

YEARBOOK 1989

SUPREME COURT HISTORICAL SOCIETY



EARL WARREN
Fourteenth Chief Justice, 1953-1969

YEARBOOK 1989

SUPREME COURT HISTORICAL SOCIETY



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General Statement

The Supreme Court Historical Society is a private, non-profit organization, incorporated in the District of Columbia on November 20, 1974; its purpose is to promote greater public understanding and appreciation of the history and heritage of the Supreme Court of the United States.

Since its inception, the Society has sought to preserve through acquisition items that have been associated with the Court over the past two centuries. The personal memorabilia of former Justices and period furnishings already acquired through the efforts of the Society enrich the physical and educational environment of the Court.

The Society seeks to further public awareness of the Court through the publication of a quarterly newsletter and an annual yearbook, and through the support of continuing research. The Society jointly sponsors with the Court the *Documentary History Project: 1789-1800*, which is engaged in collecting, editing and preparing for publication the records and papers of the Court's first decade. This past year the Society also sponsored the Opinions Index Project, which became the first complete citation index of the opinions of the Supreme Court organized by author ever published.

Although supported through public grants and private donations, the Society is primarily a membership organization, dependent upon its members for its principal support and general maintenance. As the work of the Society is made possible by its members, so are its achievements and accomplishments. Membership is available to any individual interested in helping to preserve the past to enrich the future. Currently, some 3,000 members nationwide are working together to meet this rewarding challenge.

The Society has been determined eligible to receive tax deductible gifts under Section 501 (c) (3) under the Internal Revenue Code.

ACKNOWLEDGEMENT

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Daniel Webster and the Oratorical Tradition

William H. Rehnquist

Editor's Note: *The Chief Justice gave these remarks at the Daniel Webster Symposium at Dartmouth College in Hanover, New Hampshire, on May 12, 1989.*

It is a great pleasure to join with you today to celebrate the completion of the publication of *The Papers of Daniel Webster*. I am sure that these volumes represent a major contribution to our efforts to understand and appreciate one of the giants of the nineteenth century. And surely no more fitting institution of higher learning could be imagined as a place for this celebration than Dartmouth College. As many of you know, Daniel Webster was born and raised in the Merrimack Valley of New Hampshire. He was born in the town of Salisbury in 1782--just as the Revolutionary War was ending. His father farmed and kept a tavern in Salisbury, which was then on the northern edge of the American frontier. When young Daniel was a few years old, his father moved the family to a larger farm about fifteen miles north of Concord, just off of present-day Interstate-93.

Webster was unusual in appearance even as a child--he had an unusually large head, topped with jet-black hair, and large black eyes. He was called "little Black Dan." At the age of fifteen, he set off on horseback for Hanover to enter Dartmouth. At this time--1797--Dartmouth was one of the larger colleges in the United States, but its setting was bucolic: cows grazed on the College common. (One of Webster's biographers says that he and his classmates got so tired of scraping dung off their shoes that one night a group of them rebelled and chased the cows across the Connecticut

River, into Vermont.)

Although Webster was about four years younger than the average age of his classmates, he managed to distinguish himself at the College. He was admitted into one of the two leading literary societies on the campus as a freshman, and became one of its leading lights. He was elected to Phi Beta Kappa as a junior and was recognized, even then, for his oratorical abilities. (He was also showing some indication of the spendthrift qualities that would dog him later in life: by the end of his senior year he had run up one of the largest accounts of any student at the general store in Hanover.) He graduated from Dartmouth in 1801, at the age of nineteen.

In a manner typical of the time, he taught school for a while, read law for a while, and was admitted to practice law in New Hampshire in 1805. In 1807, searching out greener fields for the practice of law, he moved to Portsmouth, which was then the largest city in the state. He married a local Salisbury woman, Grace Fletcher, and the young couple settled down in Portsmouth. Webster was elected to the United States House of Representatives in 1812 and served two terms there. But once again he began looking for greener pastures for his law practice, and in 1816 he and his family moved to Boston. It was in the Boston area that Webster spent the rest of his life. He was elected to the House of Representatives from Massachusetts in 1822 and to the United States Senate in 1827. He was a leading figure on the nation's political stage from that date until the time of his death, 25 years later, in 1852.

We need only to look around us at the



This tavern in Salisbury (now Franklin), New Hampshire, was owned and operated by Daniel Webster's father from 1784 to 1799, and served during that time as Webster's childhood home. Although sold in 1799, it was later purchased by Webster in 1839.

automobile, the airplane, radio, television--to name only obvious material differences--to realize how different the twentieth century is from the nineteenth. One of the many ways in which the nineteenth century differed from the twentieth century was that its public figures wrote their own speeches. Both the ability to speak publicly and the ability to say something worth listening to were considered qualifications for public office. Not all public officials possessed these qualifications, but those who did were listened to with marked attention.

At first blush we may feel that when we read Webster's orations we cannot truly appreciate them in the same way that we could have had we been present to hear them delivered. In a way, of course, that is true; but most of the people who knew these orations in his own time learned of them in the same way that we do today. Only the relatively few spectators who could crowd into the Senate gallery when he spoke could actually hear his famous speeches there; only those much more numerous spectators actually present at his Bunker Hill Monument dedication or his Plymouth oration could hear those addresses. But thousands and thousands of copies of each of these speeches were gobbled up by the public (after considerable

editing by Daniel Webster).

Webster was the greatest orator of his day in the United States Senate, and he was also one of the greatest advocates who has ever appeared before the Supreme Court of the United States. Let me first tell you a little bit about his advocacy before the Supreme Court.

Most practicing attorneys today, like those who practiced in Webster's time, never have an opportunity to argue a case before the Supreme Court. And most of those who do, appear there only rarely. Webster, however, argued 171 cases before the Supreme Court over a span of 37 years--an amazing achievement and a record never surpassed. Although he won slightly less than half of his cases, this is generally the lot of the lawyer who has a reputation as a great advocate before the Supreme Court. Charles Evans Hughes and John W. Davis, the great advocates before the Court during the first half of this century, were by no means always successful. The reason for their mixed success, and for that of Webster's in the nineteenth century, was that frequently "great advocates" are called in by one of the parties only when the legal situation is roughly equivalent to a baseball game in the last half of the ninth inning, when there are two outs and the home team is

down by a couple of runs. Even a great batter will hit less than .500, and even the great advocate will not win a majority of these cases. But he will win more of them than the mediocre lawyer.

Oral arguments before the Supreme Court in Webster's time were far different than they are now. Today, the Court receives extensive written briefs, containing the contentions of the parties, well before argument, and each attorney is given only half an hour to present the client's case orally. A red light on the podium dramatically indicates when this time has expired.

In Webster's day, by contrast, the caseload of the Supreme Court was far less than it is today. In the early days of his advocacy, the Court would sit in Washington for only a couple of months, in the late winter and early spring, in order to finish its business, and oral argument was a more leisurely affair.

Arguments frequently lasted not merely for hours on end, but in the great cases, sometimes for several days. An attorney with a gift of eloquence, a knowledge of the law and, last but by no means least, a good deal of stamina, could hold the attention of Justices and spectators for an entire day as he played a leading role on the stage where great issues were debated.

It is interesting to note, parenthetically, that in countries other than the United States which have inherited the English common-law tradition, oral advocacy is even today much like it was in Webster's time before our Supreme Court. In the House of Lords in England and in the High Court of Australia, there is no time limit on oral argument; in an important case, it can go on for days. The Supreme Court of Canada only departed from this tradition within the past couple of years.

Among the cases Webster argued are some with which all students of the Constitution are familiar. He was on the winning side in *Gibbons v. Ogden* in 1824, when Chief Justice Marshall spoke for the Court in giving a broad interpretation to the Commerce Clause. He was also on the winning side in *McCulloch v. Maryland* in 1819, when the Court, again speaking through Chief Justice Marshall, upheld the authority of Congress to charter a national bank. (The arguments in those cases lasted five days and nine days, respectively.) But surely the most

interesting of Webster's cases to the present audience is the case of *Dartmouth College v. Woodward*, which he argued before the Supreme Court of the United States in 1818.

The case arose from a dispute between the president and trustees of Dartmouth College. The College had received a royal charter from the Crown before the American Revolution. The charter provided for twelve trustees to govern the College and authorized them to fill vacancies occurring among their own number. The trustees had exercised their authority to turn the president of the College out of office, only to see his cause become a burning political issue in the state of New Hampshire. In 1816, the state legislature converted Dartmouth College into Dartmouth University (some issues never go away, I gather), raised the number of trustees from 12 to 21, and made other changes in the governance of the institution. The majority of the old trustees refused to accept the amendment to the charter and sued in the state court, claiming that the changes "impaired the obligation of contract," in violation of the United States Constitution. Meanwhile, they continued to operate Dartmouth College in makeshift quarters, after being evicted from the "University" buildings.

The New Hampshire state courts ruled against the claims of the old trustees, and they retained Webster to present their case to the Supreme Court of the United States. He was then 36 years old and had just moved to Boston; he had already argued several cases in the Supreme Court. But despite the fact that this case presented a new point of constitutional law--whether a corporate charter was a "contract"--and that the political infighting that gave rise to the dispute was a hot issue in New Hampshire, the case attracted little attention or interest from the legal profession or the general public in other parts of the country.

Arguments were heard in March 1818, in the cramped, temporary quarters to which the Supreme Court had been relegated after its courtroom in the United States Capitol had been burned by the British during the War of 1812. Arguments began at 11 o'clock on the morning of March 10, with Webster's argument consuming most of the first day. The audience consisted of only a few interested lawyers and a small band of New Englanders--an assemblage

which Webster later described as "small and unsympathetic."

Webster spoke in a calm, deliberate manner. As one observer wrote:

It was hardly eloquence, in the strict sense of the term, it was pure reason. Now and then, for a sentence or two, his eye flashed and his voice swelled into a bolder note, as he uttered some emphatic thought; but he instantly fell back into the tone of earnest conversation....

Drawing upon not only prior Supreme Court decisions, but also such varied sources as New Hampshire law, the Federalist Papers, Blackstone's Commentaries and English precedent dating back to the reign of Queen Elizabeth, Webster endeavored to persuade the Court that under the United States Constitution the rights and property of private corporations were beyond legislative interference. He argued that if Dartmouth College, his alma mater, could be destroyed by legislative fiat, so could Yale and Harvard. (Some here might not think that a bad

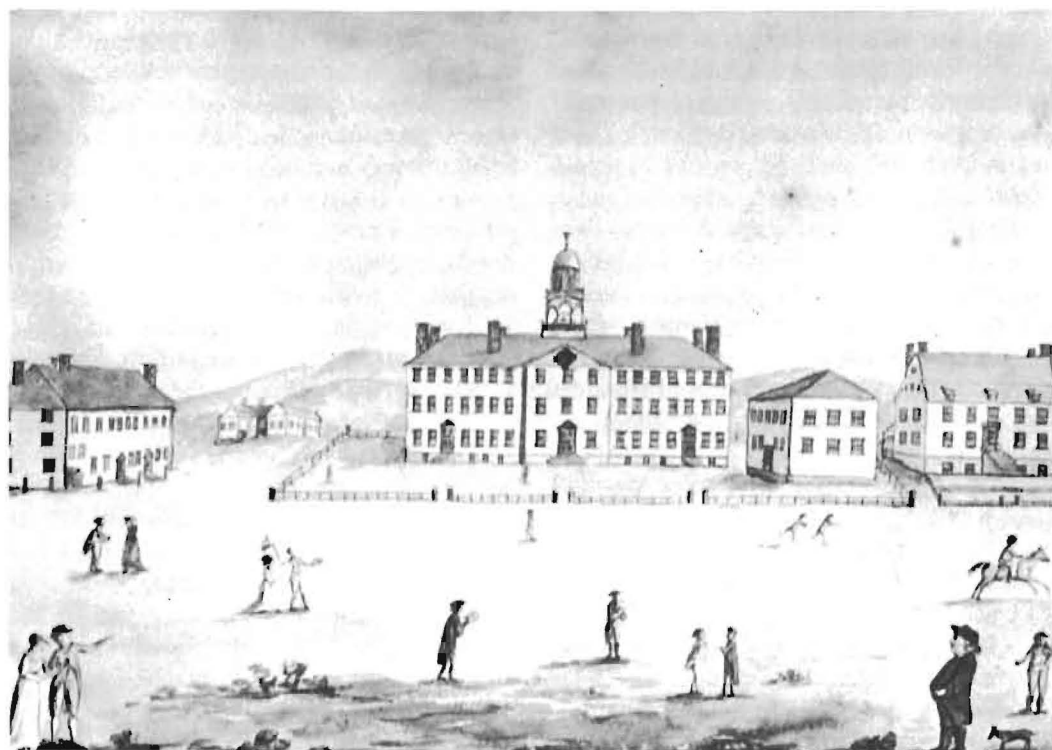
idea.)

After four hours of intricate legal reasoning, Webster paused for a moment, then made a dramatic, emotional appeal to the Justices' sympathies for the cause of higher education. He stated, according to one surviving account of the oration:

Sir, you may destroy this little institution; it is weak; it is in your hands! I know it is one of the lesser lights in the literary horizon of our country. You may put it out. But if you do so, you must carry through your work! You must extinguish, one after another, all those great lights of science which, for more than a century, have thrown their radiance over our land!

No doubt there are many in this audience today, as there may have been in the audience who heard Webster in 1818, who would disagree as to Dartmouth being a "lesser light" on the literary horizon of our country. But in any event, Webster was just laying the foundation for his next line, which I am sure is known well

Webster entered Dartmouth College in 1797, taking his degree in 1801. This picture of the campus, with Dartmouth Hall at center, was drawn two years after he graduated.



by many in this audience:

It is, sir, as I have said, a small college. And yet, there are those who love it--.

It was an extraordinary presentation. Though the peroration appears to have been planned, Webster was overcome with emotion; tears clouded the eyes of the Chief Justice; the audience and the Associate Justices sat spell-bound. As Justice Joseph Story wrote years later:

[Webster's] whole air and manner...gave to his oratory an almost superhuman influence.... The whole audience had been wrought up to the highest excitement; many were dissolved in tears; many betrayed the most agitating mental struggles; many were sinking under exhausting efforts to conceal their own emotion.

When the Court met for its 1819 Term, it convened for the first time in what one newspaper described as a "splendid room provided for it in the Capitol." The decision in the Dartmouth College case was announced at the Court's first session. When Chief Justice John Marshall began to deliver his opinion from the Bench, it was soon clear that Webster's advocacy had proved persuasive. The Chief Justice stated that the colonial charter of Dartmouth College was indeed a "contract" which the New Hampshire state legislature could not impair without violating the Constitution. One Justice dissented without opinion, and another was absent, but the remaining four of the seven Justices who then served on the Court concurred with the Chief Justice.

Before this audience, it would be tempting to say that the *Dartmouth College* case was in the very first rank of constitutional importance among those cases which Webster argued. That, however, would be something of an overstatement. The principle that a corporate charter issued by the Crown in colonial days was a "contract" within the meaning of the Constitution was an important one, but later decisions of the Supreme Court cut back on some of the language of Chief Justice Marshall, as to what actions by the state would constitute an "impairment" of such a contract. Yet, there is no

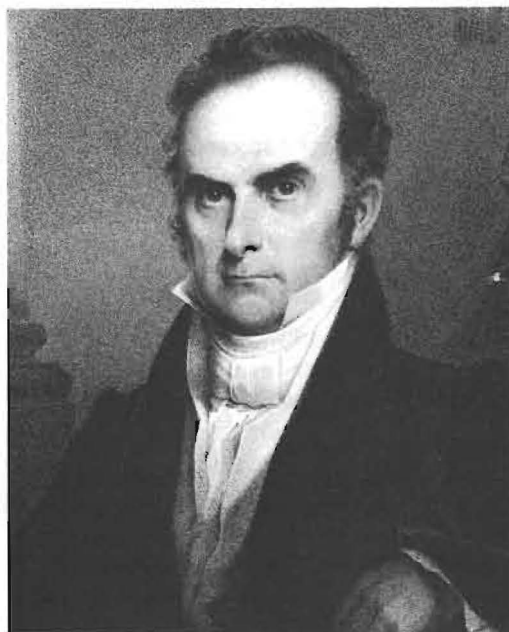
doubt that the case had a tremendous impact on Webster's career, establishing him among the outstanding members of the bar of the Supreme Court.

Webster would be accounted a supporter of the Constitution and the Union throughout his time in the Senate, and in his several unsuccessful bids for the Presidency. His first great speech on this subject in the Senate occurred in January 1830. The previous day he had walked into the Senate chamber while waiting to argue another case before the Supreme Court (one floor below). Though the topic under consideration was a resolution to restrict the sale of public lands, the debate had begun to encompass other subjects, including the raising of revenues under the national tariff, sectional differences, and even the nature of the Union itself. The political interests of the East, South and West frequently differed, and Senator Robert Y. Hayne of South Carolina sought to forge an alliance between the Southern and Western interests.

From the floor of the Senate, Senator Hayne attacked the East as being opposed to low land prices that would favor the West. He also asserted that Eastern exploitation of the protectionist tariff victimized both the South and the West, by cheapening Southern exports and making imports more expensive. A states' rights proponent, Hayne asserted that the tariff was unconstitutional and that individual states had the power to nullify such national legislation.

Astonished by the virulence of Hayne's remarks, Webster, an Easterner from Massachusetts, rose the following day to reply. Thus began what has since been described as "the greatest debate in the history of the Senate." At length, Webster aggressively contested Hayne's charge of Eastern hostility to the West, then launched into vigorous defense of the Union. To those politicians who believed that the Union was merely an arrangement of convenience which could easily be dispensed with, Webster proclaimed:

I deem far otherwise the union of the States.... I believe, fully and sincerely believe, that the union of the States is essential to the prosperity and safety of the States. I am a unionist, and.... would strengthen the ties that hold us together.



"His knowledge is at once extensive and minute, his intellectual resources very great; and whatever may be the subject of discussion, he is sure glad to shed on it the light of an active, acute, and powerful mind" wrote English traveler Harriet Martineau of Webster after an 1835 visit.

Hayne's response to Webster was extensive and consumed most of the two days. Some believed that his eloquence was so effective that he had demolished Webster's argument. By the time that Webster rose to reply, the following day, the debate had aroused unusual interest--perhaps more because of the personalities involved than because of the issues. The ornate Senate chamber was full to overflowing, and as Webster later remembered, he "never spoke in the presence of an audience so eager and so sympathetic." Webster's response ran for three hours the first day, and almost as long on the next, as he rose to a level of oratorical excellence which he never exceeded and that few others have attained.

Answering Hayne point by point, Webster eventually turned to the subject of the Union and the Constitution. He rejected the idea that the Union was merely a creature of the states, whose actions any state could declare to be constitutionally invalid. It was for the Supreme Court, and not the individual states, to decide whether an Act of Congress violated the Constitution. Turning directly toward Hayne,

for his peroration, Webster proclaimed his faith that the United States could have both liberty and union:

When my eyes shall be turned to behold for the last time the sun in heaven, may I not see him shining on the broken and dishonored fragments of a once glorious Union; on States dissevered, discordant, belligerent; on a land rent with civil feuds, or drenched, it may be, in fraternal blood! Let their last feeble and lingering glance rather behold the glorious ensign of the republic.... Liberty and Union, now and forever, one and inseparable!

Webster's speech, by fortunate chance, had been taken down in shorthand by a spectator in the Senate gallery. It soon went through more than twenty printings, and thousands of copies were distributed throughout the country, particularly to the Western states, where Webster's reputation now spread. According to one historian, "The speech touched the craving of the American imagination for the heroic and the fabulous." In later years, Hayne himself acknowledged Webster as "the most consummate orator of either ancient or modern times."

Webster would remain in the Senate for more than 16 years after his "Reply to Hayne," but he never gave a better speech there. During these succeeding years he would be known as a member of the "Great Triumvirate," along with John C. Calhoun of South Carolina and Henry Clay of Kentucky. These three would dominate the senatorial horizon for 20 years, and would amount to a major force in the nation's government, by reason of their political skills and the force of their personalities. They had entered Congress at roughly the same time. They were last gathered together in the United States Senate during the winter of 1850, when sectional antagonism over the institution of slavery had once more reared its head.

With the end of the Mexican War, in 1848, the United States had acquired a huge amount of territory from Mexico--what is now virtually the entire Southwestern part of our country. Out of this territory, California wished admission as a free state, but the Southerners in Congress demanded concessions from the North in exchange. That body turned to the difficult task of fashioning what would be called the

"Compromise of 1850." Physically, the Great Triumvirate was on its collective last legs (if I may use that expression). Clay, 73, was frail and constantly coughing, sometimes appearing too ill to climb the steps of the Capitol. Calhoun, 67, and near death, "already seemed a disembodied spirit." Webster, 68, was far from well, "nearly broken down with labor and anxiety."

In a speech to the Senate, in late January of 1850, Clay outlined a comprehensive solution which he believed would form a basis upon which the warring factions could get together. In early March, Calhoun undertook to respond on behalf of the diehard Southerners, but was so infirm that he had to listen to another Senator read his speech, as he slumped huddled in a blanket. (In a matter of months, he would be dead.)

Against this background, Webster's response was eagerly awaited, and on March 7 he took up the cudgels once more for the Union. But this time he was pleading not only with the Southerners, but with the Northerners, to compromise on issues that were very important to them. He spoke for more than three hours, seldom looking at his extensive notes. According to one commentator, "No utterance by an American statesman created more excitement at the time of its delivery or has been more fiercely discussed by historians."

The Compromise of 1850 was passed later that year. Some two years later Webster died at his estate in Marshfield, Massachusetts, at the age of 70.

Shortly after I began practicing law in Arizona, 35 years ago, I noticed hanging on the wall of the office of the United States Attorney a lithograph of someone who was obviously Daniel Webster making a speech to a group of people who looked like other Senators. I asked the U.S. Attorney what the occasion was, and he said that it depicted Webster's reply to Senator Hayne. I did not know much more about Webster's "Reply to Hayne" than the peroration, to which I had been exposed somewhere during my education--and I think the same was true of the U.S. Attorney.

As I was preparing my remarks for today I thought back to this incident, and realized that it took place about a century and a quarter after Webster delivered that speech. Then I asked myself, "Is it conceivable that 125 years from

now--indeed, 25 years from now--people would have pictures of a present-day Senator or Representative delivering a speech in the legislative chamber while colleagues crowded in to hear?" The answer is obviously "No."

In a way, this summarizes the difference between the times of Daniel Webster and our own times. It is easy to make too much of these differences and to exaggerate them, often to the benefit of the dead and departed. Neither Webster, Clay, nor Calhoun were consistent in the views they expressed throughout their long lives. Indeed, each of them seemed to exemplify Emerson's maxim that "a foolish consistency is the hobgoblin of little minds." None of them was above reproach in keeping the political bargains he made. Webster was venal even by the standards of his own day, since he encouraged the solicitation of funds from wealthy Bostonian constituents to maintain his lavish life-style in Washington. All three of the Triumvirate--Webster, Clay and Calhoun--were badly bitten by the presidential bug, and it showed in their conduct.

But when all of this debunking is given its due, there does, it seems to me, remain a difference between these three giants of the first half of the nineteenth century and public figures of more recent times. Calhoun, Clay and Webster all sat down by themselves on numerous occasions and either wrote out a speech or, at least, notes which would be used in delivering a speech on some great issue. By the standards of our times, these speeches were often incredibly long, and reading them today, it can be fairly said, is, in places, incredibly dull. But we must also remember that at the time these speeches were given there were far fewer competing modes of entertainment or enlightenment than there are today. In this the orators of the nineteenth century were fortunate; those exposed to the emotional roller coasters of today's talk shows would hardly be likely to weep at Webster's peroration in the *Dartmouth College* case.

These statesmen were at least willing to stand up and publicly say what they thought about an important public question, and to give the reasons why they thought the way they did. And the speeches or articles or letters which bore their names were more likely than not to be their own work products. As a result, people



A brilliant orator in Congress as well as before the Court, Webster in this painting by George Peter Alexander Healy thunders his celebrated reply to South Carolina Senator Robert Hayne. He ended his speech with the words "Liberty and Union, now and forever, one and inseparable!"

listened when they spoke; these men did not need a "Meet the Press" format to obtain a public hearing. That this is not so today, it seems to me, is a singular loss to our society;

but it is all the more reason for celebrating on this happy occasion the completion of The Papers of Daniel Webster.

Tribute to Chief Justice Earl Warren

William J. Brennan, Jr.

Editor's Note: Associate Justice Brennan delivered this speech at the Fairmont Hotel in San Francisco on April 8, 1989, as part of the "Earl Warren--A Remembrance" tribute marking the twentieth anniversary of Chief Justice Warren's retirement from the Bench.

It was my great honor to serve with Earl Warren on the Supreme Court for thirteen of the sixteen years he presided as Chief Justice and I take deep pride that this distinguished assembly is today honoring the memory of one of the great figures of American history. The judicial record that richly earned him that distinction is known throughout the world. Those decisions are a permanent monument to the great skills of leadership, energy, humanity and quiet wisdom he brought to his great office. I leave to others the discussion of that peerless record and limit these brief comments to some vignettes from my memory of him as Chief Justice and cherished friend.

Earl Warren was physically a large man, naturally gregarious and open, with a warm and engaging smile. It was impossible to dislike him. He liked people and people liked him. He was instinctively courteous and sensitive to the feelings of others. He put strangers at their ease immediately. However great their judicial differences with him, his brethren (16 Associate Justices during his tenure), without exception, personally were very fond of him.

It is the fashion to refer to the Supreme Court during his years as the "Warren Court." That does not, of course, signify that he dominated the shaping of the Court's decisions. Whatever the case of John Marshall, Earl Warren



Associate Justice William J. Brennan, Jr., served with Earl Warren for 13 out of the 16 years Warren presided over the Court.

would be the first emphatically to say that this was not true of him. Functioning in the nation's fledgling years, Marshall's Court perforce fashioned the principles that ruled the great constitutional decisions of that time. In contrast, most of the notable decisions of the Warren Court adopted or expanded upon constitutional views espoused--often in dissent--in cases decided before Earl Warren was appointed Chief

Justice. For his brethren, however, the "Warren Court" is highly appropriate as recognition of his effective leadership in a time that brought to the Court the greatest diversity of deeply troublesome and controversial questions in the Court's history.

He directed our weekly Court conferences superbly. He spent many hours in preparation for them, usually in bed in the early hours of the morning. The agenda of cases seeking review lengthened as the years went on, but he never failed to have a complete grasp of the issues involved in each case and to state those issues lucidly and concisely for the benefit of his brethren. He encouraged the fullest discussion of each case, but had an enviable knack for ending aimless discussion.

The unique difficulty of Supreme Court decision-making tends to develop close professional and personal relations among the Justices. There is the remote chance, however, that widely disparate judicial views--sometimes

heatedly espoused and bitterly fought--can spill over into personal differences. Earl Warren's example of utmost sensitivity to the airing of differing views, and his innate courtesy toward his brethren, set the pattern that usually kept the most heated discussions within limits of decorum and personal consideration. But he was human and on rare occasions (not more than twice, as I recall) his usually tightly controlled temper flared when he took offense at something said and he erupted with harsh words.

That happened, too, from the Bench when an oral announcement of Justice Frankfurter expanded on the Justice's written filed opinion. This was the announcement of Justice Frankfurter's dissent, which I joined, in *Carafano v. California*. The Court, without opinion but after argument, summarily affirmed the judgment of the California Supreme Court denying review of a prison warden's determination that a criminal condemned to death was not insane

The Warren Court enjoying a lighter moment: (standing, from left) Byron R. White, William J. Brennan, Jr., Potter Stewart, Arthur J. Goldberg; (seated, from left) Thomas C. Clark, Hugo L. Black, Chief Justice Earl Warren, William O. Douglas. Associate Justice John Marshall Harlan is absent.



and could be executed. Justice Frankfurter's oral announcement went beyond the dissenting opinion to say things about California's penal system that struck a sensitive nerve in the Chief Justice. That system, largely his handiwork as Governor of California, was his great pride. He took the unusual step, almost as personal privilege, of answering Justice Frankfurter's oral announcement in words that scarcely obscured his resentment, and detailed at length the history and virtues of California's progressive penal system.

He had granite integrity. He also had a deep-seated sense of fairness that conditioned both his approach to decisions and his relations with his brethren, indeed conditioned his entire life. He bent over backwards in assigning opinions to assure that each Justice, including himself, wrote approximately the same number of Court opinions and received a fair share of the more desirable ones. When President Johnson insisted, over his strenuous objection, that he chair the Warren Commission that investigated the assassination of President Kennedy, he adamantly rejected his brethren's plea that they be allowed to relieve him of the burden of opinion writing until the Commission work was completed. Throughout that Term he spent early morning and late evening hours at Commission headquarters opposite the Court and carried a full burden of Court work during the day.

His concern for his colleagues was manifested even in trivial matters. He carried the principle that he was only *primus inter pares* to the extreme length of vigorously opposing the increase from \$500 to \$2500 of the differential between his salary and the salary of an Associate Justice. He was even embarrassed that only he among the Justices was provided with a government automobile. He was always genuinely concerned with the well-being of his colleagues and their families.

His concern with fairness was also the hallmark of his jurisprudence. People were his concern, especially ordinary people--the disadvantaged, the down-trodden, the poor, the friendless. The memory of his own uphill struggle from the poverty of his youth never left him, nor the lesson that discrimination against the disadvantaged breeds poverty degrading to human dignity. He strongly believed that individual



The Chief Justice conferring with President Lyndon Johnson in the Oval Office.

human dignity was the primary value fostered and protected by the Constitution. It outraged him that a state court enforced a restrictive covenant that limited burial privileges to "members of the Caucasian race," resulting in the denial to a widow of the right to bury her husband, a Winnebago Indian, even after services had been conducted at the grave site and the burial party had disbanded. Similarly, he fought for the summary reversal of a state criminal contempt conviction of a black woman who refused to answer questions from the witness stand until counsel stopped addressing her by her first name, "Mary," and addressed her as "Miss Hamilton." Approval by the states in both cases, in his strong view, demeaned human dignity and was therefore unconstitutional state action.

