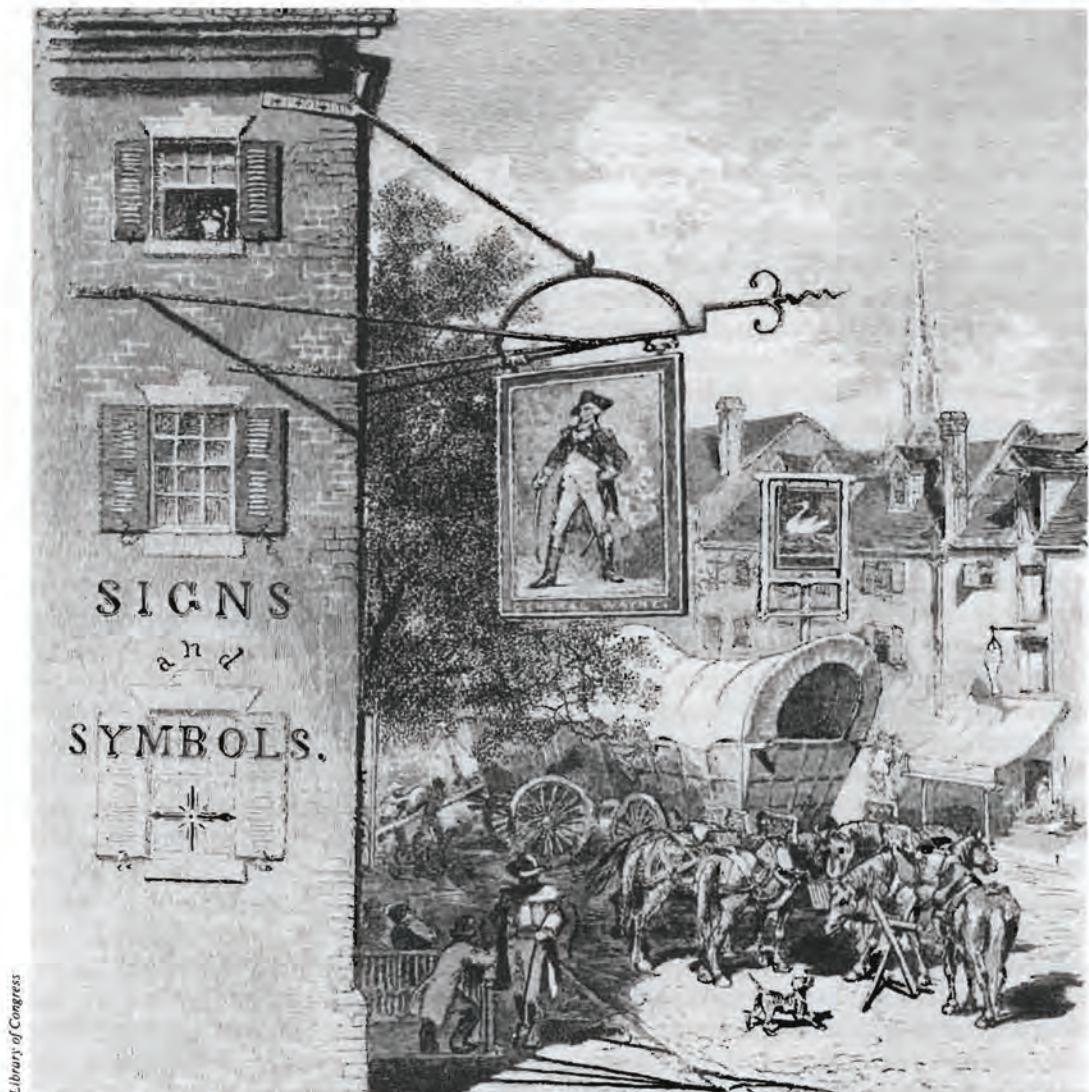
The longstanding acquaintance of the jus-

tices, their collectively amicable relations, and even the unseasonably mild February weather did not prevent some tempers from flaring at the first lengthy conference of the 1820 term. On February 22 all of the piracy cases, which had been argued a day before, were discussed. Washington opened the discussion by noting public criticism of the Court's first major piracy decision, *United States v. Palmer*, handed down two years earlier. *Palmer* had held that a congressional statute prohibiting piracy did not apply to acts committed against foreigners on foreign ships, despite the fact that the statute referred to "any person" engaging in piratical practices. Johnson said that he thought *Palmer* had been wrongly decided on the reach of the statute point: "any person" seemed not to invite a distinction between common citizens and foreigners. Story suggested, and Marshall agreed, that a "reconsideration" of *Palmer* might be in order: the critics had perhaps "misunderstood" the *Palmer* opinion. Todd said that in his opinion Congressional statutes on piracy had failed to "tighten the noose": he felt that under the current situation Americans could simply obtain commissions from foreign belligerents, go on plundering missions, and escape prosecution for piracy. Story indi-

cated that he felt that the new Congressional statute passed in 1819, which made piracy "as defined by the law of nations" a capital crime, had attended to that problem. Livingston responded that he felt that the 1819 statute was constitutionally defective because the definition of piracy was too vague. Story said that all the commentators agreed that civilized nations had equated piracy with "robbery on the high seas." Livingston said that his reading of the civilians was not as clear as that.

Washington reminded the justices of the first piracy case before them this term, where Ralph Klintonck, an American citizen, had planted false Spanish papers on a Danish ship, used the papers as a basis for evicting the ship's

crew and seizing the ship, and subsequently attempted to take the ship to an American port and represent himself as the Danish ship's captain. Klintonck's acts, Washington said, were "indefensible" and "notorious." Marshall suggested that the problem in *Palmer* was different from the problem in *Klintonck*, and the cases might be reconciled. The problem in *Palmer*, he reminded the justices, had been an unwarranted extension of the power of the federal courts in implementing the language of the 1790 piracy statute to reach acts committed by foreigners, or against foreigners, on foreign ships. Such an extension would have raised delicate foreign relations problems, Marshall noted, given the situation in the



Baltimore's "General Wayne" Inn was typical of the accommodations which the Justices might avail themselves of while travelling on circuit.

North Atlantic. But the problem in *Klintock* was different: Ralph Klintock was a pirate, an outlaw, and nothing else. Was it not the case, Marshall conjectured, that in seizing the Danish ship and in evicting its crew Klintock had made that ship a "pirate ship," beholden to no sovereign at all? If so perhaps he could be convicted for "general piracy."

Livingston agreed with Marshall's comments, and thought they nicely disposed of *Klintock*. But the second piracy case that term, *United States v. Smith*, was different, he felt. The defendant had not gone off on a wanton cruise, but had simply signed up as a crew on a privateer commissioned by an insurgent Latin American government, taken control of that ship, and subsequently plundered a Spanish vessel. The wartime relations between Spain and the insurgent republics, Livingston felt, made the acts insufficiently "piratical." Even though they were "robberies on the high seas," they might have been sanctioned by belligerent states. He reminded the justices that the defendant in *Smith* would be hanged if convicted.

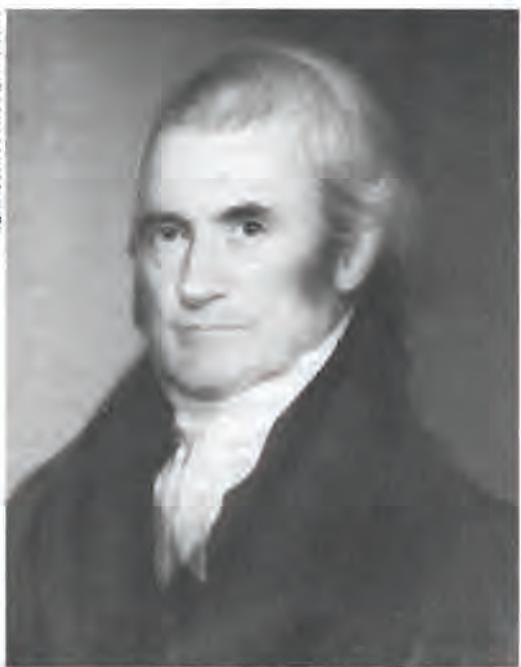
Further discussion did not change Livingston's mind that the 1819 statute, passed only a month before the incident that had led to Smith's arrest, was too vague, but the justices all agreed to "clear up" the piracy cases. Marshall announced that he would deliver the opinion in *Klintock*, basing it on his distinction between that case and *Palmer*, a distinction acceptable to all the justices. He asked Story to write for the Court in *Smith*, and Livingston said that he would dissent in that case, as a man's life was at stake. Johnson then volunteered to dispose of the four remaining piracy cases the Court had before it that term, which he and the other justices agreed had been "settled" by *Klintock* and *Smith*. Since the court's holdings in *Klintock* and *Smith* now made "general piracy" punishable under either the 1790 or the 1819 statutes, and all the defendants in the remaining cases met the requirements for general piracy, they were all to be convicted. Four days later Marshall, Story, and Livingston had produced opinions, which they read in court. Johnson was not to complete his for six more days. He was satisfied, he eventually said in his opinion, that in the 1790 statute "Congress neither intended to punish murder in cases

with which they had no right to interfere, nor leave unpunished the crime of piracy in any cases in which they might punish it." He also threatened to "respectfully solicit a revision of Palmer's case" if it was taken to apply to a murder committed by an American on a foreign ship; Congress, he felt, surely meant to punish that act.

The prickliness of the justices in the piracy cases was in part a product of their divisions in the "militia case," *Houston v. Moore*, which had been argued the previous term and had produced no consensus whatsoever. Part of the problem in *Houston v. Moore*, as Story was to put it in his eventual dissent, was the "great importance and delicacy" of the sovereignty questions it raised. If Congress had been given the power by the Constitution to organize, arm, discipline, and "call forth" the militia, could the states exercise other powers over the federal militia once it had been organized? The answer to the question, Story felt, turned on whether Congress had carried its powers into effect. It had only those enumerated powers, and the states retained a concurrent power to appoint militia officers and to train them. But once Congress had acted to implement its powers, the acts precluded similar state activity. Those principles settled *Houston v. Moore* for Story. The Pennsylvania statute in that case, which provided for court-martials of persons for failing to report for service in the federal militia, was void because Congress had provided for its own trials.

Marshall agreed with Story, but he did not want to expose his views in print, and thus kept silent. The result was a series of individual opinions. Washington produced an opinion concluding that while Congress had power to exclude concurrent state court jurisdiction over the militia, it had not expressly exercised it, and thus the state courts could try court-martials. Johnson sustained the Pennsylvania statute on the broader ground that states could make the same acts criminal that the federal government had. Duvall, Todd, and Livingston silently acquiesced in the result of Washington's opinion, which sustained the Pennsylvania statute, but, as Johnson noted, their reasons were "various." Story announced that his dissent "had the concurrence of one of my brethren," but did not name Marshall. After conference Washington remarked to Todd

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Chief Justice John Marshall  
1801-1835

that "when the Chief Justice keeps silent in opposition, we seem to fend for ourselves," and wished that he had been more persuasive in the discussion. Todd responded that Story and Johnson had so "muddied the waters" by their sniping at one another that there had never been any hope of unanimity or even compromise.

The 1820 term was a comparatively brief one. The last opinions were delivered on March 17, and the justices began to scatter. Story, who had been preoccupied with the political debates over the extension of slavery that were to be temporarily resolved in the Missouri Compromise, left shortly before the term's close to be with his family, who had suffered the loss of his daughter Caroline Wetmore Story in April of 1819. On this occasion Story took the stagecoach directly to Boston and then to Salem, stopping at Baltimore, Philadelphia, New York, New Haven, and Sturbridge in the process. The other justices departed after the 17th. Marshall returned via coach to Richmond; Livingston by coach, packet, and ferry to New York; Todd by coach and on horseback to Frankfort; Johnson by coach and packet to Charleston; Washington to Mount Vernon; and Duvall to Marietta. Each would begin a spring circuit court term

on May 1; in the interval there would be time for some leisure and recreation. Duvall supervised his estate and the care of his horses, spending considerable time out of doors in the hopes of being beyond the range of his wife's endless conversation. Todd busied himself with speculations in Kentucky real estate, from which he had made a considerable income, and with local politics and civic affairs. Livingston participated heavily in the social functions that befitted a member of the New York aristocracy and fought over politics with other members of the large and faction-ridden Livingston clan. Johnson engaged himself in the buying and selling of land, slaves, and other property in the Charleston area, as well as work on his biography of Nathanael Greene, which was to appear in 1822. Story, seemingly incapable of leisure, continued his extensive correspondence, prepared an article on William Johnson's New York Chancery Reports for the *North American Review*, worked on his "memorial" against restrictions on commerce on behalf of the merchant community in Salem, and debated issues such as the slave trade, the suffrage, and judicial salaries with his Massachusetts political acquaintances. Marshall gave dinners for his lawyer contemporaries in Richmond, played quoits at the Barbecue Club, did the grocery shopping for his family, and visited the Fauquier County sulphur springs for rest and relaxation.

The 1820 term had closed with an unfortunate outburst from Johnson in the prize case of *The Amiable Isabella*, the decision of which, because of Story's absence and internal divisions among the justices, had been put off until the 1821 term. Wheaton could hardly wait to tell Story the news of Johnson's performance. In a letter written on the last day of the term, Wheaton reported that after "the Chief Judge expressed . . . regret that [the justices] were obliged to continue the case of the Amiable Isabella to the next term, . . . Mr. Justice J. announced, with great emotion, his determination to fire off." Wheaton continued:

[He] stated that as his mind was unalterably made up and as the last argument, so far from shaking, had confirmed his first impressions, he thought the party entitled to the benefit of his vote which might be lost in case death or *any other cause* should prevent his being present . . . next term. . . . He then proceeded in a style which beggars all description,

to ridicule [William] Pinkney's argument [for the captors], treating it with the utmost contempt as a flimsy declamation of a venial advocate for privateersmen . . . Pinkney was so enraged that it was with difficulty that [William] Wirt and myself could keep him from getting up and discharging his resentment in open Court.

The judges lament this extravagant sally, which was the more unfortunate as great numbers of persons were assembled for the purpose of hearing the decision of the Court. Judge Washington assures me that everything was done that *could be done*, to prevent it, but in vain . . .

Over the spring, summer, and fall the justices were preoccupied with their circuit court cases, their travels, and their domestic responsibilities. Several engaged in correspondence with their colleagues. Washington and Story sent each other meticulous summaries of their circuit cases, outlining the facts, noting their decisions on points of law, and calling each other's attention to particularly interesting or difficult issues. Marshall corresponded regularly with Story and Washington, asking their advice on legal issues, worrying about accommodations for the next winter, and commenting on politics and social issues. Story occasionally wrote Todd and Livingston as well as Marshall and Story, filling his letters with legal discussions, opinions on political questions, and gossip about personalities. All the while Johnson remained resolutely aloof, writ-

ing no one on the Court, but filling Thomas Jefferson's ear with accounts of the pressure other justices had placed upon him to suppress his dissents and generally to promote the appearance of unanimity. Reporter Wheaton was himself an active correspondent, asking the justices and lawyers for help in assembling a record of counsel's arguments, querying the justices on substantive points in their opinions, badgering Story for notes for his volumes, and lobbying to advance his career. As autumns turned into winters, the circuit terms wound down, the justices made their way home over roads that were increasingly hazardous, and another cycle began.

\* \* \*

William Wirt, wearing his customary swallow-tail coat, vest, cravat, and breeches, stood up to address the Court in his argument in *Ogden v. Saunders* on February 19, 1827. *Ogden v. Saunders* was the Court's most celebrated case since *Gibbons v. Ogden* three years earlier, and the battery of counsel on both sides testified to it: Henry Clay, David Ogden, Walter Jones, and Wirt for the debtor; Daniel Webster and Henry Wheaton for the creditor. The case had been up before the Court in 1824, but internal divisions and the ill health and subsequent death of Todd had postponed it for two successive terms. Now a



*Library of Congress (both)*

Associate Justice William Johnson (left) frequently complained to President Thomas Jefferson (right) that his brethren were exerting considerable pressure upon him to suppress his dissents.

full seven-man bench was assembled, with Robert Trimble replacing Todd, and the case was ready to be decided.

Wirt, as he often did, had entertained himself before his argument by speculating about the eventual outcome. He knew, as several Court insiders did, that the 1819 decision in *Sturges v. Crowninshield* had concealed deep tensions among the justices as to the constitutionality of state bankruptcy and insolvency legislation. One polar position, typified by Marshall, held such legislation to be as clear an infringement of property rights as could be imagined. The very purpose of the contracts clause, Marshall felt, was to prevent the kinds of excesses he had seen in the period of the Articles of Confederation: state legislatures, led by demagogues seeking mass support, discharging debtors from their obligations. Another polar position, typified by Johnson, combined a solicitude for property rights in the abstract with a strong interest in allowing the states freedom to regulate the affairs of their own citizens. In between were positions like that of Story, who recognized the value of bankruptcy legislation in a commercial society, lobbied for (and drafted) a national bankruptcy act, but believed that state legislatures were less "sound" and that the contracts clause should serve as a restraint on their excesses.

As he looked up at the justices seated behind their desks in the courtroom, Wirt thought he could count two votes for his side and three against. Johnson, he felt, would surely prefer to give the states latitude to regulate debtor-creditor relations, especially where contracts had been drawn up in the face of insolvency or bankruptcy laws. Likewise Smith Thompson, who had replaced Livingston in 1824, was favorably disposed toward the preservation of state sovereignty and the facilitation of commercial exchange. Beyond that Wirt was uncertain. He knew that Marshall, with his strongly held and oft-repeated views about the potential hostility of state legislatures toward creditors, would vote to strike down any state bankruptcy or insolvency statute. Story's contracts clause decisions were likewise full of language about "great principles." He was likely to see the protection of property rights as paramount in *Ogden v. Saunders*, and he was no friend of state infringements on federal



Attorney General William Wirt  
1817-1825

control of commercial relations. Duvall, as well, was a negative vote, Wirt thought. Duvall almost never expressed himself publicly, but he was thought to be "sound" on property rights issues, and he almost never opposed the Chief Justice.

That left Trimble and Washington, Trimble's position was completely unknown, since this was his first term. Washington's position puzzled Wirt. Washington typically sided with Marshall and Story on constitutional questions, almost never dissented, and was regarded as an "old Federalist" on economic issues such as debtor-creditor relations. But Wirt had noticed something about the case of *Ogden v. Saunders*: it had been postponed three times by the Court, in their 1824, 1825, and 1826 terms. The 1824 postponement was easily explicable, since Thompson had come on the Court in the middle of that term, the case was argued late in the term, and the issues were difficult and controversial. But the 1825 and 1826 postponements were probably made, Wirt felt, for the usual reason the Court postponed cases, internal divisions among the justices. And what could those divisions be? Todd had missed both terms, and the postponements suggested a 3-3 split without him.

Had the justices been split 4-2, especially if Marshall was with the majority, they would have very likely issued an opinion. The issues in *Ogden v. Saunders* were ones of great impact and interest, since thousands of persons would be liable for debts if they could not discharge their obligations by taking bankruptcy. In other cases of perceived importance the Court had rendered opinions with less than a full compliment of justices.

So the Court, Wirt felt, had no majority in *Ogden v. Saunders*. But this fact must mean, if his calculations were correct, that Washington was not siding with Marshall and Story, or that Duvall had inexplicably joined with Johnson and Thompson. Wirt thought the latter possibility most unlikely. Duvall had rendered only three opinions since 1819; he was increasingly deaf, and he reportedly did not like Johnson. Washington, on the other hand, was independent, very influential in the Court's conferences, but at the same time diffident and sometime idiosyncratic in his views. Everything pointed to the fact, Wirt thought, that Marshall was looking for a fourth vote. Now Trimble was on the Court: did Marshall have it? Wirt wished he had a fuller impression of Trimble.

Seated near Wirt in the lawyers' section of the courtroom, Daniel Webster was going through the same exercise. He and Story had been the prime movers behind national bankruptcy legislation, but to no avail. Year after year Webster would go to Congress with a text of a bill drafted by Story and hope for the right atmosphere in which to introduce it, but that atmosphere never arrived. Southern and Western interests saw the bill as favoring the Northeastern commercial classes; Jacksonian Democrats opposed it as favoring banks; some groups not included in the bill's coverage, such as farmers, opposed it on those grounds. State sovereignty and states' rights issues were also raised in the debate at a time when those issues had become increasingly charged. Webster, who had attempted to use a national bankruptcy act as another means of enhancing his visibility, felt that his best chance, by 1827, was to have all state bankruptcy legislation declared unconstitutional. Then something would have to be done.

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Daniel Webster sought to further his political career astride the issue of national bankruptcy laws, but was frustrated by Congress and the Court.

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tance of maintaining commerce and preserving the obligations of debtors. His oratory would not only inspire Marshall to restate his views in conference, it would give Trimble a preview of them. Webster ran over the text of that portion of his argument. "We differ," he had written in his notes, "from our learned adversaries on general principles . . . We regard [the contracts clause] as intended to guard against great public mischiefs . . . We look upon it as a great political provision, favorable to the commerce and credit of the whole country." At this point, Webster had injected a page of history into his argument, artfully cribbed from Marshall's *Life of Washington*:

Commerce, credit, and confidence, were the principal things which did not exist under the old confederation, and which it was a main object of the present constitution to create and establish. A vicious system of legislation, a system of paper money and tender laws, had completely paralyzed industry, threatened to beggar every man of property, and ultimately to ruin the country. The relation between debtor and creditor, always delicate, and always dangerous whenever it divides society, and draws out the respective parties into different ranks and classes, was in such a condition . . . as to threaten the overthrow of all government . . . The object of the new constitution was to avert these evils; to awaken industry by giving security to property; to establish confidence, credit, and commerce, by salutary laws.

Webster felt confident that his argument would succeed. He would prepare the groundwork; the Chief Justice would do the rest.

Robert Trimble was puzzled and disconcerted after hearing the arguments in *Ogden v. Saunders*. He was a believer in a strong federal government, and his decisions in nine years as a Kentucky federal district judge, before being named to the Supreme Court, were a testament to that belief. He would have preferred national bankruptcy legislation, but Congress would apparently not act, and he regarded imprisonment for debt, and the whole system of borrowing and loaning on credit, as troublesome features of modern society. He knew, from his life in Kentucky, that one had to borrow money from time to time; that one took risks in order to secure wealth; that sometimes one was financially strapped; and that often one had to rely on the goodwill of one's creditors or debtors. It seemed impossible to him that states like Kentucky could not have some say about the kind of borrowing

and lending that took place within their borders. Had everyone in Kentucky to pay his debts on demand or go to prison, half the state would be behind bars.

Moreover, it was strange that the Court, which had, in its *Crowninshield* decision, allowed states to pass insolvency legislation so long as Congress had not, would now consider turning around and suggesting that any kind of state insolvency legislation was constitutionally invalid. This change of heart struck Trimble as unseemly. He did not know what had gone on among the justices in *Crowninshield*, but he did not want to embarrass the Court. Moreover, he had been — he confessed to himself — offended by Daniel Webster's argument. He simply did not believe that the obligation of contracts derived from a "universal law" that was independent of the civil law of the state in which the contracts were made. The argument proved too much: if it were true, the states could have no control over contracts at all. They could not pass any legislation affecting contracts in any fashion. Usury laws and statutes of limitation would be invalid under the contracts clause. The more Trimble reflected, the more he became convinced that "the great principle" of the contracts was a prohibition against retrospective legislation: legislatures could not pass laws upsetting the obligation of contracts already in existence when the laws were passed. Statutes of limitation and usury laws were not retrospective in their effect, thus they were permissible. So, Trimble had concluded, were insolvency or bankruptcy laws that had no retrospective effect.

The Chief Justice sat in his boardinghouse room, having just concluded dinner. He was an early riser and also an early sleeper, and he was about to take to his bed with a book. A knock came on the door, and Story appeared. Marshall welcomed him and reached for his bottle of port and its accompanying glasses on the shelf behind one of his chairs. He waved his hand in the direction of a chair and began to pour out two glasses. The gestures had been repeated so often, and the scene was so familiar, that the two men's actions were reflexive. The ritual signified that a Court matter was about to be discussed.

What had he taken from the discussion of the *Saunders* case at conference and during



**Associate Justice Robert Trimble, (1826-1828)** felt Daniel Webster's position on states' right to govern contracts was too limiting of states' authority.

dinner? Story asked Marshall. Was there a clear majority for holding prospective bankruptcy legislation constitutional? Indeed there was, Marshall replied. Washington had adopted an "odd" position, following precedent in a rigid, literal fashion. Marshall thought that Washington simply didn't want a situation in which debtors had no relief. Washington had himself been strapped over the years because of Mount Vernon, and he felt that Congress would do nothing. Story agreed that the national bankruptcy bill was "dead, and under circumstances in which it will not soon be revived." Trimble had been impressive in the conference, Story felt. He had seen where Webster's argument led—to an absence of power in the states to control contracts made between men within their boundaries—and he had shrewdly converted it into an extremist polemic. Washington had taken the point, Story sensed; and Thompson was unsound on state sovereignty issues at any rate. As for Johnson, the only hope was that he could be persuaded to limit the decision to contracts made solely by citizens of the states that had passed the legislation, so that debtors from other states could not have their obligations abrogated. Whatever the outcome, Johnson would surely make public his peculiar views.

Marshall sat lost in thought. In all the years I have been on this Court, he finally said, I have never expressed my views when I have had the misfortune to differ with a majority of my brethren on a matter involving the interpretation of the Constitution. But I shall write in this case. I recall, as if it were yesterday, the years of the Revolution and of the old confederation. Those of us who fought with Washington did not know whether we would have food, or supplies, or men from month to month: the states were fickle in their support and the national government was too weak. When we had finally driven out the British, and we sought to profit from our peace, the security of property and the obligations of debt were undermined by the legislatures of the confederated states. Debts were paid in worthless paper money, or not paid at all; men were discharged from their obligations by reckless legislatures; the new government was powerless to act. The contracts clause of the Constitution was a response to that unfortunate time. It embodied two great principles: that property rights, once vested, shall remain secure, and that no state shall have the power to disturb the obligations inherent in contracts between men. There is no language in the clause confining its reach to retrospective legislation. Its words are general, and apply to contracts of every description.

If you are to differ from the majority, and you know that I shall join you—and that Duvall will as well—Story said, who will write the Court's opinion? Will there be one opinion for all or will the judges render their views *seriatim*? Bushrod will object to that practice, as he invariably does, but Johnson will be determined to express his views, and in a case of such magnitude perhaps the others will want to be heard as well. You know, Marshall replied, the importance I attach to this Court's speaking with one voice on matters. But our divisions on this case are well known, and I cannot think that the majority will agree on one opinion. Were not the principles raised by this case so significant, I would keep silent, and were I in the majority I would seek to write for my brethren. But Webster perhaps overreached himself in argument, and we have lost Trimble. The case is, I fear, a melancholy signal of how different a Court we are from that which pronounced judgments in the

Bank case. That term we were sorely divided on *Crowninshield*, but we kept our differences to ourselves; now, I fear, we must air them.

Story thought of how the Court had changed since the 1819 term. Livingston, a great force for harmony and cooperation with his good humor and his ability to prick the bubble of Johnson's wrath with a sharp jest, was gone, and in his place Thompson, a thoroughgoing politician. Todd, whose bent was for practical solutions and who rarely became bogged down in doctrinal disputes, had been replaced by Trimble, by all odds a formidable and independent spirit. Duvall had grown increasingly feeble and was no longer a presence in conference. Johnson seemed to have grown more defiant and solitary with the years: it was as if he was rebelling against his own contributions to harmony and good sense in the period after the War. As for the Chief Justice, sometimes he seemed transfixed in time, as if he saw the "great principles" of the early Republic as fixed and unalterable, and his consummate wisdom about contemporary politics gave way to an uncharacteristic rigidity. It was still a great Court, Story felt. But the occasions on which he, Washington, and the Chief Justice could produce unanimity by a side comment or a politic phrase were fewer and fewer with the years. And now Wheaton would be leaving as Reporter, to Johnson's great delight and Story's concern. Wheaton had come to be something of an annoyance over the years, but he and Story had done a great deal of good work together, laying a scientific foundation for the Court's decisions. Story felt that somehow the *Saunders* case, one of the last Wheaton would report, was the end of the Court as he had known it.

\* \* \*

William Johnson lay in his bed in a boardinghouse in Brooklyn, New York, hoping to pass the night peacefully before his surgery the next day. His jaw had bothered him for months, and doctors had said that it was cancerous and that only an operation could save him. He had written his will, said goodbye to his family, and was prepared for the worst. At times he found himself indifferent to his own survival. He had been in poor health for three years now, missing two terms in Washington and being unable to attend all of his circuit sessions. Nullification, slavery,

and his penchant for involving himself in political issues had estranged him from many of his neighbors in Charleston. On the Court his relations were not much better. He had been an enemy of Story's almost from the moment of the latter's arrival in 1812; he had endured Washington's murmurings about "justices cutting up one another" seemingly on every occasion that he sought to speak out in dissent; he had no particular respect for Duvall, whom he referred to as a cypher; he was remote from both Todd and Trimble. He admired Marshall and was amused by Livingston's wit, and recently he had encouraged the independence of Thompson and Baldwin, but he was not close to anyone on the Court.

As the night passed Johnson realized that he was not going to sleep. His working life seemed to pass before him, from the startling news that Jefferson had appointed him, at the age of thirty-two, to the Supreme Court of the United States, to the last term, which he had missed altogether because of various health problems. Suddenly the memories flooded in, and he seemed to remember each with a singular exactness. The bitter controversy with Story over the common law of crimes, culminating in *United States v. Coolidge*, which Story had foolishly tried to certify up as a common law case, when everyone knew it was an admiralty case. He had had the pleasure of watching Story's expression when the Attorney General of the United States declined to argue *Coolidge*, deferring to the precedent of Johnson's opinion in *United States v. Hudson and Goodwin*. The equally bitter and more protracted battle against Story and Wheaton over "the slow and stealing progress" of the admiralty jurisdiction, which Johnson had had to resist at every turn, and had largely, with the silent help of Marshall and some pressure from Congressional critics of the Court, succeeded in resisting. The annoyance that Jefferson had shown when Johnson sided with the Court majority in the Bank case and the two great Virginia cases, *Martin v. Hunter's Lessee* and *Cohens v. Virginia*; Johnson's recognition that Jefferson had not fully understood his interest in promoting commerce across the nation and his conviction, as a planter, that state restrictions on commerce were misguided; the letters he

and Jefferson had exchanged in 1822 and 1823, in which Johnson had told the former President of his trials on the Court and Jefferson had encouraged him to speak out.

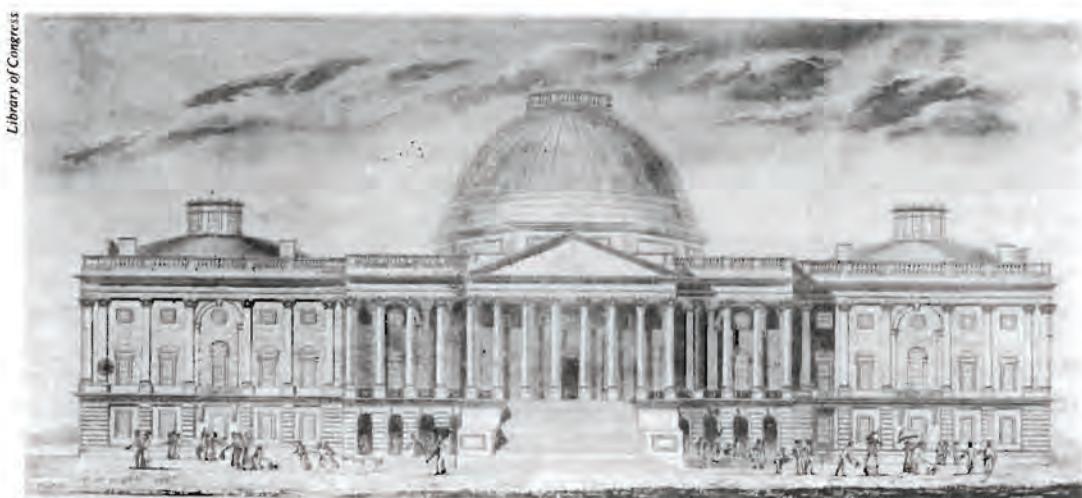
There had been some memorable cases. The fraudulent episode of *Fletcher v. Peck*, before Story's time, in which the audacity of state efforts to undermine vested property rights had been exposed; the sad episode of *The Antelope*, where Story's misbegotten circuit opinion outlawing the entire slave trade—the presumption of it!—had been soundly repudiated by the Court, and Johnson's position vindicated; Story's incredible performance in lecturing the Virginia Court of Appeals in *Martin v. Hunter's Lessee*; the equally incredible follies of the Virginians in the *Cohens* case, which even he, as strong a friend of states' rights as he was, could not tolerate; the excessively cautious posture of Marshall in *Gibbons v. Ogden*, tolerating a concurrent power in the states to regulate commerce when a ringing declaration of the exclusivity of federal power was called for; Marshall's overly broad assertion in *Osborn v. Bank* that the remotest "federal" connection to any controversy gave the federal courts jurisdiction over it. And, most recently, the Cherokee cases, *Cherokee Nation v. Georgia* and *Worcester v. Georgia*, the latter of which he had missed, and was glad of it: the Court should never have involved itself in what was purely a diplomatic matter.