This thread of concern for human dignity also runs through more famous decisions. He wrote *Miranda v. Arizona* as a step toward enforcing a constitutional framework of criminal justice consistent with human dignity and democratic equality by mandating enlightened and civilized treatment by law enforcement officers of criminal suspects. He wrote *Brown v. Board of Education* that held that segregated education threatened impairment of the hu-

man dignity of black school children and was therefore unconstitutional: "To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in a way unlikely ever to be undone." In the voting cases, often said by him to be the most important of his tenure, he saw disenfranchisement of minorities and malapportionment as twin evils denying their victims a fair and equal opportunity to enjoy democratic equality and full human dignity. Possessed of an equal right to vote, the least of us, he thought, would be armed with an effective weapon needed to achieve a fair share of the benefits of our free society. In sum, he perceived that at the core of the process of government erected by the framers--unwieldy, imperfect, wearisome, sometimes maddening--lay a profound vision of justice, and that it was the duty of the Court to make that vision a reality for the least of men. He expressed his vision after his retirement in these words:

Where there is injustice, we should correct it; where there is poverty, we should eliminate it; where there is corruption, we should stamp it out; where there is violence, we should punish it; where there is neglect, we should provide care; where there is war, we should restore peace; and wherever corrections are achieved, we should add them permanently to our storehouse of treasure.

His love of sports was another very human trait. He was an ardent hunter and fisherman; indeed, his brethren's parting gift to him upon his retirement was a specially made shotgun in which he took great pride, and with which he last hunted in California only a few months

before his death. He rarely missed a football game of the Washington Redskins (I went to many with him) and managed every fall to attend a World Series baseball game if the Series involved a city not too far from Washington. He was the perfect companion on an outing, kindly, pleasant, well-balanced, and amazingly well-informed.

None of us believed that he would slow down when he retired and he did not. He retained chambers at the Court primarily to do some writing. He wrote one book and began the writing of others, but was soon unable to resist the lure of the immense number of invitations which deluged him from campuses all over the country. He began extensive travels to colleges and universities throughout the country. He usually made no formal or prepared speech but engaged in informal question and answer sessions at which students could ask and receive an answer to virtually any question. The experience gave him a tremendous lift; his eyes would shine as he expressed enthusiastically his belief that the future of the country was safe in the hands of the coming generation.

I last saw him only two hours before his death. He wouldn't talk with me about his health. He wanted an update on the status of the proposal to create a National Court of Appeals. He strongly opposed the proposal. Its adoption, he was convinced, threatened to shut the door of the Supreme Court to the poor, the friendless, the little man. To many of his colleagues, certainly to me, he was the Super Chief. History will surely accord him a first place in the pantheon of our greatest judges and greatest Americans. My deep pride in my association with him is exceeded only by my great affection for him as a friend.

My Predecessor: Earl Warren

Warren E. Burger

I had met Earl Warren on a few occasions before he was appointed Chief Justice but had no real acquaintance with him. I attended the session of the Court on the first Monday in October in 1953, when he formally took the oath of office as Chief Justice under a recess appointment by President Eisenhower. President Eisenhower attended the hearing, sitting in that special reserved chair immediately in front of the guest box. At that time, I was Assistant Attorney General, and I sat with Attorney General Herbert Brownell, William P. Rogers, Warren Olney, and J. Lee Rankin, all of Brownell's staff. Justice Hugo Black as Senior Justice administered the oath of office to the new Chief Justice.

When an invitation was extended to President Eisenhower informally, I believe, by Earl Warren, the President responded by saying that because of his strong belief in both the reality and the importance of public perception of separation of powers he would come if invited by the Court. Justice Black then officially invited him.

Shortly after my nomination as Chief Justice in late May, 1969, but before my confirmation, I was informally invited to have lunch with the Justices. I responded by suggesting that some observers might think either that the Court was taking confirmation for granted--or that I was--and that we would be well advised to defer lunch.

Confirmation came on June 6, and Mrs. Burger and I decided that we would call on the Chief Justice and Mrs. Warren to pay our respects. We did so on the following Sunday and were cordially received. The Chief Justice



Born in Los Angeles in 1891, Chief Justice Warren was the son of a Norwegian immigrant who was employed by the Southern Pacific Railroad. Warren worked as a railroad callboy before putting himself through college and law school at the University of California.

then invited me to have lunch with him the following week to discuss the transition details and we did so. At lunch I asked the Chief Justice to administer the oath and he responded that he thought I would be having one of my colleagues of the Court of Appeals do so. I responded that the concept of continuity with change in the Court was served by his doing it and he agreed. In my view, that concept is important.

Until all of the opinions of the Court were

handed down, Chief Justice Warren continued in office and, on June 26, I took the oath. Before the ceremony the Chief Justice and I met with the clerk and the Marshal to review the details of the proceedings. It was agreed that I would sit in the well of the Courtroom until the routine business of the day on the Order List and announcement of the Court's final opinions of the Term was completed. At that point President Nixon was to present my commission to the Court after which the Chief Justice would administer the oath of office. In this review of the detailed steps one of the Court Officers suggested that once the oath was administered to me protocol called for my preceding Chief Justice Warren leaving the Bench. I immediately responded that Chief Justice Warren and I would depart arm in arm and all was well. There are times when protocol should yield to agreeable results.

After presenting the commission, President Nixon made a very warm speech paying tribute to Chief Justice Warren's great career of public service extending for more than half a century. Chief Justice Warren responded warmly and we later proceeded with the usual "photo op-

portunities" in the East Courtyard and in front of the Court while the guests were leaving to join the receiving line for the reception in the East and West Conference Rooms. Unlike today, there were no questions shouted at anyone during the photo session.

On the day of our preliminary "rehearsal" of the ceremony, Chief Justice Warren told me he would be in Washington for several weeks and then would be flying to California but that the official limousine was available to me at once. I insisted that, since we had three cars at our household, he should keep the limousine for the time. He protested but then thanked me and said that would be helpful because the new car he had ordered had not been delivered.

During the summer I was trying to pick up the strings, touring the building and meeting with the Court Officers. In the days when I argued cases in the Court I would enter by way of the garage in a Department car and go directly to the Solicitor General's chamber so I was not acquainted with the rest of the building. In 1960 Chief Justice Warren invited his former assistant Warren Olney III to become head of the Administrative Office of the U.S. Courts, and he called and asked me to urge Olney to return to Washington for this appointment. Olney and I were close friends from the time he headed the Criminal Division of the Department of Justice and I headed the Civil Division. Olney served for many years in that office and brought to bear his long experience as an active practitioner and public servant. When Olney returned to Washington to take office Mrs. Burger and I had a reception at our "farm" house, "Holly Hill." The Chief Justice and Mrs. Warren and I walked around the six acres of woods and gardens and he said somewhat sadly that he wished he had settled in the country in 1953 rather than in a Washington apartment.

During July and August of 1969 when I needed background information I went to Justice Black who was most cordial and helpful. Later, as problems arose and I needed background about the Administrative Office of the Courts and the work of the Judicial Conference and its committees, I frequently went to Chief Justice Warren's chambers and consulted with him to understand the background. He was always helpful but he protested that he should come to my chambers for these discussions. I

Warren Burger asked Chief Justice Warren to administer the oath of office when he became Chief Justice in 1969, because he thought the concept of continuity with change in the Court was important.



told him I needed the exercise and, in any event, I, as the one seeking information should go to the source. That cooperative relationship continued throughout his lifetime.

Filling Justice William O. Douglas's Seat: President Gerald R. Ford's Appointment of Justice John Paul Stevens

David M. O'Brien

Editor's Note: *This paper was prepared for the Seventh Presidential Conference at Hofstra University on "Gerald R. Ford: Restoring the Presidency," April 6-9, 1989.*

Justice Harlan Fiske Stone once likened Supreme Court appointments to a "lottery" from a pool of more or less qualified individuals. His close friend, Harvard law professor and political scientist Thomas Reed Powell, was more blunt: "[T]he selection of Supreme Court Justices is pretty much a matter of chance."¹ What they had in mind was how a President's personal politics--his political associations and friendships--determine the fate of qualified candidates for the Court. But, the pool of possible candidates also reflects the weight each President gives to (1) rewarding personal and political associates; (2) advancing his administration's ideological or policy agenda; and (3) professional considerations, the legal experience and reputation of possible nominees.² Democratic and Republican Presidents, moreover, tend to have different priorities in defining the pool from which they pull their nominees.³

President Gerald R. Ford's selection of Justice John Paul Stevens departed from the practices and priorities set by other recent Presidents, with the possible exception of Dwight D. Eisenhower. Like that Republican President he so admired, Ford had little truck with either the personal politics practiced by Democratic Presidents in naming their Justices, or the kind of White House politics calculated (occasionally incorrectly) to advance an administration's legal-policy agenda by means of judicial appoint-

ments.

Ford views it as "a mistake [for Presidents] to appoint people to the Court on ideological grounds."⁴ This is so not because they may misjudge their nominees or later be disappointed by their appointees once on the Bench. Rather, Ford maintains that it is "improper" for Presidents to have their judicial appointments turn on "ideological grounds," for that denigrates the nominee and the Court. Besides placing a premium on professional considerations, Ford, like Eisenhower, relied heavily on his Attorney General in selecting a nominee whose professional reputation put him outside the pale of partisan political controversy.

Justice Stevens, though, it seems fair to say, might never have been appointed had it not been for Ford's "accidental Presidency." As Stevens recalls, he "had no political ambitions" and "didn't think in terms of getting into the kind of political activity that normally precedes going on the Bench."⁵ And Ford was not in a position to claim an electoral mandate for turning the Court in a more sharply conservative direction.

Yet, the appointment of Justice Stevens shows much about Ford's Presidency--his dedication to professionalism in government and overcoming the "crisis in confidence" he inherited with the Oval Office from Nixon. Ford, as his congressional aide and later presidential counselor, Robert T. Hartmann, put it, "was the man for *that* season when he restored the faith of a troubled people in their constitutional government and in the honor and decency of the presidency.... To be caretaker of the Constitution is no mean glory. Jerry Ford was

a far better president than he was politician."⁶

An Irony of Politics

Ironically, political circumstances conspired to give Ford the opportunity to fill the seat of liberal Justice William O. Douglas. In 1970 as House Republican leader, Ford was involved in a drive to impeach Douglas. Five years later, after being named Vice President by President Richard Nixon and then moving into the Oval Office when Nixon resigned rather than face impeachment in August 1974, he had his only chance to fill a vacancy on the high Bench.

In the early 1970s, Republican Congressmen were embittered by the Senate's defeat of Nixon's first two nominees, Clement Haynsworth and G. Harrold Carswell, for the seat of Justice Abe Fortas. Fortas resigned in 1969, after a battle a year earlier forced his withdrawal from the nomination to be Chief Justice. He did so because of publicity that he had accepted \$20,000 for serving, while on the Bench, as an advisor to the Wolfson Family Foundation. In light of Fortas's resignation, a 1966 *Los Angeles Times* story that Douglas annually received \$12,000 as a consultant to the Parvin Foundation became newsworthy again. Though his connections with the foundation had been known, allegations of impropriety were opportunity for Republicans.⁷

Ford contended the activities of Fortas and Douglas stretched the American Bar Association's (ABA) canon of judicial ethics that a "judge's official conduct should be free from impropriety and the appearance of impropriety." What really disturbed him and others was Douglas's life-style and judicial philosophy. Ford, as Hartmann recalls, "disapproved of Douglas the way a Grand Rapids housewife would deplore the behavior of certain movie stars. The old man [Douglas] took too many wives and he seemed to encourage any new fad in youthful rebellion."⁸ Douglas joined a majority on the Warren Court in extending First Amendment protection to ostensibly obscene materials. And his publishing agent permitted Ralph Ginsberg, convicted for publishing obscene and libelous magazines, to print an excerpt from one of Douglas's books in *Avant Garde*. When Douglas participated in the Court's decision (denying) review of Ginsberg's conviction,

Ford alleged a conflict of interest.

While Representatives Harold R. Gross of Iowa and John R. Rarick of Louisiana publicly called for Douglas's resignation, Ford and Hartmann investigated the Justice's off-the-Bench activities. Ford, however, might never have taken a lead in an impeachment drive had House Republicans not forced him to do so. Indeed, he thought a "motion to impeach [Douglas] would widen the gulf between conservatives, moderates and liberals;" as House leader he "had a duty to try to prevent that from happening."⁹

Ford was prodded into doing something when an excerpt of Douglas's book *Points of Rebellion* appeared in *Evergreen*, a magazine identified with left-wing radicals. But, when he finally went to the floor of the House to call for a full investigation, Representative Andrew Jacobs, Jr., a Democrat from Indiana, beat him to the punch by introducing an impeachment resolution. Under House rules, the matter immediately went to the Judiciary Committee, which was controlled by Democrats.

When the committee found no grounds for impeachment, Ford called it a "travesty." The momentum for impeachment, however, had declined by the time of the committee's report. The Senate had confirmed Justice Harry Blackmun, Nixon's third nominee for Fortas's seat. Douglas's association with the Parvin Foundation no longer appeared extraordinary in view of revelations during Blackmun's confirmation hearings that, as a federal appellate judge, he was associated with the Mayo Clinic and the Kahler Corporation Foundation, among others, as well as a trustee of (Chief Justice Warren Burger's alma mater) the William Mitchell College of Law.

Ford continued to maintain that "Douglas's extensive extrajudicial earnings and activities have impaired his usefulness and clouded his contribution to the United States Supreme Court."¹⁰ That, in turn, led to attacks in the press on him forming a "partisan witch hunt." In retrospect, Ford claims what he "did at the time may have been politically ill advised, but it was not irresponsible."¹¹

Four years after attacking Douglas, Ford then had the chance to fill the seat the Justice occupied for more than 36 years. The decision to retire was not unexpected, though painfully

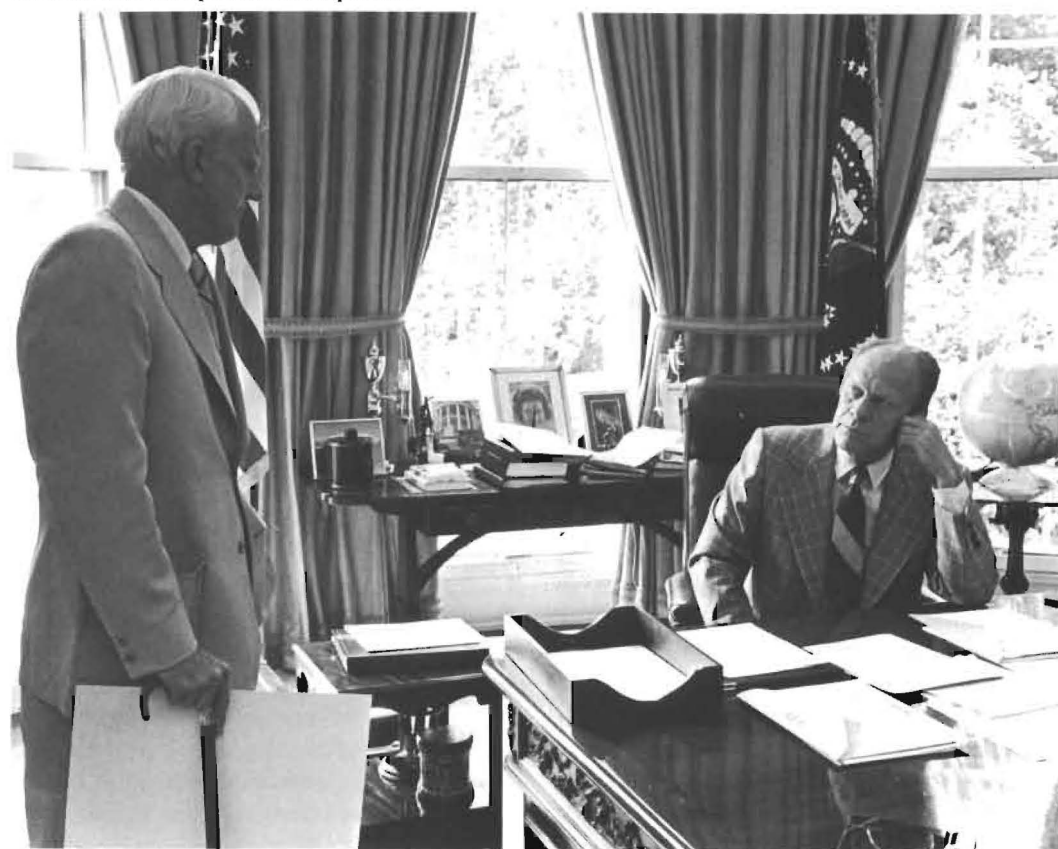
difficult for Douglas. It was not that Ford would appoint his successor, or even that Nixon's appointees were moving the Court in directions that troubled the Justice. On December 31, 1974, after arriving in Nassau for a winter vacation, Douglas suffered a stroke. He was hospitalized and could not return to the Court to hear oral arguments until March 24, 1975. Frail, confined to a wheel chair, and despite deteriorating health, he persisted even after doctors told him in October that he would not walk again. Finally, on November 1, following a meeting with Fortas and Clark Clifford, the strong-willed but enfeebled 76 year-old Justice gave in to the inevitable.

On the morning of November 12, Justice Douglas called Deputy Attorney General Harold Tyler to tell him that he intended to resign and that his wife, Cathy, would deliver his letter of resignation later that day. Douglas never forgot or forgave Ford's attack on him, and could not bring himself to give his letter directly

to the President. At 3:15, Cathy delivered Douglas's letter to Tyler at the Department of Justice.¹² "It was my hope," Douglas explained in his letter, "that I would be able to continue to participate in the work of the Supreme Court." But, "it would be inadvisable for me to attempt to carry on the duties required of a member of the Court. I have been bothered with incessant and demanding pain which depletes my energy to the extent that I have been unable to shoulder my full share of the burden of the Court's work."

Ford immediately accepted the resignation with a letter commending Douglas's "contributions to the law both as a scholar and jurist."¹⁴ That afternoon he met with Attorney General Edward Levi and presidential counselor Philip Buchen to discuss potential successors. The next day, Ford told reporters he would make his nomination "as soon as I reasonably can, because it is widely recognized that the workload of the Court and the extremely important issues to be decided require, as soon as possible, a full

President Gerald Ford consulted with presidential counselor Philip Buchen (at left) about who he should nominate to succeed Justice Douglas. Ford was determined to restore confidence in the government by choosing a political moderate with solid professional experience.



Court of nine Justices. With only eight Justices," he added, "there is too much risk of an equal 4 to 4 division of opinion in critical cases." As to his nominee's qualifications, Ford said:¹⁵

I shall take very seriously the need to have a person highly respected for professional quality, for intellectual capacity, and for integrity. Also, I am looking for an energetic person and preferably one of middle age who can be expected to contribute effectively for a substantial period of years to the important work of the Court.

"Few appointments a President makes," Ford realized, "can have as much impact on the future of the country as those to the Supreme Court."¹⁶

Towards a Restoration of Public Confidence and Professionalism

Even before meeting with Levi and Buchen to discuss potential nominees, Ford laid the foundation for a process and an understanding which ultimately determined the selection of his nominee. Whether or not, as Buchen later claimed, Ford was "weak as an administrator and a planner,"¹⁷ there is no denying his commitment to restoring public confidence in the post-Watergate Presidency by returning professionals to government. "[O]ur long national nightmare is over," he proclaimed on becoming the 38th President: "Our Constitution works. Our great Republic is a government of laws and not of men."

Ford's commitment to the restoration of public confidence and professionalism in government was no more evident than in the Department of Justice (DOJ), notably with the appointment of Edward Levi as Attorney General. His determination and virtually complete reliance on Levi, more than any other factor, accounts for his final choice in filling the vacancy on the Court.

"[N]owhere did Watergate leave more lasting scars than at the Department of Justice," Ford recalls. "In less than three years, it had had three Attorneys General--Richard Kleindienst, Elliot Richardson and William Saxbe."¹⁸ Watergate "had a devastating impact on the record and morale of the Department of Jus-

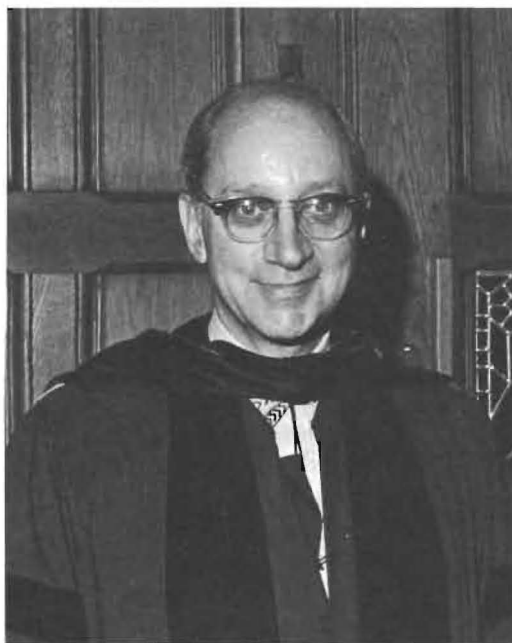
tice. Allegations of partisan politics were rampant. Relations with Congress were at a low ebb. The Federal Bureau of Investigation had gone through a disturbing era. United States intelligence and counterintelligence activities were being seriously challenged by Congress, the news media, and the public."¹⁹

Ford needed to make his own imprint on the Justice Department. Still, he did not initially dismiss William Saxbe who became Attorney General in January, 1974, during the Watergate crisis. Less than a year later, however, Ford offered Saxbe the Ambassadorship to India after hearing he wanted the assignment. This enabled Ford to distinguish his Administration's approach to judicial selection and legal policy.

Indicative of Ford's commitment to restoring public confidence in government was his judgment that the "new Attorney General. . . had to be someone of unquestioned integrity and impeccable legal abilities and background and ought to come from outside the traditional political arena."²⁰ Nixon had "heavily politicized" the department and Ford was concerned that Presidents typically chose their closest advisors or campaign managers for the government's highest legal post. He wanted "someone nonpolitical."²¹ His chief of staff, Donald Rumsfeld, and Buchen agreed. Ford "needed an Attorney General who would be different, someone highly respected in the legal profession and uninhibited by partisanship."²² Rumsfeld suggested Levi, who was president of the University of Chicago and former dean of its law school. When Ford met him on December 5, 1974, he was impressed and immediately offered the position of Attorney General.

No less important, Ford delegated and relied on the judgment of his new Attorney General. "One of the most critically important responsibilities" assigned him, Ford recalls, was "to assist in choosing a nominee to the United States Supreme Court."²³ But, there was more to their relationship and, again, it reflects a shared commitment to professionalism in government.

Levi brought in his own team and set the tone in the department. Harold Tyler, a federal district court judge, was persuaded to serve as Deputy Attorney General. To head the civil division, Levi recruited the dean of Brigham



Edward Levi was president of the University of Chicago when President Ford appointed him Attorney General. He was given a free hand by the White House to make selections of judges for the Justice Department, and Ford solicited his advice about candidates for the vacant seat on the Court.

Young University Law School, Rex Lee, who later served as Ronald Reagan's Solicitor General. For the criminal division, Levi elevated a respected United States attorney, Richard L. Thornburgh, who was brought back as Attorney General at the end of Reagan's second term and continued on during George Bush's administration.

Professional considerations governed Levi's view of federal judgeships as well. Like other Presidents, Ford delegated primary responsibility for filling vacancies in the lower federal courts to his Attorney General.²⁴ Initially, Levi personally handled these nominations. But, he soon found he was too busy with other matters and that most were routine. Thereafter, the task was assigned to Deputy Attorney General Tyler, who was assisted by two career attorneys. Tyler worked to rebuild relations with the ABA, which were badly damaged during the Nixon years. He had a "virtually free hand" and conferred with Levi only after conducting his own investigation of potential nominees.²⁵

Notably, except for the Supreme Court appointment, Levi and Tyler had few dealings

with White House staff in recommending nominees for the 66 lower court judgeships filled by Ford. They enjoyed a degree of independence and freedom from White House intervention and supervision that contrasts sharply with the operation of other Administrations.²⁶ Rather than imposing ideological considerations or its own legal-policy goals, Ford's DOJ sought high-caliber nominees and cooperation from the Senate in securing their confirmation.

The process and goals of selecting federal judges during Ford's Presidency, to be sure, failed to infuse a sharp conservative judicial philosophy into the federal bench. In the words of Stephen Markman, the Assistant Attorney General in charge of judicial recruitment during President Ronald Reagan's second term: "the Ford Administration did not make significant changes" and "the weakness of the Ford Administration may be seen in the statistic that a record 21 percent of its district court appointments went to members of the opposing party."²⁷

Yet, such criticism reflects both how the priorities of Administrations differ and the political circumstances constraining each Presidency. All Presidents give more or less weight to three factors in their judicial selection: (1) the professionalism, or legal experience and reputation, of potential nominees; (2) rewarding their long-time supporters and party-faithful; and (3) pursuing their ideological or policy agenda through judicial appointments. Unlike some other Presidents, Ford placed a premium on the professional qualifications of nominees, to the exclusion of ideological considerations and occasionally even partisan politics. Like Eisenhower, Ford also delegated major responsibility to his Attorney General, who in turn worked with the ABA in evaluating potential nominees' professional qualifications.

The decision to consult with the ABA on filling Douglas's seat was itself politically symbolic; it signified that the professional considerations would be taken seriously. Nixon put an end to the practice of consulting with the ABA on nominees for the Court in 1971. The ABA's Standing Committee on Federal Judiciary had screened prospective nominees for the Court since Eisenhower's selection of Justice William J. Brennan, Jr. in 1956, rating them as "qualified" or "unqualified." But, Senate criticism and rejection of the nominations of Hayns-

worth and Carswell—who the ABA ranked as “highly qualified” and “qualified,” respectively—infuriated Nixon and prompted the ABA to change its system of rating nominees. (Supreme Court nominees are now rated “well qualified,” “qualified,” or “not qualified.”) After another round of unfavorable press over possible candidates for the seats of retired Justices John Harlan and Hugo Black in 1971, Attorney General John Mitchell refused to submit any further names to the ABA. The committee was left on its own in investigating Nixon’s last two appointees, Justices Lewis F. Powell and William H. Rehnquist.

With Ford’s appointee to the Court, the ABA re-established its informal role in evaluating candidates before the President’s final selection. Whatever the merits of the ABA’s rankings, they serve to legitimate the professional competence of nominees.²⁸ And the renewal of the ABA’s role underscored Ford’s concern with restoring professionalism and public confidence in government.

Admittedly, even if Ford wanted to make an ideological appointment, he was in a poor position to do so. As an “accidental President,” he had no pretense of claiming an electoral mandate and faced Democratic majorities in Congress. With the prospect of running for election in 1976, he faced competing interests within the White House and the watchful eye of Democratic Senators, who considered Douglas’s seat crucial to the Court’s future direction.

Neither Ford nor Levi entertained making an ideological appointment, however. Ford was a moderate or “traditional” conservative, believing in judicial self restraint. “The Court,” in Ford’s view, “should not be benign nor a legislative court, but in between those extremes. . . moderate in between those lines.”²⁹ “Under Chief Justice Warren,” he felt, “the Court had begun legislating by judicial decree instead of simply interpreting the law.”³⁰ Still, Ford was not inclined toward naming hard-line conservatives.

Before Douglas’s resignation, Ford told Levi and Buchen that his top priority in selecting a candidate for the Court was “competency” and “previous court experience.” Next, the nominee’s “[p]ersonal integrity” and “history of independent thought.” Legal and judicial experience ranked higher than legislative

and political experience, which stood above (and virtually eliminated those with only) academic records as law professors. A final consideration was age; any nominee “should be 50 plus or minus.”³¹

Lobbying and Cross-cutting Pressures

As other Presidents, Ford faced conflicting pressures from within and without the White House. Differences between holdovers from the Nixon era and Ford’s appointees were evident. As Richard Cheney, who served in Nixon’s first term and returned to his Administration before becoming an assistant to Ford, observed:³²

The worst conflicts in terms of personal relationships were inside the White House. There is no question about it. We had conflicts between the old Nixon carry-overs, and the new Ford staffers. The Nixon hands who were there when President Ford arrived knew how the White House ought to operate. Most of them were absolutely first-rate people untainted by Watergate in any shape or form. The old Ford people had been with President Ford either when he was a congressman on the Hill or since he joined the administration as vice president.

When the vacancy on the Court opened, Ford’s Presidency split three ways over the appointment of (1) a woman, (2) a hard-line conservative, or (3) a moderate, politically non-controversial lower court judge. In addition, some 30 Congressmen wrote the President about their preferred candidates, as did representatives of special-interest groups, Republican lawyers, judges, and other individuals interested in promoting their own candidacy.³³

White House staff quickly compiled a list of possible nominees. Among the appellate court judges later given consideration were Third Circuit Court of Appeals Judge Arlin Adams, endorsed by Senator Hugh Scott and others, along with seventh circuit Judge Philip Tone. Others mentioned, but not given more consideration, included: Judge Charles Clark of the fifth circuit, who was recommended by Senator James O. Eastland. Senator Strom Thurmond suggested federal district court judges Robert Chapman and Charles E. Simmons, along with

Judge Emery Widener of the fourth circuit. The Alabama Bar Association put up the name of Judge Frank M. Johnson, Jr., who James E. "Jimmy" Carter elevated to the appellate bench. Ninth Circuit Court of Appeals Judge Alfred Goodwin was supported by Senator Mark O. Hatfield, while Representative John Byrnes drew attention to eighth circuit Judge Smith Henley. Roger Blough mentioned Judge Irving R. Kaufman of the Second Circuit Court of Appeals.

The prominent attorneys included former Solicitor General Robert H. Bork; presidential counselor Philip Buchen; former Nixon legal counsel Leonard Garment; and Attorney General Levi. In addition, Deputy Attorney General Tyler was mentioned, along with Caspar Weinberger and Congressman Charles Wiggins. The National Women's Political Caucus and Pat Lindh proposed a rather diverse group of women attorneys: Bella Abzug, Yvonne B. Burke, Martha Griffiths, Margaret Heckler, Carla Hills, Elizabeth Holtzman, Barbara Jordan, Patsy Mink, Betty Southard Murphy, and Pat Schroeder.³⁴

Ford confronted the most direct pressure

The National Women's Political Caucus, chaired by Audrey Rowe (below) from 1975 to 1977, urged the nomination of a woman. A number of White House staff also pushed for a female candidate, some arguing that it would help Ford's bid for the Presidency in 1976.



for nominating a woman from his wife, Betty, who publicly favored Housing and Urban Development (HUD) Secretary Carla Hills.³⁵ Jill Ruckelshaus, the presiding officer of the National Commission on the Observance of International Women's Year,³⁶ Audrey Rowe, chair of the National Women's Political Caucus, and the National Federation of Business and Professional Women's Clubs strongly urged naming a woman.³⁷

Within the Administration, Pat Lindh compiled the resumes of several women judges and law professors. Among the top were D.C. Superior Court Judges Sylvia Bacon and Margaret Haywood; D.C. Court of Appeals Judge Julia Cooper; Ninth Circuit Court of Appeals Judge Shirley Hufstедler; federal district judge Cornelia Kennedy; and Susie Sharp of the Supreme Court of North Carolina. Several law professors, Ruth Bader Ginsberg, Herma Hill Kay and Dorothy Nelson, were on Lindh's list as well as that of the National Women's Political Caucus. Other judges included Norma Holloway Johnson, Florence Kelley, Elizabeth Kovachevich, Constance Baker Motley, and Sandra Day O'Connor (who Reagan appointed to the Court in 1981), along with professors Soia Mentschifoff, Ellen Peters, Harriet Rabb, and Jean Kettleon.