Jefferson had been in his grave for eight years, and Johnson wondered whether he would have regarded those years with his usual sanguinity or with the occasional choler that had crept into his perspective late in his life. Surely even Jefferson, the apostle of state sovereignty and the friend of peaceful revolution, would have been appalled at the idea of nullification. On that issue Marshall, Jefferson's old antagonist, and even Story were right: the Union dismembered could not last. Slavery was the root cause of nullification, and Jefferson would have viewed the growing militancy among slave-owners in South Carolina and in Virginia with alarm. The Court had thus far not entertained a case testing the constitutionality of extending slavery to the territories, and Johnson hoped it never would; but the case was coming as the nation expanded and the attitude of each new state

toward slaveholding became a matter of public interest and controversy. Johnson knew where he stood on that issue. Slavery was an abomination and an evil, but it was permitted by the Constitution and embedded in plantation society. The Union and slavery must learn to co-exist.

Johnson remembered Jefferson's denunciation of the justices' practice of silent acquiescence. He had taken pride in following through on his promise to declare himself separately in constitutional questions, and he knew that Jefferson would have been amused and delighted to see the old custom of quartering together in the boardinghouse break down. Who would have thought that a woman, and an admirer of Marshall, would have broken up the practice? He remembered arriving in Washington for the 1829 term to find the new justice, John McLean, boarding in his Washington home and traveling to the Capitol to meet with his colleagues. In time he learned that Mrs. McLean thought it was foolish and unnecessarily expensive for her husband to board overnight in Capitol Hill when he had perfectly fine quarters in the same city. On hearing this news Johnson resolved that he would subsequently quarter by himself: it saved him the awkwardness of daily interchange with Story and, if the truth be known, removed him from the intimate company of Justice Henry Baldwin, on the Court since 1830, whom Johnson thought quite mad, and who was capable, at dinner, conference, or in the halls of the boardinghouse, of moments when he seemed incapable of agreeing with anyone about anything.

With the solidarity of the boardinghouse broken up, Washington dead, the Chief Justice's health somewhat impaired, and several Jackson appointments on the Court, the old days of solidarity, conviviality, and subtle pressure were gone. Johnson welcomed the change. It was a Court in which he breathed more easily, stated his views in his own way, and encouraged others to do the same. Had he known that the singleminded Court of his early years, dominated by Marshall and Washington, would have evolved in such a fashion, he never would have offered his resignation, as he had to Madison in 1814. He was, on the whole, glad that Madison had never re-



The Capitol Building, circa 1826, housed the Court in a ground floor chamber beneath the Senate. Plagued by poor heating in winter and withering summer temperatures magnified by lack of ventilation, the chamber was uniformly uncomfortable nearly year-round.

sponded to his letter. He might die tomorrow, but he had lived a full and free life. He knew that John Quincy Adams had called him a "restless, turbulent, hot-headed, politician caballing Judge," but even Adams had had to admit that Johnson was "a man of considerable talents" who was "flaringly independent." They could write all of the above on his tombstone.

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John Marshall awoke in his bedroom in Philadelphia. So, it appeared, he was not going to die after all. The fellow Physick had done wonders: over a thousand uric acid stones had been removed from the area of his prostate gland. He would be confined to his room for weeks, unable even to leave his bed. But if he stayed quiet he had every chance of full recovery. Marshall knew how he would spend the time, when awake: he would think about his wife Polly, now very frail, and his life on the Court. After thirty years as Chief Justice there was a good deal to think about, and perhaps he would be spared a few years more as a kind of unexpected gift.

Had he to repeat his life, Marshall realized, he would do few things differently, and one thing he would surely do over would be to accept, without any diffidence, the nomination of Chief Justice of the United States. He remembered that his first reaction, after Adams nominated him, was what a bitter cup of tea his choice must be for Jefferson, and how

he had determined not to give Jefferson's party any opportunity to label him a partisan. He and Bushrod Washington, who had been as loyal as he had been astute, had slowly, through example, suggestion, and occasional comments, changed the Court's practice from *seriatim* opinions to the "opinion of the Court." Cushing's lack of ability, Patterson's laziness, and Chase's senility had helped facilitate the process; by the time Johnson came on the Court in 1804 it was entrenched. The system, Marshall felt, perfectly complemented the Court's living arrangements. Cases could be discussed informally in the boardinghouse, a decision reached, and the opinion assigned in a manner that made each judge feel as if he had fully participated in the decision. Then the opinion would, in most cases, be written by Marshall himself, and the remaining judges would take no notice of it. Marshall smiled as he thought of the reporting of the Court's opinions in those early days: judgments would be delivered and then disappear, only to emerge years later in Cranch's Reports. Sometimes the printed product would bear little resemblance to the opinion Marshall had delivered, but that made very little difference, because almost no one — certainly not the other judges — read it.

It was a different Court then, Marshall believed: one fewer justice, no men of caliber save Washington and, in his peculiar fashion, Johnson, not many important cases, little

pressure to dispose of business. He wrote most of the opinions himself, reasoning most of them out by analogy and principle. Besides *Marbury v. Madison*, the great mandamus case, Fletcher against Peck, and the Burr trial (which never reached the Court as a body), there were no cases of monumental importance until the outbreak of the 1812 war. Then matters changed with a rush. Story came on the Court, with his ideas about expanding the jurisdiction of the federal courts, his great learning, and his abundant energy; admiralty and maritime cases began to crowd in on the lower courts, and the battles over the common law of crimes and admiralty jurisdiction surfaced: legislatures began to infringe on vested rights, and the great contracts clause cases began; Virginia, Ohio, and Kentucky defied the Court, provoking the jurisdictional controversies that led to *Martin*, *Cohens*, and *Osborn*; domestic commerce became as important as maritime commerce, and the Bank and steamboat cases resulted; the presence of black and red men in America raised issues of great delicacy for the Court.

An eventful time, one that he had been fortunate to live through and to participate in. His favorite years, he now felt, had been those from 1811 to 1823, years in which the judges had established a routine, considered important cases, and decided them without much rancor or difficulty. There were of course, exceptions: the admiralty jurisdiction cases, *Sturges v. Crowninshield*, the *Dartmouth*

*College* case, the common law of crimes cases. But on the whole it had been an exciting and a harmonious span of time. Marshall had enjoyed the company of all of the judges and had been able to smooth over much of their internal differences. Johnson, for all of his combativeness, had a mind of power and perspicuity; he only wanted tact, and was too quick to take offense. Duvall was too often underestimated: he had sound judgement, a gentle but firm manner, and an ability to take the sting out of a phrase. Many times he had prevented discussions from becoming heated by an assiduous restatement of another judge's polemic.

Todd was likewise a valuable judge, particularly helpful on the real property disputes that came out of Kentucky, Ohio, and Tennessee in those years. On constitutional matters Todd could be counted on to support the Union and to bear in mind matters of necessity and convenience. He was a good friend to the cause of solidarity and an amiable presence in the boardinghouse. Livingston was equally helpful and amiable. Marshall had first wondered why Livingston had not asked for more opinions or participated more fully in juridical studies, but he soon realized why: the man enjoyed conversation and camaraderie but disliked writing opinions. With his keen wit and his penchant for jesting sarcasm, Livingston was the *bon mot* of the conferences: not even Story could match him in erudition. Livingston could even get Johnson



Several of the Justices boarded at Brown's Indian Queen Hotel through the mid-1820s.

Library of Congress

Library of Congress



Associate Justice Thomas Todd  
1807-1826

to pause occasionally from his persistent over-seriousness; Marshall relied on Livingston to break up the ponderousness of a Story-Johnson exchange with a swift barb. Few would understand, Marshall felt, the contributions made by those "silent" judges: in the Court informal discussion and debate were as important as the delivered opinion. By silent acquiescences and moderated views the judges offered their views to the public as a united body. There were few opportunities for critics to seize upon. The history of the Court in that period was reflected not merely by the language in Wheaton's Reports but by the more informal, but equally important, language of the silent judges in conferences.

Story and Washington were, of course, his firm allies and his able partners in those years. Marshall realized that something had always kept Story, in his own contacts with Marshall, from becoming the overbearing or tiresome pedant that he sometimes was to others. Perhaps it was the difference in their ages: Story had always treated him with a certain respect. Perhaps the flintiness of Story's personality had simply been smothered by my own dull slowness, Marshall began to soliloquize to himself; but at any rate I have been

spared the preachiness and arrogance Story exhibited to others. I knew, of course, not to turn Story loose on a delicate case too often. Occasionally, when the situation demanded it, Story's juridical erudition was matched by his political acumen: *Martin* was an example. But on other occasions Story pressed a point too far or put matters too baldly, as in his unfortunate opinion in the Kentucky land case, *Green v. Biddle*, which the Court found prudent to withdraw.

Washington was, of course, my dearest friend and closest colleague. Washington had chosen to defer most of the opinion writing to me; that was a matter of temperament. Washington was a born lawyer, a close reasoner with a penchant for nice distinctions and narrow holdings. He was uncomfortable in the realm of great principles; he liked precedent, logic, and parsing cases. His remarks in conversation often clarified the issues at stake, but he felt content to stop at that point; I needed to go on. He was fearless in his independence when he and I differed on matters, but he almost never dissented, believing, as I did, that dissents served no purpose and weakened the integrity of the Court. He restrained Story on more than one occasion, and he was a great force for harmony and cohesiveness throughout his time on the Court. None disliked him and all respected him: he was a judge's judge.

Those years during and after the war had truly been exciting and pleasant ones. The war was itself an abomination, but its effects, on the whole, were healthy: the nation gained more territory, expanded its commerce, and established itself as master of its own continent. Above all the war produced a kind of unity, a commitment to the nation and a temporary suspension of sectional interest and discord. But in the last ten years, the forces of disunion had revived. I know where I would lay the blame for most of this unfortunate renaissance, on Mr. Jefferson, a tireless and strident agitator in his "retirement," seeking to rake up the animosities of the past.

The doctrines propounded by Jefferson and his cabal of followers had surfaced as early as the Bank case, when his confidant Roane and his dupe Brockenbrough had attacked the Court in the Richmond *Enquirer*. Jefferson had followed up that episode with his attacks on the *Cohens* case, his published criticism of

the Court in letters, his encouragement of the polemics of Taylor of Caroline, and his unprincipled efforts to enlist Madison in his cause. The results have born bitter fruit: Jackson the demagogue, denouncing the Bank under the banner of "equality"; the disunionist nullification doctrines; the shortsighted parochialism that is now claimed as the birthright of every young Virginian. When is added to this the unfortunate proliferation of slavery, the lack of any real support for African colonization, the selfish opposition to Mr. Clay's very sensible program for expanding commerce and improving the nation's transportation, and the fanaticism of those who suddenly believe that slavery must be immediately abolished, I fear that the Union cannot last. I hope that I will at least be given a few more years to help preserve it if I can.

Story has been preparing a volume of commentaries on the Constitution, which I hope will receive widespread attention as a healthy corrective to the disunionist doctrines of the moment. He has been asking me, over the years, to consider the sources of my constitutional principles. I have not given him fully satisfactory answers, I fear, for my views are not as learned or as scientific as he might like. But I have borne in mind certain precepts as I went along.

I was not an exact contemporary of the great men who framed the Constitution, but I knew most of them and was of an age, during the Revolution, the Confederation, and the years of the Constitution's framing and ratification, to understand what was at stake. We had committed ourselves to a republican form of a government, in my view the most perfect man could devise. But the danger of a republic in America was twofold: decay from within and fragmentation from without. We could not suffer corruption among our representatives; neither could we survive the breakup of our constituent parts. Jefferson understood the first principle but not the second; Hamilton, perhaps imperfectly, understood the first. But Washington, through his own virtue and his great judgment, forestalled corruption by setting limits to his presidency and deigning to side fully with any of his successors, thereby implicitly encouraging Jefferson to form an opposition party and thus ensure that dynasties would not go unremarked. I deplore

Jefferson's views, of course, but I believe that only through "frequent recourse to first principles" can the Republic be purged of nascent corruption. Jackson's followers promise to be corrupt before long, and I suspect that organized opposition to them will emerge.

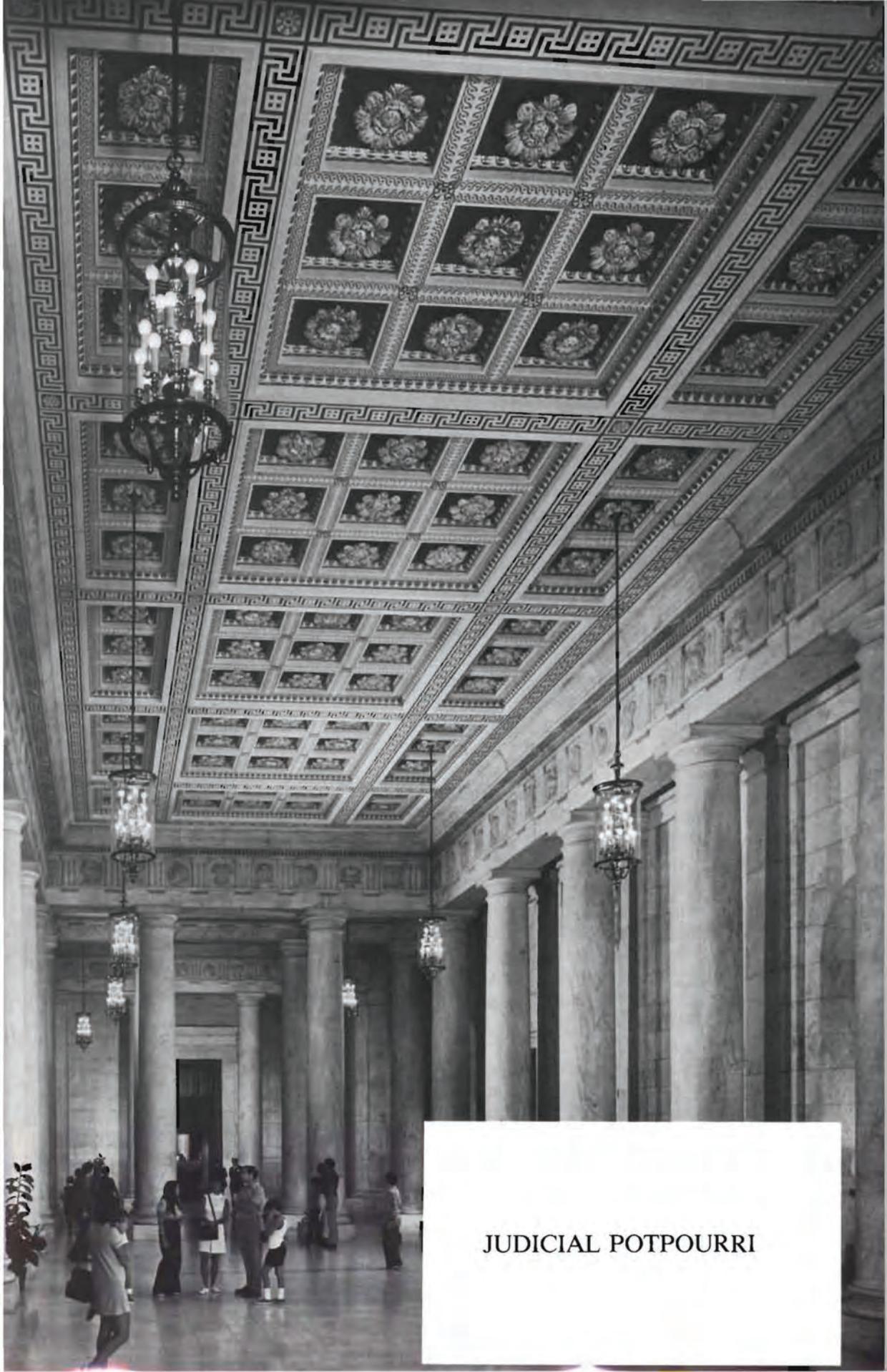
Corruption, though, has not been the chief problem of our republic; it has been fragmentation. The Constitution was designed to insure that a strong federal government would serve as a bulwark against sectional discord and economic chaos engendered by demagogues in the respective states. The overriding goals of the Constitution's framers were thus economic security, national strength, and the maintenance of a republican society. This meant protection for private property, checks against demagoguery or dissension in the states, and support for those national institutions necessary to ensure that a Union would be preserved.

With these principles and goals in mind, I simply read the language of the Constitution. The language of the contracts clause was designed to prevent state legislatures from interfering with private obligations and being overly solicitous of the debtor classes. The language of the commerce clause and the necessary and proper clause, taken together, was to protect those national institutions that Congress created in pursuit of its great objects from being crippled by state jealousies. The language of Article III, as implemented in the Judiciary Act of 1789, was to insure that the state courts could not set themselves up as the final interpreters of the federal constitution. These were the great outlines of the constitution: protection for private property, support for the Union and necessary national institutions, and the creation of an independent judiciary. I have simply filled in the outlines in appropriate cases. I have cast myself back to the time when the Republic was created and restated the first principles of the creation as I witnessed them.

There are, on the horizon, forces gathering whose impact I cannot fathom. The spirit of enterprise, so useful to our commerce, has become sufficiently rampant in the nation to create a whole class of workers and artisans whose political sensibilities I fear are not finely honed. Suffrage restrictions are being swept away. The old practices of trade and exchange

are disappearing, and "commercial men" are everywhere. The uneducated, the propertyless, and the transient are more important in politics than ever before. I am not sure what all this portends, but I see unchecked democracy in the future, and I fear for the Republic. Washington understood, as I said in my volumes on his life, the difference between the orderly civic virtue of a republic and the chaos and demagoguery of a democracy. I fear that distinction will be lost. I fear that in some

distant future I and the other judges will be remembered as monarchists and reactionaries, and Mr. Jefferson and Mr. Jackson as the patron saints of the levellers. But perhaps I grow unduly gloomy; Physick and Providence have spared me and the Court has not yet capitulated to a democratic future. Tomorrow I shall write Story and ask him about arrangements for the boardinghouse this winter. We must not let the judges scatter; that will be the first step toward disunion.



JUDICIAL POTPOURRI

## Toward 1987: The Foundation for the Constitution

by Cornelius B. Kennedy

By 1786, a consensus was slowly emerging that the confederacy, created by the former colonies in 1778 after they declared themselves to be sovereign independent states, was inadequate to deal even with those matters which the now sovereign states had committed to it. There was as yet, however, no agreement on how to strengthen the bond of union.

Those decisions would be made the next year in 1787 at the convention in Philadelphia. In making those decisions, the delegates to the convention were guided both by the experience of 150 years of local self government under the liberal colonial charters and by a decade of experience under the constitutions adopted by the colonies when they became sovereign independent states.

The framing of the Constitution really begins, therefore, in 1618 when the London Company adopted the Ordinances of Virginia after the English king transferred to it the management of the colony established at Jamestown in 1606. By those Ordinances, the London Company turned the management of the colony over to the colonists themselves. Under the Ordinances, the colonists participated in the legislative, executive and judicial functions of the government of the colony through two councils. One council, whose members were chosen by the colonizing company from among the colonists, assisted the governor. The other council, called the General Assembly, made the laws. Composed of members "chosen by the Inhabitants," it acted by "the greater Part of the Voices then present" and was vested with the power to "make, ordain, and enact such general Laws and Orders, for the Behoof of the said Colony, and the good Government thereof" as should appear necessary. Both councils had jurisdiction over judicial matters in addition to their respective jurisdiction over executive and legislative matters. According to a 1624 "Declaration" by the colonists with respect to their "hande in the governinge of themselves," monthly courts were held in every precinct of the colony to "do justice in redress of all small and petty matters," while matters of more consequence were referred to the governor, the council, and the general assembly.

The 1629 charter granted by the king to the founders of the Massachusetts Bay Colony followed a similar pattern. It provided for a governor, deputy governor, and eighteen "as-



Private correspondence between individuals such as Jonathan Jackson (above) and Rufus King, expressed the personal interest Americans took in the appropriate design of a new federal government.



The Massachusetts Bay Colony in 1634 — its charter provided for an elected assembly.

sistant" who were elected from the freemen of the Company. These elected representatives were "to assemble every month, or oftener at their Pleasures" and keep "a Courte or Assemblie" for ordering and directing the affairs of the colony. There was also a Great or General Courte or Assembly composed of the governor, deputy governor, the elected representatives and all free men of the colony. It met quarterly to make "Lawes and Ordinances for the Good and Welfare of the saide Company" which were not contrary to the laws of England and to impose lawful fines, imprisonment "or other lawful Correccon."

Although this form of government placed the making and execution of the laws and the administration of justice in the Virginia and Massachusetts Bay colonies in the hands of the colonists themselves or their elective representatives, it was only twenty years before the combination of legislative and judicial powers in the same hands raised concerns of tyranny. Thomas Hooker, who had already led a movement out of the Massachusetts colony to

found settlements along the Connecticut River, forcefully expressed his concern in a letter to Governor Winthrop in 1638 when he wrote that the almost unlimited discretionary power exercised by judges in Massachusetts made it plain that if judges were not limited by laws, government would degenerate into tyranny and confusion.

Three years later, the 1641 Massachusetts Body of Liberties directly addressed this concern by providing that no one could be penalized under color of law or countenance of authority "unless it be by vrtue or equitie of some expresse law of the Country waranting the same" adopted by the general assembly and sufficiently published. This provision effectively separated the legislative and judicial functions by expressly limiting the powers and discretion of those acting as judges to the enforcement of laws which had already been adopted and published. Thus, both the concept of "government under law" and the rationale for the doctrine of separation of functions, both of which are fundamental to the Constitution, were a part of colonial political thought almost 150 years before the Federalist Papers argued that concentrating all the powers of government, legislative, executive and judiciary in the same hands is precisely the definition of despotic government (Federalist 47).

The 1641 Massachusetts Body of Liberties contained other provisions which also were to become a part of the Constitution. The governor and other administrators, officers and the members of the general legislative court were to be elected by the people. Every man, whether inhabitant or foreigner, free or slave, was at liberty to come before any public court, council or town meeting and orally or in writing move any question or present for action any complaint, petition or bill within the proper jurisdiction of that body. Trial by jury was generally guaranteed, with the decision in a case to be made by jurors chosen by the free men of the community. A provision, later used by Chief Justice Marshall in *Marbury v. Madison* as the underpinning of Marbury's right to seek a writ of mandamus against Madison to obtain the delivery of his commission as notary public, gave any person denied or deprived of any power or liberty granted by the Body of Liberties the right "to

commence and prosecute their suite, Complaint or action against any man that shall so doe in any Court that hath proper Cognizance or judicature thereof."

From 1641 on, the separation of the judicial and legislative functions, with the judicial function limited to the enforcement of laws already passed by the elected representatives, was increasingly adopted as a basic concept of self government in the colonies. Under the 1663 charter of Rhode Island, for example, although the elected representatives were given the power to make and repeal such laws, statutes, orders and ordinances "as to them shall see meete for the good and welfare," the legislative body no longer had the power to hear and decide cases which arose under the laws. Instead, it was to determine the places and courts of jurisdiction for the hearing and determining of all actions, cases, matters and things happening within the colony which shall be in dispute.

The charter of West New Jersey in 1677 even more clearly separated the judicial function from the legislative and executive functions, but preserved direct popular control over the judiciary as well as over the legislative and executive functions, by providing that the judicial power to decide cases was vested in the jury selected by the people, not in the judge. The Charter provided "[t]hat there shall be in every court, three justices or commissioners, who shall sit with the twelve men of the neighborhood, with them to hear all causes." While the judgment in the cause was to be announced by the justices, it was to be "such judgment as they shall receive from, and directed by the said twelve men, in whom only the judgment resides, and not otherwise . . . And if any judgment shall be passed in any case civil or criminal, by any other person or persons, or any other way, then . . . it shall be held null and void . . ."

By such provisions, 110 years before the drafting of the Constitution the people of the self governing colonies had already opted for a form of self government which both separated the judicial function from the legislative and executive functions and retained citizen control over the making of laws and the adjudication of cases alleging violations of those laws. Indeed, control over the judiciary by the people was two-fold because the scope of the

judicial power was limited to the enforcement of the laws adopted by the people's elected representatives and the decisions in individual cases were to be made by juries composed of the people, rather than by the judges.

For almost a century after 1677, the colonists enjoyed this concept of government under the broad right of self government in local matters provided by their charters. Their euphoria ended abruptly in 1765, however, when Parliament adopted the Stamp Tax Act. The colonists were dismayed. The law clearly threatened the form of government they had developed during the past 150 years. First, it was a law imposed on them other than by their own elected representatives. Second, by providing that the law was to be enforced in the Courts of Admiralty, which were executive branch courts, it breached both the concept that juries composed of the people should decide such matters and the concept of a judiciary separate from the legislative and executive branches of the government. Thus, while the Stamp Tax Act is most widely known because of the charge that it constituted taxation without representation, John Adams wrote of the separation of functions issue:

But the most grievous innovation of all, is the alarming extention of the power of courts of admiralty . . . No juries have any concern there! The law and the fact are both to be decided by the same single



*Baltimore Archives*

The Stamp Tax Act imposed by Parliament in 1765 required colonists to pay a fee to have stamps such as the one pictured above affixed to legal papers, newspapers and other documents.

judge, whose commission [by the king] is only during pleasure . . . We cannot help asserting, therefore, that this part of the Act will make an essential change in the constitution of juries, and it is directly repugnant to the Great Charter itself.

Although the Stamp Tax Act was repealed the next year, the Declaratory Act, which accompanied the repeal, marked the beginning of an assault by Parliament on the concept of self government which the colonists had grown accustomed to during the previous one and one half centuries. Charles Townsend became the leader of the House of Commons that year and he announced:

It has long been my opinion that America should be regulated . . . and its royal governors, judges, and attorneys be rendered independent of the people.

To accomplish that goal, Parliament under Townsend's leadership adopted the Townsend Acts which asserted increased governmental control over the colonies. Resistance to these acts by the colonists caused the repeal of some, but the duty which had been imposed on tea was not repealed. The colonists expressed their resentment by the Boston Tea Party. In retaliation, Parliament passed a series of statutes which became known as the Intolerable Acts. Two of these acts, although specifically applying to Massachusetts, greatly alarmed all of the colonies because they provided for the exercise of legislative power in the colony by a council appointed by the Crown and for the selection of jurors by county sheriffs appointed by the Crown instead of the selection being made by the people in town meetings as had previously been the practice. This destroyed both the tradition of popular control of the government by the governed and the colonial tradition of government based on a separation of functions.

The colonies joined together to protest these acts of Parliament. In the 1774 Resolves of the First Continental Congress, they respectfully but firmly set out their desire to preserve their right to local self government "in such manner as has been heretofore used and accustomed." After the king failed to heed their pleas to protect their right to self government from invasion by Parliament, the colonists declared their independence on July, 4, 1776. The Revolutionary War followed. When John Adams interviewed a soldier who had been in

the Battle of Concord and Lexington, and asked the question "what was the matter, what did you mean going into the fight?" the soldier responded:

What we meant in going for those red-coats, was this: we had always governed ourselves and we always meant to. They didn't mean we should.

This determination to protect the right of self government, which by then they had long enjoyed, was reflected in the constitutions and declarations of rights which all but two of the newly sovereign states adopted between 1776 and 1780: Virginia, Delaware, Maryland, New Hampshire, New Jersey, North Carolina, Pennsylvania, and South Carolina in 1776; Georgia, New York and Vermont in 1777 and Massachusetts in 1780. Only Connecticut and Rhode Island did not adopt constitutions. They continued, instead, under the form of government established by their liberal colonial charters. The constitutions or declarations of rights adopted in 1776 by Pennsylvania, Maryland and North Carolina all emphatically declared that the people had the sole and exclusive right of governing. The constitutions of Maryland, Massachusetts, Vermont, Pennsylvania and Virginia addressed the bitter complaints of "despotism" and "tyranny" of public ministers, and of "ministerial rapacity," which had made in the Declaration of the Causes and Necessity of Taking Up Arms, adopted July 6, 1775, by declaring that public officials were "trustees and servants of the people." Pennsylvania, Massachusetts, Vermont and Virginia specifically provided that the people had the right to "reduce" public officers to "a private station" and to fill the vacancies by regular elections as a means of restraining those who were employed "in the legislative and executive business of the State" from "oppressing" the people.

The Virginia constitution provided expressly that the legislative and executive powers of the state shall be separate and distinct from the judiciary; and the Maryland, North Carolina and Georgia constitutions provided that those functions shall be forever separate and distinct from each other. Other state constitutions prohibited anyone who held an office "for profit" in one branch of the government from holding an office in another

branch at the same time.

Most commonly, the constitutions of the new states provided that the legislative branch was to consist of two houses with the members of the House elected on a different basis than the members of the Senate or Council. Often the constitutions provided that all the money bills shall originate in the House, but that all other bills could originate in either chamber and be amended in the other chamber. If a constitution provided for a privy council to assist the governor, as Delaware's did, its members could not also serve in the legislature.

The chief executive officer of the state, sometimes called President or Chief Magistrate, was commonly chosen by joint ballot of both houses of the legislature. In exercising the executive powers of government, he was expressly "limited and restrained" by the constitution of the state and its laws. The phrase "with the advice and consent of" appears frequently in connection with the power of the chief executive to appoint military and civil officers of the state, who would serve "during pleasure," unless otherwise directed by the legislature. Members of the judicial branch were usually appointed by joint action of the executive and legislative branches and continued in office "during good behavior."

The constitution of Georgia specifically provided that the legislative branch could make no laws which were "repugnant to the true intent and meaning of any rule or regulation contained in this constitution." The constitution of New York provided that all bills which had been passed by both houses of the legislative branch should be presented to the executive council which could return a bill to the house in which it had originated with objections. If upon reconsideration, both houses by a two-thirds vote again passed the bill, it became law. A bill also became law if it was not returned within ten days after being presented. A number of constitutions required all bills to be read three times on different days before passage to permit the people time to express their views, except in cases of great necessity and danger.

The control of the people over the judicial branch was assured by provisions that laws which the courts enforced could be made only by their elected representatives, and by provi-



John Adams of Massachusetts was an adamant proponent of the separation of powers.

sions that made the jury the judge of the law as well as of the facts. The constitution of Massachusetts provided that each branch of the legislature, as well as the governor and council, could require opinions of the justices of the Supreme Court upon important questions of law and upon "solemn occasions" and also that the governor, in order that he could act for the benefit of the public and not be dependent on the legislature for his support, should have a fixed salary, as did the justices of the Supreme Judicial Court.

Usually, while the *form* of government was set out in the constitution, it was accompanied by a separate declaration of rights. These included the right to be secure from unreasonable search and seizures, the right to be formally charged before being held to answer for any crime or offense, freedom of the press, the prohibition of bills of attainder and ex post facto laws, and freedom of speech and assembly.

Despite such provisions intended to assure free and fair self government, Thomas Jefferson was to write in 1781 with reference to the government of his own state of Virginia:



Library of Congress

George Washington addressing the Constitutional Convention of 1787—delegates to the Convention brought with them 150 years of experience in local self-government.

All the powers of government, legislative, executive, and judiciary, result in the legislative body. The concentrating these in the same hands is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. 173 despots will surely be as oppressive as one . . . As little it will avail us that they are chosen by ourselves. An *elective despotism* was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided among several bodies of magistracy, as that no one could transcend their legal limits without being effectually checked and restrained by the others.

John Adams of Massachusetts had written even earlier in 1776, of the need for a separation of functions to check tyranny in government and preserve freedom:

A legislative, an executive, and a judicial power comprehend the whole of what is meant and understood by government. It is by balancing each of these powers against the other two, that the efforts in human nature toward tyranny can alone be checked and restrained, and any degree of freedom preserved in the constitution.

Jay, from the state of New York, described even more succinctly the problem posed by a government in which elected representatives of the people performed all three functions of government, when he wrote Jefferson on August 18, 1786:

To vest Legislative, Judicial and Executive power in one and the same body of men, and that too in a body daily changing its members, can never be wise. In my opinion, those three great departments of sovereignty should be forever separated, and so distributed to serve as checks on each other.

This concern which Jefferson, Adams and Jay expressed was strikingly reminiscent of the concern expressed nearly 150 years earlier about the danger of tyranny when elected representatives of the people performed all three functions of government, as they did under the 1618 Ordinances of Virginia and the 1629 Charter of the Massachusetts Bay Colony.

Thus, when the delegates to the Constitutional Convention assembled in Philadelphia the summer of 1787, they brought with them not only over 150 years of experience in local self government but also a decade of experience under the constitutions of their individual states.

They were not engaged so much in a great experiment as they were in applying the lessons already learned about self government through those experiences to the situation at hand in order to prepare that Constitution "which has appeared to us the most advisable."

# The Judicial Bookshelf<sup>1</sup>

by D. Grier Stephenson, Jr.