Some women rumored to be in consideration invited rebellion within the Republican Party. The GOP Steering Committee strongly opposed Hufstедler, among others. For the committee, Senator James A. McClure wrote Ford about Hufstедler:³⁸

Her opinions from the bench lead us to believe that she is precisely the kind of judicial activist which has characterized recent difficulties with judicial decisions. We believe her appointment would tilt the Court away from the prudent direction it has been taking under the Chief Justiceship of Warren Burger.

Attached to McClure's letter were the names of "eight persons whose records would indicate the kind of judicial and judicious temperament [sic] which we believe important to balance the Supreme Court." At the top was Robert H. Bork.

A wing of the White House staff held out

hope for a woman's nomination even though, within days of Douglas's resignation, Levi circulated a list of the candidates under consideration. It included no women. In a "Memorandum For The President," Lindh pointed out that "two or three of the candidates on the Attorney General's list are opposed to the Equal Rights Amendment, which really puts us in double jeopardy." She reminded Ford of his "many statements concerning the status of women in our society," before imploring that "all else being equal, your nomination of a properly qualified woman for the Supreme Court would be appropriate and just."³⁹ Appointment of a woman, others argued, might also help Ford in his bid for the 1976 presidential election. In retrospect, Ford agrees, "a woman might have helped, but who can say."⁴⁰

Notwithstanding the publicity and efforts of some White House staffers, no woman appeared seriously in the running. This is so despite Ford's recalling that he told Levi to "[s]urvey the field and [not] exclude women from your list,"⁴¹ as well as the names of two women--Judge Kennedy and HUD Secretary Hills--at the bottom of Ford's "short working list" of potential nominees.⁴²

Another faction within the Presidency and the Republican Party pressed for "a more ideological appointment."⁴³ For one, presidential advisor and former head of the American Enterprise Institute (AEI), William Baroody, Jr., advised naming Robert Bork, a leading conservative scholar, AEI associate, and former Yale law school professor.⁴⁴ "He is young and is a strict Constructionist and," wrote Arizona's Senator Barry Goldwater in a letter to the President, "would give continuity to the kind of Court that you want for at least twenty-five years."⁴⁵

Bork would have proven as (maybe more) controversial as he was in 1987, when his nomination by Reagan went down in the Senate by the widest margin (58 to 42) of any Supreme Court nominee.⁴⁶ In 1975, he was identified with the disgraced Nixon Administration more than with the advocacy of a "jurisprudence of original intention." Barely two years earlier, Archibald Cox, the special prosecutor assigned to investigate the Watergate break-in and cover-up, had asked Nixon to turn over White House tapes. The President refused but eventually

offered to provide summaries of relevant conversations. When Cox found the deal unacceptable, Nixon ordered Attorney General Elliot Richardson to fire him. Instead, Richardson resigned. So did the Deputy Attorney General, William Ruckelshaus. Finally, Solicitor General Bork became Acting Attorney General, and he fired Cox. The "Saturday Night Massacre" unleashed a wave of public anger that within days forced Nixon to relinquish some of the incriminating tapes.

Bork's confirmation would probably have been defeated and a bitter battle further hurt Ford's chances in the 1976 election. The Democratic-controlled Senate was concerned about any nominee following Nixon's appointments. With four Nixon appointees, Douglas's seat was considered "pivotal," his successor certain to tip the balance on the Court in more conservative directions. Massachusetts' Democratic Senator Edward Kennedy held subcommittee hearings on the need for "balance" on the Court, and pushed for a Senate Judiciary Committee "advice and consent" procedure before Ford named his nominee. Max Friedersdorf, a legislative liaison, alerted the President. Nebraska's Senator Roman Hruska and other Republicans finally blocked Kennedy's

Robert Bork did not make it to the top of President Ford's list because, as Acting Attorney General, he had fired Archibald Cox in the "Saturday Night Massacre" and was perceived as being tainted by the Watergate scandal.



efforts on November 21.⁴⁷ This underscored for Ford the importance of quickly naming his nominee (before opposition gathered momentum) and steering clear of anyone controversial.

Even if a confirmation fight over Bork could have been won, Ford was not predisposed towards naming him. As a moderate Republican, Ford did not "view the philosophical grounding of [judicial] candidates to be as important" as would those in the Reagan Administration.⁴⁸ His dedication to restoring the Presidency's reputation bode ill for a candidate who would revive the Watergate controversy. In short, Bork's reputation and record did not match that of others already on the federal bench or Ford's priorities, and his political liabilities would dearly cost Ford the Presidency.

From the outset, Ford was determined to name a respected moderately conservative jurist in order to avoid the kind of political conflict that ensnared Nixon's two ill-fated nominees. That view was shared by Levi and others in the Administration, at least those not bent on making a politically symbolic statement through the appointment of either a woman or a hard-line conservative. Roger Blough, for one, advised naming "an individual with a middle of the road" philosophy rather than "a more conservative one" on the ground "that if the Court was perceived as being unduly conservative then respect for it as an institution would be diminished."⁴⁹ Besides, Ford could claim no electoral mandate for changing the Court.

John Hart Ely, unwittingly, represented those in the Administration who thought the appointment should go to a moderate conservative. Ely, who clerked for Chief Justice Earl Warren and was serving as general counsel in the Office of the Secretary of Transportation, cautioned in a letter to the President that,

The appointment of an extreme conservative to Justice Douglas' seat would throw the Court rather seriously out of ideological balance. The Court's importance in our society has been attributable in large measure to its position as an instrument of continuity—a position that would be jeopardized by the appointment of an extreme conservative to the Douglas seat—and also to the fact that although it has never had significant independ-

ent power it has nonetheless kept at least the pressure of persuasion on the political branches respecting such values as racial equality and free expression. . . . Moreover, a little arithmetic will demonstrate that such an appointment would effectively eliminate the Supreme Court as a meaningful independent force for civil liberties for quite a long time to come.

Nixon, he added, "did do great harm to two of the three branches of government. The obvious harm was to the office of the Presidency, harm you have understood and done so much to repair. But harm was done to the Supreme Court as well, by making it a campaign issue and engaging in an openly, even cynically political selection process." He concluded with a statement capturing rather well the position taken by Ford and others that,

the process of selection be one that is structured—and, at least as important, that it be perceived by the public—as not primarily political, that it be understood as different from the way one picks a running mate (or even the General Counsel of a cabinet department). Should the Court overtime come to be viewed as just another political branch, America will have lost, and irretrievably lost, something that is entirely unique and extremely valuable.⁵⁰

There were thus conflicting views and cross-cutting pressures focusing on Ford's selection for the Court. Others outside the Administration sought influence as well. For instance, widely-respected appellate court Judge Henry J. Friendly wrote the President urging Levi's nomination.⁵¹

Levi, it bears noting, was not without his supporters. Illinois Senator Charles Percy initially proposed his appointment in a telephone conversation with Ford on November 14.⁵² That day Chicago's Mayor Richard Daley also left word at the White House that he endorsed him.⁵³ Before the vacancy occurred, however, Levi and the President agreed it would appear improper for Ford to name his Attorney General to the Court, in light of the circumstances of their holding office. When Douglas resigned, Levi also told Ford that it would be unwise to nominate anyone from within his

Administration.⁵⁴ Their efforts to restore confidence in government would also have probably been undercut.

Nor was Judge Friendly alone in suggesting possible nominees.⁵⁵ Justice Lewis F. Powell mentioned to Levi and others the possibility of Phil C. Neal, a former dean of the University of Chicago Law School.

Two days before Douglas notified the President of his retirement, Chief Justice Burger also wrote Ford a letter, hand-delivered to the White House by Mark Cannon, the Administrative Assistant to the Chief Justice. "Against the possibility that a vacancy may occur on the Court," Burger suggested "certain factors that deserve consideration."⁵⁶

(1) Rarely have the geographical factors been as neutral as at the present. As you know, the two youngest Justices are from the West (White and Rehnquist); there are three from the Midwest (Burger, Stewart, Blackmun); one from a border state, Maryland (Marshall); one from the Northeast (Brennan); and one from the South (Powell).

(2) The average age of the nine Justices is now 65 years.

(3) For more than ten months past we have been functionally only a Court of eight, and this has placed us under substantial handicaps.

(4) Since I took office in June 1969, the Court has been functionally eight Justices for more than two years.

(5) All indications are that our work will continue to increase both in the volume and in the complexity and novelty of issues; a number of crucial cases have been set for reargument due to the absence of Justice Douglas last year. To resolve them with a Court of eight Justices is highly undesirable, for many reasons.

Burger impressed on Ford that certain considerations go into making his selection: "(a) It must be a nominee of such known and obvious professional quality, experience and integrity that valid opposition will not be possible. (b) Given the present difficult condition of the Court's work--a condition that has pre-

vailed for more than 10 months--a nomination should be made swiftly. . . before rival candidacies develop that could engender divisiveness and delay confirmation. We need nine Justices without delay," he emphasized, adding,

A nominee with substantial judicial experience would have several marked advantages; the adjustment to the work of the Court would be expedited because of familiarity with the enormous amount of "new law" in recent decades; insulation from controversy and partisanship by reason of judicial service is also likely an advantage (as it was to Justice Blackmun and me). This does not rule out a non-judge but it emphasizes that a general practitioner, no matter of what legal capacity, has very likely had little occasion to keep up with the great volume and complexity in the evolution in criminal law and public law matters that now compose the bulk of the Court's work.

Concluding, the Chief Justice reiterated that timing was "a critical factor" and the nominee's age "crucial." While declining to propose particular candidates, Burger offered "to pursue these points in more depth with you."⁵⁷

Delegation and Dedication to Professionalism

In the 16 days following Douglas's resignation to the announcement of his successor (from November 12 to 28), press reports reinforced the perceived split within Ford's Presidency over appointing a woman, or a hard-line or moderate conservative. But, the politics and infighting among White House staff had no impact on the actual selection process. During this period Levi quietly and independently pursued his investigation of the principal candidates.

Soon after becoming Attorney General, Levi was asked by Ford to think about possible candidates for the Court. And two days before Douglas announced his retirement, Levi sent the President a list of those he thought "worthy of consideration," along with brief appraisals of their qualifications.

Levi's list was the basis of discussion with Ford on the afternoon of November 12. Notably, only six of the 18 also appeared on the list

compiled by Cheney from White House staff and others seeking to influence the Administration. None were women, as earlier noted. Those mentioned by both Levi and Cheney were Judges Arlin M. Adams, Alfred T. Goodwin, and William H. Webster; Bork; Congressman Charles E. Wiggins; and Senator Robert P. Griffin. Levi suggested other appellate judges, Paul H. Roney, John Paul Stevens, J. Clifford Wallace, and Malcolm Wilkey. Also listed were several leading academic and practicing lawyers: Philip Areeda, a former counsel to President Nixon; Bennett Boskey, a respected Washington, D.C. lawyer; Philip Kurland, a conservative University of Chicago Law School professor, who had clerked for Justice Felix Frankfurter; Vincent Lee McKusick and James H. Wilson, Jr., two prominent attorneys, respectively, in Maine and Georgia; Dallin H. Oaks, a former University of Chicago professor and president of Brigham Young University; and Antonin Scalia, who was Assistant Attorney General for the Office of Legal Counsel and later returned with Levi to the University of Chicago, before Reagan named him to the appellate bench in 1982 and to the Court in 1986.⁵⁸

Since Ford was interested in a nominee in his fifties, rather than someone older and less likely to remain on the Court for long, Levi indicated some outstanding judges, such as Edward Gignoux (age 59) and Carl McGowan (age 64), were excluded.

Attached to Levi's memorandum were short biographies of those he deemed merited serious consideration: Adams, Bork, Goodwin, McKusick, Oaks, Roney, Stevens, Wallace, and Webster. He merely gave the legal backgrounds of Oaks, McKusick, Goodwin, and Roney without indicating his view of their qualifications. Webster, he noted, "has proven to be a very competent judge--energetic, careful, and intelligent." Similarly, Levi thought, "Judge Wallace is an able, intelligent judge and is markedly conservative, especially in criminal law matters." He had somewhat more to say about the remaining three, Adams, Bork and Stevens.

Levi commented least about Bork, who graduated from the University of Chicago Law School, before entering private practice and later teaching antitrust law at Yale Law School. Bork "was generally known in the profession as



Arlin M. Adams, United States Circuit Judge for the Third Circuit, was a top contender for the nomination. Attorney General Levi lauded him highly but gave Stevens even greater praise.

one of the foremost conservative critics of the prevalent interpretation and enforcement of the antitrust laws." But his stands on matters of constitutional law were "less well known, except for his prominent role, in the first term of President Nixon's administration, as one of the draftsmen and proponents of legislation" to eliminate "busing as a judicial remedy for segregated schools." As Solicitor General, Bork enjoyed "the highest reputation" for his "ability and integrity." Missing from Levi's discussion was Bork's well-known role in the Saturday Night Massacre. "If Mr. Bork was appointed to the Court," he concluded, "there would be little doubt of his intellectual capacity for the work. There would be equally little doubt that, on the Court, Mr. Bork would provide strong reinforcement to the Court's most conservative wing."⁵⁹

Judges Adams and Stevens received more attention and praise. Since Adams' appointment to the third circuit bench in 1969, Levi found he had

proven himself an able, highly energetic judge, generally conservative in judicial philosophy. . . . His positions on substantive constitutional issues are generally conservative. His

opinions demonstrate considerable energy, broad scope of interest and an underlying judicial philosophy, which includes a concern with limiting the role of the federal courts and of clarifying and to some extent limiting the right of standing to sue."

But, Levi ended with mixed praise:

His opinions have considerable flair and reach, which gives them interest and can suggest an influential member of the Court, but revealing a certain weakness, not so much in analytical skill—which he has—but in being willing to sometimes by-pass or go beyond the most careful analysis.⁶⁰

Levi reserved his highest praise for Stevens. They, of course, knew each other from Chicago and the University of Chicago. Stevens was younger (born on April 20, 1920), but, as Levi, he grew up in a family in the Hyde Park community near the university; his father, an affluent businessman, had passed the Illinois bar but never practiced law. They were not, however, childhood friends, as were Nixon appointees Warren Burger and Harry Blackmun. Instead, their relationship developed from professional interests and social contacts in the Chicago bar association.

As an undergraduate at the University of Chicago, Stevens majored in English, made Phi Beta Kappa, and planned "to be an English teacher." World War II intervened and, after graduating, he enlisted in the Navy in 1942, serving in the Pacific until 1945. Towards the end of the war, his older brother, a lawyer, wrote him "at great length about some of the psychological rewards of practicing law;" it "had a real impact on [his] thinking." Pro bono work did not interest him, rather "the challenges and opportunities to make some kind of contribution to what goes on in the world." In addition, he frankly wanted to take advantage of GI Bill of Rights and government loans to pursue his studies.⁶¹

After the war, Stevens entered Northwestern University Law School in an accelerated two-year program. There, he enjoyed the "competitive aspect" of law school, especially the fact that "at the time there were class ranks. It was kind of a challenge to do as well as you

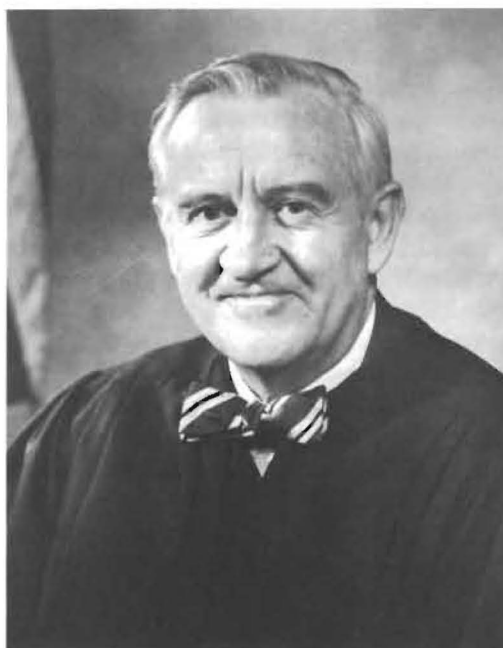
could in law school." He graduated first in his class in 1947, and then had the chance to go to the Supreme Court as a law clerk.

Stevens's clerkship was a lucky coincidence as much as a reflection of his abilities. As it happened, in the summer of 1947 Congress passed a statute authorizing each Justice to hire a second law clerk. Justice Wiley Rutledge contacted Professors Willard Wirtz and Willard H. Pedrick at Northwestern about graduates who might serve as clerks. And, Stevens recalls, he then went to the Court on the flip of a coin:

They urged him to take a Northwestern graduate and they also urged the Chief Justice [Fred Vinson, who made a practice of taking Northwestern graduates as his clerks] to take one [the following year]. There were two of us who were substantially equally well qualified, they thought, and they proposed that we flip a coin for the position. And I won the flip so that I got the first choice which was to go that year with Justice Rutledge, and the next year Art Sedar went with the Chief Justice because he lost the flip and had to wait a year.

During his clerkship, Stevens came to greatly admire Rutledge, a liberal jurist and F.D.R.'s last appointee to the Court. Rutledge's judgment impressed him, whereas Justice Felix Frankfurter though "brilliant" appeared "too technical" in deciding cases. He also remembers hearing Thurgood Marshall argue cases for the National Association for the Advancement of Colored People (NAACP) before the Court, and reading memos written by Byron White, who clerked a year earlier for Chief Justice Fred Vinson (and who Stevens had met in the Pacific). Stevens, though, "never really" thought he would eventually return to the Court. He "had no political ambitions or objectives and," he explains, "didn't think in terms of getting into the kind of political activity that normally precedes going on the bench."⁶²

After clerking at the Court, Stevens returned to Chicago and entered private legal practice, specializing in antitrust and commercial law litigation. He joined the firm of Poppenhausen, Johnston, Thompson and Raymond in 1948. Three years later, he left to serve as Associate Counsel to the Subcommittee on the



While clerking for Justice Wiley Rutledge during the 1947 Term, John Paul Stevens (above, as Associate Justice) heard Thurgood Marshall argue cases before the Court for the NAACP and read memos written by Byron White who had clerked for Chief Justice Vinson the year before.

Study of Monopoly Power of the House Committee on the Judiciary. He then returned to his Chicago firm for six months, before leaving to form another firm, Rothschild, Stevens, and Barry.

Besides his legal practice, Stevens taught part time, first at Northwestern University Law School (in 1952-1953) and then at the University of Chicago Law School (in 1954-1956). At Chicago, Dean Levi asked him to co-teach his antitrust course with Aaron Director, an economist who had a major influence on Bork's work on antitrust.⁶³ Stevens wrote a number of antitrust articles as well as served as a member of Attorney General Herbert Brownell's National Committee to Study the Antitrust Laws in 1953-1955. He continued practicing law until Nixon, at the suggestion of Senator Percy, appointed him to the Seventh Circuit Court of Appeals in 1970.

Stevens' five years on the appellate bench was the focus of Levi's report. In Levi's words:⁶⁴

Judge Stevens has proved a judge of the first rank, highly intelligent, careful and energetic. He is generally a moderate conservative in his

approach to judicial problems, and in cases involving the attempted expansion of constitutional rights and remedies. He has shown particular ability in antitrust and other matters of federal economic regulation and would add strength to the Court in this area. Overall he is a superb, careful craftsman. His opinions lack the verve and scope of Judge Adams' but are more to the point and reflect more discipline and self restraint.

Subsequently, during Stevens' confirmation hearings, Levi offered more lavish praise, characterizing the judge's appellate court opinions as "gems of perfection" and a "joy to read."⁶⁵

Based on Levi's report and November 12 meeting with Ford, an initial cut in the pool of candidates was made. This enabled Levi to immediately ask the Federal Bureau of Investigation (FBI) and the ABA to begin examining the backgrounds of their top candidates. By 6:00 that evening, Levi had requested Lawrence Walsh to have the ABA Standing Committee on Federal Judiciary begin its preliminary investigations of the backgrounds of the eleven on Levi's short list: Adams, Bork, Goodwin, Griffin, McKusick, Oaks, Roney, Stevens, Wallace, Webster and Wiggins.

Levi also asked that the ABA report back with its "informal" evaluation of each within five days.⁶⁶ In the meantime, he further studied "the decisions of the judges, read the writing of the academicians, and analyze[d] the performance of those in private practice."⁶⁷

Under the auspices of the ABA, Levi received help from leading law professors in evaluating the opinions of appellate court judges being seriously considered. Harvard Law School Professor Lawrence Tribe and five other faculty members, for example, analyzed the 200 opinions Stevens had written on the appellate bench.⁶⁸

Old Friends and Political Ambitions

While Levi carried the ball in evaluating the top candidates' qualifications, Ford confronted the lobbying efforts of White House staff and others. In particular, Ford had to deal with an old friend, home state Republican Senator Robert Griffin. Nor was the Senator without his backers. Michigan's Governor William G. Mil-

liken, among others, telephoned the President to endorse his nomination and underscore that the Senator "wants" the appointment.⁶⁹

Presidents have often appointed their political associates and friends to the Court. But, the circumstances of Ford's Presidency virtually precluded Griffin from being seriously considered. His nomination would ring of "cronyism"⁷⁰--a charge Republicans had leveled against Lyndon Johnson and Justice Fortas. Besides, Ford was devoted to restoring confidence in government and preferred elevating a sitting appellate court judge with an established judicial record.

Ford thus had to handle Griffin, who relentlessly pursued the nomination. After several chats with Ford and four days before the nomination would be publicly known, Griffin remained insistent, sending the President a *Washington Star* article entitled "Will the Court swing into Retrogression?" It noted that "half of the 100 men who have so far served have not had previous judicial experience," including Justices Hughes, Brandeis, Black, Frankfurter and Warren (whose names Griffin underlined). In his files, Cheney noted Griffin "would have been an excellent choice for the Court. However, Bob Griffin is an able and important leader in the Senate, and I think he is performing a very valuable service there."⁷¹ This, though, was a rationalization for a friend and posterity.

The President and his advisors tried dissuading Griffin by pointing up a technical obstacle. Article I, Section 6, clause 2, disqualifies any member of Congress for appointment to an office in the federal government for which the Congressman voted to create or increase the salary thereof during the term for which the Congressman was elected. Griffin had voted for a 5 percent salary increase for all federal employees, including federal judges, and thus might be considered constitutionally disqualified for an appointment to the Court.⁷²

Rather than being deterred, Griffin was determined to find a way around this barrier. Within days of Douglas's resignation, he had sent the White House proposed language for legislation that might eliminate this obstacle. It provided:⁷³

Notwithstanding any other provision of law,

if a Member of Congress resigns to accept appointment to any other civil office under the authority of the United States, the compensation and emoluments available during the remainder of the time for which he was elected shall not exceed the level of compensation and emoluments which would have been available for service in such office at the beginning of the time for which he was elected.

Although nothing came of the proposal, Griffin continued his campaign for the Court. As the President was reaching his final decision on Sunday, November 23, Griffin telephoned him twice.⁷⁴ By this time Levi had already made his "final recommendation," Ford recalls, "that I nominate one of two outstanding federal judges, whose major opinions he sent to me for my own analysis. I took this material to Camp David for the weekend, and on my return, we had our final Oval Office review."⁷⁵ But, Ford's conversations with Griffin that weekend were apparently unconvincing, or the Senator was simply unwilling to accept fate.

On November 24, Griffin wrote Ford, again, explaining why the Article I restriction should not apply to him. This time revealing frustration, he pointed out that a strict construction of that constitutional provision would forbid "a President [from appointing] a *Member of Congress to fill the office of the Vice President* [as Nixon had done with Ford] under the Twenty-fifth Amendment if Congress happened to have increased the salary of the Vice President during the term for which the particular Congressman or Senator was elected."⁷⁶

"A Close Call"

During the weekend of November 22 and 23 at Camp David, Ford basically settled on naming either Judge Adams or Stevens. "It was a close call," he remembers, "for both were superb jurists."⁷⁷ Both received the ABA's highest rating. Ford further discussed his choice with Levi and Buchen on Saturday. He asked for information about some of their views, in particular Stevens' opinions on the environment, which Buchen analyzed in a memorandum.⁷⁸ Buchen also told Ford that "an older senior federal district judge [felt] that Stevens

might be soft on crime cases." But he discounted that, noting Stevens' opinions did "not substantiate this." The FBI and ABA reports on "Webster, Clark and Wallace" were still forthcoming, though Ford was already focusing on Adams and Stevens.⁷⁹

Ford still had not met his nominee, however. That was arranged for Monday, before Thanksgiving, at a White House dinner for federal judges. There, Ford and Stevens casually chatted. After dinner, the President conferred privately with Chief Justice Burger and Levi.⁸⁰

By the Monday dinner, Stevens knew he was "in the running." His first indication came a week earlier. "First of all," he says,

shortly after Justice Douglas resigned, Bob Specker, who [was] a judge on the seventh circuit called me up, when I walked in the office one morning, and said he'd received a call from the ABA committee on judicial candidates inquiring about me. He inferred that I was being considered for the appointment. That was the first word I had, and then there were newspaper stories that indicated there were a certain number of people on a list that were seriously being considered.

Four or five days later, the FBI called and told him that he was "the subject of an investigation and that gave [him] some notice that there was this possibility. But," he emphasizes, "others were also investigated so it was by no means certain."⁸¹

When arriving at his decision, Ford ranked in order those considered for the nomination.⁸² His final choice was made from three Nixon-appointed appellate judges, Adams, Stevens and Tone. Attorney McKusick ranked in this group as well, but lacked judicial experience. Next to these was a second group rated in fourth, fifth and sixth place--respectively, Bork and Judges Goodwin and Webster. Here, Judges Wiley and Clark were also counted. A third, distant group included Griffin and Congressman Wiggins. Ford placed the two women on his list, Judge Kennedy and HUD Secretary Hills, in this category as well. Oaks and Judge Roney were "X-out" due to speculation about troubles winning confirmation. Those remaining had been eliminated earlier and never fully

investigated: Areeda, Boskey, Kurland, Scalia and Wilson.

After further conferring with Levi, Buchen, Senator Percy and Senate Judiciary Committee Chairman Eastland, Ford made a decision in keeping with his original determination to select a nominee based on professional considerations and restore confidence in government.

At 12:21 on the day after Thanksgiving, Ford phoned Stevens from the Oval Office.⁸³ Stevens remembers he was "in his office in Chicago."⁸⁴

And my two law clerks were with me. My secretary was not. It was a kind of semi-holiday. We were trying to finish an opinion. The phone rang and I asked Sharon Baldwin to answer the phone for me and she picked it up, and I can still remember her holding the phone. She said, I think you're going to want to take this call. She handed the telephone to me and it was President Ford. And he told me what he proposed to do, and said before he announced it publicly he wanted to be sure that I would accept the position. It took me about two seconds to say he didn't have to worry about that.

Senator Charles Percy of Illinois knew Stevens well, recommended him highly to Ford and testified on his behalf before the Senate Judiciary Committee during confirmation hearings.



Following their ten-minute conversation, Ford called Senators Eastland, Griffin and Hruska to tell them he would publicly announce his nominee later that afternoon.

Nomination and Confirmation

Immediately after Ford announced Stevens' nomination at a press conference, White House staff began calling members of Congress for their reactions. Not surprisingly, reactions were mixed. Senator Percy, who knew Stevens well, said he was "an exceptional jurist." But, Stevens was unknown to many others. "Who," responded Massachusetts' Representative Tip O'Neill, "I never heard of him--who is he?" On reading Stevens' biography, he added, "Good Luck."⁸⁵ Democrats were generally pleased or relieved a hard-line conservative had not been picked. As Senator Kennedy commented, "Thank you. Good to learn that it is a federal judge. They do not get enough recognition and are well trained for the position." Other Democrats and Republicans wondered whether "he [would] cause trouble with the Reagan people?"⁸⁶ After asking "what happened to the plans to name a woman," South Dakota Senator James Abourezk rather bluntly put it, "Too bad for you guys that Nancy Reagan isn't an attorney."⁸⁷

Some women and women's organizations were let down and angry. At a meeting of the New York Women's Bar Association, Representative Bella Abzug charged:⁸⁸

Not only did President Ford not designate a woman to the Supreme Court vacancy, an action which is long overdue but it appears that he has selected a man whose judicial record indicates he does not favor expanded rights for women. . . . His opinions consistently demonstrate a narrow construction of the law and a belief in judicial restraint. . . . Judge Stevens has exhibited an unwillingness to involve the Federal Court in the enforcement of our civil rights law.