"[I]t seems to have been reserved to the people of this country," observed Alexander Hamilton, ". . . to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force."<sup>2</sup> Key to the continuing American experiment with "reflection and choice" has been the Supreme Court of the United States which Hamilton expected to "construe the laws according to the spirit of the Constitution. . . ."<sup>3</sup> "Deducible from the general theory of a limited Constitution," judicial review has made the Court a compelling force in the plan of union the framers devised. Attempting to resolve issues which divide and perplex the nation, the Court contributes both symbolically and substantively to the strength and vitality of constitutional government.

Because the Court matters politically, it has understandably been subject to continuing scholarly and journalistic oversight. Such scrutiny has been especially important for the judiciary because it has partially substituted for the direct political accountability provided for the executive and legislative branches, but absent for the federal judiciary. The Court's visibility has thus been a source of the institution's legitimacy as a check on popular power.

Yet, something besides the political consequences of judicial decisions must account for the attention the Court receives. Certainly, the scale and uniqueness of the institution invite and facilitate scrutiny. After nearly two hundred years, the entire succession of justices numbers only slightly more than the present number of United States senators. While there have been forty presidents, there have been only fifteen chief justices. Second, the work of the Court is relatively open. In the churning sea of government today, the Court institutionally seems like an island of procedural calm. Precedents, briefs, argument, and opinions are public and readily available. Only the

conference and the actual shaping of the opinions remain hidden from view. Even the veil shrouding this stage of the process ascends after a time, as justices take steps to preserve their papers. Third, the scope of the Court's business is intellectually manageable. One can grasp the substance and significance of the decisions of one term in a way that cannot be matched in a survey of the voluminous output of a session of Congress or the rulings of executive agencies.

Circumstances conducive to study and analysis partly explain therefore the volume of writing about the Court. However, they by no means produce a uniformity of view, as recent books amply demonstrate.

## The Justices

Publication of a biography of a justice is always a special event, for it is through such books that students of the Court have gleaned so much about the institution's decision-making procedures as well as the contributions of individual members. Some years ago, J. Woodford Howard, himself a biographer of Justice Murphy, identified the prime objects of a judicial biography as the description and relation of "the judge's personality, background, and belief system to his conduct on the bench and impact on the law and politics of his time."<sup>4</sup>

R. Kent Newmyer's *Supreme Court Justice Joseph Story*<sup>5</sup> meets this test and does more. Newmyer's is at least the third major volume on Story to appear within the past two decades. Gerald Dunne's 1971 biography<sup>6</sup> excelled in drawing within its pages a portrait of Story the man. Joseph McClellan's biography which appeared the same year<sup>7</sup> stressed Story's jurisprudence and included generous excerpts from his extensive writings.

Newmyer's is different because it absorbs the events of Story's day as a backdrop to illuminate his life. Already thoroughly familiar with this period of the Court's history,<sup>8</sup>



The career of Associate Justice Joseph Story (1812-1845) is examined in a recent biography by R. Kent Newmyer.

Newmyer reveals Story as a major figure on a stage with changing scenes at a vital time in American history. Story "belonged to that generation touched by the idealism of the American Revolution. He grew up with the Republic, intermingled his ambition with its fate. Story brought to bear his own special genius, to be sure, but his singular talent would not have blossomed so brilliantly or produced so copiously except for the rich soil of republican culture."<sup>9</sup> By "republican culture" Newmyer means the ideological ground shared by Americans: "that a successful revolution and a bountiful providence had marked out the American republic for a special destiny."<sup>10</sup>

Newmyer highlights the "symbiotic connections" between Story's view of the law and the life of the nation. So Story's legal practice appears not just as an example of legal culture in early nineteenth-century Massachusetts but as a reaction to the rise of political parties. Even his years of teaching at Harvard Law School (all the while remaining a Justice) and the outpouring of legal treatises are part of the counterrevolution of Massachusetts conservatives in the 1820s.

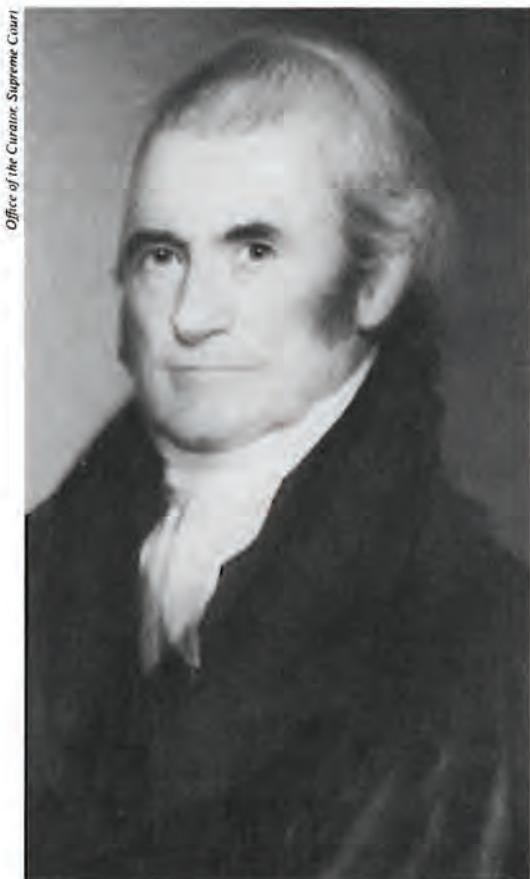
Story's career as a close colleague of Chief Justice Marshall and later as a member of the Taney Court is consistent with this theme. His years as a justice demonstrated prodigious concern for (1) the establishment and maintenance of a strong central government along classic Federalist lines; (2) the protection of rights of private property — that is, vested rights and the advancement of commerce; and (3) the almost religious duty and special competence of the judiciary, especially the national judiciary, to bring about realization of the first two. Judges were not only to govern, but "to bring legal principles to bear on the great political and economic problems of the age." One is amazed, admits Newmyer,

at the bold systematizing of Story's law — and at what he assumed law could do, what republican lawyers and judges were expected to do. . . . Like the authors of the *Federalist*, Story saw law as the instrument by which men institutionalized their rational moments as a bulwark against their foolishness, passions, and selfishness. . . . To be a teacher, an author, and a judge was to be a statesman as the American Enlightenment defined the term.<sup>11</sup>

For Story, law was "what religion was for Jonathan Edwards: the mind, heart, and soul, the binding cement, of a community dedicated to individualism."<sup>12</sup>

In some respects, Story was on the "winning side" of the great issues of the mid-nineteenth century. Yet, Newmyer portrays Story as one who was witness to the undoing of his republican community brought about by the political forces of the day. Change was not due to economics or demographics, reasoned Story, but human failure, a backslide from the ideals of the Revolutionary period. To the degree today that Story is an artifact rather than a current force in law is a measure of the transformation of the old republic into the new.

Arrayed alongside Newmyer's portrayal of Story the activist is Wallace Mendelson's perception of John Marshall the non-activist. His essay "Was Chief Justice Marshall an Activist?" is one of thirty articles authored by Mendelson and reprinted in *Supreme Court Statecraft*.<sup>13</sup> With individual selections originally published between 1949 and 1982, the collection is arranged in six divisions: The Judge's Art, Freedom of Expression, The Fourteenth Amendment, Judicial Review,



Chief Justice John Marshall is described by Wallace Mendelson not as an innovator, but rather as "... a gifted spokesman for a widely held view."

#### Jurimetrics, and The Path of the Law.

It is a mistake, Mendelson believes, to view Marshall as an activist. In his view, activists are innovators. "Like Jefferson in the Declaration of Independence, Marshall . . . was not an innovator, but a gifted spokesman for a widely held view."<sup>14</sup> Fighting against the argument of "Progressive Historians," Mendelson argues that Marshall's jurisprudence was not the model for the Warren Court's activism of the 1960s. He denies that Marshall foisted judicial review on an unsuspecting nation, promoted nationalism at the expense of local prerogative, and protected property at the expense of human rights.

Rather, Marshall's conception of judicial review was about as narrow as could be. It was aimed at cementing the union, to provide what Story called "a revising authority."<sup>15</sup> Presumably this meant making explicit that the nation had in the Supreme Court a workable final authority in interpreting the

Constitution. So, in *Marbury v. Madison*<sup>16</sup> Marshall implicitly rejected the counter premise of the Virginia and Kentucky Resolutions that the *states* had the final say. Equally unacceptable was the view floated in debates over the Judiciary Act of 1802, repealing the Act of 1801, that *Congress* had the last word on the meaning of the Constitution. According to Mendelson, Marshall was not being inventive because *Marbury* was so compatible with the Constitution itself, Section 25 of the Judiciary Act of 1789, and the Court's own prior decisions such as *Hylton v. United States*.<sup>17</sup>

Neither was *Gibbons v. Ogden*<sup>18</sup> especially innovative, according to Mendelson. Marshall simply "resolved (a mainly linguistic) doubt in favor of Congress and the democratic process." An activist decision would have minimized congressional authority, ignoring "the origins of the Commerce Clause — as the 1895-1936 Court did. . . ."<sup>19</sup>

As for a property bias, Mendelson insists that a case like *Fletcher v. Peck*<sup>20</sup> did not involve a choice between a pro-property and an anti-property result. A decision either way would have aided some property holders and hurt others. Reviewing the formidable opinions by Marshall and Story in *Dartmouth College*,<sup>21</sup> the author argues that even Story demonstrated that states could avoid irrevocable or nonamendable charters by reserving a right to amend in the issuing authority. Furthermore, in including charters within the scope of the contracts the Constitution protected, Marshall was only giving the word "contract" the broader and unexceptional eighteenth century meaning which included transactions generally, rather than agreements between private parties solely.

If Marshall's legacy as an activist is thus undeserved, neither did he set the precedent for the Warren Court. Rather, Mendelson argues, "it was . . . the laissez faire activists beginning in the 1890s" for whom the label is a more perfect fit. "The father of that movement was Mr. Justice Field. His son-in-law (so to speak) was Mr. Justice Black who passed the torch to the Warren Court activists—and lived to regret it."<sup>22</sup>

Marshall's work would presumably meet the standard for proper judicial behavior that Mendelson lays out in the preface. While a judge must reject "outworn traditions," the

judge must avoid "widely unwanted progress." In a system where the Constitution fulfills the need for stable authority, judges must attend to the "inevitable need for change without loss of continuity." This end they reach by extrapolating "from the deeply held values of their society."<sup>23</sup>

Roughly a century after Marshall and Story completed their years of service on the Court, Frank Murphy began his. Murphy's year as Attorney General of the United States and his decade as a justice are the subject of the third and final volume of Sidney Fine's biography of the Mayor of Detroit, Governor of Michigan, and Governor-General of the Philippines who became a paradigm of judicial activism on the modern Court.<sup>24</sup> *Frank Murphy: The Washington Years* is, like Newmyer's book on Story, a full scale judicial biography. Like Newmyer, Fine follows the methodology of the historian to probe not just the man but the times in which he lived and the issues he faced as a public figure. Also like Newmyer, Fine is not so totally absorbed in a single justice that the Court's work appears to be the handiwork of one individual.

Access to Murphy's papers and the extant papers of every Justice with whom Murphy served<sup>25</sup> enabled Fine to present an extensive account of the inner workings of the Court, including conference deliberations and the drafting of opinions. J. Woodford Howard's earlier biography of Murphy drew on some of the same sources, but some of the sources at Fine's disposal were not accessible when Howard did his research. Accordingly, Fine's *Frank Murphy* provides some additional information about, and insight into, the Stone and early Vinson Courts, without radically questioning the conclusions of existing scholarship. This suggests as much about the integrity of the sources as it does about the skill of those who consult them.

For example, a thorny question persists about Murphy's vote with the majority in the *Gobitis* flag-salute case.<sup>26</sup> Justices Black and Douglas, the Court's two other ardent liberals, did the same. Only Justice Stone dissented against Justice Frankfurter's opinion denying First Amendment protection to the Jehovah's Witnesses in this instance. Murphy even abandoned the draft of his own dissenting opinion. Fine believes this was not because, as Howard maintains, its "policy orientation was so blatant,"<sup>27</sup> but because "an indecisive freshman . . . discussed his proposed dissent with the chief justice, who persuaded him to go along with the Court."<sup>28</sup> That may be. Yet, what remains unclear is why Murphy failed to join Stone's powerful dissent when it was circulated among the Brethren, especially since Murphy had already drafted one of his own. Not only were Murphy's leanings strongly against the flag-salute rule, but with less risk he could have withdrawn his own dissent and sided with one written by another senior member of the Court.

At a distance of two chief justices and nearly four decades after Murphy's death, what assessment does Fine offer of Murphy's service on the Court? Since the average tenure for a Supreme Court justice is longer than a decade, it is fair to wonder about the lasting impact of one who, like Murphy, served only nine and a half years. The designation of "greatness" has eluded even most of the justices who sat for more than a decade on the Court.<sup>29</sup> With the exception of Justice Cardozo, whose reputation as a jurist had a substantial headstart,



Associate Justice Frank Murphy  
1940-1949



United Press International

The Court heard *Minersville School District v. Gobitis* in 1940, and ruled against the Gobitas family (shown above) on June 3, 1940. Justice Murphy's vote with the majority is one of the controversies examined in Sidney Fine's *Frank Murphy: The Washington Years*. The Court records misspelled the Gobitas family name, hence the landmark decision continues the error.

none of those with fewer than nine or ten fairly can be accorded the honor. In Frankfurter's words, "[t]ime is one of the most important factors in the realization of a man's potentialities."<sup>30</sup> Murphy is thus a border-line case. Fine observes that most of his opinions in the realm of civil liberties were concurrences or dissents, and it is for his stances in those cases that he is best remembered. Alongside 130 majority opinions were 20 concurrences and 69 dissents. "Dissent has a popular appeal," Justice Jackson counseled later, "for it is an underdog judge pleading for an underdog litigant."<sup>31</sup> Murphy's dissent in *Korematsu v. United States*,<sup>32</sup> for example, still carries meaning more than four decades later. Moreover,

[i]n his belief that the central idea of the Constitution was the protection of the individual, his search for the just and fair result, his solicitude for the disadvantaged, and his disdain for legal niceties and the doctrine of judicial restraint when they ap-

peared to serve as a sanction for injustice, Murphy anticipated the "jurisprudential posture" of Earl Warren.<sup>33</sup>

Fine admits, however, that even the Warren Court rarely cited opinions by Murphy in support of its own decisions. Murphy's "tended to be brief and emotional even when solidly grounded, often lacked intellectual depth, and were sometimes composed without due regard for the 'preferred canons of craftsmanship.'"<sup>34</sup> Admitting that it would have been a "disaster" to have nine Frank Murphys on the Supreme Court at one time, Fine concludes that the nation nonetheless benefitted from the presence of a justice "who pursued justice so ardently...." In other words, Murphy was a good man, if not a great jurist. "Flawed like all men, Frank Murphy still impresses as one of the more admirable figures in public life during three tumultuous decades in the nation's history.... [T]he world



Associate Justice Hugo L. Black  
1937-1971

was a better place for his having been there.<sup>35</sup>

"Greatness" is a term easily and appropriately applied to Justice Hugo Black. His thirty-four years of service on the Supreme Court from 1937 until his death in 1971 loom large on the twentieth-century American political and constitutional landscape. A fair assessment of his long career as an attorney, police judge, prosecutor, United States senator, and justice reveals a man who made a substantial and, probably, a lasting impression on the law during an era of unprecedented social change. It is no exaggeration to say that Black had a hand in precipitating that change. Neither is it far-fetched to add that much of the continuing controversy surrounding judicial review flows from Black's constitutional jurisprudence. In a way matched by few, he defined the terms of the debate and for a long time was one of its chief contenders. To the expanding bibliography on Black's life and work appears a significant addition: *Mr. Justice and Mrs. Black:*

*Office of the Curator, Supreme Court*

*The Memoirs of Hugo L. Black and Elizabeth Black.*<sup>36</sup>

Appearing in the centennial year of Justice Black's birth, *Mr. Justice and Mrs. Black* combines three contributions in one. First are Justice Black's own memoirs which he began writing in 1968. At his death in 1971, he had progressed only as far as 1921, his Senate and Court years still lying ahead untouched.<sup>37</sup> The second part, written by Mrs. Black, is appropriately called "The Years Between" and "aims to 'catch the reader up' both by way for further explanation of certain gaps in Hugo's writing and with a brief chronology of his subsequent life and career."<sup>38</sup> The third and longest part contains excerpts from handwritten diaries Mrs. Black kept from 1964 until her husband's death. With the assistance of Professor Paul R. Baier, the diary excerpts are carefully, extensively, and productively annotated, containing not only citations to cases but extensive excerpts from opinions Black authored and — the real gems — several of Black's memoranda to the other justices as well as exchanges with counsel (and with "the brethren") during oral argument.<sup>39</sup>



*Mrs. Hugo Black, Random House*

*Mr. Justice and Mrs. Black* adds significantly to the literature on one of this century's most influential justices through the author's extensive use of memoirs, private papers and personal reflections on life with the Justice.