A week after the nomination, the National Women's Political Caucus vowed to fight Stevens' confirmation.⁸⁹

Nor were hard-line conservatives enthusiastic. In a *Chicago Tribune* article, "Two Cheers For President's Man In Middle," col-

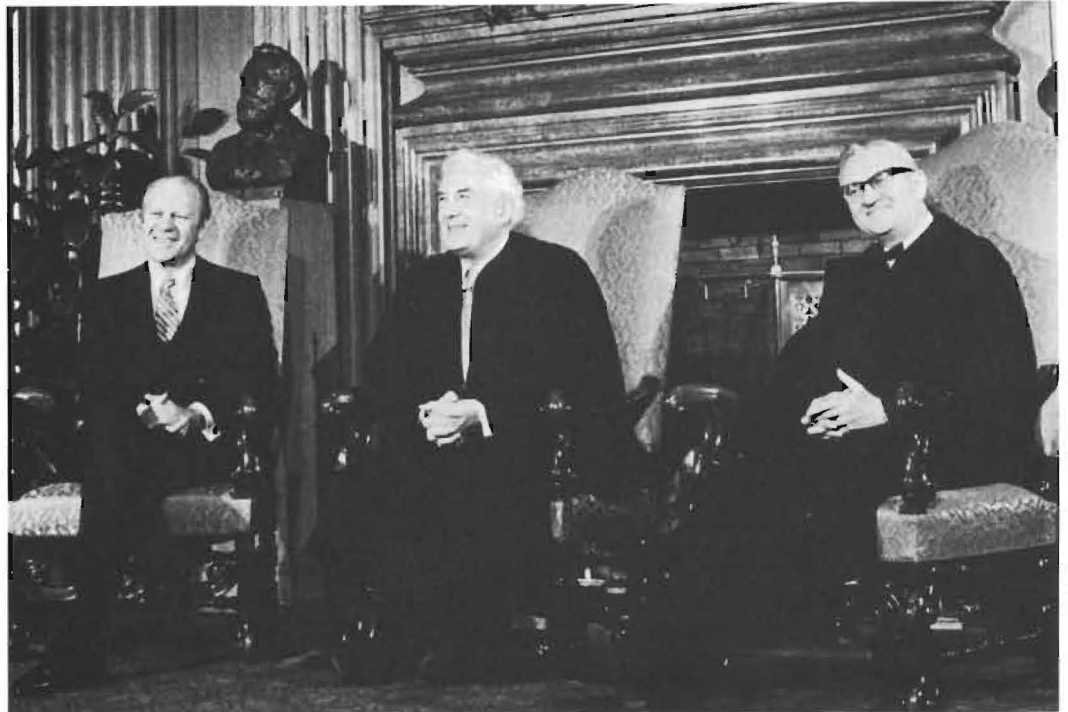
umnist (and later staunch Reaganite) Patrick Buchanan explained the "absence of enthusiasm for the President's decision is roughly with the visible sign of relief which has swept the nation's liberal community, which feared that Gerald Ford would seek out and nominate the most brilliant constitutional conservative in America. Quite consciously, however, he did not." Buchanan summed it up:⁹⁰

Surely, Judge Stevens will be a decided improvement upon the judicial Jacobin he replaces, William Douglas, but what will a judicial moderate do to bring an end to the disaster the federal courts have made on America's public school systems, from Denver to South Boston?

One, then, is disappointed in the choice not because of what it says about Judge Stevens, a man of ability and integrity, but because of what it says about President Ford. He had in his own administration, in the Solicitor General [Bork], a constitutional conservative of brilliance, scholarship, courage, and youth. But Robert Bork was passed over, because as Newsweek wrote, "A controversial nominee was the last thing Ford was after."

On the first of December, Stevens' nomination was forwarded to the Senate Judiciary Committee. At lunch that day, Senator Percy introduced him to ten Senators.⁹¹ Later, that afternoon Stevens made a round of half-hour visits with eight other Senators. This was not the usual practice (until after Stevens' nomination). But as Senator Philip Hart told the nominee, some Senators thought they may have misjudged Haynsworth because they had not met him before his confirmation hearings. Haynsworth had a slight speech impediment which, during his testimony before the judiciary committee, some mistook as a sign of duplicity. Hence, Hart and others wanted to informally chat with Stevens before his hearings.

The Senators, recalls Stevens, were very cautious about questioning him about controversial matters that might come before him once on the Court. While not asking Stevens his views on capital punishment at that time, South Carolina's Senator Strom Thurmond impressed on Stevens his own strong opposition to abol-



President Ford, Chief Justice Warren Burger and Associate Justice John Paul Stevens on December 19, 1975, the day Stevens took the Judicial Oath.

ishing capital punishment.⁹² The next day, Stevens met privately for the first time with Chief Justice Burger at lunch in the Chief's chambers.⁹³ Afterwards he made courtesy calls on twelve more Senators and met several others the following morning.

A week later, the Senate Judiciary Committee held three days of hearings on Stevens' nomination. Levi and Illinois Senators Percy and Adlai Stevenson enthusiastically endorsed him. Warren Christopher, chairman of ABA Standing Committee on Federal Judiciary, also praised the nominee's qualifications. Based on its investigation, he reported, the committee was

*unanimously of the opinion that Judge Stevens meets high standards of professional competence, judicial temperament and integrity, and that is our committee's highest evaluation. To our committee this means that from the standpoint of professional qualification Judge Stevens is one of the best persons available for appointment to the Supreme Court of the United States.*⁹⁴

While Stevens's testimony on December 8

and 9 appeared amicable, his hearings were not free of controversy. "Although it may have seemed to outsiders that I sailed through the confirmation process," he remembers, "it didn't seem that way to me. It's more trying than it might appear to be to the outsiders."⁹⁵

The only political opposition came from women's organizations--the National Organization of Women (NOW) and the Women's Legal Defense Fund. Testifying for NOW, Margaret Drachsler claimed that Stevens was insensitive to women's rights and misapplied the law in several sex discrimination cases. In her view, he "lack[ed] impartiality, a requisite for appointment to the Supreme Court."⁹⁶ Stevens stood on his record, though. Admittedly, he did not look favorably on the proposed Equal Rights Amendment to the Constitution. "Other than its symbolic value," he was not sure it would accomplish anything beyond that already available under the equal protection clause of the Fourteenth Amendment. "Women have not achieved full equality yet, but are marching in that direction," he observed while affirming his commitment to following precedent and developing trends in the law. As to his standard for applying the Fourteenth Amendment, he

said it was "the same when a man or woman claims discrimination: Would he or she have fared better if he or she had been of the opposite sex?"⁹⁷ The Judiciary Committee was persuaded that "the cases cited as bases of opposition [to Stevens' confirmation] reflect [his] commitment to precedent and established procedures rather than any sexual bias."⁹⁸

In addition, three private citizens testified in opposition on December 10. Anthony R. Martin-Trigona from Chicago charged that Stevens participated in a cover-up years earlier when serving as counsel to a special commission investigating members of the Illinois Supreme Court. But, Stevens testified that it was "simply not true" and the charges went uncorroborated. Rocco Ferran, testifying on behalf of the Citizens for Legislative Reform, opposed confirming another lawyer for the Court because experts from other disciplines should be represented as well. And Robert J. Smith of Michigan City, Indiana, in lengthy and rambling testimony contended several of Stevens' appellate rulings had cost him a livelihood.

On December 11, the Senate Judiciary Committee unanimously recommended Stevens' confirmation by the full Senate. Less than a week later, on December 17, after very brief discussion the Senate voted 98-to-0 to confirm him. Justice Stevens recalls "a sort of sense of disbelief" at returning to the Court. It was "very strange that here I should be sitting in the same Court where I had clerked a quarter century before, watched Thurgood Marshall argue before the bench, and read memos written by Byron White." Yet, he also felt "there was a sort of sense of continuity about the place, that the same names come back and forth."⁹⁹

Conclusion

Justice Stevens' appointment was as much a product of Ford's "accidental Presidency" as the President's determined professionalism in restoring public confidence in government. Unyielding to the cross-cutting pressures within his Presidency pushing for a more politically symbolic nomination--whether of a woman or a well-known conservative--Ford adhered to his vision of what the Court and the country needed. And Stevens, as Ford puts it, "was the right man for the times."¹⁰⁰

Stevens' opinions on the appellate bench struck Ford as "concise, persuasive and legally sound."¹⁰¹ Comparing them with those written since being elevated to the Court reveals an impressive coherence, consistency, and careful attention to the facts in each case.¹⁰² They also disclose a judicial philosophy and self-perception bearing a remarkable affinity with President Ford's conservatism--the conservatism of a measured professional approach to decisionmaking, not that of sharp ideological commitment. When tackling issues of public policy, as in filling the vacancy on the Court, James M. Cannon, the director of Ford's Domestic Council, recalls the President typically preferring "the combination of a good memorandum and a firm discussion, a civil and correct discussion. He treat[ed issues] more as if he were a judge. He listen[ed] to one argument and the other argument, then he retire[d] into his office and [made] a decision on it."¹⁰³ Regarding himself as "the most conservative member of the Court," Justice Stevens emphasizes he "never had an agenda" when explaining:¹⁰⁴

that's because I really try very hard to minimize the influence of my own views and what's socially desirable in resolving the issues in the case. And I sometimes conclude that some of my colleagues are less inclined to do no more than is necessary to decide the case. I just think that the work of a judge is work that he does in response to the problems that come to him. And I really don't consider it part of a judge's function to set out in a pioneering fashion and make new law. You do it as an incidental part of your work when you have to. But you don't chart your course in that way.

Justice Stevens' brand of judicial conservatism reflects well on, and seems a fitting tribute to, his presidential benefactor. And, unlike many Presidents who have been disappointed by their nominees,¹⁰⁵ President Ford is "proud of Justice Stevens' service on the Court." The Justice, Ford says, has "lived up to his expectations and been a forthright member of the bench."¹⁰⁶

Acknowledgement: *The author is grateful for the assistance of Lisa Tobein and William J. Stewart of the Gerald R. Ford Presidential Library, and to Judge Harold Tyler for his comments.*

Endnotes

- ¹ Letter, October 28, 1928, *Harlan Fiske Stone Papers*, Box 24, Library of Congress; quoted and further discussed in David M. O'Brien, *Storm Center: The Supreme Court in American Politics* (New York: Norton, 1986), at p. 47.
- ² For further discussion, see David M. O'Brien, *Judicial Roulette: A Twentieth Century Task Force on Judicial Appointments* (New York: Twentieth Century Fund, 1988).
- ³ For further discussion, see O'Brien, *Judicial Roulette*, Ch. 3; and, generally, Henry J. Abraham, *Justices and Presidents* (New York: Oxford University Press, 2d ed. 1985).
- ⁴ Interview with President Gerald R. Ford (February 16, 1989).
- ⁵ Interview with Justice John Paul Stevens, Supreme Court of the United States (October 17, 1988).
- ⁶ Robert Hartmann, "The Loyalist and the Praetorian Guard," in K. Thompson, ed., *The Ford Presidency* (Lanham, MD: University Press of America, 1988), at pp. 92-93.
- ⁷ For further discussion, see, O'Brien, *Storm Center*, at pp. 97-99; and Bruce A. Murphy, *Fortas: The Rise and Ruin of a Supreme Court Justice* (New York: Morrow, 1988).
- ⁸ Robert Hartmann, *Palace Politics* (New York: McGraw-Hill, 1980), at p. 60. For a somewhat different view, compare Gerald R. Ford, *A Time to Heal* (New York: Harper & Row, 1970), at p. 90.
- ⁹ Ford, *A Time to Heal*, at p. 93. See also materials on the investigation of Justice Douglas in the *Robert Hartmann Papers*, Gerald R. Ford Presidential Library, Ann Arbor, Michigan. [Hereafter cited as FPL.]
- ¹⁰ News Release, December 16, 1970, by Congressman Ford, in *Hartmann Papers*, Box 17, FPL. See also, Letter to Congressman Celler, Chairman of the Committee on the Judiciary, July 29, 1970, *Hartmann Papers*, Box 12, FPL.
- ¹¹ Ford, *A Time to Heal*, at p. 94.
- ¹² I am indebted to Judge Tyler for these observations (April 7, 1989).
- ¹³ Letter of Retirement, *Weekly Compilation of Presidential Documents* (November 12, 1975).
- ¹⁴ Letter of President Ford to Justice Douglas, *Weekly Compilation of Presidential Documents* (November 12, 1975).
- ¹⁵ "Questions and Answers," November 13, 1975, in *Philip Buchen Papers*, Box 62, FPL.
- ¹⁶ Ford, *A Time to Heal*, at p. 334.
- ¹⁷ Philip Buchen, "Reflections on a Politician's President," in Kenneth Thompson, ed., *The Ford Presidency* at p. 29.
- ¹⁸ Ford, *A Time to Heal*, at p. 235.
- ¹⁹ Gerald Ford, "Attorney General Edward H. Levi," 52 *University of Chicago Law Review* 284 (1985), at p. 284.
- ²⁰ *Ibid.*
- ²¹ Ford, *A Time to Heal*, at p. 236.
- ²² Ford, *University of Chicago Law Review*, at p. 284-285.
- ²³ Ford, *op. cit.*, at p. 287.
- ²⁴ For further discussion of the role of the Department of Justice in selecting lower court judges from President Roosevelt to Reagan, see, O'Brien, *Judicial Roulette*, at Ch 3.
- ²⁵ This discussion draws on the author's interviews with Edward Levi (December 19, 1986) and Phil Modlin (December 9, 1986), conducted in the preparation of *Judicial Roulette* and to which the reader should refer. Also consulted were materials in *Edward Schmultz's Papers*, Box 7, and White House Central Files (WHCF), FPL.
- ²⁶ See, David O'Brien, "The Reagan Judges: His Most Enduring Legacy?", in C.O. Jones, ed., *The Reagan Legacy: Promise and Performance* (Chatham, N.J.: Chatham House, 1988), at pp. 60-101.
- ²⁷ Stephen Markman, "A Comparison of Judicial Selection Procedures," Memorandum for Attorney General Edwin Meese, September 8, 1986 (an unpublished manuscript furnished by the author and discussed in *Judicial Roulette*).
- ²⁸ See O'Brien, *Judicial Roulette*, Ch. 5.
- ²⁹ Interview with President Ford.
- ³⁰ Ford, *A Time to Heal*, at p. 334.
- ³¹ Interview with President Ford and "Notes on Supreme Court Vacancy," *Buchen Papers*, Box 62; and *Edmund Schmultz Papers*, Box 7, FPL.
- ³² Richard Cheney, in Thompson, *The Ford Presidency*, at p. 71.
- ³³ See materials in *Buchen Papers*, Box 64, FPL.
- ³⁴ "Memorandum for the President," *Richard Cheney Papers*, Box 11, FPL.
- ³⁵ Interview with President Ford. See, Abraham, *Justices and Presidents*, at p. 323.
- ³⁶ *Buchen Papers*, Box 64, FPL.
- ³⁷ *Cheney Papers*, Box 11, FPL.
- ³⁸ Letter to the President, November 18, 1975, from Senator McClure, *Presidential Handwriting Files*, Box 13, FPL.
- ³⁹ Memorandum from Lindh, November 17, 1975, in *John Marsh Papers*, Box 32, FPL.

40. Interview with President Ford.
41. Ford, *A Time to Heal*, at p. 335.
42. See the discussion in the text at *infra* note 78.
43. Interview with President Ford.
44. Letters in *Buchen Papers*, Box 62; and *John Marsh Papers*, Box 32, FPL.
45. Letter, October 17, 1975, White House Central Files--Federal Government (WHCF-FG), Box 50, FPL.
46. See, O'Brien, *Judicial Roulette*, "Epilogue: The Bork Controversy."
47. "Memorandum for the President," November 21, 1975, in *Marsh Papers*, Box 32, FPL.
48. Markman, "A Comparison of Judicial Selection Procedures."
49. *Cheney Papers*, Box 11, FPL.
50. Letter, November 17, 1975, in WHCF-FG, Box 51, FPL.
51. *Buchen Papers*, "Letters Recommending Potential Nominees," Box 62, FPL.
52. "Memorandum For Phil Buchen," November 14, 1975, in *Presidential Handwriting*, Box 13, FPL.
53. Note to Dick Cheney, in *Presidential Handwriting*, Box 13, FPL.
54. Judge Tyler to author, April 7, 1989.
55. For a further discussion of Justices advising Presidents, see, O'Brien, *Storm Center*, at pp. 85-96.
56. Letter, November 10, 1975, in *Cheney Papers*, Box 11, FPL.
57. See, *Buchen Papers*, Box 21; FPL.
58. "Memorandum for the President," November 10, 1975, *Cheney Papers*, Box 11, FPL.
59. *Ibid.*
60. *Ibid.*
61. Interview with Justice John Paul Stevens.
62. *Ibid.* See also, John P. Stevens, "Mr. Justice Rutledge," in Allison Dunham and Philip Kurland, eds., *Mr. Justice* (Chicago: University of Chicago Press, 1964), at p. 318.
63. See, David M. O'Brien, "Ginsburg and The Chicago School of Thought," *Los Angeles Times*, Opinion (November 8, 1987), Part V., p. 1 & 6.
64. "Memorandum for the President," November 10, 1975, in *Cheney Papers*, Box 11, FPL.
65. See, United States Congress, Senate, *Nomination of John Paul Stevens To Be A Justice of the Supreme Court: Hearings Before the Committee on the Judiciary*, 94th Cong., 1st Sess. (Washington, D.C.: Government Printing Office, 1975). [Hereafter cited as *Stevens' Nomination Hearings*.]
66. Memorandum for Philip Buchen from Edward H. Levi, November 13, 1975, *Buchen Papers*, Box 62, FPL.
67. Ford, *University of Chicago Law Review*, at p. 288.
68. Interview with Justice Stevens.
69. Memorandum for Philip Buchen, from James E. O'Connor, November 22, 1975, *Buchen Papers*, Box 62, FPL.
70. Interview with President Ford.
71. Note to the President from Mildred Leonard, November 24, 1975, *Cheney Papers*, Box 11, FPL.
72. *Cheney Papers*, Box 11, FPL.
73. Note, November 25, 1975, *Buchen Papers*, Box 63, FPL; and Memorandum for the President from Max Friedersdorf, November 21, 1975, *Marsh Papers*, Box 32, FPL.
74. Note from Cheney's office, November 24, 1975, *Buchen Papers*, Box 62, FPL.
75. Ford, *University of Chicago Law Review*, at p. 288.
76. Letter from Senator Robert Griffin to the President, November 24, 1975, *Cheney Papers*, Box 11, FPL.
77. Ford, *University of Chicago Law Review*, at p. 288.
78. Memorandum for Dick Cheney from Phil Buchen, November 25, 1975, *Buchen Papers*, Box 62, FPL.
79. Letter from Levi to Philip Buchen, November 26, 1975, *Buchen Papers*, Box 62, FPL.
80. See, WHCF-FG, Box 17; and *Presidential Daily Diary*, Box 78, FPL.
81. Interview with Justice Stevens.
82. Attached to Memorandum for Jim Connor from Dick Cheney, December 9, 1975, in *Presidential Handwriting Files*, Box 13, FPL.
83. Presidential Telephone Logs, WHCF-FG, Box 17, FPL.
84. Interview with Justice Stevens.
85. Memorandum for the President from Max L. Friedersdorf, November 28, 1975, in *Buchen Papers*, Box 62, FPL.
86. "Reactions On John Paul Stevens," in *William Kendall Papers*, Box 10, FPL.
87. "Reactions On John Paul Stevens," (second memo) in *Kendall Papers*, Box 10, FPL.
88. Press Release, December 8, 1975, in *Kendall Papers*, Box 10, FPL.
89. Letter to Senator James O. Eastland, December 8, 1975, from Lee Novick, Vice Chairwoman of the National Women's Political Caucus, in *Kendall Papers*, Box 10, FPL.
90. Copy in *Kendall Papers*, Box 10, FPL.
91. Memorandum for Philip Buchen, from Patrick O'Donnell, December 1, 1975, in *Kendall Papers*, Box 10, FPL.
92. Interview with Justice Stevens.
93. Note, December 1, 1975, in *Buchen Papers*, Box 62, FPL.
94. *Stevens' Nomination Hearings*, at p. 21.
95. Interview with Justice Stevens.
96. *Stevens' Nomination Hearings*, at pp. 78-84.
97. *Ibid.*
98. U.S. Congress, Senate, Judiciary Committee, *Report of the Senate Judiciary Committee on the Nomination of John Paul Stevens to be a Justice of the Supreme Court*.
99. Interview with Justice Stevens.
100. Interview with President Ford.
101. Ford, *A Time to Heal*, at p. 335.
102. See and compare, Special Project, "The One Hundred and First Justice: An Analysis of the Opinions of Justice John Paul Stevens, Sitting as Judge of the Seventh Circuit Court of Appeals" 29 *Vanderbilt Law Review* (1976) 125-209; and Robert J. Sickels, *John Paul Stevens and the Constitution: A Search for Balance* (University Park: Pennsylvania State University Press, 1988).
103. James M. Cannon, "Domestic Issues and The Budget," in Thompson, ed., *The Ford Presidency*, at p. 176.
104. Interview with Justice Stevens.
105. For further discussion, see, O'Brien, *Storm Center*, at pp. 81-84.
106. Interview with President Ford.

The 1924 Term: Recollections of Chief Justice-Taft's Law Clerk

C. Dickerman Williams

My service as a law clerk to Chief Justice William Howard Taft may be said to have begun in the spring of 1924, when Dean Swan of Yale Law School called me into his office. This was in April, I believe. I expected to graduate in June. At that time my own office as editor-in-chief of the *Yale Law Journal* was next door to his. He told me that Chief Justice Taft had asked him to name a student from the graduating class to be his law clerk beginning in the summer of 1924 and continuing for one year. I was aware that Justices Holmes and Brandeis made a practice of having as law clerks students from the graduating class of the Harvard Law School. Taft had originally taken over the law clerk of his predecessor, Chief Justice White, an older man who served the Chief Justice continuously. However, this man had resigned and Chief Justice Taft had decided to adopt the practice of his colleagues Holmes and Brandeis in choosing a successor. Dean Swan told me that the faculty had decided to nominate three students and let Chief Justice Taft select the one he liked best. The other two, he said, were Douglas Arant (my predecessor as editor-in-chief of the *Journal* and later to be an outstanding lawyer in Birmingham, Alabama) and William D. Whitney of my own class (and managing editor of the *Journal*). In the midst of a brilliant career at Cravath, Whitney saw fit to resign to become his wife's business manager--she was Adrienne Massey, a prominent British actress; the event startled the New York Bar.

In accordance with Dean Swan's instructions, I telephoned Chief Justice Taft's office and made an appointment to see him two days later in Washington. At our conference we

talked in a general way, especially about my studies; he did not ask me about either my politics or my religion. My duties, he said, would be to digest, i.e., summarize, the facts and issues in petitions for certiorari, a petition to the Supreme Court to review the decision of a lower court, usually a circuit court of appeals, the highest court of a state or the U.S. Court of Claims. These are now usually called "certs," but at that time the full word was used. I would also do research to aid him in his written opinions.

Being in Washington and having to go to Union Station for a train back to New Haven, I took advantage of the opportunity to visit the U.S. Senate, the Capitol being not far from the station. From the public gallery I looked down on the Senate floor; I was seated immediately behind Senators Lodge and LaFollette, who to my mind represented extremes in the Republican party. Indeed Senator LaFollette became an independent candidate for President later that year. The two Senators were talking to each other most cordially.

On my way back I sat in the compartment of the Pullman car which was then maintained for men to converse. In the course of the conversation, one of the men identified himself as father-in-law of Orme Wilson, Jr., a person who had recently achieved great publicity for some accomplishment, the nature of which I have forgotten. At any rate, on arriving in New Haven I felt that I had really arrived, having conferred with the Chief Justice of the United States; having observed Senators Lodge and LaFollette; and having conversed with the father-in-law of Orme Wilson, Jr. Several days



The author, pictured upon his graduation from Yale Law School in 1924. Chief Justice Taft did not follow the example of Justices Holmes and Brandeis in recruiting clerks from Harvard Law School.

later, Dean Swan informed me that Chief Justice Taft had selected me to be his law clerk and I should write to him as to when I should report for duty. I did so and was told to present myself at the Supreme Court conference room on August 1 and to write digests of the then pending petitions for certiorari and send them on to him.

I was, of course, in Washington August 1. At that time the Supreme Court sat in a room in the Capitol which had been used until the completion of the Senate wing in 1855 as the chamber of the U.S. Senate, the place where Senators Clay, Webster, Calhoun and others had made their famous speeches. The conference room was directly across the main corridor from the court room. It was in the charge of a librarian, but was only large enough for a relatively few books (the United States Reports; the Federal Reports; a number of treatises, and some state court reports). I was expected and the librarian provided me with a typewriter and paper. Mr. Cropley (at that time Deputy Clerk of the Court) handed me a batch of petitions for certiorari for me to work on.

In passing, I might say that at that time the Chief Justice had only one law clerk rather than

the three that Chief Justice Rehnquist has. I do not want to intimate that I was doing the work which now requires three people; it is rather that petitions for certiorari are at least five times as numerous now as they were in 1924; also, that the opinions of those days were much shorter and more succinct than those of today and less research was regarded as necessary, perhaps because in those days the Justices wrote their own opinions.

Chief Justice Taft was not in Washington--he was at Murray Bay in Canada, the historic summer home of the Taft family (meaning not only the Chief Justice, but also his numerous brothers, their children and grandchildren). After completing a number of digests, I sent them to the Chief Justice at Murray Bay.

During the summer, Washington is very hot and there was of course no air-conditioning in 1924. I took a room at the Shoreham Hotel and turned an electric fan on myself when I went to bed, and slept all right. I did not then know anybody in Washington; the only people whom I met were Court personnel. The Court Crier (a Mr. Waggaman) and I would occasionally go swimming in the Potomac River on the Virginia side of the old iron bridge at a place from which it was easy to enter the river and remain in not too deep water. This area was then in a state of nature. This was my only recreation.

The Court's Term officially began on the first Monday in October (October 6, 1924), the first day the Court sat to hear argument; however, the Chief Justice came back several weeks earlier to see that everything was in order and to preside over the Conference of Senior Circuit Judges as provided by the Act of September 14, 1922.¹ Also at that time there were only nine circuits; the Tenth was subsequently created out of the Eighth and the Eleventh out of the Fifth. The Court of Appeals of the District of Columbia was not regarded as having the same status; there simply was no District of Columbia Circuit, as there is now--a rather anomalous kind of circuit. The circuits had originally been created by the Judiciary Act of 1789 and historically served as a group of districts. Getting to Washington involved more of an effort than it does today; Senior Circuit Judge Gilbert of the Ninth Circuit told us how his train had gone through a snowstorm in the course of his four-day trip from San Francisco to Washington.



A freelance photographer snapped this picture of the author strolling the boardwalk of Deauville, France, in July 1924.

The Conference was also much more informal than those provided at present under the Judicial Code, but covered much the same ground. The Chief Justice appointed me Secretary of the Conference. Each judge reported on the status of the docket in each of the district courts in his circuit. It was apparent that in some districts the judges were overworked while in others the judges had varying amounts of spare time. I do not recall the comment of any particular judge other than Judge Killitts, District Judge in the Northern District of Ohio, and apparently a rather headstrong judge. Judge Denison, Senior Circuit Judge of the Sixth Circuit, reporting for that District, seemed hesitant in his comment. The Chief Justice said: "Do not hesitate to speak frankly about Killitts--you know I appointed him."

After the survey of the courts the Chief Justice took up "possible suggestions that may seem in the interest of uniformity and expedition of business." The first was the way in which in jury cases many lawyers conducted long--almost interminable--examinations of prospective jurors on the *voir dire*. The Chief Justice reminded the judges that at common law, which under the Seventh Amendment governed federal trials, it was the judges--not the lawyers--

who conducted the *voir dire*. At the suggestion of the Chief Justice the Conference resolved that that procedure (i.e., questions put by the judges) should be followed in the federal courts. When this ruling was made public, there was a considerable controversy in the newspapers in the form of letters from lawyers who did not like to have this privilege taken away. But Professor (as he then was) Frankfurter, in a letter to *The New York Times*, ardently defended the Conference ruling.

The Chief Justice then moved on to another grievance; the apparently automatic way in which district judges granted bail pending appeal to defendants convicted in criminal cases. Here he was taken aback by Judge Sanborn,² who said in substance: "Mr. Chief Justice, the Supreme Court ruled in *Hudson v. Parker*,³ that the accused defendant in criminal cases should not be imprisoned until his conviction has been affirmed by the court of last resort." Apparently the Chief Justice was not aware of (or had forgotten) *Hudson v. Parker* and could only express his thought that it was unfortunate that a convicted defendant could simply walk out of the courtroom after a verdict of "guilty." The Chief Justice did not argue with Judge Sanborn but bided his time.



Chief Justice Taft lobbied hard for reforms to modernize the clogged, decentralized judicial system. He also lobbied successfully for a new building for the Supreme Court; the cornerstone was laid after his death in 1932.

When the Chief Justice returned from summer vacation, I lost my office in the Court conference room and was assigned an office in the attic of the Chief Justice's home. He lived on Wyoming Avenue, a short distance from Connecticut Avenue, in a substantial but unpretentious brick house. His secretary, Mr. W.W. Mischler, ordinarily known as "Misch," was also in the attic. Misch and I did not hit it off; I think that he resented me, but we never had any open quarrel and, of course, I spent a good deal of time at the Supreme Court Library. The Chief Justice had his chambers in what I suppose had once been a bedroom. As I recall, he had only the United States and Federal Reports and a few treatises in his chambers. As my research often was concerned with non-federal cases and both federal and non-federal statutes, I was frequently required to use the Supreme Court Library; this was a room on the ground floor of the Capitol, just inside to the right from the main steps of the

building. What was then the Library had been the courtroom of the Court until it had moved to the former Senate chamber. This had the incidental result of requiring me to be in the Capitol building many times and enabling me to go up to the courtroom to listen to arguments of outstanding interest, provided that the listening was not excessive in duration.

All the Justices were in town prior to October 6. The Chief Justice called a couple of meetings before the formal opening to make progress on the certiorari petitions and, I suppose, to greet each other. The Chief Justice went in his car, driven by a chauffeur, for the first meeting and asked me to go with him. He said we were going to pick up Justice Brandeis en route. I was curious about the greeting he would give to Justice Brandeis, as I was aware that he had testified before the Senate Judiciary Committee against Justice Brandeis' nomination, as in fact had several--if not most--of the ex-Presidents of the American Bar Association. As we approached Justice Brandeis' apartment house, we saw him standing on the sidewalk in front, waiting. The Chief Justice told me to get out of the car promptly when we reached Justice Brandeis and I did so. He then got out right after me, and going up to Brandeis threw his arms around him with every appearance of affection and said "My brother." I concluded that whatever animosity had previously existed between them had ended.

On Saturdays, the Court met in conference to decide petitions for certiorari, cases argued during the week and other matters, if any. The Clerk would supply a formal list. Each petition had a number given according to the chronological order of filing, and argued cases in chronological order of argument. The Chief Justice would make a presentation of the case. After such discussion as seemed necessary the Justices would vote, the junior Justice voting first. Each Justice had a docket book and would note in his docket how the various Justices had voted. Before the conference the Chief Justice and I would make a pile of the cases, his digest, the briefs and the record in each case being bound by a rubber band. When the conference was over, he would return to his home with his docket book, the Clerk's list and printed assignment sheets. He would then assign each argued case to a particular Justice to write the opinion.

I would note the assignment on the assignment sheet. I would also note "granted" or "denied" against each certiorari petition. The assignment sheets were then delivered immediately to the other Justices by Burke, his messenger, by motorcycle. The actions on the certiorari were on a separate sheet which I delivered to Mr. Copley on the following Monday morning.

I recall that he once told me to write "granted" respecting a particular petition. As I could see from the docket book that five Justices had voted against certiorari, I said, "Mr. Chief Justice, there was a majority against." He replied that as four Justices had favored certiorari, it would be granted. This is the so-called "rule of four." The Chief Justice had certain tendencies in his assignments. Cases involving jurisdiction would often go to McReynolds or himself; cases involving public lands would go to Van Devanter (he had been Assistant Attorney General assigned to the Interior Department). As the Term proceeded, the Chief Justice was more and more influenced by the state of the Justices' work. If a Justice had several cases in which he had not yet circulated a draft opinion, he was less likely to get any more. On the other hand, if a Justice was current, as Holmes for instance always was, he would be more likely to get an assignment. Holmes in fact wrote a skeleton opinion in every case during the argument and on the cover of the record in this case. (He would then doze--or at least close his eyes--until the next case was reached.)

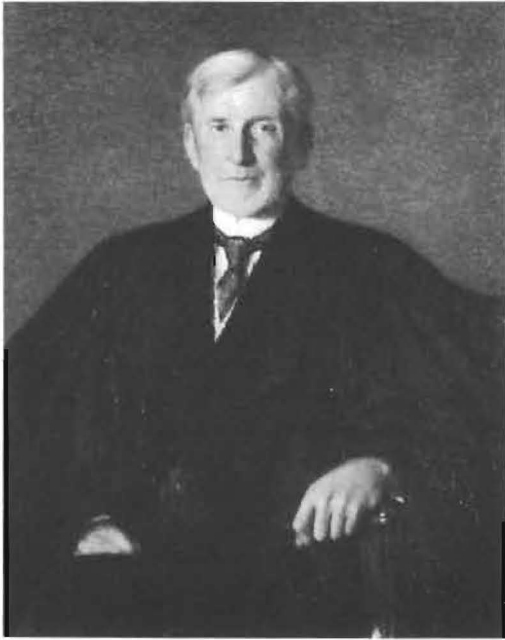
I was, of course, curious to see what disposition the Court would make of the various petitions. According to its own rules, the Court took cases according to the importance of the question presented, but in fact it often took a case because it disagreed with the decision of the lower court even if the case was (or seemed to me) of minor importance. Except in a few cases of obvious national interest, and in a few others of total insignificance, I was quite unable to predict when the Court would grant certiorari. This was true at the end of the year as much as at the beginning.

A problem facing the Court, and one which Chief Justice Taft felt he must deal with promptly, was the aging and declining strength of Justice McKenna, at that time the Senior Associate Justice of the Court. He had been failing for some time and his opinions were not

of the standard which the other Justices thought the Court's opinions should be. Of course the Justices made suggestions and even demands regarding each other's opinions, but that could hardly be extended to completely rewriting an opinion. The Chief Justice did not involve me in any move to cajole McKenna into retirement, but he did refer to the situation from time to time in discussing McKenna's opinions. He concluded that McKenna would not resign unless he were prompted to do so, but that if he were prompted in a nice way and with due appreciation of his work on the Court (which had extended over a period of more than 20 years), he would step aside. The next Justice in seniority (Holmes) had been appointed by President Theodore Roosevelt and McKenna by President McKinley. One might suppose that, before taking steps in the matter, the Chief Justice would consult the next Senior Associate Justice (i.e., Holmes), but he may have felt that Holmes' reaction would be "I suppose I am next." Indeed, he may have consulted Holmes and perhaps others, but I was not aware of it.

There was a current story that Justice Brewer had been one of a committee to urge Justice Field to resign because of age. When years later a committee of Justices made the same suggestion to Brewer and had referred to his own approach to Field, he had said, "Yes, and a dirtier day's work I never did in my life." At any rate, it was Justice Van Devanter whom the Chief Justice consulted so far as I am aware and who concurred in his thought that pressure should be put on McKenna. Taft did so; of course, I was not present, but I gathered from the Chief Justice that after a preliminary hesitancy, McKenna did agree to resign. He did so. I remarked to the Chief Justice that Holmes--as Senior Associate Justice--would now sit on his right and the Chief Justice commented in substance, "I imagine that he is pretty bitter that he has not been there since McKenna began to fail."

Of course Justice McKenna's resignation created a vacancy and thus the need for a new appointment. The then Attorney General was Harlan F. Stone, who had been appointed to succeed Attorney General Daugherty, who had become involved in scandals of the Harding Administration. The Chief Justice had not known Stone intimately, although presumably



Chief Justice Taft consulted Justice Van Devanter about how to persuade an aging Justice McKenna (pictured above) to resign.

they were acquainted as Stone had been Dean of Columbia Law School while Taft had been a Professor at the Yale Law School. (Stone later became a partner in the firm of Sullivan & Cromwell.) Stone was highly regarded by the faculty of the Yale Law School while I was a student there and presumably Taft either shared or was aware of this regard. The final touch was Stone's presentation, on behalf of the President, in the case of *Ex parte Grossman*.⁵ Grossman had been convicted of contempt of court in violating an injunction used under the Volstead (National Prohibition) Act and then pardoned by President Coolidge. Judges Carpenter and Wilkerson of the District Court for the Northern District of Illinois refused to release him, holding that the Judiciary and Executive Departments were entirely separate and that the President could not alter a judgment of a court. The Attorney General, as the principal lawyer of the Executive branch, made the argument on behalf of the validity of the pardon (ordinarily the Solicitor General argued important cases in the Supreme Court); the Department of Justice engaged two eminent lawyers to make the argument against its validity. Chief Justice Taft, having been President and knowing the prob-

lems of the Presidency, was inclined to sustain the pardon. He found the Attorney General's brief to be excellent. As Stone stood before the Court for about an hour making his oral arguments, the Chief Justice had a good chance to look him over and was greatly impressed. He recommended to President Coolidge that Stone be appointed and Coolidge accepted the recommendation. (I believe Stone had other support as well.)

The Chief Justice wanted to head off the appointment of anyone other than Stone (there was gossip that Chief Justice von Moschzisker of the Pennsylvania Supreme Court wanted the appointment and had the support of the Pennsylvania Senators). Hence he arranged that the resignation of McKenna and the nomination of Stone be simultaneous, and they were. On January 5, 1925, McKenna resigned at noon and President Coolidge sent Stone's nomination to the Senate that afternoon. Nobody had a chance to persuade President Coolidge to appoint anyone else.

On the night before Stone's induction, Taft and Stone conferred at the Chief Justice's home. The Chief Justice described to Stone the procedures of the Court (the docket, the assignment procedure, etc.). I was on hand to present Stone's docket to him and point to the various entries which the procedure of the Court would call upon him to make and show such other papers as the Chief Justice wanted him to see.

The Chief Justice was soon lobbying Congress to enact what became the Act of February 13, 1925 (43 Stat. 936), greatly reducing the mandatory jurisdiction of the Supreme Court and enlarging its certiorari jurisdiction. The Act of March 3, 1891 (26 Stat. 826), created the Circuit Courts of Appeal; it had given those courts appellate jurisdiction over criminal, admiralty, patent, revenue and diversity cases, subject only to certiorari review by the Supreme Court. The Act had left unimpaired the mandatory jurisdiction of the Court in constitutional and other statutory cases, especially railroad liability cases; the latter involved primarily personal injuries suffered by railroad employees. Issues in the Court of Claims also could be appealed as of right. The Court as the highest court in the land was bored constantly having to deal with the details of personal injuries, which were numerous, especially as before reaching

the Court, since two other courts would have already considered the merits of such cases.

The Act of February 13, 1925, is a long and elaborate statute dealing with numerous aspects of federal court jurisdiction. I have mentioned the only feature of it which seemed important to the Chief Justice in conversations we had.

I understood from Chief Justice Taft that the Court was unanimously in support of the bill which became the Act. It was supported by appearances before the Judiciary Committees of Congress by a committee of Justices including the Chief Justice, Justice Van Devanter, and Justice McReynolds. I do not know who actually drafted the bill, but it was not the Chief Justice.

Enlarging the certiorari jurisdiction of the Court of course meant more work for the law clerks. Fortunately, at least for the 1924 Term law clerks, the Act provided that it should not take effect for three months, i.e., until May 13, 1925. In the first few days of May the Government filed a large number of appeals from the Court of Claims, about twenty, I think, and I thought, "Thank God I have been spared the need to summarize these cases."

All draft opinions were circulated to the members of the Court; the Chief Justice had a messenger (Burke), who delivered to the other Justices the draft opinions and the assignment sheets. All the Judges had messengers to circulate the draft opinions to be discussed at the next conference and approved (or modified). My recollection is that none of the early opinions were modified substantially as a result of points (if any) raised by other Justices at the conferences. Not only the Chief Justice, but also the other Justices had only relatively minor opinions in the early part of the Term.

Important cases came in December. One was *Sanitary District of Chicago v. United States*,⁵ which the Chief Justice assigned to Justice Holmes. Unlike the present situation when the numerous law clerks have lunch with one another in a dining room set aside for that purpose, the law clerks of those days had relatively little contact with each other. It so happened that I did know Barton Leach, law clerk to Justice Holmes and Warren Ege, law clerk to Justice Brandeis; we had lunch together from time to time, but only by prearrangement. I recall that Leach told me that Holmes hoped to

get the *Sanitary District* case. When the Chief Justice did assign it to him, I told him that I happened to know from his law clerk that Holmes had wanted to get that case. The Chief Justice said that Holmes, without directly asking him, had conveyed that idea to him also and he was pleased to gratify him. Although I did not think especially about it at the time, I now realize that from my remark the Chief Justice would know that the various law clerks (including his own) were discussing the work of the Court among each other. He apparently acquiesced.

By a curious coincidence, two highly important cases came before the Court on December 5, 1924, *Myers v. United States*,⁶ and *McGrain v. Daugherty*.⁷ I happened to be in the courtroom when the *Myers* case was originally reached for argument. The issue was the constitutionality of a statute requiring that the Senate approve the removal of an officer appointed by the President with the consent of the Senate. Solicitor General Beck represented the Government and upheld the removal of a postmaster by President Wilson without the consent of the Senate. There was no appearance for the estate of the removed officer; he had died before the case reached the Supreme Court. Mr. Beck told the Court that he regretted this non-appearance, because in his opinion the opinion of the District Court could not be sustained. The District Court had dismissed the case on a technicality which Mr. Beck regarded as unpersuasive and had hence concluded that the case squarely presented the constitutional issue. The Court agreed with Mr. Beck and decided to request the Senate to designate a counsel to present the arguments on behalf of the constitutionality of the statute. The Senate did so and appointed George Wharton Pepper, an outstanding Philadelphia lawyer and United States Senator from Pennsylvania. I listened in April to the arguments when the case was fully argued by Messrs. Beck and Pepper. I shall not attempt to summarize the arguments.

At my next meeting with Chief Justice Taft after the arguments, he assigned the opinion to himself but said that the case was so important that he would not try to get out an opinion during the 1924 Term, but would work on it during the summer and the following year. The opinion was 71 pages long, and there were long

dissents by Brandeis (in which Holmes concurred) and by McReynolds. Meanwhile, he instructed me to make a study of the impeachment of President Johnson which had presented the same issue. I did so in the last part of the Term and wrote an exhaustive paper. It was really an immersion into the impeachment proceedings. The key argument for President Johnson was that the first Congress had rejected as unconstitutional a proposed similar limitation on the President's power of removal of the Secretary for "Foreign Affairs."

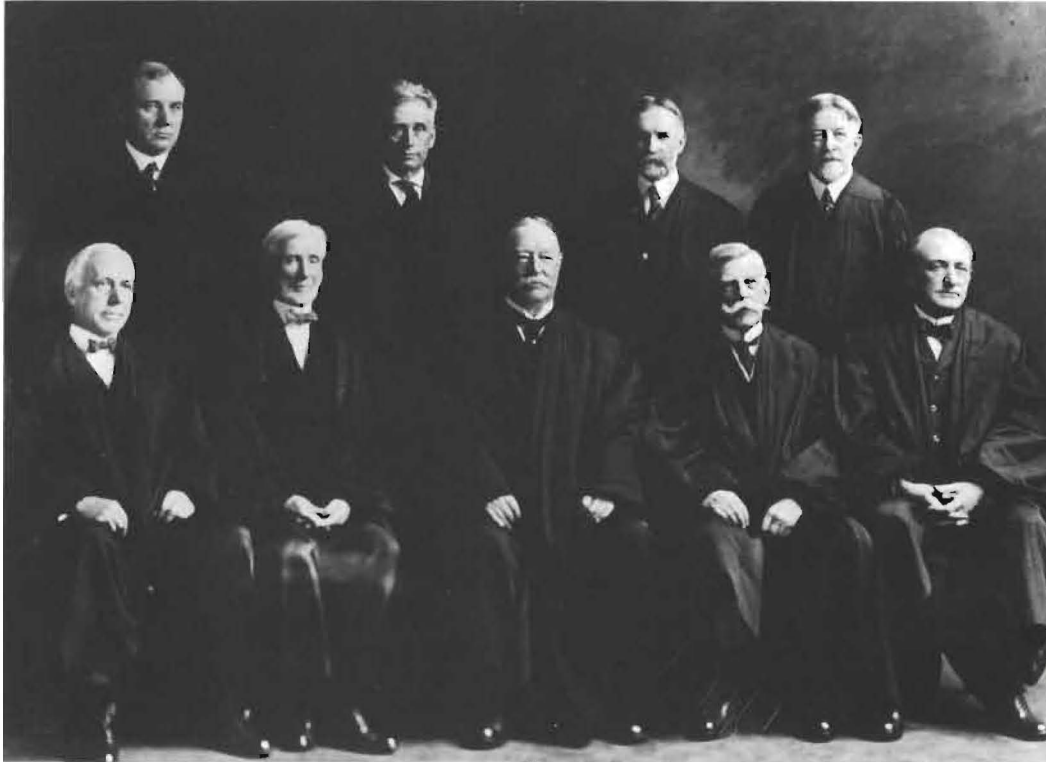
Presumably because he was the only member of the Court who had been President and therefore was most familiar with the problems of the Presidency, the Chief Justice assigned the opinion in *Ex parte Grossman* to himself. In spite of the excellence of the Attorney General's brief and the similar excellence of the brief on behalf of Judges Carpenter and Wilkerson, the Chief Justice was determined to make his opinion invulnerable. I was assigned to research various ideas that might conceivably occur to a constitutional scholar, such as the legal effect of pardons by the King of England,

consideration by the Constitutional Convention and other federal cases. The other members of the Court concurred without reservation in Chief Justice Taft's opinion upholding the pardon.

Also, I was called upon for extensive research in the case of *Carroll v. United States*.⁸ This case was an appeal from a conviction of transporting liquor in violation of the Volstead Act. The case had originally been argued at the 1923 Term; the Court had decided to affirm. The Chief Justice had assigned the opinion to Justice McReynolds. In the course of writing the opinion, McReynolds changed his mind and concluded that the judgment should be reversed. The case was then reargued at a later date in the 1923 Term. Again the Court voted to affirm; McReynolds and Sutherland dissented. The Chief Justice this time assigned the opinion to himself, but the opinion was not finally delivered until March 2, 1925, almost a year after the reargument.

The opinion was elaborate. The facts were as follows. The law officers whose action was challenged had been engaged in patrolling the

The Taft Court: (seated from left) Willis Van Devanter, Joseph McKenna, Chief Justice Taft, Oliver W. Holmes, James C. McReynolds; (standing from left) Pierce Butler, Louis D. Brandeis, George Sutherland, Edward T. Sanford.



highway between Detroit and Grand Rapids, Detroit being well known as a place for the unlawful importation of liquor. The officers saw a car on the way from Detroit going west in the direction of Grand Rapids; one of the officers recognized the driver as a man who had made an agreement to sell him liquor (the officer posing as a bootlegger). He had taken \$50 for the liquor, but had failed to keep his engagement to deliver. It was accepted law (recognized by all the members of the Court) that a law officer would only arrest a man for a misdemeanor if it was committed in his presence, whereas in the case of a felony, he could make an arrest in the reasonable belief that the man was guilty. It was also a given that transporting liquor was only a misdemeanor; however, after having stopped the car, the officers had kicked the upholstery and found it hard. They thereupon had torn the upholstery and found secreted underneath it numerous bottles of liquor. They seized the liquor and delivered it to the U.S. Marshal for destruction.

The men, whom they then took to the local police station, were prosecuted and convicted. They appealed, principally on the ground that an officer can arrest for a misdemeanor only when he sees it committed in his presence. The Chief Justice's opinion drew a distinction between the evidence necessary to make an arrest of a person and that necessary to seize contraband. He pointed out that the liquor was illicit and possibly subject to seizure at any time; in other words, the question was not what warrants the arrest of an individual, but what warrants the seizure of contraband. He found--with my assistance⁹--cases showing that goods could be seized if the officer reasonably believed them to be contraband. He pointed out that the route westward from Detroit to Grand Rapids was well known for its use to import illegal liquor and that the very defendants involved had made an illegal agreement only a few days earlier for the delivery of liquor. This made it reasonable for the officers to believe that the automobile contained contraband and was therefore lawfully seized. Having seized the liquor there could be no doubt that the men transporting it had done so in their presence. Therefore the requirements for the seizure of contraband and the arrest of persons had been met. McReynolds' dissent was acid and he

accused the Chief Justice of disregarding constitutional principles because he thought there was a great deal of violation of the Volstead Act. He more or less ridiculed the theory of contraband which, he asserted, was an afterthought.

The Chief Justice assigned himself other cases. With the exception of the *Myers* and *Carroll* cases, to which I have referred, I do not recall specifically the cases in which I did research. Also, I saw the successive drafts of his opinions and, from time to time, made suggestions. I recall in particular one suggestion which he told me to write out for inclusion in his opinion. It was quite brief--only two sentences--and, in fact, he revised the sentences, but did include them in his opinion. I recall that on that Saturday afternoon when he came back from the conference his first remark was "Well, Williams, you have lost your two sentences. McReynolds (who had dissented) said that he would concur if I would strike out those sentences, so I agreed to do so." I said, "Mr. Chief Justice, you must admit that the sentences did prove of some use--they did get McReynolds to concur."

I have already mentioned that two important cases came before the Court on December 5--*Myers v. United States* and *McGrain v. Daugherty*.¹⁰ I did not work on *McGrain v. Daugherty*, but I believe that it is important and the fact that the Court changed its mind while the case was under advisement makes it deserving of more than passing mention.

McGrain was a deputy of the Sergeant at Arms of the U.S. Senate (the Daugherty in the case was not the former Attorney General, but his brother Malley S. Daugherty). This case arose out of the scandals of the Department of Justice under Attorney General Daugherty and held unequivocally that Congress could investigate the Executive departments, notwithstanding that the investigation might discredit an individual. The District Court had reached a contrary conclusion,¹¹ and granted the writ of habeas corpus. At the initial conference on this case the Supreme Court had agreed with the District Court and voted to affirm. If it had adhered to that decision, the great congressional investigations of recent years either could not have taken place at all or would have been severely hampered.

So far as I am aware it has never previously been revealed that the original vote of the Court had been to affirm. I never mentioned the subject because I thought it confidential. As over sixty years have passed and all the parties (except perhaps some law clerks of that day) are dead, I think it now a matter of history and appropriately stated in an article to be published.

Chief Justice Taft assigned the opinion in *McGrain v. Daugherty* to Justice Van Devanter. The Chief Justice had high regard for Van Devanter's opinions. According to the Chief Justice he worked with great care and thoroughness, and polished his opinions most thoughtfully. He regarded Van Devanter's opinions as the best of those of any member of the Court.

Before the end of the Term, the Chief Justice summoned another meeting of the Senior Circuit Judges.¹² Although as previously noted, the Conference was primarily occupied with a review of the work in the District Courts, the Chief Justice managed to have the Conference put a limitation on *Hudson v. Parker*, whose reference to it by Judge Sanborn had so disconcerted him at the September Conference. The June Conference, albeit making a reference to "the purpose of the federal statutes not to

C. Dickerman Williams (pictured in 1962) recalls that Chief Justice Taft often invited Justices Van Devanter or Butler to ride in his automobile with him.



subject to punishment any one until he has been finally adjudged guilty in the court of last resort," added the following significant sentence: "But the judicial discretion of the federal courts and judges in granting or withholding bail after conviction should be exercised to discourage review sought, not with the hope of new trial, but on frivolous grounds merely for delay."

Further discussed at the June Conference was the excessive use by prosecutors of the conspiracy statute when only misdemeanors were involved: as conspiracy was a felony, a conviction provided a more severe sentence than a misdemeanor conviction, even if the conspiracy had been only one to commit misdemeanors. Also, evidence was admissible in conspiracy cases more readily. It was resolved that the District Judges and the Attorney General should caution the United States Attorneys.

* * * * *

Some miscellaneous matters not connected with legal work for the Chief Justice are the following:

Miss Gertrude Ely, a Bryn Mawr woman with an interest in public affairs and some acquaintance with the Chief Justice, came in to see him one day. She showed him a photograph and said, "This is a drinking fountain that the City of Geneva has built in honor of President Wilson and his contribution to the League of Nations." I had never before seen the Chief Justice angry. He said in a loud and angry voice: "Wilson doesn't deserve a drinking fountain or whatever. It was his stupidity and obstinacy that kept us out of the League of Nations. If we had once gotten into the League of Nations no one would ever have heard of the reservations."

My status as the Chief Justice's law clerk made me eligible to High Society; more specifically I should say, to the balls given by a Mrs. Leiter, who had a magnificent house on Dupont Circle. Also I was invited to other parties by socially prominent people. In this way I met a number of young men and women. I remember in particular two lovely girls whom I got to know, Miss Helena Lodge, the granddaughter of Senator Lodge, and Miss Eleanor Wilson, whose father had been U.S. Attorney for the District of Columbia during the administration

of President Taft.

My mother and one of her sisters, also a widow, took a home on Florida Avenue adjacent to what is now the Cosmos Club. (The house has since been destroyed.) Mrs. Taft invited all of us to Thanksgiving Day dinner. After dinner, coffee was served and the Chief Justice handed coffee cups to my mother and aunt. I think that mother got quite a kick out of being handed coffee by a former President of the United States.

In going to work I walked along Florida to Connecticut, up Connecticut to Wyoming, and then turned left to the Chief Justice's home. The Holton Arms, a school for girls, was at the corner of Florida and Connecticut. I would be walking by a few minutes before nine. In good weather I would see the girls, many of whom were quite pretty, sitting on the lawn of the school. We would wave at each other. Senator LaFollette lived at the corner of Connecticut and Wyoming; he was a great gardener. I would often see him with trowel and spade working on his garden as I went by.

In those days the Court sat from 12 noon to 2 p.m. and from 2:30 p.m. to 4:30 p.m. The Chief Justice enjoyed an automobile ride after Court. It so happened that I would often observe who his companion was. Most often it would be Justice Van Devanter and next most often Justice Butler. I never observed him with any other member of the Court. I felt that these Justices were closest to him. Sometimes--presumably when no Justice was available--he chose me. I can't say that he made any startling revelations to me.

He never mentioned his controversies with Roosevelt, MacArthur or Pinchot. He would more often refer to the cases argued that day and the lawyers who had argued them. He occasionally mentioned other members of the Court, but I already stated any comment on them of any present interest. In general, he did not like the influence that Senators had in the appointment of lower court judges. He believed that the appointments of Southern judges he had made as President were excellent--he had had a free hand because no Southern Senator was a Republican. He had an attachment to all Republicans who had remained faithful in 1912--he was not hostile to all who had not; in fact, a majority of Republicans had voted against

him but his feelings towards them did not have the warmth of his feelings for the faithful. I surmise that, although he never said so, the disgrace of Daugherty and the semi-disgrace of Harding were bitter blows to him. They had both been completely loyal to him in 1912.

He did not like dissents, although he did recognize that occasionally dissents were called for. He himself had dissented on the Minimum Wage Case of 1924. Although he always spoke favorably of Brandeis and Holmes, he felt that their fairly frequent dissents were a cross which he had to bear. He was opposed to the appointment of any new Associate Justice who might be expected to join Holmes or Brandeis. He did recognize their ability; I recall in particular that he once said of an opinion by Brandeis in some case, "Brandeis has written an opinion that I can only describe as masterly."

He considered McReynolds a difficult personality (as everyone else did, too). In particular, he was annoyed that McReynolds demanded that he take up with the Chief of Protocol at the State Department that Justices of the Supreme Court had the right to be seated with appropriate distinction at Washington dinner parties. He once remarked: "McReynolds seems to think that the hostesses of Washington are in a conspiracy to denigrate the Supreme Court." On one occasion McReynolds, having been seated at a dinner party below an official whom he deemed of inferior status, demanded that the Chief Justice make a specific protest to the Chief of Protocol.

I cannot recall that he ever made a comment on Sutherland or Sanford.

In general it was my impression that, apart from an occasional annoyance, he respected his colleagues and that under his guidance the Court was working well together.

In that quiet era, the Court was able to adjourn the Term on June 8, 1925. The Chief Justice and I took the same train, "The Montrealer," that day; he was going to New Haven for a meeting of the Yale Corporation; I got off at New York to study for and take my bar examinations; that was the last time that we saw each other in an intimate relationship. That relationship had always been pleasant and agreeable but he was exacting as regards my work.

Endnotes

¹ The Act of September 14, 1922 (42 Stat. 837), adopted by Congress at the request of the Chief Justice, provided for a conference of the Chief Justice and the Senior Circuit Judges on the last Monday of September. The Act of 1922 also provided a revised method of transferring judges with spare time to districts overburdened with cases. An additional provision of the Act of 1922 authorized the Conference to "submit [further]...suggestions to the various courts as may seem in the interest of uniformity and expedition." Presently this conference is regulated by 28 U.S.C. Sec. 331. Last revised by the Act of November 19, 1988 (102 Stat. 4650). The present "Judicial Conference" is far more elaborate and generally formidable than the simple conference provided by the Act of 1922.

² Senior circuit judge of the 8th Circuit.

³ 156 U.S. 277 (1895).

⁴ 267 U.S. 87 (1925).

⁵ 266 U.S. 405 (1925).

⁶ 272 U.S. 52 (1926).

⁷ 273 U.S. 135 (1927).

⁸ 267 U.S. 132 (1925).

⁹ If I can be said to have made any contribution to constitutional law during my service to the Chief Justice, it was my work in the *Carroll* case.

¹⁰ 272 U.S. 52 (1926); 273 U.S. 135 (1927).

¹¹ 299 Fed. 620 (S.D. Ohio, 1924).

¹² This subject is thoroughly discussed and the foregoing language quoted in an opinion by Justice Butler, sitting as Circuit Justice for the Seventh Circuit in 1926 and quoted at 10 F. 2d 657, *United States v. Motlow*.

Justice Robert H. Jackson and Segregation: A Study of the Limitations and Proper Basis of Judicial Action

Jeffrey D. Hockett

The ruling in *Brown v. Board of Education of Topeka*¹—that racially segregated public schools violate the Equal Protection Clause of the Fourteenth Amendment—has rightfully come to be one of the most celebrated decisions ever rendered by the Supreme Court.² When announced, however, the form as well as the substance of Chief Justice Earl Warren's opinion drew bitter criticism.³ Despite its moderate and nonaccusatory tone, negative commentary was directed at the opinion even by those who strongly approved of its purpose.⁴ The apparent lack of a legal basis for the ruling, and Warren's reference to sociological studies purporting to demonstrate the harmful effects of segregation on black children,⁵ struck many as evidence of a policy-making Court or an instance of judicial usurpation of the legislative function.⁶ While the form of Warren's opinion was not the primary reason for the protracted noncompliance that followed the ruling,⁷ the misgivings engendered by the decision were undoubtedly exacerbated by the vulnerability of the Court's argument.

Many of the criticisms leveled at *Brown* could have been avoided or blunted had some of Justice Robert H. Jackson's ideas been incorporated into the Court's opinion. Jackson's working papers on the case reveal that he possessed a certain prescience concerning public reaction to judicial attempts to depart from long-standing constitutional doctrine and to reinterpret provisions in light of current presumptions and conditions. And he believed that this case, more than most cases, demanded consideration of the limitations of the judicial

process in dealing with complex social issues.⁸ Jackson's careful attention to the inherent limitations of judicial efforts to reform society and the informal restraints placed on these efforts by public opinion resulted, paradoxically, in a sounder approach to securing the rights of the plaintiffs in *Brown*. This is not to say that Jackson afforded an ideal means to effect the needed change in constitutional doctrine. Significant revisions of his argument would have been necessary, and Chief Justice Warren anticipated certain criticisms not accounted for by Jackson. Nevertheless, an examination of Jackson's writings provides valuable insights into the politics of constitutional revision by the judiciary—insights that would have facilitated the implementation of *Brown* and that are relevant to contemporary circumstances.

Justice Jackson, Segregation and the Fourteenth Amendment

Several scholars, in reconstructing the judicial deliberations in *Brown*, have noted Jackson's reservations and concerns which complicated the quest for Supreme Court unanimity.⁹ However, there has been no thorough analysis of Jackson's views concerning the unconstitutionality of segregation which were formed after he resolved his doubts. Jackson's argument for ending segregation was set forth at length in an unpublished memorandum which he composed in 1954.¹⁰ This opinion probably was suppressed in the interest of Court unanimity and because of Jackson's debilitated condition following his heart attack of the same year.¹¹

The first section of Jackson's memorandum provides a brief discussion of the complexity of the situation before the Court. The eradication of segregation presents a formidable task, he believed, since it "involves nothing less than a substantial reconstruction of legal institution[s] and of society." Segregation is established not only in the laws of seventeen states and the nation's capital but also is embedded in the social customs of a large part of the country. Segregation persists, according to Jackson, because of fears, prides and prejudices, "which even in the North are latent," and which the Court cannot efface. And however sympathetic the members of the judiciary may be "with the resentments of those who are coerced into segregation, we cannot, in considering a recasting of society by judicial fiat, ignore the claims of those who are to be coerced out of it." The tendency toward separation is fundamental in mankind and is not limited to this country or to racial considerations. "It has seemed almost instinctive with every race, faith, state or culture to resort to some isolating device to protect and perpetuate those qualities, real or fancied, which it especially values in itself." Separatism is sometimes desired even by minorities. It is currently practiced on a voluntary basis by certain religious groups that forbid intermarriage, establish separate denominational schools and "seek to prevent contacts which threaten dilution of blood or dissipation of faith." This "instinct for self-preservation," Jackson argued, accounts for the existence of segregation in several Northern states as well as in the South.

The Southern situation, in Jackson's view, is complicated by antagonisms toward blacks that do not exist in the North. The white South still deeply resents the program of reconstruction and the humiliation of carpetbag government. Whatever the necessity or merit of these reconstruction measures, "the North made the Negro their emotional symbol and professed beneficiary, with the material consequence of identifying him with all that was suffered from his Northern champions." The race problem in the South thus involves more than mere racial prejudice; it is characterized by the enmity resulting from "a white war and white politics."