With taste and dignity and with loyalty to an institution with which she was closely allied during one of its most active and turbulent eras, Mrs. Black adds to what is already known about the Supreme Court during the late Warren and early Burger Courts. Anecdotes abound, including an account of the Blacks' hikes in 1967 through tall brush in Ogelthorpe, Georgia, in search of his great-grandfather's homestead. The Justice was stung by a yellowjacket, and they "left the property all covered with beggar's lice and cockleburs."<sup>40</sup> There are ample glimpses of Black at work as a Justice (such as his efforts with colleagues in the sit-in case, *Bell v. Maryland*,<sup>41</sup> portrayals of intra-court relations (entertaining the Blackmuns in November 1970), and generous insight into Hugo Black the man ("He'll take over and try to change your life," advised his departing secretary Gladys Coates).<sup>42</sup> In this third respect Mrs. Black's contribution is most important. As Justice Brennan explains in the Foreword,

Mrs. Black opens the window into the life she lived with Justice Black for fourteen years, until his death. It is at once a love story, tender and touching, and a picture of a great man that helps us know Justice Black. . . . It is much more than a daily diary, although it is some of that. It tells us much of the agony of decision known by every Justice, of the uncertainty one feels as one treads one's way to the judgment that cannot be escaped. It tells us too . . . of the friendships on and off the Court that become precious. . . . But best of all, there emerges in living color the portrait of a great American all of us would want to know.<sup>43</sup>

"The Supreme Court is made up of human beings," Paul Baier writes, "yet the humanity of the Court is largely unknown."<sup>44</sup> This volume helps to close the gap.

#### The Court

*The Judiciary and Responsible Government 1910-1921* by Alexander M. Bickel and Benno C. Schmidt, Jr., is the most recent volume to appear in the Holmes Devise *History of the Supreme Court of the United States*.<sup>45</sup> Bickel completed the first seven chapters before his death, with Schmidt writing the final three. Both could write about the judicial process with that extra perspective of first-hand experience: Bickel clerked for Justice

Frankfurter, and Schmidt clerked for Chief Justice Warren. Bickel's chapters survey the circumstances surrounding the appointment of each Justice during the years of the chief-justiceship of Edward Douglass White, as well as the cases involving economic and social regulation which comprised a large part of the Court's docket at that time. Schmidt's chapters review the White Court's record on race discrimination cases.<sup>46</sup>

The Bickel-Schmidt volume is rich in its use of mainly unpublished sources. Bickel had access to Brandeis' "working papers" as well as the notes then Professor Felix Frankfurter made of conversations he had with Brandeis at Cape Cod. These contain many of Brandeis' reflections on his colleagues and comments on the Court's work at that time. Also important throughout are references from the Van Devanter, Hughes, and Holmes papers, to name but three manuscript collections.<sup>47</sup> Documentation in this volume is excellent, proving once again how insightful such sources can be, and how crucial it is for scholars to have access to the papers of justices. Since such sources frequently contain information not available elsewhere about the most secretive part of the Court's work, authors need to provide (as have Bickel and Schmidt)<sup>48</sup> full citation so that others may examine evidence and test conclusions. Accordingly, absence of citations or vague references to sources not yet open to others correspondingly reduce the value of any judicial study, especially when it deals with the Court's deliberative processes.

Perhaps because of Bickel's death and the resulting joint authorship, the book does not advance a unifying theme or offer hypotheses to be explored. Perhaps the White years can best be characterized as containing varying attitudes and doctrine. These would not harden for another decade, before starting the slide toward the constitutional confrontation of 1937. In short, the period 1910-21 was a collection of cross currents, witnessing, for example, both *Bunting v. Oregon* and *Hammer v. Dagenhart*.<sup>49</sup> Indeed, debates over the propriety of judicial review, intensifying after 1890, do suggest a theme for the White Court: the justices grappled with the problem of assuring constitutional guarantees in a democratic system. Would rights be protected solely through the political process or with the aid of

Office of the Curator, Supreme Court



The White Court, shown above as it was constituted in 1916, is the focus of the most recently released volume in the *Oliver Wendell Holmes Devise* series. Standing, left to right are: Associate Justices Louis Brandeis, Mahlon Pitney, James C. McReynolds and John H. Clarke. Seated, left to right are: Associate Justice William R. Day, Joseph McKenna, Chief Justice Edward D. White; and Associate Justices Oliver Wendell Holmes, Jr. and Willis Van Devanter.

the courts? If courts had a role to play, how large would it be? How hesitant were judges to be in setting aside decisions made by politically accountable officials? That the outcome of the debates leaned increasingly toward intervention by the courts in policy making may well be part of the basis for the Court's power today. Because the Court after 1890 assumed a major governing role in economic matters, there developed an expectation that courts should govern, regardless of the issue in dispute.

It was during the period examined by Bickel and Schmidt that interest groups began a systematic use of the courts to further their objectives. Litigation, like war, became the conduct of politics by other means. This phenomenon of interest group litigation is the subject of Lee Epstein's *Conservatives in Court*.<sup>50</sup>

The immediate background for Epstein's study is the rapid growth of conservative

interest groups in the 1970s and 1980s. While liberal groups such as the National Consumer's League (dating from 1899) and the National Association for the Advancement of Colored People (dating from 1910) long ago became skilled in litigation politics, conservative groups are comparative newcomers.<sup>51</sup> For example, only three of the groups Epstein chronicles were in business before 1970. No wonder then that earlier studies such as Clement Vose's pioneering *Caucasians Only*<sup>52</sup> focus mainly on groups pursuing liberal objectives.

Of course, conservative causes were especially influential in American constitutional law during the late nineteenth century. This is a story that has been told in several places.<sup>53</sup> But Epstein has something else in mind. His concern is not just an evolution in constitutional theory that comes about through the normal course of cases, arguments, and judicial appointments, but a staged and coordi-

nated drive to achieve a specific objective, using devices such as the *amicus curiae* brief, the test case, and articles in law reviews. An issue thus becomes transformed and transferred from the rough and tumble of routine politics to the halls of the judiciary.<sup>54</sup>

Building on the results of studies such as Vose's, Epstein tests conclusions about the strategy and tactics of liberal groups against the methods of conservative groups and finds that they are very similar. First, whether pursuing liberal or conservative policies, interest groups "often resort to litigation when they view their goals as unobtainable or difficult to achieve in other political forums." Second, sponsorship appears to be "the preferred strategy of interest group litigators." Third, necessary resources for interest groups "are money, government support, frequent and increasing use of the courts, expertise, extra-legal publicity, and intergroup support." Indeed, cooperation by the Solicitor General's Office appears crucial. Finally, the groups "generally obtain their objectives through litigation."<sup>55</sup>

Epstein believes that conservative groups will increasingly resort to the judicial process. If more liberal groups persist as well, the Supreme Court "will more than ever before [be] put . . . in the position of having to mediate between competing group interests." Judicial politics, he concludes, may come to be viewed as "not significantly different from the legislative and executive processes" where contending lobbies have long clashed.<sup>56</sup> It may also be the case that litigation enables groups initially at a numerical disadvantage to broaden their base by appealing to a wider constituency. Fired by an emotional issue, a group persevering through litigation all the way to the Supreme Court, win or lose, is bound to attract publicity for its cause, as well as valuable support from others that might be obtained no other way.

Campus-bound scholars are not alone in studying the judicial process. Justices and other judges engage in self-analysis. In *Views from the Bench*, Mark Cannon and David O'Brien have compiled twenty-eight judge-authored articles, speeches, and essays: seventeen by federal and state judges and eleven by Supreme Court justices, including six members of the current Court. Most of the selec-

tions date from 1970.<sup>57</sup>

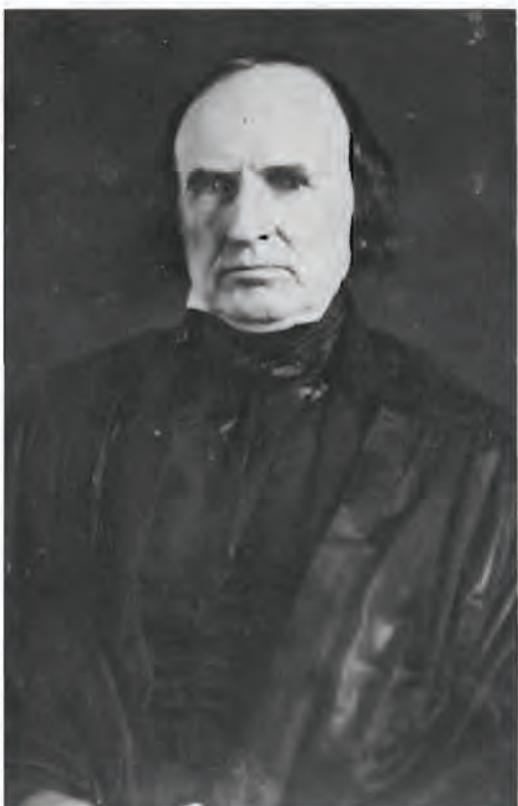
In their preface, Cannon and O'Brien note the tradition of "judicial lockjaw" — the injunction against a judge's "speaking out." Yet, "speaking out" is as old as the admonitions against it. Their volume is proof enough that judges and justices have not successfully gagged themselves, even if there remains a widely shared view that judges are subject to constraints that do not apply to ordinary politicians.

More than a few justices have made use of *extra-curiam* opportunities to advance their personal notions of public policy especially as it relates to the role of the judiciary. In his five-volume biography of George Washington, Chief Justice Marshall was not bashful in promoting the Federalist theory of the union, and later took to the newspapers to defend anonymously his opinion in *McCulloch v. Maryland*.<sup>58</sup> Shortly, Justices Story and Baldwin recorded their theories on the Constitution in sets of commentaries. The breadth of tolerance was such that Justice John McLean maintained his seat on the Court while running perennial campaigns for the presidential nomination on the National Republican, Free



"You can't blame Japan for feeling it an insult" exclaimed the caption of this political cartoon depicting an anti-Japanese bias in U.S. Immigration laws. Author Lee Epstein examines conservative interest groups' use of litigation to achieve political aims.

Library of Congress



Associate Justice John McLean (1829-1861) was active in politics and prolific in the press during his tenure on the Court.

Soil, and Republican party tickets. He made known his views on a variety of subjects through letters in newspapers and even condemned publicly the Polk Administration's conduct of the Mexican War. A year later he expressed his views in a letter on the power of Congress to legislate on the status of slavery in the territories.<sup>59</sup> Comment short of McLean's excesses had become so widespread by mid-century that justices routinely began making their thoughts known outside the confines of written opinions. The practice continues today, tempered only by the general and wise refusal to discuss cases under review.<sup>60</sup>

Still, when justices voice opinions on controversial matters, they run the risk of sapping the strength of the institution. This was Justice Black's point, more than four decades ago, when he advised that the kinds of questions the Court confronts in its cases impose "a sharp limitation on . . . freedom of discussion in [one's] unofficial capacity."<sup>61</sup> But Black was not arguing against all comment, as his own record testified. As Judge Rifkind said in 1966,

[W]hen the issue is of sufficient significance, the command of conscience insistently imperative, and the public clamor is adjudged irrational, a judge ought not to hesitate to lend his aid, his voice and his presence to a great cause even as he would unhesitatingly render an unpopular judgment.<sup>62</sup>

There is indeed room for extracurial comment. Legal writing and lecturing are, as Judge Edwards once suggested, "antidotes to judicial atrophy" and a means of preventing the judiciary from becoming "a grey bureaucracy completely remote from the life and problems of the nation."<sup>63</sup> The authors whose works are collected in *Views from the Bench* would appear to agree.

In this impressive collection, three articles are especially noteworthy. In "The Courts and Social Policy,"<sup>64</sup> Judge Henry Friendly addressed three problems he found with the Supreme Court's 1973 abortion decision, *Roe v. Wade*.<sup>65</sup> First is the "severity of the restrictions imposed on state abortion laws." Second are "the boundaries of the newly created constitutional right of personal autonomy." Third is the "use of social data offered by appellants and amici curiae for the first time in the Supreme Court itself," where that data had not been subject to scrutiny in the lower courts. "If an administrative agency, even in a rule-making proceeding, had used similar materials without having given the parties a fair opportunity to criticize or controvert them at the hearing stage, reversal would have come swiftly and inexorably."<sup>66</sup>

Judge Ralph Winter's "The Activist Judicial Mind"<sup>67</sup> agrees that the abortion cases are evidence that judicial activism "has entered an unprecedented era." The results of this activism are not "random" but "seem consistently liberal or at least consistent with that branch of reformist, middle-class liberalism descended from the Progressive Era at the turn of the century." In his view, today's activism stems from three basic attitudes prevalent in the judiciary: first, a "hostility to a pluralist, party dominated, political process;" second, "a demand for 'rationality' in public policy;" and third, "skepticism about the morality of capitalism."<sup>68</sup> Contemporary judicial activism has taken the form of what Madison denominated (and rejected) in *Federalist No. 51* as the "hereditary or self-appointed authority" to protect minority interests. Yet, the

"belief that an activist court will do only good things and be a successful moderating influence is more a matter of faith than of logic, of political religion than of experience."<sup>69</sup>

Also questioning the role of the activist jurist, Judge Robert Bork in "Tradition and Morality in Constitutional Law"<sup>70</sup> acknowledges the risks of speaking out: "When a judge undertakes to speak in public about any subject that might be of more interest than the law of incorporeal hereditaments he embarks upon a perilous enterprise."<sup>71</sup>

Peril is also present in what Bork considers "ideologies that are subversive of the very idea of the rule of law." These he finds "worrisome for the future" because increased litigation means that more power will accrue to judges. Because he believes constitutional law has little theory of its own, it "is almost pathologically lacking in immune defenses against the intellectual fevers of the larger society...." These "fevers" he describes as "an infusion of extraconstitutional moral and political notions."<sup>72</sup> Bork's solution is a different kind of theory, one that "relates the framers' values to today's world" by establishing "the proposition that the framers' intentions with respect to freedoms are the sole legitimate premise from which constitutional analysis may proceed." Looking outside the Constitution for constitutional meaning teaches "disrespect for the actual institutions of the American polity," which are "designed to achieve compromise, to slow change, to dilute absolutisms. They embody wholesome inconsistencies. They are designed, in short, to do things that abstract generalizations about the just society tend to bring into contempt."<sup>73</sup>

While the essays in *Views from the Bench* mainly concern the judicial function, Leo Pfeffer's *Religion, State and the Burger Court* surveys the current Supreme Court's handiwork in a significant area of constitutional law: church and state.<sup>74</sup> Publication of Pfeffer's book is a reminder that most of the law on church and state is a product of the Burger Court. Of course there were important decisions in the field before 1969, but the number of cases since Burger's appointment overshadows anything that came before. This gives Pfeffer's title added significance.

A self-styled "strict separationist" rather than an "accommodationist," Pfeffer gives the

Burger Court high marks generally for its decisions protecting free exercise of religion, but with interpretation of the Establishment Clause, he recognizes "two Burger Courts." The Court of the 1970s held fast, he finds, to a division between government and religion, noting that *Lemon v. Kurtzman*<sup>75</sup> in 1971 was the "first time in American history that the . . . Court ruled unconstitutional laws appropriating funds to finance the operations of religious schools."<sup>76</sup> Since 1980, however, and thanks largely to Justice Powell's "conversion from absolutism to accommodationism" the trend has been to uphold policies challenged under the Establishment Clause. Past decisions were not overruled, but distinguished. "Perhaps the Court did not want to emulate the recklessness of the Roosevelt-packed New Deal Court in overruling the decisions of its conservative predecessors."<sup>77</sup>

### The Constitution

Leonard Levy's *Constitutional Opinions* focuses in part on the origins of church/state policies Leo Pfeffer examined. The volume is a collection of twelve essays, ten of which deal with the formative years of American constitutional government. Chronologically they range from "Freedom of Speech in Seventeenth-Century Thought" to "Jefferson as a Civil Libertarian." Especially timely are the essays appearing as chapters six and seven: "The Bill of Rights" and "The Original Meaning of the Establishment Clause."<sup>78</sup>

The first suggests that the amendments comprising the Bill of Rights are of more importance to those who now enjoy their protections than to most of those who were responsible for their ratification. If Americans today regard the Bill of Rights as standing for the principle that "the individual may be free only if the government is not," Levy's study reveals only "slight passion" on anyone's part two centuries ago to "enshrine personal liberties in the law of the land."<sup>79</sup>

Statecraft and political expedience — not devotion to principle — gave birth to the Bill of Rights. Opponents of the proposed Constitution (the Anti-federalists) used the absence of a bill of rights as a major argument in their fight. The standard Federalist response reasoned that a bill of rights was unnecessary. If the national government under the Constitu-

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*James Wilson*

James Wilson, who later served on the Court from 1789-1798, was concerned at the time the Constitution was ratified that the addition of a bill of rights might actually serve to restrict the rights of the citizenry.

tion was a government of delegated powers, why bar the exercise of powers not delegated? Moreover, adding a bill of rights might also be dangerous. In James Wilson's words,

A bill of rights annexed to a constitution is an enumeration of the powers reserved. If we attempt an enumeration, everything that is not enumerated is presumed to be given. [This would] throw all implied powers into the scale of the government, and the rights of the people would be rendered incomplete.<sup>80</sup>

As Hamilton argued in *Federalist* No. 84, government could by inference do anything not forbidden.