Consideration of the conditions which brought about and sustained segregation, Jackson believed, should deter the Court from adopting "a



This photo of Associate Justice Robert Jackson was taken on October 16, 1941, the year he joined the Supreme Court. Although he attended Albany Law School--where he completed the two-year course in one year--he learned the law mostly by apprenticing and attending trials in his hometown of Jamestown, N.Y.

Pharisaic and self-righteous approach" to these cases and from promulgating a "needlessly ruthless decree."

After appraising the complexity of the controversy before the Court, Jackson turned in the second part of his memo to the question of whether existing law condemned segregation:

Layman as well as lawyer must query how it is that the Constitution this morning forbids what for three-quarters of a century it has tolerated or approved. He must further speculate as to how this reversal of its meaning [could have been initiated] by the branch of the Government supposed not to make new law but only to declare existing law and which has exactly the same constitutional materials that so far as the states are concerned have existed since 1868 and in the case of the District of Columbia since 1791.

Since segregation has existed in this country for so long, Jackson argued, it is difficult to believe

"that the states which have maintained segregated schools have not, until today, been justified in understanding their practice to be constitutional."

Several considerations, according to Jackson, support the notion that segregated schools are constitutional. The language of the Fourteenth Amendment does not furnish a definitive basis for outlawing segregated schools, as ratification of the Fifteenth Amendment was required even to assure equal voting rights to blacks. With the deficiencies of the Equal Protection Clause obvious, the Fifteenth Amendment included no language referring to either segregation or education.

Historical analysis reinforces the view that the Fourteenth Amendment does not prohibit segregated schools. It is difficult to support the contention, Jackson argued, that any influential body of the movement behind the Fourteenth Amendment intended this provision to eradicate segregated schools or had even thought about either segregation or the education of blacks as a current problem. Although a few individuals involved in the framing and passage of that provision hoped it would establish complete social equality between the races and assimilation of liberated blacks into the American population, a majority of those who supported the Amendment were concerned merely with "ending all questions as to the constitutionality of the contemporaneous statutes conferring upon the freed men certain limited civil rights."¹²

If deeds are consulted as evidence of purpose, Jackson argued, the behavior of neither Congress nor the states indicates that the Fourteenth Amendment was aimed at prohibiting segregation in education. The very Congress that proposed the Amendment, and every subsequent Congress, maintained segregated schools in the District of Columbia. Furthermore, while Confederate states were readmitted to the Union only upon acceptance of the Fourteenth Amendment, Congress never indicated that segregated schools violated the conditions of reinstatement. It is true that five states abandoned segregated schools when the Amendment was submitted to them, and four states which had segregated schools refused to ratify the provision. But nine Northern states and two border states continued or established seg-

regated educational facilities after ratifying the Fourteenth Amendment, and the eight reconstructed states all instituted segregated schools. "Plainly," Jackson concluded, "there was no consensus among state legislators or educators ratifying the Amendment any more than in Congress that it was to end segregation."

Judicial precedent, in Jackson's view, also supports the view that segregation is constitutional. Indeed, almost a century of case law confirms this view. Even Northern state judges and the Northern members of the United States Supreme Court have held continuously that the Fourteenth Amendment does not of its own force prohibit the states from establishing separate educational facilities for the races.

An examination of the language, history and case law of the Fourteenth Amendment led Jackson to conclude:

Convenient as it would be to reach an opposite conclusion, I simply cannot find in the conventional material of constitutional interpretation any justification for saying that in maintaining segregated schools any state or the District of Columbia can be judicially decreed, up to the date of this decision, to have violated the Fourteenth Amendment.

In the next section of this memorandum, Jackson focused on the difficulties attending the enforcement of a judicial decision invalidating segregation. In view of the Court's inability to ensure the equality of separate facilities after *Plessy v. Ferguson*,¹³ he argued, there is "no reason to expect a pronouncement that segregation is unconstitutional will be any more self-executing or any more efficiently executed." This pessimistic prediction is warranted since the Court lacks the power to enforce general declarations of law by applying sanctions against persons not before it in a particular case. Furthermore, the school districts can be expected to continue segregation without the aid of legislation, since racial separation "exists independently of any statute or decision as a local usage and deep-seated custom." If the Court must rely entirely upon its own resources, a decision invalidating segregation is thus likely to "bring the court into contempt and the judicial process into discredit."

Any constructive policy for abolishing seg-

regation, Jackson believed, must come from Congress. The power of this branch to implement its decisions far exceeds that of the Court. Congress can enact laws binding all states and districts and can delegate supervision to administrative agencies that may apply sanctions against those who fail to comply with the law. Moreover, Congress can supply federal funds to facilitate changes that are beyond the means of particular communities. Finally, Congress can assume the burden of expensive litigation against recalcitrant states.

Jackson rejected the argument of the Eisenhower Administration that the federal District Courts must assume the burden of implementing a decision invalidating segregation since Congress may refuse to act.¹⁴ In Jackson's view, the belief that the courts must act because the representative system has failed is an insufficient basis for judicial action. The judiciary must first be capable of supervising educational authorities on a continuing basis. This task, however, is "manifestly beyond judicial power or functions," as "[a] gigantic administrative job has to be undertaken." "Local or state or federal action will have to build the integrated school systems if they are to exist." Another reason the judiciary should not be asked to implement a ruling invalidating segregation is that the federal government offered no guidance to determine when and how school systems should be reconstructed. Jackson refused to

be a party to thus casting upon the lower courts a burden of continued litigation under circumstances which subject district judges to local pressures and provide them with no standards to justify their decisions to their neighbors whose opinions they must resist.

While most of his opinion was devoted to an examination of the difficulties attending the execution and justification of a decision invalidating segregation, Jackson explained in the final section of this memorandum why the constitutionality of the practice could be maintained no longer. He began this section with the conciliatory statement that "[u]ntil today Congress has been justified in believing that segregation does not offend the Constitution." Congress and the states have relied on the

Court's holdings that the requirement of equal protection does not prohibit reasonable classifications of citizens nor require government to accord identical treatment to all. In its holding in this case, Jackson argued, the Court does not invalidate the principle that equal protection allows classifications that "rest upon real not upon feigned distinctions" and that have a "rational relation to the subject matter for which the classification is adopted."

What the Court does invalidate, however, are classifications in education based upon race. It is now possible to see, according to Jackson, that the primary basis of these classifications--that there are "differences between the Negro and the white races, viewed as a whole, such as to warrant separate classification and discrimination" in educational facilities--is incorrect. Jackson conceded that he did not know whether this presumption was warranted in earlier times. When first liberated, blacks had little opportunity to demonstrate their capacity for education or even for self-support. Consequently, Jackson did not want

to stigmatize as hateful or unintelligent the early assumption that Negro education presented problems that were elementary, special and peculiar and that the mass teaching of Negroes was an experiment not easily tied in with the education of pupils of more favored background.

The spectacular progress made by blacks, however-- "one of the swiftest and most dramatic advances in the annals of man"--has enabled them "to outgrow and to overcome the presumptions on which it [segregation] was based." In other words,

[t]he handicap of inheritance and environment has been too widely overcome today to warrant these earlier presumptions based on race alone. I do not say that every Negro everywhere is so advanced, nor would I know whether the proportion who have shown educational capacity is or is not in all sections similar. But it seems sufficiently general to require one to say that mere possession of colored blood, in whole or in part, no longer affords a reasonable basis for a classification for educational purposes and that each indi-

vidual must be rated on his own merit. Retarded or subnormal ones, like the same kind of whites, may be accorded separate educational treatment. All that is required is that they be classified as individuals and not as a race for their learning, aptitude and discipline.

The necessity for judicial action on this subject thus "arises from the doctrine concerning it which is already on our books."

The breakdown of racial distinctions in American society also contributes to the unreasonableness of segregation. "Blush or shudder, as many will," Jackson noted, "mixture of blood has been making inroads on segregation faster than change in law." An increasing population with mixed blood baffles anyone attempting to classify the races.

The fact that segregation had been upheld for so many years is insufficient reason for the Court to continue to place its imprimatur upon the practice. "It is neither novel nor radical doctrine," Jackson argued, "that statutes once held constitutional may become invalid by reason of changing conditions, and those held to be

good in one state of facts may be held to be bad in another."

Jackson ended his memorandum with the statement that he favored "going no farther than to enter a decree that the state constitutions and statutes, relied upon as requiring or authorizing segregation merely on account of race or color, are unconstitutional." He called for reargument on the nature of the decree that would provide a remedy to the petitioners in this case. But Jackson anticipated that the Court would have to allow for varying periods of compliance. In view of the complex and diverse circumstances surrounding the issue, Jackson held that "only a reasonably considerate decree would be an expedient one for the persons it has sought to benefit hereby."

The Jackson Memorandum: A Statement of the Limitations and Proper Basis of Judicial Action

The most fundamental difference between the opinions of Warren and Jackson was the challenge posed in the latter to the underlying premise of segregation. Jackson's opinion was

E. Barrett Prettyman, Jr., who served as Justice Jackson's law clerk in 1953-54, cautioned that Jackson's memorandum was too negative in tone to garner public support. Below, he talks with Justice Kennedy (right) at the Society's annual lecture in 1989.



predicated upon the accurate assumption that the primary justification for racial classifications was a belief in the inferiority of blacks. The notion of black intellectual and moral infirmity was widely accepted by individuals and groups (both Northern and Southern) whose views dominated public discourse during the latter part of the nineteenth century. These allegedly immutable racial distinctions were thought to necessitate and justify segregation in general (so as to avoid the debilitation of the white race through interbreeding) and separation of the races for purposes of education in particular (since blacks could not benefit from the education afforded to whites).¹⁵ Jackson's bold decision to examine the sensitive issue of racial differences contrasted with Warren's strategy of focusing on the harms caused by segregation.¹⁶

Before examining the implications of these strategies, it must be noted that the boldness of the final section of Jackson's memorandum was offset by a marked concern evident throughout much of the opinion with the vexing difficulties of enforcement and justification. The cautious tone of Jackson's memorandum disturbed E. Barrett Prettyman, Jr., Jackson's law clerk during the 1953-54 Term and Justice Harlan's clerk during the 1955 Term. In a reply memo, Prettyman told Jackson that his argument was unlikely to generate public or political support because of its "negative attitude" and preoccupation with "doubts and fears." "If you are going to reach the decision you do," he wrote to Jackson, "you should not write as if you were ashamed to reach it."¹⁷ Prettyman's criticisms of Jackson's memorandum are compelling. He was justified in pointing out to the Justice that it is one thing to express numerous concerns about a difficult decision, but "it is another thing to state them at such length and in such precedence over your affirmative views that the result you reach is swallowed up in them." Jackson would have been wise to heed Prettyman's suggestion that the memo begin with a clear, affirmative, and extended discussion of the legal position adopted in the final section of the opinion.¹⁸ Without these revisions (and others to be discussed shortly), it is unlikely that Jackson's opinion would have generated public and political support.

Yet, an opinion which failed to take Jackson's

concerns into account would not have generated much support, either. Jackson anticipated intense opposition to a decision invalidating segregation, and he wisely counseled his brethren to concern themselves with the limitations of the judicial process and the difficulties attending the execution of the Court's rulings. As Walter Murphy suggests, a Justice of the Supreme Court "is not often in a particularly favorable position to exert the dynamic sort of leadership which can mobilize effective reform or counterreform movements,"¹⁹ since the Court has control of neither purse nor sword. For this reason, Jackson believed the considerable powers of Congress would have to be enlisted to aid in desegregation efforts. His discussion of congressional power, his confession of judicial incapacity to direct the implementation of *Brown*, and his statement that a solitary judicial effort to eradicate segregation would ultimately damage the institutional prestige of the courts were intended to solicit the aid and enlist the moral authority of Congress.²⁰

Jackson's suggestion that *Brown* would remain an empty gesture without congressional involvement was borne out. In 1964, ten years after the decision, only slightly more than 1 percent of Southern black children attended school with whites, and several states had no public school integration. Significant progress toward desegregated schools was made only in the late 1960s, after the fiscal power of Congress was brought to bear on recalcitrant states.²¹ Of course, a judicial appeal for congressional assistance in desegregation efforts was unlikely to be successful in 1954, given that Southern Congressmen held influential positions on important committees.²² A slightly more promising strategy would have been to combine the appeal for congressional support with a plea for assistance from the Executive, as President Eisenhower oftentimes stated that he was obligated to enforce the law as interpreted by the Court regardless of his personal beliefs.²³ Such a request might have served as the catalyst needed to activate an Administration that was, for the most part, apathetic toward civil rights issues.²⁴ Jackson was correct, however, in assuming that congressional involvement was essential to the success of *Brown* (i.e., a President can only propose necessary legislation), and his opinion, unlike Warren's, was crafted to

induce a legislative response.

Jackson's appeal for positive congressional action would not have been heeded unless the form or rationale of his opinion was compelling. His attempt to persuade representatives and their constituents of the unconstitutionality of segregated public schools differed considerably from the logic of *Brown*. And it is likely that, overall, Jackson's approach would have been less vulnerable to the attacks of segregationists and more persuasive in the minds of those who had no interest in perpetuating the practice but would insist that an exercise of judicial power be "legitimate." Jackson realized that the Justices could not invoke the specific intent of the framers of the Fourteenth Amendment to justify the desired change in constitutional doctrine. Contrary to Warren's contention that the circumstances surrounding the adoption of the Amendment are "[a]t best...inconclusive,"²⁵ Alexander Bickel's historical investigation (published in the year fol-

lowing the Court's ruling) demonstrated that segregation in educational facilities was present to the minds of the framers, but they chose not to ban the practice. Warren's dismissal of the constitutional record thus left the Court open to the charge that the Justices had willfully ignored history.²⁶

Yet, Jackson's frank and protracted historical discussion also would have made the ruling vulnerable. He emphasized the history behind the Amendment so as to avoid the impression that the Court was accusing the states of behaving unconstitutionally in the past.²⁷ But it is doubtful the South would have looked upon the decision more favorably had the opinion dwelt upon this information. Indeed, this probably would have incited resistance by fostering a feeling that an injustice had been inflicted upon the states. A more prudent strategy--and a strategy more well founded than Warren's--would have been to acknowledge briefly the circumstances surrounding the Amendment while

Chief Justice and Mrs. Earl Warren meet with President Dwight D. Eisenhower and the First Lady at the White House. The author suggests that the Court would have been wise to appeal to Eisenhower for help in desegregation matters in order to rally support from the Executive branch.



emphasizing the reasons segregation should still be viewed as a violation of the Equal Protection Clause. This would have required that Jackson juxtapose the second and final sections of his opinion to make the point explicit that the notion of constitutional intent has never been restricted to the particular conceptions of the framers of a provision. Jackson needed to emphasize that the general proscription of unreasonable classifications is part of the meaning of the equal protection requirement.²⁸

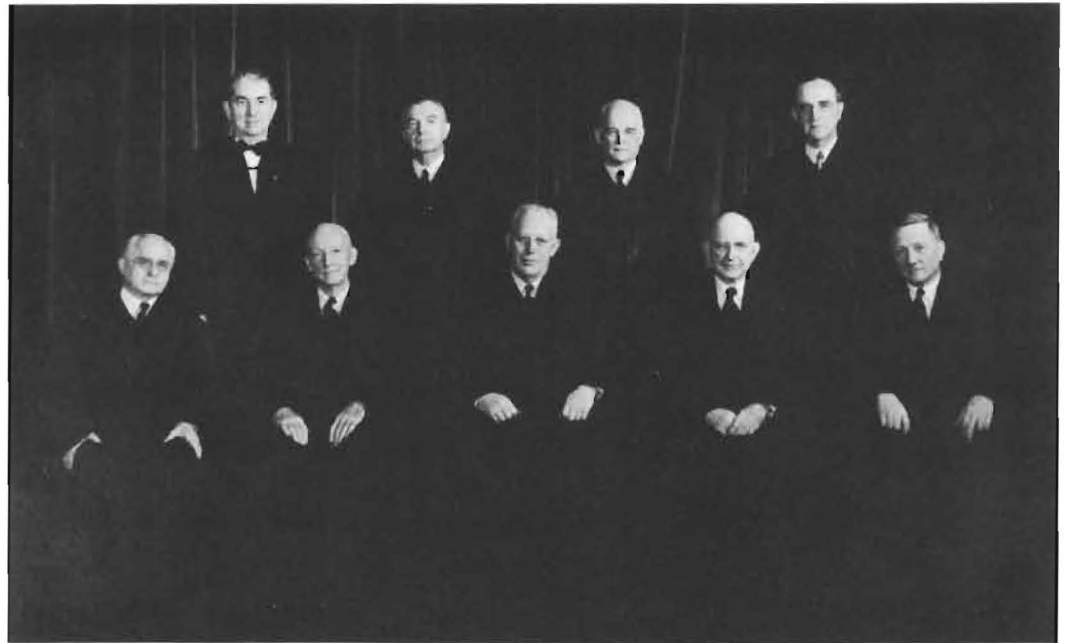
These problems of emphasis and organization aside, Jackson's justification for invalidating segregation in public schools was less susceptible to the charge of judicial legislation than was the rationale employed in the Court's opinion. Prior to *Brown*, the Justices never challenged the *Plessy* standard itself; at most, they insisted that separate educational facilities be equal.²⁹ By maintaining that separate schools could never be equal,³⁰ *Brown* departed significantly from previous decisions. Jackson realized that "the holy rite of judges consulting a higher law loses some of its mysterious power," to use Walter Murphy's words, "[w]hen the Court reverses itself or makes new law out of whole cloth [and] reveals its policy-making role for all to see."³¹ And he believed the Court could act to preserve its institutional integrity or prestige by resting its decision upon a "legal" foundation.³² That is, while the Justices would reverse constitutional doctrine--invalidate the notion of "separate but equal"--they would do so by employing the standard used in previous equal protection cases, namely, classifications between groups or individuals are allowable only if they reasonably relate to legislative purpose and are based upon real distinctions.³³

Jackson's expectation that the Justices would receive harsh criticism for deviating from past rulings was well founded. A common charge directed at the Court was that it "blatantly ignored all law and precedent."³⁴ Some suggest the Court could have strengthened its argument by elaborating upon Warren's point that the notion of "separate but equal" was actually a departure from earlier rulings, which held that the Fourteenth Amendment proscribed all state-imposed discriminations against blacks.³⁵ Warren's failure to follow this tack, however, was fortunate, and perhaps purposeful. These earlier rulings would have been subjected to

severe and compelling historical critiques had the Justices based the decision on the claim that they were merely returning to the original understanding of the Amendment as articulated by an earlier Court.³⁶ The historical accuracy of the basis of Jackson's argument (i.e., that constitutional provisions should be interpreted as general concepts not restricted to the particular conceptions of the framers) has been debated recently.³⁷ But the idea that the Equal Protection Clause prohibits unreasonable classifications generally was not controversial and was unlikely to be challenged seriously.³⁸ Certainly, Jackson would have been criticized for departing from the understanding that racial classifications in education are reasonable. His approach, however, enabled him to use language emphasizing continuity with previous rulings that Warren could not employ.³⁹

Another sense in which Jackson's argument was less susceptible to the charge of judicial legislation was that it did not appear to rely upon "extralegal" materials.⁴⁰ Conspicuously absent from Jackson's opinion were references to the sociological data that had figured prominently in the petitioner's arguments and were mentioned in Warren's opinion.⁴¹ In view of the fact that studies demonstrating the harmful effects of segregation were irrelevant to Jackson's holding (i.e., his contention that racial classifications in education are unreasonable did not depend upon whether segregation created a feeling of inferiority in black children), he had no reason to refer to the data. In an earlier draft of his memorandum, however, Jackson expressed extreme skepticism concerning the wisdom of incorporating social science evidence into Fourteenth Amendment jurisprudence. "I do not think," he argued, that "we should read into the concept of equal protection the shadowy and changing doctrines relating to mental and emotional reactions."⁴²

Jackson's skepticism concerning the wisdom of incorporating such evidence into the Court's opinion was warranted. Warren's use of sociological studies was taken by many as proof that *Brown* was a political decision, one that merely implemented the personal value preferences of the Justices.⁴³ Warren's opinion, according to one commentator, "read more like an expert paper on sociology than a Su-



The Court that handed down the unanimous *Brown v. Board* decision on May 17, 1954: (sitting, left to right) Felix Frankfurter, Hugo L. Black, Earl Warren, Stanley F. Reed, William O. Douglas; (standing, left to right) Tom C. Clark, Robert H. Jackson, Harold H. Burton, and Sherman Minton.

preme Court opinion."⁴⁴ Although legal controversies are oftentimes bound up with empirical questions, and such cases should be decided in the context of facts derived from the most reliable sources, the public generally views law and science as insular disciplines. Most believe the Court's only legitimate function is to interpret law (without reference to "nonlegal" sources), and judicial use of sociological data is regarded as evidence of policy-making Justices.⁴⁵

Some scholars suggest that the sociological evidence was incidental to Warren's opinion and could have been dropped without weakening the Court's argument. The cruelty of segregation, they believe, was obvious and required only a common-sense discussion to rebut the antiquated psychology underpinning *Plessy*.⁴⁶ Other scholars argue quite persuasively, however, that the Court was obligated to make reference to the studies.⁴⁷ The proximity and number of prior rulings accepting the possibility that separate facilities can be equal compelled the Justices to move beyond common-sense arguments in explaining the sudden departure from precedent.⁴⁸ Warren's approach, then, was vulnerable whether or not reference was made to the findings of social science. By

contrast, though Jackson based his opinion upon an empirical proposition (i.e., that blacks are not inferior to whites), he was not obligated to employ extralegal materials, since there were no direct recent rulings examining the basis of racial classifications.⁴⁹ Unlike Warren, Jackson was able to resort to a common-sense discussion of changed presumptions and conditions which necessitated a modification in constitutional doctrine.⁵⁰

The basis of Jackson's holding was useful not only for the purpose of preserving the Court's institutional integrity. Jackson's argument also placed the right of the petitioners to equal protection of the laws on a secure foundation--a foundation more secure than that provided by the claim that segregation creates a feeling of inferiority in black children.⁵¹ The shortcomings of Warren's approach were demonstrated by the efforts of segregationists to have *Brown* reversed. Proponents of segregation initially sought to have the decision overturned by claiming science had shown blacks to be an inferior race -- a race undeserving of the rights and privileges accorded to whites. This unfounded assertion and unsuccessful tactic was followed by the accumulation of evidence ostensibly demonstrating the preferability of

segregated to integrated schools.⁵² Segregationists referred to the works of scholars such as A. James Gregor, who argued that racial separation actually enhances the development of a healthy personality in the black child "by reducing the psychological pressure to which the child is subjected" through contact with whites. In an ironic paraphrase of Warren's language in *Brown*, Gregor concluded that integration "gives every evidence of creating insurmountable tensions for the individual Negro child and impairing his personality in a manner never likely to be undone."⁵³ Criticism of the Court's argument was found not only in the writings of segregationists. Several scholars sympathetic to *Brown* doubted that the empirical basis of the Court's holding had been demonstrated convincingly by the findings of social science.⁵⁴

While the effect of segregation on the personalities of black children was a matter of some controversy, the overwhelming weight of scientific opinion supported the view that all significant disparities in achievement between blacks and whites were traceable to environmental rather than biological causes. When *Brown* was rendered (and since then), scientific racism attracted little attention and virtually no support from the social science community.⁵⁵ Considering the segregationists' failure to demonstrate the inferiority of blacks,⁵⁶ Jackson's assumption that his declaration concerning the irrationality of segregation would withstand criticism or challenge was well founded.⁵⁷

While Jackson's position on segregation survives the challenges of racists, it remains open (as does the Court's implementation decision)⁵⁸ to the criticisms of proponents of desegregation. Although he died before the Court heard arguments on the form of its remedial decree,⁵⁹ Jackson accepted the strategy ultimately adopted by the Justices. He was willing to defer relief to the victims of segregation by allowing for varying periods of compliance with the ruling as to accommodate diverse local conditions.⁶⁰ By failing to require immediate compliance with a declaration of unconstitutionality, Jackson essentially tolerated a deprivation of constitutional guarantees. The apology for this position -- that compliance is only deferred and not evaded -- is little consolation to those individuals who must hope for good faith efforts by state officials toward compli-



In 1951, Oliver Brown of Topeka, Kansas, sued the city school board on behalf of his eight-year-old daughter, Linda Carol, who had to walk 21 blocks to get to a black school when a white school was only 5 blocks away. She later became Mrs. Charles D. Smith, and is pictured above with her two children.

ance and who are deprived of a public benefit that is rightfully theirs. It is arguable that the Justices must ensure that no individuals are deprived of their constitutional rights for reasons of expediency if the Court is to act in a principled manner.⁶¹

As Alexander Bickel argued, however, a large and heterogeneous society like ours would disintegrate if it were deprived of the art of compromise or were "principle-ridden." Our society cannot be governed entirely by principle in some matters and exclusively by expediency in others. Often, guiding principle must co-exist with expedient compromise. Universal, immediate compliance with a declaration of unconstitutionality, while attractive, may be impossible to achieve in a particular situation, given the complexity of the task involved, the intransigence of public opinion, or the vulnerability of the Court's institutional prestige. Bickel maintained, however (and there is no reason to believe Jackson would have disagreed), that if a principle enunciated by the Court cannot be the

"immutable governing rule," it must affect or guide the tendency of policies of expediency.⁶²

The Limitations of the Jackson Memorandum

While the form of Jackson's memorandum would have stifled or blunted much of the criticism directed at the Court's decision, his argument for ending segregation was vulnerable in ways that Warren's opinion was not. Jackson was correct in claiming that the primary justification for racial classifications was a belief in the inferiority of blacks.⁶³ Segregationists, however, proffered other justifications for the practice. Some defended the dubious claim that racial separation was merely the form of social organization preferred by both races.⁶⁴ Human beings, it was argued, find their greatest happiness when among people of similar cultural, historical, and social background.⁶⁵ Jackson would thus have been subject to the charge that his analysis of segregation was simplistic. The Court was particularly susceptible to this sort of criticism since most of its members were Northerners.⁶⁶

Alternatively, Jackson would have been criticized for failing to acknowledge the implications of the first section of his opinion, where he discussed the "instinctive" drive for separation present in every race, faith or state.⁶⁷ Jackson intended to convince the South forthwith that the Court was aware of the complexities of desegregation and to assuage fears that the Justices sought to engage in the wholesale dismantling of Southern culture.⁶⁸ He failed to realize, however, that by entertaining the disingenuous arguments of segregationists, he undercut his efforts to demonstrate the unreasonableness of racial classifications.⁶⁹

Warren's opinion did not elicit charges of oversimplification or inconsistency, since he made no observations about the underlying premises of segregation. His argument was limited to an inquiry concerning the effects of the practice. True, the Court was implored during the hearings on the nature of its remedial decree to respect the complex structure of customs and traditions that had grown up around segregation.⁷⁰ But, in declaring the practice unconstitutional, Warren did not incite resistance by fostering the impression that the Court had misunderstood the distinctive culture of a

significant portion of the country.

It is arguable that Warren's avoidance of any discussion of the rationale underpinning segregation precluded him from expressing a sufficiently strong judicial commitment to a philosophy of racial equality.⁷¹ Jackson's opinion--with its profession of the fundamental sameness of the races⁷²--may have been more appropriate for a ruling that marked a long overdue change in American race relations.⁷³ But *Brown* was and is generally regarded as a momentous decision and the product of an egalitarian political philosophy.⁷⁴ Moreover, Jackson's opinion would have had the unfortunate effect of subjecting blacks to the demeaning and superficial arguments of racists. The post-*Brown* developments demonstrated that certain proponents of segregation did not hesitate to defend the notion of immutable racial distinctions.⁷⁵ These repulsive arguments would have persisted and received wider exposure had the Court's opinion struck at the roots of the practice.⁷⁶

Jackson's explicit challenge of the primary justification for segregation also would have made the Court's opinion appear somewhat self-righteous. Jackson held that the irrationality of segregation was apparent to all reasonable minds, and the obverse of this is that only unreasonable (or morally deficient) people continue to see any justification for racial classifications. Warren's opinion (although nonaccusatory) also drew attention to the moral deficiency of segregationists. He maintained that segregation caused permanent harm, and all America knew where culpability lay.⁷⁷ Nevertheless, the psychological damage caused by segregation was not presented as a self-evident truth; social science data was used to demonstrate the existence of the harm. The infliction of this injury was thus less blameworthy than a belief in racial inferiority.⁷⁸

Another problem stemming from Jackson's decision to challenge the underlying premise of segregation is the breadth of his ruling. Jackson's argument was likely to alarm the South since it effectively undercut all forms of segregation (i.e., if blacks are not inferior, the legal separation of the races cannot be justified in any social setting). By contrast, Warren narrowed the scope of his ruling by stressing the peculiar importance of public education and hence the

need for vigilance in detecting inequality in this area alone.⁷⁹ This argument was expected to minimize the misgivings of those affected by the ruling.⁸⁰ *Brown*, however, could scarcely have engendered more controversy, as education was the most sensitive area in which desegregation could occur. School integration was viewed widely as a harbinger of what segregationists regarded as an execrable development in race relations--miscegenation. The period of adolescence was thought to be critical for the formation of social barriers between the races.⁸¹ That segregation fell relatively easily in most areas except education suggests that the breadth of Jackson's opinion would not have generated significantly more opposition than Warren's ruling.⁸²

While the drawbacks associated exclusively with Jackson's memorandum would have warranted concern, these problems were surmountable or were not as significant as the problems presented by Warren's opinion. Jackson minimized the accusatory or self-righteous tone of his opinion by noting that racial separation was not restricted to the South and stating that those who accepted the notion of racial distinctions should not be stigmatized or censured.⁸³ Charges that Jackson oversimplified the premises underlying segregation would have subsided as it became clear that alternative justifications were insupportable.⁸⁴ That this was likely to occur is demonstrated by the fact that efforts to prove the biological inferiority of blacks waned in part because of evidence to the contrary.⁸⁵ Arguments defending immutable racial distinctions would have persisted longer had the Court employed Jackson's reasoning. But it may be that significant progress toward equality in American society required that racists be challenged to defend their baseless arguments.