The Federalist explanation backfired. The Constitution as it left the hands of the framers contained, after all, several specific prohibitions such as the ban on granting titles of nobility. Without a bill of rights, the Anti-federalists could make the reasonable point that now all unprotected rights stood in danger. The potential elasticity of the "necessary and proper" clause only strengthened their case. So Federalists had to promise a bill

of rights to assure ratification. Moreover, once ratification had been achieved, a bill of rights had to be proposed if only to quiet the calls for a "second convention." There, much of the work of 1787 (a national taxing power, for example) might have been undone. By proposing a bill of rights, the Federalists were able to take the wind out of the Anti-federalist sails by removing the main cause around which popular opposition to the Constitution could gather.

But for these circumstances and Madison's insistence that something be done, Levy believes the proposed amendments would simply have died in the First Congress. The Anti-federalists, fearing of the scope of national power and the corresponding loss of state prerogatives, led the drive for a bill of rights. The irony they discovered too late was that they got neither full credit for its adoption nor the substance of what they really wanted.

One very important part of the Bill of Rights was of course the protection afforded religious freedom in the First Amendment. This Levy addresses in "The Original Meaning of the Establishment Clause." At least since the Supreme Court's decision in *Everson v. Board of Education*<sup>81</sup> four decades ago, debate has persisted on and off the Court over whether a broad or a narrow view of the Establishment Clause is more faithful to history. The former insists that the Constitution bans all aid to all religions; the latter insists that the Constitution outlaws only assistance which favors one religious group over another. The question has obvious significance for scholars such as Judge Bork who, as noted earlier, insist that the framers' intentions are "the sole legitimate premise" from which constitutional analysis may proceed.<sup>82</sup>

The question, Levy acknowledges, "seems to transform into partisans all who approach it." While admitting that the issue is "debatable" and that the sources are unclear and "always disappointingly incomplete," he nonetheless concludes that "a preponderance of the evidence" points to the broad view as being historically the more accurate one. Significant for this conclusion were establishment practices in the colonies and the states, where in some places at least, "establishment" was understood to mean aid to several religious groups, not just financial support to a

single official church. In other words, the First Amendment was probably intended to bar any federal "meddling" in religious matters.

Levy bases this conclusion as well on the Federalist arguments *against* a Bill of Rights, namely that Congress was bereft of authority, even in the absence of the First Amendment, "to enact laws which benefited one religion or church in particular or all of them equally and impartially."<sup>83</sup> Yet these were the same arguments which, in the debate over the desirability of a Bill of Rights, Levy considered "patently absurd."<sup>84</sup>

A more extensive analysis of the issue appears in Thomas Curry's *The First Freedoms*.<sup>85</sup> While culminating in the debates over the First Amendment in Congress, Curry's book has deeper roots. Probing colonial records, newspapers, and pamphlets, he attempts to discover the intentions underlying the religion clauses by viewing the problem from the perspective of Americans during the colonial and revolutionary years. As such, he turns up a surprising degree of agreement, as well as disagreement, in habits and attitudes among Americans of that era. In Curry's view, the provisions of the First Amendment "did not represent the triumph of one particular party or specific viewpoint over a clear or entrenched opposition...." Instead, a consensus emerged in the language intended, in Richard Henry Lee's words, "for ages and nations yet unborn."<sup>86</sup>

"One will look in vain," Curry writes, "for the analytical distinctions scholars presume the generation that enacted the First Amendment made between government establishment of a particular sect and government establishment or favor to many sects."<sup>87</sup> One should not be disappointed that Americans at this time did not "work out specific practical applications of their theories on Church and State."<sup>88</sup> While concerned for the future as well as their present, they may be forgiven for not answering all the questions that perplex Americans today. Curry concludes that "Americans during the revolutionary period did not always carry their principles into practice either in Church-State or other matters," yet this fact, he feels, does not negate those principles.

Except in a few instances, such as financial support of churches, they passed to subsequent generations

the task of working out the consequences of the principle that the state had no competence in religious matters in a society wherein customs, mores, laws and religion intertwined and wherein the majority equated religion with Protestantism.<sup>89</sup>

Government efforts to "organize and regulate" support for religion were probably viewed by most as a "usurpation of power," falling within what they saw as "an establishment of religion."<sup>90</sup>

### Judicial Review

It is judicial review of course which lends added significance to debates over provisions in the Constitution such as the Establishment Clause. As a center of controversy, judicial review has been subject to searching scholarly inquiry for only about a century. The reason for this delayed reaction to judicial review is simple: it was not until late in the nineteenth century that judicial review evolved in both the state and federal courts to be a major check on popular majorities. Before 1940, detractors considered the power tarnished and plainly inappropriate in a political system which took pride in describing itself as "government by the people." Since 1940, defenders of judicial review have come forward to restore its lustre as a nearly indispensable tool in protecting human dignity against popular majorities. The result has been a proliferation of "theories" of judicial review, prompting constitutional scholar William Van Alstyne to confess awkwardness in maintaining "that it is *this* Constitution that is being interpreted. Rather, it is more widely felt that one must ask: Whose partial jurisprudence is currently being applied?"<sup>91</sup>

The point is that not just any application or justification of judicial review will do. Some writers emphasize the intent of the framers. Others stress use of certain political and moral premises. Throughout, the objective of most seems to be the furtherance of a society they think is, or should be, the objective of the Constitution. Because of its prominence in legal literature and education, the debate can reasonably be expected to influence the Court.

Laurence Tribe's *Constitutional Choices*<sup>92</sup> enters this debate confessing a "sense of ultimate futility of the quest for an Archimedean point outside ourselves from which the

legitimacy of some form of judicial review or constitutional exegesis may be affirmed." Indeed, to say that "one is merely the voice of the framers' intentions or of a contemporary consensus, or the perfecter of popular mechanisms for choice devised by others, is to lose touch with the need for continuing self-doubt in the exercise of adjudicatory power."<sup>93</sup> Moreover, the search for legitimating theories can be as dangerous as they are unpersuasive: "in matters of power, the end of doubt and distrust is the beginning of tyranny."<sup>94</sup>

For Tribe, the prevailing interpretation of the Constitution is a collective responsibility. Of course the Supreme Court has a dominant role, but Americans make constitutional choices when they vote, when Presidents nominate members of the judiciary, and when the Senate confirms.

[J]ust as the constitutional choices we make are channeled and constrained by who we are and by what we have lived through, so too they are constrained and channeled by a constitutional text and structure and history, by constitutional language and constitutional tradition, opening some paths and foreclosing others. To ignore or defy those constraints is to pretend to a power that is not ours to wield. But to pretend that those constraints leave us no freedom, or must lead us all to the same conclusions, is to disclaim a responsibility that is inescapably our own.<sup>95</sup>

What makes a particular choice correct for Tribe is certainly the morality of it, admittedly a morality that might not be shared by others. But there is more. Tribe is intrigued by the manner in which the choice is justified. Admitting that this is what he does best, Tribe prefers to reason in terms of the theory of the Constitution itself, acknowledging that other plausible theories exist, but showing how a particular choice advances defensible objectives. Doing constitutional law therefore means "constructing constitutional arguments and counterarguments or exploring the premises and prospects of alternative constitutional approaches in concrete settings."<sup>96</sup>

The result is an understanding of the Constitution that is neither a mirror nor an empty vessel "whose users may pour into it whatever they will. The Constitution tells us *something*, and what it says — although necessarily read through lenses we ourselves bring to the task — must be the touchstone for evaluating" the document.<sup>97</sup>

Note for instance Tribe's analysis of *Michael M. v. Superior Court*, when the Supreme Court upheld the California statutory rape law against an attack on equal protection grounds.<sup>98</sup> (Only the male could be criminally punished, yet the majority found no constitutional infirmity since the sexes were not "similarly situated.") Tribe suggests a "lens" the Court could have used but did not. The law criminalized all sex acts involving unwed, underage females, but not all sex acts involving unwed, underage males. Tribe's point is that the statute contained a hidden gender discrimination, one that was not necessarily beneficial, namely that there could be no "legal sex" involving unwed underage females.<sup>99</sup>

By contrast, the court has a lesser role to play when fundamental political acts such as amending the Constitution are at issue. Starting from the premise that the amendment process at heart indicates a consensus in the population that the legal system has not provided the right answers or is inadequate to the tasks at hand, Tribe believes that allowing the Court to pass on the "merits" of an amendment or on most aspects of the amending process itself "would unequivocally subordinate the amendment process to the legal system it is intended to override. . ." In turn, judicial intervention would "gravely threaten the integrity of the entire structure."<sup>100</sup>

Yet a different answer is forthcoming with another structural issue: reversing the Court by withdrawing jurisdiction. Tribe believes such moves are constitutionally flawed. "[T]he upshot would be *no* judicial forum capable of assuring either the supremacy or the uniformity of entire bodies of federal law. . ." Tribe reasons here not only from the text of the Constitution but from the Court's "basic role."<sup>101</sup>

The point is that choices on fundamental questions must be *constitutional* choices. There is not a total freedom to choose whatever one might like to choose. Instead, in a distant paraphrase of John Marshall, Tribe cautions that it is "a Constitution — a specific, necessarily imperfect Constitution — in whose terms we are, after all, choosing." This is a paradox or mystery the framers bequeathed to later generations of Americans, a paradox that cannot be avoided.<sup>102</sup>

Like Tribe's *Constitutional Choices*, Lief Carter's *Contemporary Constitutional Law-making*<sup>103</sup> starts from the premise that little is to be gained by the attention currently paid to the problem of the *legitimacy* of judicial review. Doctrines expounding the proper role for the Court simply do not matter very much for the "audience of students, practitioners, and attentive citizens that it plays to and the political script from which it improvises."<sup>104</sup> Instead, Carter's goal in this sequel to his *Reason in Law*<sup>105</sup> is to explain "how the Court can perform convincingly before a pluralistic political audience, one whose members do *not* necessarily share the same ideologies, values or personal goals."<sup>106</sup> A multiplicity of perspectives only increases the need for what Carter labels "normatively convincing performances."

Carter reviews much of the current literature on approaches to constitutional jurisprudence, from conventional interpretive theory to non-interpretive "political alternatives" and non-interpretive "normative alternatives." The strict interpretivists, such as Judge Bork, he calls "preservatives."<sup>107</sup> They look back to the Constitution either because that is the only source of fundamental law the nation has and/or because the Constitution enshrines the right kind of polity. In either case, the Constitution becomes "the premise of the authoritative past."<sup>108</sup> Evolution of the document would therefore come not through interpretation but through the democratic amending process the Constitution ordained.

Non-interpretivists advancing "political alternatives" include individuals such as Herbert Wechsler, Alexander Bickel, Jesse Choper, and John Ely. "They debate the political justifications for the Court's use of power, not the uses of that power themselves. The question is whether it is 'legitimate' for the Court to make racial and religious policies about public schools [for example], not what those policies ought to be."<sup>109</sup>

Among the non-interpretivists advancing what Carter terms "normative alternatives" are Robert Dworkin, John Rawls, and Walter Murphy. "[F]rom the normative perspective, judicial decisions should bypass all the institutional and meta-analyses about legitimacy and go straight to the ideological questions themselves. . . . In the concrete case, courts

must decide whether a legislative policy or bureaucratic practice seems unintelligible in light of constitutional ideology. If no intelligible defense exists, the policy must fail."<sup>110</sup> For those advocating the "normative alternative," decisions in the realm of constitutional law are "dignitarian": they must include judicial protection of individual dignity.

Each camp assumes that a decision is "good" only if it is "correct." Whether it is correct in turn follows from application of a particular method of interpretation. But Carter is not convinced that one has to agree with a decision to believe it to be a good one. Rather, he advances his own *aesthetic theory* of constitutional interpretation, as a meeting ground for the many constitutional approaches that abound.

Carter begins by accepting a political model of the Court's operation. That is, he does not deny the political nature of an institution which has its jurisdiction largely set by an elected Congress, its members selected and approved by an elected President and Senate, and its docket largely filled with a variety of political disputes currently dividing the nation. This, in other words, is the context within which the making of constitutional law takes place. But as the starting place, this context is not the finishing point. "Constitutional law-making correctly done makes statements about the normative character of the polity. It is a struggle to identify what sort of a community the United States is and what it might become."<sup>111</sup> Constitutional decisions are thus public political acts, and as such they are performances.

The justices must be acutely conscious of using symbols so that others are in a position to consider "the possibility of a new understanding" — an otherwise unexpected result. Drawing as much on the skills of the rhetorician as the statesman, Carter asserts that "the persuasiveness of a performance . . . depends on matters of fit, both the internal fit of the parts and their fit . . . to the things they refer to. . . ." The audience in turn accepts the fit if it accords with practice and with "what the audience already accepts as authoritatively permissible."<sup>112</sup> Archibald Cox has made a similar point: "[T]he opinions of the Court can help to shape our national understanding of ourselves," he argues, but "the root of its

decisions must already be in the nation. The aspirations voiced by the Court must be those the community is willing not only to avow but in the end to live by.<sup>113</sup>

As models, Carter points to the keynote address by Governor Mario Cuomo to the 1984 Democratic Convention and to the advice of journalist Henry Fairlie.<sup>114</sup> The lesson of both is that the performance "succeeds by reforming the materials an immediate audience already possesses."<sup>115</sup> Exemplary opinions within the *United States Reports* include the "oratory" in Justice Jackson's majority opinion in the second flag-salute case,<sup>116</sup> Justice Brandeis' concurrence in *Whitney v. California*,<sup>117</sup> and especially Chief Justice Vinson's majority opinion in *Sweatt v. Painter*.<sup>118</sup> Carter's "great performances" achieve their quality by building "directly on [their] reading of the experiences of citizens in a world of political power."<sup>119</sup>

Especially when the result is not immediately popular, a successful opinion is one where the appeal is wide, beyond the halls of legal academe and into the world of an educated citizenry. In doing its job well—and Carter himself would prefer decisions emphasizing the dignity of the individual—the Justices must be aware of the strength and

effectiveness that comes through persuasion of that larger group. Not just any practical argument will do. He joins Tribe<sup>120</sup> in commenting on what he regards as an unfortunate trend in the style of some recent opinions: "If politics is persuasion, . . . then mimicking the 'objective' rhetoric of cost-benefit balancing and the like without explaining why our experience makes it right to do so will not persuade."<sup>121</sup>

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The scope of Carter's book underscores the range of opinion about the Court and its work. There is no shortage of perspectives on what the justices ought to be doing. The remarkable thing, of course, is that the justices are constantly "doing." The Court as an institution continues from day to day as a vital part of the American political system. That fact explains both the scholarly attention the Court attracts and the evolutionary impact of published reflection on what the Court does. Early in this century, the great Court scholar Edward S. Corwin offered the judgment that "If judges make law, so do commentators."<sup>122</sup> The same might be said for writers about the judiciary itself. They also help to shape the Court.

#### Footnotes

<sup>1</sup> The volumes surveyed in this article are listed alphabetically below:

Bickel, Alexander M., and Benno C. Schmidt, Jr., *The Judiciary and Responsible Government 1910-21*, vol. IX of *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States* (New York: Macmillan, 1984), pp. xiv, 1041.

Black, Hugo L., and Elizabeth Black, *Mr. Justice and Mrs. Black: The Memoirs of Hugo L. Black and Elizabeth Black* (New York: Random House, 1986), pp. xiv, 354.

Cannon, Mark W., and David M. O'Brien, eds., *Views from the Bench: The Judiciary and Constitutional Politics* (Chatham, N.J.: Chatham House Publishers, Inc., 1985), pp. xxii, 330.

Carter, Lief H., *Contemporary Constitutional Lawmaking: The Supreme Court and the Art of Politics* (New York: Pergamon Press, 1985), pp. xviii, 217.

Curry, Thomas J., *The First Freedoms: Church and State in America to the Passage of the First Amendment* (New York: Oxford University Press, 1986), pp. viii, 276.

Epstein, Lee, *Conservatives in Court* (Knoxville: University of Tennessee Press, 1985), pp. xii, 204, pp. xii, 784.