Conclusion

Since the problems associated with Jackson's opinion were not overwhelming, adoption of his argument by the Court would have been

wise. The post-*Brown* developments demonstrated that the Court is only as powerful as its opinions are persuasive, and Jackson's argument for ending segregation was less susceptible to criticism than Warren's. Jackson's opinion was more consonant with constitutional history and accorded more closely with the public's conception of a permissible exercise of judicial power. Neither opinion could be characterized as a paean to the triumph of racial equality, as both "refused to lift the nation to the magnificence of the principle [they] had that day redeemed."⁸⁶ Even Jackson's opinion, which afforded a grand opportunity for such a statement,⁸⁷ seemed uncharacteristically hesitant and subdued.⁸⁸ Both Justices realized, however, that eloquence and incandescence had to be sacrificed to avoid the appearance of a pharisaical decree.⁸⁹

If Jackson's opinion afforded a more promising strategy for securing the rights of the plaintiffs in *Brown*, it is reasonable to ask why the Court failed to adopt his approach. One possibility is that the Justices were unaware of this strategy, since Jackson's debilitating heart attack prevented him from presenting his case to his brethren.⁹⁰ This does not seem compelling, however, when one considers that during the *Brown* deliberations Warren proposed an argument for ending segregation similar to Jackson's. S. Sidney Ulmer, drawing upon the conference notes of Justice Harold Burton, suggests that the Chief Justice initially thought the Court should attack the underlying premise of segregation.⁹¹ Ulmer provides no reason for Warren's abandonment of this tack. A likely explanation, however, may have been the need for unanimity. With three Justices from the South, the drawbacks of Jackson's argument may have led to its rejection. So, while the form of Warren's opinion drew public criticism that Jackson's approach may have avoided, the Chief Justice delivered something essential for the eventual success of a controversial ruling that Jackson may have been unable to furnish--the force of a Court speaking with one voice.⁹²

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Endnotes

¹ 347 U.S. 483 (1954).

² For a listing of articles extolling *Brown*, see Michael J. Perry, *The Constitution, the Courts, and Human Rights: An Inquiry into the Legitimacy of Constitutional Policymaking by the Judiciary* (New Haven: Yale University Press, 1982), p. 167 n. 8.

³ See *The New York Times*, 18 May 1954. Opinions for the Supreme Court are, of course, institutional products or negotiated documents, and Warren's opinion in *Brown* is no exception (see David M. O'Brien, *Storm Center: The Supreme Court in American Politics* (New York: W.W. Norton and Company, 1986), pp. 233-34, 240-62). Throughout this essay, however, I refer to the *Brown* opinion as "Warren's opinion," since the Chief Justice was the primary author of the document. Warren said he wrote "every blessed word" (see J. Harvie Wilkinson III, *From Brown to Bakke: The Supreme Court and School Integration, 1954-1978* (New York: Oxford University Press, 1979), p. 30).

⁴ See, e.g., Herbert Wechsler, "Toward Neutral Principles of Constitutional Law," *Harvard Law Review* 73 (1959): 26-35. See also Wilkinson, *Brown to Bakke*, pp. 34-39; and Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality*, 2 vols. (New York: Alfred A. Knopf, 1975), 2: 898-900.

⁵ 347 U.S. at 494-95.

⁶ I.A. Newby, *Challenge to the Court: Social Scientists and the Defense of Segregation, 1954-1966* (Baton Rouge, Louisiana: Louisiana State University Press, 1967), p. 186.

⁷ Significant progress toward fulfilling the promise of *Brown* was not made for over a decade (Charles A. Johnson and Bradley C. Canon, *Judicial Policies: Implementation and Impact* (Washington, D.C.: CQ Press, 1984), p. 256. The primary reason for noncompliance was, of course, white discontent with the result reached by the Court.

⁸ "Memorandum by Mr. Justice Jackson," 15 March 1954, p. 4, *The Papers of Robert H. Jackson*, Box 184, Library of Congress, Manuscript Division, Washington, D.C. (hereinafter cited as *Jackson Papers*).

⁹ See Dennis J. Hutchinson, "Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958" *Georgetown Law Journal* 68 (1979): 34-44; S. Sidney Ulmer, "Earl Warren and the Brown Decision," *The Journal of Politics* 33 (1971): 689-702; and Kluger, *Simple*

Justice, 2: 764-72.

¹⁰ "Memorandum By Mr. Justice Jackson," 15 March 1954, *Jackson Papers*, Box 184. Work on the argument contained in this memorandum began early in the 1953 Term, as Jackson believed then, according to his law clerk, E. Barrett Prettyman, Jr., that "most of the Justices would eventually have to write the case" ("Notes re Segregation Decision. December 15, 1954," *The Papers of E. Barrett Prettyman, Jr.*, Box 1, University of Virginia Law School Library, Rare Books Room, Charlottesville, Virginia) (hereinafter cited as *Prettyman Papers*). I trace the argument of Jackson's final and most developed memorandum. Page references to this short document are omitted in this section for the reader's convenience.

Richard Kluger devotes several (primarily descriptive) pages to Jackson's memorandum, but he concludes: "Whatever its virtues... the Jackson memo left a good deal to be desired as a state paper" (Kluger, *Simple Justice*, 2: 869-73). Kluger is critical of the cautious tone of Jackson's writing. I attempt to demonstrate that while the memo is flawed in several respects, Jackson's argument for ending segregation has the earmarks of a piece of judicial statesmanship. The concerns which led to the cautious tone of Jackson's opinion (i.e., the inherent limitations of judicial efforts to reform society and the restraints placed on these efforts by public opinion) gave him insight into securing the rights of the plaintiffs in *Brown*.

¹¹ Prettyman contends Jackson "was about to start reworking [the draft] when he had a heart attack in March." While Jackson was in the hospital, Warren personally delivered his own segregation opinion to the Justice. Jackson suggested minor revisions but agreed to support the opinion ("Notes re Segregation Decision. December 15, 1954," *Prettyman Papers*, Box 1). Given Jackson's physical condition, Richard Kluger's contention seems reasonable that the Justice "would have been likely to activate his concurrence memorandum only if Warren's opinion seemed to him a piece of irresponsible butchery" (Kluger, *Simple Justice*, 2: 880-81). Warren's desire for and efforts to achieve unanimity are discussed in *Ibid.*, pp. 880-83.

¹² Jackson did say historical analysis "yields for me only one sure conclusion: it was a passionate, confused and deplorable era" ("Memorandum by Mr. Justice Jackson," 15 March 1954, p. 6, *Jackson Papers*, Box 184). And in an earlier version of his memorandum, he seemed even more inclined to accept the view that history was

unhelpful (Memo dated 1/6/54, p.6, *Jackson Papers*, Box 184). But the definite import of his final version is that history supports the views of segregationists.

¹³ 163 U.S. 537 (1896). *Plessy* held that separate facilities for the races were permissible under the Fourteenth Amendment so long as the facilities were equal.

¹⁴ The Department of Justice filed an amicus brief in favor of the plaintiffs in *Brown* (Kluger, *Simple Justice*, 2: 705-09).

¹⁵ Charles O. Lofgren, *The Plessy Case: A Legal-Historical Interpretation* (New York: Oxford University Press, 1987), pp. 93-115; see also Wilkinson, *Brown to Bakke*, p. 36.

¹⁶ 347 U.S. at 493-95.

¹⁷ "Re Nos. 1-4," pp.1, 3, *Jackson Papers*, Box 184.

¹⁸ *Ibid.*, pp. 1-4.

¹⁹ Walter F. Murphy, *Elements of Judicial Strategy* (Chicago: University of Chicago Press, 1964), p. 208. See also Johnson and Canon, *Judicial Policies*, p. 259.

²⁰ See above pp. ????. See also Murphy, *Elements of Judicial Strategy*, pp. 123-29.

²¹ Johnson and Canon, *Judicial Policies*, pp. 256-61; Kluger, *Simple Justice*, 2: 948-82.

²² See Barbara Hinckley, *The Seniority System in Congress* (Bloomington, Indiana: Indiana University Press, 1971), pp. 35-52; Barbara Hinckley, *Stability and Change in Congress*, 4th ed. (New York: Harper & Row, 1988), pp. 105-70; and Kluger, *Simple Justice*, 2: 950.

²³ Murphy, *Elements of Judicial Strategy*, pp. 146-47.

²⁴ Kluger, *Simple Justice*, 2: 950-52; C. Vann Woodward, *The Strange Career of Jim Crow*, 3d. rev. ed. (New York: Oxford University Press, 1974), pp. 163-68.

²⁵ 347 U.S. at 489.

²⁶ Alexander M. Bickel, "The Original Understanding and the Segregation Decision," *Harvard Law Review* 69 (1955): 1-65. (For a recent study of Fourteenth Amendment history, see Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Cambridge, Massachusetts: Harvard University Press, 1977). Berger contends that the framers did not intend to proscribe segregated schools (*Ibid.*, pp. 117-33, 243-45)). Bickel's essay was the product of research conducted in 1952 when he served as a law clerk for Justice Frankfurter. The Justice had copies of Bickel's memorandum distributed among his brethren, and it is likely that Bickel's work informed Jackson's discussion of Fourteenth Amendment history (Kluger, *Simple Justice*, 2: 825-28). In his law review article, Bickel did not reject *Brown* or brand it as entirely inconsistent with history. But he concluded, contrary to Warren, that history is "anything but inconclusive" on the issue of whether the framers thought segregated schools were constitutional. Bickel suggested Warren may have meant merely that history is inconclusive on whether the framers understood that the Court could, in light of future conditions, have power to abolish segregation (as this was how Bickel squared *Brown* with the historical record) (Bickel, "The Original Understanding," pp. 56-65). This interpretation of Warren's meaning, however, is too kind. Warren's language certainly suggests that no firm conclusion can be reached on what the framers thought about the constitutionality of segregated schools (see 347 U.S. at 489-90).

²⁷ Kluger, *Simple Justice*, 2: 771.

²⁸ See above, pp. 54-55.

²⁹ *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337

(1938); *Sipuel v. Oklahoma*, 332 U.S. 631 (1948); *Fisher v. Hurst*, 333 U.S. 147 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950).

³⁰ 347 U.S. at 495.

³¹ Murphy, *Elements of Judicial Strategy*, p. 204.

³² According to E. Barrett Prettyman, Jr., Jackson believed Warren's opinion was flawed since it did not appear to have a legal basis ("Notes re Segregation Decision. December 15, 1954," p. 1, *Prettyman Papers*, Box 1).

³³ See, e.g., *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911); *F.S. Royster Guano Co. v. Virginia* 253 U.S. 412, 415 (1920); *Railway Express Agency v. New York*, 336 U.S. 106 (1949); and *Walters v. City of St. Louis*, 347 U.S. 231 (1953). Richard Kluger and S. Sidney Ulmer contend that Jackson believed the Court should indicate that its ruling in *Brown* was a "political decision" (Kluger, *Simple Justice*, 2: 860-61; Ulmer, "Earl Warren and the Brown Decision," p. 695). In Kluger's words: "As a political decision, [Jackson said] he could go along with it, but he would insist that it be so defined or he would have to protest. Almost certainly, Jackson was telling the conference that he would file a separate concurring opinion if whoever wrote the opinion of the Court feigned that the Justices were doing anything other than declaring new law for a new day" (Kluger, *Simple Justice*, 2: 861). This conclusion is drawn from Justice Burton's terse and sometimes cryptic conference notes. If Kluger means that Jackson wanted to announce that the Justices had decided to outlaw segregation without any justification other than their personal values, such an interpretation is difficult to accept. An examination of Jackson's memorandum indicates that a more reasonable interpretation of Jackson's position is that he believed the Court had to acknowledge that it was making new law (was departing from precedent) and that the states had been justified in believing their past actions were constitutional. The Justices, however, had to demonstrate that the Court's decision was justified in law and that the classifications made by the states in the past were no longer acceptable. Ulmer seems to suggest this interpretation, but he fails to elaborate upon it (see Ulmer, "Earl Warren and the Brown Decision," p. 695).

³⁴ See, e.g., "Ruling Tempers Reaction of South," *New York Times*, 18 May 1954, p. 20. See also Kluger, *Simple Justice*, 2: 897-98, 947.

³⁵ Kluger, *Simple Justice*, 2: 899. See 347 U.S. at 490-91. These earlier cases included *Strauder v. West Virginia*, 100 U.S. 303, 307-08 (1880), *Virginia v. Rives*, 100 U.S. 313, 318 (1880), and *Ex Parte Virginia*, 100 U.S. 339, 344-45 (1880).

³⁶ While Warren's assertion that the history of the Fourteenth Amendment is not enlightening is misleading, the claim that the Amendment was intended to proscribe all forms of racial discrimination is patently false (see above, n. 26, and accompanying text). Had the Court based its decision upon this claim, there would have been no need to refer to controversial social science data (see below, pp. 59-60). Consequently, all attention would have focused on the historical accuracy of the earlier rulings.

³⁷ See Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Massachusetts: Harvard University Press, 1977), pp. 131-37; Perry, *Constitution, Courts, and Human Rights*, pp. 70-75; Berger, *Government by Judiciary*, pp. 363-72, 414-18; H. Jefferson Powell, "The Original Understanding of Original Intent," *Harvard Law Review* 98

(1985): 885-948; and Raoul Berger, "Original Intention' in Historical Perspective," *George Washington Law Review* 54 (1986): 296-337. A majority of the Court has never accepted the view that the only legitimate basis for constitutional decision-making is the specific intentions of the framers, and even those who purported to do so apparently thought it necessary at times to deviate from the original understanding. For example, Justice Hugo Black's book, *A Constitutional Faith* (New York: Alfred A. Knopf, 1968), is a testimony to the importance of judicial fidelity to the intent of the framers. But his position in *Reynolds v. Sims*, 377 U.S. 533 (1964) (among other decisions), can only be characterized as a departure from this interpretive model (see Berger, *Government by Judiciary*, pp. 69-98). A Court that is liberated from the specific intent of the framers can certainly abuse its power. On the other hand, judicial adherence to a rigid form of interpretivism or originalism prevents the Court from acting when changed presumptions and conditions reveal the injustice of a governmental practice, and resort to the political process offers no hope for reform. Raoul Berger believes the original intent must be followed whatever the consequences: "I cannot bring myself to believe that the Court may assume a power not granted in order to correct an evil that the people were, and remain, unready to cure." (*Government by Judiciary*, p. 409).

³⁸ See above, n.33, and John Nowak, Ronald D. Rotunda, and J. Nelson Young, *Constitutional Law*, 3d ed., Hornbook Series (St. Paul, Minnesota: West Publishing Co., 1986), pp. 523-26.

³⁹ See above, p. 55.

⁴⁰ The term "extralegal" is, in a sense, a misnomer, as legal questions oftentimes cannot be separated from empirical questions (see below, n. 45, and accompanying text).

⁴¹ 347 U.S. at 494-95.

⁴² Memorandum dated 1/6/54, p. 11, *Jackson Papers*, Box 184.

⁴³ Paul Rosen, *The Supreme Court and Social Science* (Chicago: University of Illinois Press, 1972), p. x; Newby, *Challenge to the Court*, p. 186; Kluger, *Simple Justice*, 2: 891-92; Wilkinson, *Brown to Bakke*, pp. 27, 31.

⁴⁴ James Reston, "A Sociological Decision," *New York Times*, 18 May 1954, p. 14.

⁴⁵ Rosen, *Supreme Court and Social Science*, pp. 3-22.

⁴⁶ Edmond Cahn, "Jurisprudence," *New York University Law Review* 30 (1955): 157-61; Monroe Berger, "Desegregation, Law, and Social Science," *Commentary* 23 (1957): 475-76; Charles L. Black, Jr., "The Lawfulness of the Segregation Decisions," *Yale Law Journal* 69 (1960): 421-30; Kluger, *Simple Justice*, 2: 892-93, 900. In his opinion for the Court in *Plessy*, Justice Brown said: "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it" (163 U.S. 537, 551 (1896)). Brown was unaware that the second sentence in this passage conceded the possibility that segregation causes psychological harm.

⁴⁷ William B. Ball, "Lawyers and Social Scientists—Guiding the Guides," *Villanova Law Review* 5 (1959): 221; Kenneth B. Clark, "The Desegregation Cases: Criticism

of the Social Scientist's Role," *Villanova Law Review* 5 (1969): 234-35; Herbert Garfinkel, "Social Science Evidence and the School Segregation Cases," *The Journal of Politics* 21 (1959): 43.

⁴⁸ See above, n. 29. The import, if not the holding, of *Sweatt v. Painter*, 339 U.S. 629 (1950), is that separate higher educational facilities for blacks cannot be equal, given the beneficial intangibles afforded exclusively by white schools. This decision, however, could not have served as the basis of a common sense argument that separate facilities at the elementary school level are inherently unequal, since *Sweatt* emphasized intangibles unique to a law school environment (viz., reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, and tradition and prestige) (*Ibid.* at 634).

⁴⁹ Acceptance of the reasonableness of racial classifications was only implicit in the Court's rulings addressing the notion of "separate but equal."

⁵⁰ One might argue that Jackson's approach involved improper judicial behavior, since his discussion of the underlying premise of segregation and events demonstrating the unreasonableness of racial classifications required him to go beyond the Court record (see above, pp. 55). The long-established doctrine of "judicial notice," however, allows judges to take broad societal conditions and events into account. The Model Code of Evidence of the American Law Institute holds that judges may on their own motion take notice of such things as "specific facts so notorious as not to be the subject of reasonable dispute, and...specific facts and propositions of generalized knowledge which are capable of immediate and accurate demonstration by resort to easily accessible sources of indisputable accuracy" (as quoted in Walter F. Murphy and C. Herman Pritchett, *Court, Judges, and Politics: An Introduction to the Judicial Process*, 4th ed. (New York: Random House, 1986), pp. 360-61. The historical and contemporary information upon which Jackson drew could reasonably fall within these guidelines.

⁵¹ 347 U.S. at 493-95.

⁵² Newby, *Challenge to the Court*, pp. 185-204.

⁵³ A. James Gregor, "The Law, Social Science, and School Segregation: An Assessment," *Western Reserve Law Review* 14 (1963): 626-29. Compare Warren's language in *Brown*, 347 U.S. at 494.

⁵⁴ Cahn, "Jurisprudence," pp. 161-65 (Cahn's critique of the sociological studies employed by the Court was quoted frequently by segregationists; Newby, *Challenge to the Court*, pp. 188-89); M. Berger, "Desegregation, Law, and Social Science," pp. 475-76; Black, "The Lawfulness of the Segregation Decisions," pp. 421-30. (See also Rosen, *Supreme Court and Social Science*, pp. 182-96; and Wilkinson, *Brown to Bakke*, pp. 32-33.) These scholars maintained that the Court was not obligated to refer to social science evidence, since the cruelty of segregation was obvious and capable of judicial notice (see above, n. 46, and accompanying text). This claim, however, was weakened by sociological studies suggesting that integration causes psychological harm in black children.

⁵⁵ Rosen, *Supreme Court and Social Science*, pp. 186-89; Newby, *Challenge to the Court*, pp. 192-93.

⁵⁶ See above, p. 60.

⁵⁷ Jackson might have been criticized for improperly applying the baseline equal protection requirement or "rational basis" test. That is, segregation must stand under

this test if racial classifications have "some reasonable basis in terms of some rational view of the public interest." Second, "[i]f a set of facts could conceivably exist that would render a [racial] classification reasonable, their existence must be assumed" Archibald Cox, The Role of the Supreme Court in American Government (New York: Oxford University Press, 1976), p. 59-60, emphasis in original; see also John Hart Ely, Democracy and Distrust: A Theory of Judicial Review (Cambridge, Massachusetts, Harvard University Press, 1980), p. 31. The Court could have envisioned and segregationists could have put forth several arguments to demonstrate the existence of some reasonable basis for racial classifications: 1.) some studies suggest that there may be immutable racial distinctions (Newby, Challenge to the Court, pp. xi-xii); 2.) even if there is no basis to scientific racism, the presence of disadvantaged blacks in white classrooms could hinder the educational development of white students (this was the argument put forth by the state of Virginia after *Brown*; Kluger, Simple Justice, 2: 913-14); 3.) some evidence suggests that racially segregated schools promote healthy personalities in black children (see above, pp. 60-61). Jackson, however, could (and should) have noted that the Court considered racial classifications "suspect" (ironically, this principle was first articulated in the Japanese exclusion case, *Korematsu v. United States*, 323 U.S. 214, 216 (1944)). With suspect classifications, the traditional presumption of constitutionality is reversed. The state's goal must be "compelling," and the burden is on the state to demonstrate the validity of the arguments supporting the classification and to prove that alternative means are not available to accomplish the stated legislative goal (Novak, Rotunda, and Young, Constitutional Law, pp. 530-31). None of the above justifications for segregation would survive strict scrutiny.

^{58.} *Brown v. Board of Education of Topeka*, 349 U.S. 294 (1955).

^{59.} Kluger, Simple Justice, 2: 903.

^{60.} See above, p. 56. In its implementation decision, the Court did not fix a date for the end of segregation, nor did it direct the courts below to require the defendant school boards to submit desegregation plans within a certain period of time. It merely ordered the lower courts to "require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954 ruling" (349 U.S. at 300; see also Kluger, Simple Justice, 2: 939-41; and Woodward, Strange Career of Jim Crow, pp. 152-53).

^{61.} This was the argument of the NAACP after *Brown* (Kluger, Simple Justice, 2: 926-28).

^{62.} Alexander Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics, 2d ed. (New Haven: Yale University Press, 1986), pp. 64-72, 247-54.

^{63.} See above, p. 57.

^{64.} According to C. Vann Woodward: "[W]hile they did comply, blacks were neither happy nor voluntary in their acquiescence [to racial restrictions] and...they resisted where it was possible" ("The Mississippi Horrors," *New York Review of Books*, 36 (June 29, 1989): 15).

^{65.} Wilkinson, Brown to Bakke, p. 36; Woodward, Strange Career of Jim Crow, pp. 167-68. The Court appeared to accept this justification in *Plessy* (163 U.S. at 550-51).

^{66.} Only Hugo Black (Alabama), Stanley Reed (Kentucky), and Tom Clark (Texas) were Southerners.

^{67.} See above, p. 53.

^{68.} He also sought to avoid the appearance of self-righteousness (see above, p. 53).

^{69.} These arguments were disingenuous and unsupported since the justification which fit racial classifications most closely was the exclusion of a race because of the supposed inferiority of its members. In other words, a philosophy of racial inequality would surely produce this sort of legislation. Other reasons advanced to support segregation do not fit the classification as closely. Alternative means to accomplish these goals are apparent (see Ely, Democracy and Distrust, pp. 145-46). Under strict scrutiny, the alternative justifications would not support the classification (see above, n. 57). Jackson, of course, would have had to revise significantly the first section of his opinion.

^{70.} Kluger, Simple Justice, 2: 913.

^{71.} *Ibid.*, pp. 900-01; Johnson and Canon, Judicial Policies, p. 257; Wilkinson, Brown to Bakke, p. 39.

^{72.} See above, p. 55.

^{73.} Jackson's opinion, however, was not a particularly strong statement of racial equality either (see below, p. 63).

^{74.} See above, n. 2; "Historians Laud Court's Decision," *New York Times*, 18 May 1954, p. 17; and Kluger, Simple Justice, 2: 895-96.

^{75.} See above, pp. 60-61.

^{76.} The segregationists relented in their attempts to defend the notion of immutable racial distinctions in part because Warren's opinion presented other targets (see above, pp. 60-61). These targets were not present in Jackson's memorandum.

^{77.} Wilkinson, Brown to Bakke, p. 53.

^{78.} Warren's controversial use of social science evidence, then, helped the Court avoid the appearance of self-righteousness. The common sense discussion of the harmful effects of segregation desired by some commentators (see above, pp. 59-60) would have had the opposite result.

^{79.} 347 U.S. at 492-93.

^{80.} Kluger, Simple Justice, 2: 946.

^{81.} Rosen, Supreme Court and Social Science, pp. 173-74.

^{82.} Kluger, Simple Justice, 2: 948.

^{83.} See above, pp. 10-11.

^{84.} See above, n. 69.

^{85.} But see above, n. 76.

^{86.} Although Wilkinson's language refers only to Warren, it applies as well to Jackson (Wilkinson, Brown to Bakke, p. 29).

^{87.} Jackson's critical examination of racist tenets afforded an excellent occasion for a powerful statement on human equality.

^{88.} See his beautiful language in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

^{89.} It is probably for this reason that neither Warren nor Jackson employed language from the ringing dissent of the first Justice Harlan in *Plessy* (see 163 U.S. at 552-64). It has been suggested that the tone of *Brown* would have been elevated had the Court borrowed from this great opinion (see Wilkinson, Brown to Bakke, p. 29).

^{90.} See above, p. 52.

^{91.} Ulmer, "Earl Warren and the Brown Decision," pp. 692-94.

^{92.} For sources examining Warren's efforts to achieve unanimity in *Brown*, see above, n. 9. For a discussion of unanimous Court opinions, see O'Brien, Storm Center, pp. 214-15, 273-74.

President Hayes Appoints a Justice

Loren P. Beth

Associate Justice David Davis, "Lincoln's Manager," was elected to the Senate by the Illinois legislature January 25, 1877, and resigned his seat on the Court effective March 4. Thus, Rutherford B. Hayes knew--even before his own election was certain--that there would be a Supreme Court vacancy to be filled. Speculation about the appointment naturally began immediately, but the possibilities in January and February were wide open, since there was still a good chance that the new President would be a Democrat. It remains mysterious, however, that Hayes took so long to make his appointment, when one might have expected that the seat would be filled almost as soon as the Cabinet appointments were made.

Two considerations rendered his decision less urgent than it might otherwise have been. One was the fact that Congress adjourned shortly after getting itself organized and approving the Cabinet appointments in March. Thus any appointment to the Court made before it reconvened would have to be a recess appointment, and under the circumstances of Hayes' relations with the Republican Stalwarts, such an appointment could well cause him nothing but embarrassment: there was a real possibility that a Justice who had already taken his seat might eventually be disapproved by a fractious Senate. While Hayes intended to call a special session to deal with the Army appropriation, which Congress had failed to enact, it was found possible (and politically desirable) to delay this until October 15.¹ As a consequence, the Supreme Court nomination could not go before the Senate until that date. Then too, the Court was itself nearing the end of its October 1876

session; Justice Davis' resignation did not take effect until March 4, 1877. Any new Justice would thus barely have assumed his seat--even assuming prompt Senate action--before the Court adjourned for the summer.

Between these two circumstances, the President found himself with the leisure necessary to take his time about what was likely to be a contentious nomination. There were good reasons, in fact, not to announce the name of Davis' successor until Congress could act on it, rather than letting debate drag on through the summer and fall. There is, however, no reason

Justice David Davis managed Abraham Lincoln's Senatorial campaigns in 1858 and 1860. His lifelong friendship with President Lincoln earned him a seat on the Court and considerable political clout.



to suppose that the President actually made up his mind about the appointment until shortly before the special session convened October 15.

Harlan was in the mind of the President, along with several other possibilities, by early March. As a matter of fact, Hayes probably thought of Harlan as soon as he determined that he would not appoint the Kentuckian Attorney General. Justice Samuel F. Miller, who kept up with this affair, partly because of his interest in pushing his own brother-in-law, William Pitt Ballinger of Texas, wrote Ballinger in mid-March assessing the qualifications the President had in mind for the post:²

Caldwell and Wood [sic] have been pressed on his consideration by more men of influence than any other nominees. Judge Bruce of Alabama who is [a] graduate of my law office had an interview three days ago with the President as I suppose to favor Wood; but of that I am not sure. He told me however, that the President was hesitating between Harlan of Kentucky or possibly Bristow their interest being one, and a real Southern man, and in this latter sense he did not consider Wood or Caldwell to meet the requirement. Now the difficulty of selecting a real Southern man is that all the men who before the rebellion had made high reputation as lawyers are either dead or too old for the place.

Miller could have added that most prominent Southern lawyers were still tainted by their association with the Confederacy.

Even at this early date, Miller had identified the most prominent contenders. Henry Clay Caldwell of Arkansas and William B. Woods of Alabama were both federal judges; they were not "real" Southerners, being carpetbaggers--Woods from Ohio and a Union army officer, Caldwell from Iowa and also a Union veteran.³ Woods was apparently very well liked in his circuit (or else he orchestrated a campaign), for Hayes' good friend James A. Garfield wrote that he felt that he had never seen as many sincere recommendations as those which supported Woods.⁴ Hayes was sufficiently impressed to appoint him to the next Supreme Court vacancy, in 1880.

Woods and Caldwell had, nevertheless, at



Associate Justice Samuel Miller sat on the Bench from 1866-1890 and wrote more opinions--616--than any Justice before him. He advised President Hayes on the potential political ramifications of each candidate's nomination to the seat vacated by Davis.

least two advantages over Harlan or Bristow: they came from judicial circuits which were then unrepresented on the Court. On the other hand, Kentucky was in the same circuit as Ohio, which already had two Justices--Chief Justice Waite and Justice Noah W. Swayne. The Chief Justice told Miller that it would be a mistake to appoint anyone from Kentucky. In Miller's words, "it would be very unpolitic to fill the place from a circuit which now has two members of the court, and...this would give Davis's circuit just ground of complaint."⁵ Miller had by this time talked personally to the President (Waite apparently never did), and presumably passed this word on; but the President was by this time fully aware of the politics of the situation. He was being importuned by Illinois lawyers and political leaders to nominate Judge Thomas Drummond of that state to fill what they seemed to regard as the "Illinois seat."⁶ These men, David Davis himself included, were not anti-Harlan as much as they were opposed to another appointment from the Sixth Circuit.

On the same occasion, Hayes asked Justice

Miller for his own opinion. Miller, while pressing the candidacy of Ballinger, nevertheless told the President that both Harlan and Bristow "were fully up to the standard required both by native ability and professional attainments," and that of the two "Harlan was probably a man of the most vigorous intellect, while Bristow was believed to be if any different of the soundest judgment."⁷ The two agreed, however, that Bristow's presidential hopes stood in the way of his appointment.

Harlan had other liabilities, which may have given Hayes pause. He had come late to Republicanism and had originally opposed the Reconstruction Amendments: Republican Stalwarts thus distrusted him. They were not encouraged by his service on the Louisiana Commission even though that body's work merely gave the President a pretext for doing what he wished to do anyway. There were, moreover, rumors of corruption and even possible bribery related to the Louisiana episode which were to haunt him during the struggle in the Senate over his confirmation. Finally, the Stalwarts would never forgive Ben Bristow or the other Republican reformers who had prevented their man Blaine from being nominated in 1876. Harlan was rightly seen as a member of the reform wing of the party, and any job given him by the Administration would be regarded as a reward to Bristow.⁸

But if he had weaknesses, Harlan also had major strengths. He was the man known to be closest to Bristow, so that if Bristow's appointment was seen to be impolitic, Bristowites like Henry V. Boynton might be expected to regard Harlan as the best available alternative. And in general, Hayes needed to maintain his own reputation as a reformer who was willing and able to battle the Stalwarts and beat them. The choice of Harlan would do this. He was, in addition, enough of a Southerner to propitiate Southern Republicans and appease Southern Democrats, thus carrying out an earlier version of Nixon's "Southern Strategy."