Fine, Sidney, *Frank Murphy: The Washington Years* (Ann Arbor: University of Michigan Press, 1984).

Levy, Leonard W., *Constitutional Opinions: Aspects of the Bill of Rights* (New York: Oxford University Press, 1986), pp. viii, 272.

Mendelson, Wallace, *Supreme Court Statecraft* (Ames: Iowa State University Press, 1985), pp. x, 351.

Newmyer, R. Kent, *Supreme Court Justice Joseph Story: Statesman of the Old Republic* (Chapel Hill: University of North Carolina Press, 1985), pp. xi, 490.

Pfeffer, Leo, *Religion, State and the Burger Court* (Buffalo: Prometheus Books, 1984), pp. xiv, 310.

Tribe, Laurence H., *Constitutional Choices* (Cambridge: Harvard University Press, 1985), pp. xiv, 458.

<sup>2</sup> *Federalist No. I.*

<sup>3</sup> *Federalist No. 79.*

<sup>4</sup> Howard, "Judicial Biography and the Behavioral Persuasion," 65 *American Political Science Review* 704, 704-5 (1971).

<sup>5</sup> R. Newmyer, *supra* n. 1.

<sup>6</sup> G. Dunne, *Justice Joseph Story and the Rise of the Supreme Court* (1971).

<sup>7</sup> J. McClellan, *Joseph Story and the American Constitution* (1971).

<sup>8</sup> R. Newmyer, *The Supreme Court under Marshall and Taney* (1968). Even though Story had a substantial impact on American law through both judicial opinions and treatises, it is well to recall that he was not President Madison's first choice for the position. Justice Cushing died on September 10, 1810. Madison first nominated Levi Lincoln, but after Senate confirmation in January 1811, Lincoln refused to serve. Alexander Wolcott was Madison's second choice, but the Senate rejected this nomination 24-9. In February, John Quincy Adams received a unanimous vote for confirmation, but Madison had failed to get the prior consent of the nominee, and Adams, like Lincoln, refused. After Justice Chase's death in June 1811, Madison was caught up in a bitter cabinet and sectional crisis. He waited until November 15, 1811, when he sent to the Senate the names of Joseph Story and Gabriel Duvall. Confirmation came three days later. See Dowd, "Justice Story and the Politics of Appointment," 9 *American Journal of Legal History* 265 (1965).

<sup>9</sup> Newmyer, *supra* n. 1, xiv.

<sup>10</sup> *Id.*, xvi.

<sup>11</sup> *Id.*, xiv, 389.

<sup>12</sup> *Id.* Story also believed that religion had an important place in the health of the state. "My own private judgment has long been (& every day's experience more & more confirms me in it) that government cannot exist without an alliance with Religion to some extent, & that Christianity is indispensable to the true interests & solid foundation of all government." Letter from Story to Rev. Jasper Adams, May 1833, quoted in *id.*, 183. This statement accords with Story's position in his 2 *Commentaries on the Constitution of the United States* 631, cited as authority by Justice Rehnquist in *Wallace v. Jaffree*, 53 U.S.L.W. 4665 (1985) (dissenting opinion).

<sup>13</sup> *Supra* note 1. Mendelson's essay on Marshall originally appeared in S. Halpern and C. Lamb *Supreme Court Activism and Restraint* (1982), a book surveyed in this space in the 1985 *Yearbook*.

<sup>14</sup> Mendelson, *supra* n. 1, 103.

<sup>15</sup> *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheaton) 304, 348 (1816).

<sup>16</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>17</sup> 3 U.S. (3 Dallas) 171 (1796).

<sup>18</sup> 22 U.S. (9 Wheaton) 1 (1824).

<sup>19</sup> Mendelson, *supra* n. 1, 91.

<sup>20</sup> 10 U.S. (6 Cranch) 87 (1810).

<sup>21</sup> 17 U.S. (4 Wheaton) 518 (1819).

<sup>22</sup> Mendelson, *supra* n. 1, 100.

<sup>23</sup> *Id.*, ix.

<sup>24</sup> S. Fine, *supra* n. 1. Justice Murphy's activism

served the new liberalism of the Roosevelt Court. In his words, "the law knows no finer hour than when it cuts through formal concepts and transitory emotions to protect unpopular citizens against discrimination and persecution." Quoted in R. McCloskey, *The Modern Supreme Court* 106-107 (1972).

<sup>25</sup> Apparently, only the private correspondence of Justice Douglas was unavailable to Fine.

<sup>26</sup> 310 U.S. 296 (1940). Fine notes that when *Gobitis* was decided, only Douglas and Murphy (the two most junior Justices) had not taken part in earlier flag-salute litigation. Before *Gobitis*, between 1935 and 1940, the Supreme Court had four times refused to reverse state courts on this issue.

<sup>27</sup> J. Howard, *Mr. Justice Murphy* 251 (1968).

<sup>28</sup> Fine, *supra* n. 1, 186.

<sup>29</sup> H. Abraham, *Justices and Presidents* 289-90 (1974).

<sup>30</sup> Frankfurter, "Chief Justices I Have Known," 39 *Virginia Law Review* 883, 885 (1953).

<sup>31</sup> R. Jackson, *The Supreme Court in the American System of Government* 18 (1955). Justice Murphy's use of dissents was perhaps closer to Justice Brennan's. Referring to "dynamic interaction among members of the present Court" and "dialogue across time with the future Court," Justice Brennan sees dissent as a duty. "Saying 'listen to me, see it my way, change your mind,' is not self-indulgence—it is hard work that we cannot shirk," Brennan, "In Defense of Dissents," *The Pennsylvania Gazette* 20, 21 (Feb. 1986).

<sup>32</sup> 323 U.S. 214 (1944).

<sup>33</sup> Fine, *supra* n. 1, 594.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*, 594-96.

<sup>36</sup> H. Black and E. Black, *supra* n. 1.

<sup>37</sup> *Id.*, 3-63.

<sup>38</sup> *Id.*, xiii. The second part spans pages 65-86.

<sup>39</sup> The diary excerpts are found at pages 87-280; the notes at pages 281-312. There follows a list of all opinions Justice Black authored, as well as a list of his law clerks.

<sup>40</sup> *Id.*, 180.

<sup>41</sup> *Id.*, 91-92, 378 U.S. 226 (1964).

<sup>42</sup> H. Black and E. Black, *supra* n. 1, 76-77, 251.

<sup>43</sup> *Id.*, vii.

<sup>44</sup> *Id.*, 314.

<sup>45</sup> Bickel and Schmidt, *supra* n. 1. Approximately half the projected volumes in the series have been published. Originally the plan called for one volume on both the White and Taft Courts, which would have spanned the years 1910-1930. Early in his research, however, Bickel realized the subject called for two volumes. As a result Robert Cover is now responsible for the second volume (on the Taft Court) which Professor Bickel would have authored in the Holmes Devise *History*.

<sup>46</sup> Benno Schmidt's chapters on the race cases preceding and during the years of the White Court are splendid pieces of social history and judicial analysis. Particularly noteworthy is his recounting of *Giles v. Harris*, 189 U.S. 475 (1903), where the

Court through Justice Holmes concluded that remedying discrimination in voter registration was beyond its capacity, especially when it was as widespread as all knew it to be. Schmidt adds (at 925): "Can any decision better reveal the extraordinary change in the conception of federal judicial power that took its place from the beginning to the middle of the twentieth century?" Also, Schmidt explores the distinct possibility that Chief Justice White held up the decision in *Guinn v. United States*, 238 U.S. 347 (1915) (striking down the Grandfather Clause) to avoid a probable dissent by Justice Lurton. Bickel and Schmidt, *supra* n. 1, 945.

<sup>47</sup> For instance, Bickel reprinted the unpublished dissent by Justice Holmes in the first round of *Stettler v. O'Hara* and *Simpson v. O'Hara*, the Oregon minimum wage cases restored to the docket in 1916 for reargument, where the state court's decision upholding the statute was later affirmed by an equally divided bench [243 U.S. 629 (1917)]. Holmes added an additional paragraph for the dissent after reargument, indicating that again the vote must at first have gone against the statute but that one or two Justices apparently waived (with Brandeis not taking part). Bickel commented that the dissent, if issued, "would have undoubtedly have taken its place among the great, well-remembered opinions of Holmes." Had the decision come down against the law, it might, according to Bickel, have telescoped some history, by "bringing the twenties back into the teens." Bickel and Schmidt, *supra* n. 1, 596-598.

<sup>48</sup> While Bickel and Schmidt's documentation is excellent, future volumes in the Holmes Devise *History* might wisely include a listing in one place of all manuscript collections consulted in the research and cited in the text, providing both the location of the collection and, where appropriate, the terms of access. This arrangement would not only provide more information to readers, but would permit the use of abbreviated citations in the text. Presumably this suggestion would have most value for volumes covering the most recent periods of the Court's history, where manuscript sources appear to be both larger and more numerous. In this respect, Fine's biography of Justice Murphy, *supra* n. 1, offers an example worth following.

<sup>49</sup> 243 U.S. 426 (1917); 247 U.S. 251 (1918).

<sup>50</sup> *Supra* n. 1.

<sup>51</sup> Brandeis and Frankfurter as attorneys were both active in the National Consumers' League. Similarly, Thurgood Marshall was on the staff of the NAACP from 1939 until 1961 and assisted in the creation of the Legal Defense Fund in 1939.

<sup>52</sup> C. Vose, *Caucasians Only* (1959). Vose details efforts by the NAACP and the Legal Defense Fund to remove legal support from racially restrictive covenants. A similar volume is David R. Manwaring's *Render Unto Caesar; The Flag-Salute Controversy* (1962), outlining the legal battles of Jehovah's Witnesses.

<sup>53</sup> For example, see C. Jacobs, *Law Writers and the Courts: The Influence of Thomas P. Cooley*,

*Christopher G. Tiedman, and John F. Dillon upon American Constitutional Law* (1954); A. Paul, *Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench, 1887-1895* (1960); B. Twiss, *Lawyers and the Constitution* (1942); A. Mason, W. Beaney, and D. Stephenson, *American Constitutional Law* 305-11 (7th ed., 1983).

<sup>54</sup> M. Shapiro, *Law and Politics in the Supreme Court* 8 (1964).

<sup>55</sup> Lee, *supra* n. 1, 15.

<sup>56</sup> *Id.*, 156.

<sup>57</sup> Cannon and O'Brien, *supra* n. 1.

<sup>58</sup> 17 U.S. (4 Wheaton) 316 (1819).

<sup>59</sup> McLean's comments on slavery evoked such sharp congressional reaction that even the Justice's supporters had to disassociate themselves from his statement. Senator Reverdy Johnson said: "The judgment of the public, in its almost universal censure of the step, will effectually guard against its repetition. A Judge should be separated, not only while he is on the Bench, but forever, from all the agitating political topics of the day. Once a Judge, he should ever be a Judge." Quoted in 2 C. Warren, *The Supreme Court in United States History* 271 (1922).

<sup>60</sup> Since McLean's day, perhaps Justices Brewer and Douglas have been the most outspoken. For Brewer's views, see his "The Nation's Safeguard," 16 *New York State Bar Association Proceedings* 37 (1893), and "Protection of Private Property from Public Attack," 10 *Railway and Corporation Law Journal* 281 (1891). Justice Douglas' books include: *Points of Rebellion* (1970), *Democracy's Manifesto* (1962), *The Right of the People* (1958), and *We the Judges* (1956).

<sup>61</sup> Black, "Address," 13 *Missouri Bar Journal* 173 (1942).

<sup>62</sup> Rieskind, "A Judge's Nonjudicial Behavior," 38 *New York State Bar Journal* 22, 23 (1966).

<sup>63</sup> Edwards, "Comments on Judicial Ethics," 38 *Fordham Law Review* 259, 273 (1969).

<sup>64</sup> Cannon and O'Brien, *supra* n. 1, 266-278.

<sup>65</sup> 410 U.S. 113 (1973).

<sup>66</sup> *Id.*, 274.

<sup>67</sup> *Id.*, 290-302.

<sup>68</sup> *Id.*, 291.

<sup>69</sup> *Id.*, 301.

<sup>70</sup> *Id.*, 166-172.

<sup>71</sup> *Id.*, 166.

<sup>72</sup> *Id.*, 168.

<sup>73</sup> *Id.*, 169.

<sup>74</sup> Pfeffer, *supra* n. 1.

<sup>75</sup> 403 U.S. 602 (1971).

<sup>76</sup> Pfeffer, *supra* n. 1, xii.

<sup>77</sup> *Id.*, xiii.

<sup>78</sup> "The Bill of Rights" was originally published in J. Greene, ed., *Encyclopedia of American Political History* (1984). In its present form, the essay on the Establishment Clause was first published in J. Wood, Jr., ed., *Religion and the State: Essays in Honor of Leo Pfeffer* (1985). An earlier version appeared in 1972. Unexplained is the absence of notes and citations for chapter six of the new book. By contrast, chapter seven is followed by notes and

citations. All but one of the essays in the collection were originally published between 1960 and 1985. One is scheduled for inclusion in a forthcoming work, of which Levy is co-editor, L. Levy *et al.*, eds., *Encyclopedia of the American Constitution* (1987).

<sup>79</sup> Levy, *supra* n. 1, 134, 124.

<sup>80</sup> Quoted in *id.*, 115.

<sup>81</sup> 330 U.S. 1 (1947).

<sup>82</sup> Cannon and O'Brien, *supra* n. 1, 171.

<sup>83</sup> *Id.*, 137.

<sup>84</sup> *Id.*, 112.

<sup>85</sup> Curry, *supra* n. 1.

<sup>86</sup> Quoted in *id.*, 193.

<sup>87</sup> *Id.*, 211.

<sup>88</sup> *Id.*, 219.

<sup>89</sup> *Id.*, 221.

<sup>90</sup> *Id.*, 222.

<sup>91</sup> W. Van Alstyne, *Interpretations of the First Amendment* 8 (1984).

<sup>92</sup> Tribe, *supra* n. 1. The book contains 16 essays, six of which were originally published in law reviews between 1979 and 1984.

<sup>93</sup> *Id.*, 5, 21.

<sup>94</sup> *Id.*, 7 (italics omitted).

<sup>95</sup> *Id.*, vii-viii.

<sup>96</sup> *Id.*, x.

<sup>97</sup> *Id.*, 26.

<sup>98</sup> 450 U.S. 464 (1981).

<sup>99</sup> Tribe, *supra* n. 1, 240.

<sup>100</sup> *Id.*, 27.

<sup>101</sup> *Id.*, 52.

<sup>102</sup> *Id.*, 268.

<sup>103</sup> Carter, *supra* n. 1.

<sup>104</sup> *Id.*, 103.

<sup>105</sup> L. Carter, *Reason in Law*, 2nd ed. (1984).

<sup>106</sup> Carter, *supra* n. 1, 103.

<sup>107</sup> *Id.*, 48.

<sup>108</sup> *Id.*, 104.

<sup>109</sup> *Id.*, 72.

<sup>110</sup> *Id.*, 106.

<sup>111</sup> *Id.*, 102-103.

<sup>112</sup> *Id.*, 169.

<sup>113</sup> A. Cox, *The Role of the Supreme Court in American Government* 117-18 (1976).

<sup>114</sup> Fairlie, "The Decline of Oratory," *The New Republic* 15 (May 28, 1984).

<sup>115</sup> Carter, *supra* n. 1, 170.

<sup>116</sup> *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943).

<sup>117</sup> 274 U.S. 357 (1927).

<sup>118</sup> 339 U.S. 629 (1950).

<sup>119</sup> Carter, *supra* n. 1, 182.

<sup>120</sup> Tribe, *supra* n. 1, viii.

<sup>121</sup> Carter, *supra* n. 1, 166. In Tribe's view, "constitutional choices . . . must be made and assessed as fundamental choices of principle, not as instrumental calculations of utility or as pseudo-scientific calibrations of social cost against social benefit — calculations and calibrations whose essence is to deny the decision maker's personal responsibility for choosing." Tribe, *supra* n. 1, viii. Note the role of "cost-benefit" analysis in *United States v. Leon*, 52 U.S.L.W. 5155 (1984).

<sup>122</sup> Corwin, Book Review, 22 *Michigan Law Review* 84 (1923).

# Ten Year Index: S.C.H.S. Yearbook

The following is an index to the first ten years of the Society's *Yearbook* (1976-1985). The index is divided into three sections: the first is a *Yearbook* chronological index listing the table of contents of each issue; the second is an index by author; and the third is subject index dividing articles into four major subject categories — 1) Bicentennial of the Constitution, 2) Supreme Court History, Practice, Constitutional Issues and Literature, 3) Supreme Court Justices, and 4) Supreme Court Nomination and Confirmation Process.

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