But most of all, Hayes owed a good deal to John Harlan, much more than he owed to Bristow himself. Bristow had been a competitor and was always seen by Hayes people as a potential thorn in the President's side whenever Hayes might do, or not do, something on which the reformers might have strong opinions. Harlan,

on the other hand, had swung the Kentucky delegation to Hayes at a critical moment in the Convention. In addition he had incurred some substantial political risk by agreeing to serve on the Louisiana Commission. Finally, there is no doubt that Hayes knew of Harlan's hopes to be Attorney General, and felt that there was a danger that Kentuckians might turn against him if something else was not offered.

Even so, there is some evidence that Hayes would have preferred to appoint Woods, who had none of Harlan's political liabilities. His offer of the post of Ambassador to the Court of St. James's is probably best viewed as an attempt to satisfy Harlan without putting him on the Supreme Court. Harlan's refusal of that offer quite possibly put him in a position in which the Court appointment became almost inevitable.

By August, although Justice Miller continued to press for Ballinger, it had pretty clearly become a choice between Woods and Harlan. At this juncture, Harlan's friend from Louisiana Commission days, Wayne MacVeagh, wrote to the President,⁹

I cannot resist the conclusion that you are wrong in the tendency you first expressed to fill [the vacancy] from one of the extreme Southern states. I certainly need not protest that I am absolutely free from any prejudices against that section of our common country, ... but... I cannot divest myself of the conviction that if a lawyer of unquestioned ability, a statesman of comprehensive views and a thoroughly sound Republican can be found living in the more Northern States of the South, it is safer to offer him the position.

I believe General Harlan of Kentucky meets all these requirements and that you could not possibly do a wiser and better thing for the country as well as for your Administration than offer him the existing vacancy.

...I therefore earnestly hope that you will see your way clear to offer the present vacancy to General Harlan and to await another opportunity before going further South.

Whether or not MacVeagh's words influenced the President, he did exactly what they suggested.

What was John Harlan doing while all this

was going on? As suggested earlier, he was concentrating on his law practice, with time out to try to obtain or retain federal jobs for his friends or political supporters. His oldest son Richard was to start at Princeton in the fall and money was as usual a problem.

In addition, there is some evidence that Harlan was actively involved in his own candidacy for the Court vacancy. By July it was practically certain that President Hayes was not going to offer the position to Bristow; this left Harlan free to pursue the position as actively as he wished. He did not want to do anything overt, but it is perhaps true that he worked behind the scenes to stimulate support. This was nothing more than many others had done and were doing. Caldwell, in particular, had "campaigns" for the Supreme Court once before and was doing so again--although this time without the support of Justice Miller, who was committed to his brother-in-law.

How active Harlan really was cannot be judged with any certainty. Boynton, accused him of politicking for the position in Philadelphia with MacVeagh and Cameron as early as July. In September and October dozens of letters arrived at the White House urging his nomination. Most, but not all, of these came from Kentucky lawyers or other prominent Kentuckians. These could very well have been written without any urging from Harlan himself; some may have been spontaneous, although it is more likely that a few of his close associates orchestrated a letter-writing campaign. Another evidence of his personal interest appears in a letter from Charles W. Fairbanks to someone close to the White House.¹⁰

I have just had an interview with Judges Gresham and Howland¹¹--the former you know and the latter is Master in Chancery of the U.S. Court [in Indianapolis].

During the interview the subject of Judge Drummond's case came up. I learned that John M. Harlan was, and is, moving earnestly for appointment to the Supreme Bench. He has been here a number of times of late, and I am advised a petition has been started in his favor--though it is not signed to any considerable extent. The petition is not openly circulated as Judge D[rummond]'s was--and such as sign it (if any have) do it with the under-

standing that H. should be appointed if Judge D. is not. This is as Judge G. thinks.

I understand Judge David Davis is very pronounced against the President's going South for an appointee, and from what Judge G. intimated Judge D[avis] will be very much disappointed if Judge Drummond is not appointed. And he expressed himself to Gresham recently as being most decidedly opposed to Harlan. I was surprised to learn of his strong disinclination towards the selection of a Southern man.

I write this upon request of the Judges whom I have mentioned. They in common with a great many regard it as advisable to appoint a Judge to the Supreme Bench from the Circuit and think no one is entitled to the place above Judge D.

David Davis was not, in fact, as much opposed to Harlan as he was in favor of Drummond. He seems to have had friendly though not intimate relations with Harlan and was close to Bristow as well. Certainly he supported the nomination when it came before the Senate.

Whatever Harlan himself was doing, other candidates were doing also. Then too, many who were not in the race themselves had candidates to promote. And thus, quite a few non-Kentuckians were called upon to comment on Harlan's ability and political availability. The President's political intimate, William Henry Smith (by 1877 director of the Western Associated Press in Chicago), was asked by the President for his frank opinions.¹²

Confidentially and on the whole is not Harlan the man? Of the right age--able--of whole character--industrious--fine manner, temper and appearance.

Early in October, Smith's reply was not wholly favorable.¹³

Is Harlan the man? I think so. His age, vigor--mental and physical--his agreeable manners and personal magnetism are strongly for him. I think him a very much better man in every way than Bristow, and if a Southern man is to be taken, he is the man. The appointment will offend a good many people of both parties of this section, who believe the

selection should be made from this state [Illinois]. They will complain at first but in time, if the Administration continues in well doing, they will forget about it or overlook it. This remark applies to the people, not to a few politicians who sympathize with Conkling and swear you have destroyed the party in breaking the machine. I hope, however, the appointment of a judge will not be made at a date earlier than November. The more time you get, the surer of victory.

Although still favorable to Harlan, Smith was less hopeful a few days later about the political reaction that might be expected in the Middle West.¹⁴

I am troubled about that Supreme Court business. The offense to the people of this District, if an appointment is made out of it, is going to strike deeper than I at first thought. This District is second to none in importance. It will be more important in the future. To appoint Harlan will be to give the Ohio Dist. three members, & deprive this strongly Republican one of any. Then the appointment of Harlan would be less acceptable here than a man from the Gulf States. That is now clear. In view of these facts & the near approach of the Wisconsin Election I hope you will postpone the appointment until the regular Session. Hence I telegraphed through Webb today. Give the lawyers of this dist. a fair & full hearing.

MacVeagh, too, was at work. He wrote to C.B. Lawrence of Chicago (and presumably to others) soliciting support for Harlan. Lawrence thereupon wrote the President that if a Southern man were to be appointed; "no lawyer could be named from the South who would be more acceptable to the bar of this Circuit than Gen. Harlan and there can be no question of his eminent fitness for the place."¹⁵

Miller, in a letter to Ballinger just a week before Hayes' decision was made public, seemed resigned to Harlan's appointment, although writing to another aspirant he could not openly give up hope.¹⁶

I do not see how the President can appoint Harlan, though I think he wishes to do

so. If not Harlan then there is much hope for you. His action thus far in making appointments shows the strong perhaps too strong influence of his personal wishes. Next to Harlan I think his wishes are in your favor.

Whether one calls it independence or stubbornness, Hayes disregarded the advice of both Smith and Miller (who of course had opposing alternatives in mind) and on October 16, 1877, he had finally made up his mind, submitting the name of John Marshall Harlan.

In the American system, nomination by the President is far from tantamount to final appointment. Not only does the Senate have the power to "advise and consent," but it is a power of which that body is extremely jealous, and fairly often uses to delay if not to block appointment. This is especially true when the President is weak, when his party is a minority in the Senate, or when there is strong anti-President feeling in a numerous faction of his own party. Although Hayes appears stronger to contem-

Rutherford B. Hayes had been the Governor of Ohio and a Union general before becoming President. Although greatly respected for his integrity, he could not control the Republican Stalwarts.



porary historians than he often did in his own time, he will never be ranked among our really strong Presidents. But even a strong man would have had difficulty with the Republican Stalwarts. To them the only good President was one who was under their thumb. It is true that Harlan's association with Bristow would have led, in any case, to some opposition in the Senate. But it is certain that much of the opposition--and its strength--was due to Stalwart anger at the President's temerity in daring to nominate anyone not approved by them.

The result of this situation was that Harlan's confirmation was held up for six weeks. In hindsight, it appears that the Stalwarts did not have real hopes of defeating him, but of course Harlan did not know this, and these were anxious weeks for the Kentuckian and his growing family.

The reasons for opposition were varied, and much depended upon who the objector was. Some of the opposition--but not the most serious or intractable--came from the Seventh Circuit, which was losing a seat. This was certainly true of Senator David Davis of Illinois, who felt that "his" seat belonged to the Circuit. But he was, as Justice Miller reported, "personally friendly to Harlan," and ended up voting for his confirmation. Senator Timothy O. Howe, Republican of Wisconsin, had dual reasons for opposing: not only was Harlan from a different Circuit, but Howe had personal ambitions for the seat.¹⁷ Melville W. Fuller, a prominent Chicago attorney and Republican leader, opposed the appointment almost solely on Circuit grounds. He found it "a disagreeable surprise," and went on to say that it "accomplished nothing except to reward a Louisiana Commissioner, a personal and secondary consideration. I hope the nomination will fail of confirmation."¹⁸ It is fortunate that Harlan did not know of this letter, for in the 1880s he was to send his son James to study in Fuller's office; they had become friends while Harlan was "on circuit." Fuller went on to become Chief Justice in 1888, and the men and their families became intimate--an association which lasted many years.

But the most serious attacks came from the Eastern Republican Stalwarts, joined by such midwesterners as Senator "Zach" Chandler of Michigan. To a large extent these men, as noted above, were merely trying to deal Hayes

a defeat: Harlan was incidental, and anyone else appointed would have run the same gauntlet. Even here there were variations in motive, however. The Chairman of the Senate Judiciary Committee, George F. Edmunds of Vermont, was a man of rock-like integrity and stubbornness.¹⁹ He distrusted Harlan's Republicanism and, apparently, opposed him for no other reason. He set about to collect whatever information he could that was critical, writing off to acquaintances in Kentucky such as Lincoln's Attorney General, James Speed. Speed was forced to acknowledge Harlan's sins--his opposition to the Civil War Amendments and the Civil Rights Bill, his support of McClellan for President in 1864, and his relatively recent conversion to Republicanism. But he concluded with a strong endorsement of his old friend:²⁰

It is due to Gen'l Harlan to say that eight or ten years ago, he sloughed his old pro-slavery skin and has since been an earnest open and able advocate of what he had thought wrong or inexpedient. This I know from intimate intercourse with him since his removal to Louisville.

From the beginning of our civil troubles till General Harlan became anti-slavery the idea that had led his course was the integrity of the country. For that he was ready to sacrifice everything.

But if Edmunds assumed prominence due to his titular position as Chairman of the Judiciary Committee, his opposition was more or less rational and not self-interested. This was not as true of the real focus of Harlan's opposition, Senator Roscoe Conkling.²¹ The New York machine leader and old-time spoilsman, together with Blaine, as Justice Miller hyperbolically said, "would prefer to take the chances of what would come from a democratic administration after the next election, to yielding any of their ancient rights of controlling public patronage and submit to Evarts, Schurz & Co. They profess to dislike the policy. They really want the offices."²²

Regardless of the reasons for the trouble, it was serious enough to worry Harlan and his supporters. Various of these went or were sent to Washington to help; his young partner, "Gus"

Willson, spent the entire six weeks there. He later claimed that he had been of use "during the several months Senator Edmunds held up the nomination," apparently partly in countering the hostile moves of Henry V. Boynton.²³ Eli Murray also went to Washington at Harlan's request. As Harlan explained to President Hayes,²⁴

I have information from Washington which leads me to believe that there is a purpose with some to postpone all consideration of my nomination until the regular session in December. Underlying this purpose is the desire to defeat my nomination not because my Republicanism is doubted but because I was a member of the Louisiana Commission. In order to cover this plan the air is being filled with charges against me, some of which cast doubt upon my fidelity to the Republican party, and some imputing to the Commission improper practices at New Orleans.

I have requested my friend Gen. Murray to proceed to Washington that he may, if it shall seem necessary, take such steps as he may deem proper for the protection of my good name against those who would assail it.

The Kentucky Democrats supported Harlan almost to a man. This was especially true of Senator James B. Beck who, as Harlan reminded him, had participated in Preston H. Leslie's campaign for the governorship against Harlan in 1871.²⁵ House members like John G. Carlisle also helped in lending influence, although of course they had no vote. So did John's old friend Tom Crittenden, now a Democratic Congressman from Missouri.

Crittenden provided both advice and help. Remarking that he had just talked with Senator Voorhees,²⁶ Crittenden admitted that "there is a fight against you," but went on, "you can't be beat. Keep quiet and be easy... I have reason to believe you will get out of the Committee all right." A few days later the Missourian reported having talked to the new Senator from Ohio, Stanley Matthews.²⁷ Since Matthews was a strong Hayes man there was no doubt how his vote would go. But Voorhees thought that Senator Maxey would support Harlan as well.²⁸ Tom Crittenden also told his brother to "tell Harlan to keep quiet," judging that he would be

appointed unless he does "some more unworthy thing in a few days" than he has ever done before.²⁹

Harlan defended himself as best he could, not in person, since he was not called to testify, but by letter. Beck presumably made the best use possible of the letter Harlan supplied him late in October, in which the nominee summarized his political record, claiming convincingly that he was really a Republican and had fundamentally changed his opinions from the time when he supported McClellan and opposed the Civil War amendments. As he pointed out, there was really no organized Republican party in Kentucky until after 1867, and he had been the most prominent leader of the party since that time.³⁰

Harlan also defended his record as a member of the Louisiana Commission. Stalwarts had, of course, opposed the Commission itself and Hayes' use of its report to justify the withdrawal of troops from the beleaguered state; but to add to this there were charges--apparently stimulated in part by Henry Boynton--that the Commissioners had used bribery or were at least aware of its use in persuading Republican legislators to desert to the other side. While Harlan utterly denied that he or any other of the Commissioners had offered bribes, he was silent as to the rest of the charge. But since the charge was itself minor even if true--Boynton wrote no more to Bristow than that "Harlan knew that forty thousand dollars was raised by the Nicholls men to set the Nicholls government on its feet"³¹--he undoubtedly did not wish to dignify it by replying.

Harlan defended his resignation from the army in 1863 against the implication that it occurred because of his opposition to Lincoln's Emancipation Proclamation. The only possible defense was his own words written at the time; and while they were probably true, there was no further way to prove it.

Of course there was no way that Harlan could counter the opposition based on geographical location of circuits, but that was not in itself very serious anyway.

Finally there were the usual criticisms, in addition, made against many judicial appointees, that they are not good lawyers, have no judicial experience, and do not have a "judicial temperament." Thus one writer who had lived

in Kentucky from 1865 to 1867 wrote to Iowa Senator S. J. Kirkwood:³²

Harlan... is not a jurist and never was accredited with being. Is not in full sympathy with the Republican party and never was. Never had any influence in his own state that amounted to anything... He is in fact a milk and water politician[,] a political demagogue who all his life has been after office, but his fitness as a judge never entered the minds of his Kentucky friends...

Another critic said much the same:³³

Harlan is deficient in legal and professional education, such as ought to be had by any one on the Supreme Bench. As for general scholarship or literary attainments, he has none. I defy any one to prove from any oral, or written, or printed utterance, he ever made that a literature, ancient or modern, ever existed...

But Harlan also had much active support, his old pre-war partner W. F. Bullock, now a Democrat, contradicted the above assessments of Harlan's legal abilities, calling him "justly

Named after Chief Justice John Marshall, Justice John Harlan was raised to defend both slavery and the Union. He did not join the Republican cause until after the Civil War when he came to realize the desirability of the 13th and 14th Amendments.



distinguished for his high legal attainments, his active and discriminating mind, his studious habits, and his high sense of Justice and honor."³⁴ And the judges of the Kentucky Court of Appeals (mostly Democrats) said that Harlan's personal character was "above reproach," and that "he is an able, enlightened and learned lawyer, and one of the most laborious and painstaking members of his profession."³⁵

Lewis N. Dembitz--Louis D. Brandeis' father-in-law--agreed. Harlan, he said, was one of the two leaders of the Kentucky bar. "He has a fine judicial temper--he shows it by the fairness and moderation of his course as an advocate."³⁶

An Indiana lawyer, doubtless swallowing his disappointment that his circuit would lose its representation on the Court, nevertheless told the President that Harlan's selection "would give more general and uniform satisfaction to the Republicans of our State than that of any other man in the South."³⁷

The remarks in such letters--which could be multiplied--are doubtless overblown, yet just as certainly they contain an element of sincerity. John Harlan had a gift for friendship, a gift for advocacy, and he lived in a small, tightly knit legal community in which no one's defects could be easily hidden. Over a long period in politics he had inevitably made enemies, as well. But what seems remarkable is that so many of his political opponents seem to have respected him as a man, as a lawyer, and as a politician.

Over a six-week period the opposition gradually dwindled. By November 19 Senator Beck was able to assure the impatient Harlan "that you are to be reported favorably & I [do not] doubt soon will be confirmed."³⁸ And on November 26, Texas Democratic Senator Joseph E. McDonald announced that Harlan had been favorably reported--apparently without a recorded committee vote.³⁹ A motion was placed before the Senate, in executive session November 29, that Harlan's nomination be confirmed (along with sixteen other Hayes nominations).⁴⁰ Conkling, still fighting the Stalwart battle against Hayes, moved that the resolution of confirmation be reconsidered--a motion which happily failed. The final confirmation was apparently by voice vote and included all seventeen appointees, and probably occurred on Monday, December 3.⁴¹ The previous Friday Beck tri-

umphantly wrote Harlan that his appointment was finally assured.⁴²

...Voorhees and I were greatly delighted and went off half cocked. Maxey says [to] say 'unanimously' because I want him to know I was for him, & I was in a humor to oblige everybody.... The motion to reconsider, if it does not prevail falls & the confirmation stands & on Monday after 12 P.M. the President will be advised & send the Comm[ission].... It is all right you can't be beaten. I have seen both sides.... I think I can get all our side [the Democrats] to stand by you...

Many years later Mallie Harlan recollected the day (she apparently got her dates mixed, but there is no reason to doubt the essential accuracy of her tale).⁴³

After lunch--as he was, naturally, somewhat

restless because of the way in which his nomination was hanging fire in the Senate--his three boys urged him to join them in an impromptu game of foot-ball which took place upon a common in the outskirts of the city. With great glee they afterwards described the way in which their father had played "full-back" on their side, and how everyone had "stood from under" when he advanced, with great deliberation and dignity, to kick away the ball whenever it threatened their goal.

When my four "boys" (for my husband was always a boy along with his three sons) returned, late that afternoon, to our Broadway home--tired and happy and hungry for their Thanksgiving Dinner--a telegram was waiting for him, informing him that on that very morning "the Senate had unanimously confirmed his nomination as an Associate Justice of the Supreme Court of the United States."

Endnotes

¹ Army pay was suspended for the first quarter of the new fiscal year in order to avoid an earlier (hot Summer) session. See Williams, *The Life of Rutherford Birchard Hayes*, II, p. 81 (1914). On March 18, Justice Miller wrote to a friend that the vacancy would not be filled "until the Senate is in session again." (Miller to William Pitt Ballinger, cited in Charles Fairman, *Mr. Justice Miller and the Supreme Court* (Cambridge: Harvard University Press) p. 352 (1939). But Miller at that time had no idea that it would be October before the Senate reconvened.

² Fairman, *op. cit.* Miller consistently misspelled the name "Woods."

³ William B. Woods (1824-1887) had been an Ohio legislator, who settled in Alabama after the war and, as a Republican, was appointed U.S. Circuit Court judge in 1869; see DAB, XX, 505-506. Henry Clay Caldwell (1832-1915), born in Virginia, served in the Iowa legislature but was in 1864 appointed by Lincoln as U.S. District Court judge for Arkansas, serving in that capacity until 1890, when he was made a Circuit Court judge until his retirement in 1903; see DAB, III, 408.

⁴ In John P. Frank, "The Appointment of Supreme Court Justices: Prestige, Principles and Politics," *1941 Wisconsin Law Review* 172, at 205.

⁵ Miller to Ballinger, May 6, 1877. Fairman, *Miller*.

op. cit., p. 358.

⁶ Thomas Drummond (1809-1890) was a U.S. District Court judge in Illinois from 1850 to 1869; Grant promoted him to the Circuit Court in 1869, a post he occupied until 1884. NCAB, XX, 111-112.

⁷ See note 5, p. 357.

⁸ The politics of the appointment--especially as regards Harlan--are surveyed ably by Ellwood W. Lewis, "Document: The Appointment of Mr. Justice Harlan," 29 *Indiana Law Journal* 46 (1953).

⁹ MacVeagh to Hayes, August 21, 1877. Hayes Library.

¹⁰ Charles W. Fairbanks to an unknown recipient merely called "My dear Uncle," September 25, 1877. Hayes Library.

¹¹ Apparently John D. Howland, who is otherwise unknown.

¹² Hayes to Smith, September 29, 1877. Hayes Library.

¹³ Smith to Hayes, October 3, 1877. Hayes Library.

¹⁴ Smith to Hayes, October 10, 1877. Hayes Library.

¹⁵ C.B. Lawrence to Hayes, August 31, 1877. Hayes Library.

¹⁶ Miller to Ballinger, November 21, 1877. Quoted in Fairman, *Miller*, *op. cit.*, p. 369.

17. Hayes called him "an eager candidate." Williams, *Hayes Diary*, *op. cit.*, p. 471. Timothy O. Howe (1816-1883), Justice of Wisconsin Supreme Court, Republican Senator 1861-1879, Postmaster General in Arthur's Cabinet 1881-1883. DAB, IX, 297-298.

18. Fuller to Hannibal Hamlin, October 29, 1877. Fuller Papers, Chicago Historical Society. Hamlin was a Senator from Maine, and had been Vice-President during Lincoln's first term.

19. George F. Edmunds (1828-1919), served in the Senate from 1866 to 1891. He was regarded as "the ablest constitutional lawyer in Congress," but was also noted for his "lack of amiability and contentious nature." DAB, VI, 24-27. Zachariah Chandler (1813-1879), Republican boss of Michigan, Senator 1857-1875, Secretary of the Interior under Grant 1875-1877. DAB, III, 618.

20. Speed to Edmunds, November 10, 1877. Quoted in Frank, *op. cit.*, pp. 208-209.

21. Roscoe Conkling (1829-1888), a competitor for the Presidential nomination in 1876, was Senator from New York from 1867 to 1881 and one of the most powerful figures in that body. See David M. Jordan, *Roscoe Conkling of New York* (Ithaca: Cornell University Press, 1971).

22. Miller to Ballinger, October 28, 1877. Quoted in Fairman, *Miller*, *op. cit.*, p. 366.

23. Willson to Richard D. Harlan, April 11, 1930. Harlan Papers, LC.

24. Harlan to Hayes, October 31, 1877. Hayes Library.

25. Harlan to Beck, October 31, 1877. Filson Club.

26. Senator Daniel W. Voorhees (1827-1897), influential Democratic Senator from Indiana from 1877 to 1897. DAB, XIX, 291. John G. Carlisle (1835-1910) served in the House from Kentucky from 1877 to 1890, and was Speaker for three terms; regarded as a "great" Speaker. Senator 1890-1893, Secretary of the Treasury under Cleveland 1893-1897. DAB, III, 494-496.

27. Stanley Matthews (1824-1889), Republican Senator from Ohio 1877-1879, he was nominated for the Supreme Court by Hayes in 1881 but failed of confirmation; nominated again by Garfield, he served until his death in 1889. DAB, XII, 418-420.

28. Senator Samuel B. Maxey (1825-1895). Confederate General and Senator from Texas 1875-1887. DAB, XII, 435-436.

29. Crittenden to Harlan, November 21, and 27, 1877; Crittenden to his brother (otherwise unidentified), November 10, 1877. Harlan Papers, UL.

30. Harlan to Beck, *op. cit.*

31. Boynton to Bristow, December 10, 1877. Hayes Library. One W. H. Painter used Boynton's information for a broadside attack on Harlan's character. He wrote: "I think a man who is by his own confession a particeps criminis to the late debauchery & revolution at New Orleans will be a dishonor to the bench." Painter to Edmunds, October 4, 1877. Quoted in Lewis, "Document," *op. cit.*, n. 79.

32. John Ledwick to Kirkwood, November 17, 1877. Quoted in Lewis, *ibid.*, p. 70. Samuel J. Kirkwood (1813-1894), was Governor of Iowa and Republican Senator 1877-1881; Secretary of the Interior under Garfield. DAB, X, 436-437.

33. William Brown to Edmunds, November 19, 1877. Quoted in Lewis, *ibid.*, n. 88.

34. W. F. Bullock to Hayes, September 10, 1877. Hayes Library.

35. Signed by Chief Judge W. Lindsay, Will S. Pryor, J.M. Elliott and M.H. Cofer, September 7, 1877. Hayes Library.

36. Lewis N. Dembitz to Hayes, September 26, 1877. Hayes Library.

37. E.B. Martindale of Indianapolis to Hayes, September 25, 1877. Hayes Library.

38. Beck to Harlan, probably November 19, 1877. Harlan Papers, UL.

39. 21 *Sen. J.* 1877-1879 139 (1901). All of the dates given in the text after November 19 are uncertain, since there exists no official record of when the Senate did what.

40. *Ibid.*, 143.

41. This is the date that seems to be indicated in Beck's letter, see below, n.42.

42. Beck to Harlan, November 30, 1877. Harlan Papers, UL.

43. Malvina Harlan, *Some Memories...*, *op. cit.*, p. 79.

Precedent as Mythology: The Case of *Marbury v. Madison*

Robert L. Clinton

Introduction

Long ago Plato warned that great truths may embody noble lies. One of the acknowledged great truths in the illustrious literature of American constitutional law holds that the doctrine of judicial review, presently conceived as the power of courts to invalidate laws, is firmly grounded in Chief Justice John Marshall's opinion for the United States Supreme Court in the case of *Marbury v. Madison*.¹ Not so long ago that case was but an obscure precedent for jurisdictional rulings and those involving the issuance of writs of mandamus.² The Supreme Court did not cite *Marbury* in support of judicial review until 1887; and in that instance the Court failed to make it plain that it knew exactly what it had cited.³

Yet in the second decade of the present century, Albert J. Beveridge, Marshall's most distinguished biographer, can make the following statement:

*Marbury, for perfectly calculated audacity, has few parallels in judicial history. In order to assert that in the Judiciary rested the exclusive power to declare any statute unconstitutional, and to announce that the Supreme Court was the ultimate arbiter as to what is and what is not law under the Constitution, Marshall determined to annul Section 13 of the Ellsworth Judiciary Act of 1789... Marshall resolved to go still further. He would announce from the Supreme Bench rules of procedure which the Executive branch of the Government must observe.*⁴

Echoing Beveridge some four decades later, Alexander M. Bickel says that "If any social process can be said to have been 'done' at a given time and by a given act, it is Marshall's achievement. The time was 1803; the act was the decision in the case of *Marbury v. Madison*."⁵ Clearly, if the aforequoted statements are correct, *Marbury* symbolizes far more than mere "judicial review." It symbolizes what many modern commentators have come to call "judicial activism" as well.

That prevailing orthodoxy regards *Marbury* to be the prime exemplar of aggressive judicial behavior is quite apparent not only from perusal of texts in the field of constitutional law, but also from those in the field of American government where many would-be lawyers are first exposed to the case. One recent text declares that "When the courts make decisions so as to set policy, we have what is known as an 'activist' court. Yet, in fact, a majority of the United States Supreme Court has been nothing else since Chief Justice Marshall, in *Marbury v. Madison* (1803), proclaimed the Court's right to be the final interpreter of the Constitution."⁶ Another claims that "Marshall went out of his way to declare Section 13 unconstitutional."⁷ Yet another, alluding to the legendary Marshall-Jefferson conflict, says that "John Marshall's unwillingness to do battle with Jefferson was, in fact, the reason he contrived a way out by using judicial review in *Marbury v. Madison*."⁸

Several generations of political scientists and lawyers have been nurtured by such views, and another is being nourished by them now. They have been significant in the legitimation of American ideas respecting the proper extent

of judicial power in the twentieth century. Both proponents and opponents of assertive federal courts have made extensive use of the decision's allegedly innovative character. Proponents have urged the "statesmanship" of the great Chief Justice in his disposition of the case. Opponents have pointed out that statesmanship is a "political" function which judges have no business performing.

Most authorities appear to concede the idea so eloquently embodied in Robert G. McCloskey's image of the case: "...a masterpiece of indirection, a brilliant example of Marshall's capacity to sidestep danger while seeming to court it, to advance in one direction while his opponents are looking in another."⁹ The consensus seems to be that in *Marbury*, the Court went out of its way to invalidate a statutory provision, in order to avoid a direct conflict with the President, and assert an authority over Congress which could hardly be challenged in the circumstances of the case, but which could nonetheless be utilized as precedent for subsequent assertions of that same authority. According to this theory, Marshall's handling of the case was motivated primarily by political, not legal, concerns; and everybody's favorite precedent is thereby afflicted with a seminal taint.

The main thesis of this essay is that the foregoing understanding of *Marbury v. Madison* is essentially mythological. Following the recent suggestion of Professors Dionisopoulos and Peterson that judicial review was already an accepted part of the American institutional structure well before 1803,¹⁰ and perceiving no reason why Marshall should have found a resort to subterfuge necessary in order to "establish" an already-established institution in the decision of *Marbury's* case, I shall re-examine those portions of the famous opinion which appear to have generated the current interpretation. If the allegedly political aspects of the decision may be straightforwardly accounted for by reference to legal factors alone, then the modern conception of judicial review in constitutional cases, a conception which emphasizes political aspects and ignores most of the legal ones, will have been discovered to embody a fiction, however noble, in its primary expression.

Before proceeding further, it is perhaps advisable to add a few words of clarification.

First, I shall sometimes refer to the dominant view of *Marbury v. Madison* as an "activist critique." This should not be taken to imply that those who hold the view are thereby proponents of "judicial policy-making." The phrase applies rather to opinions about how the Court approached the issues, and what was decided, in *Marbury* itself. Indeed, among the more striking features of the modern debate on judicial review is the apparent agreement of *both* proponents *and* opponents of judicial policy-making on what I am calling the "activist critique" of *Marbury*. Second, my criticism of the various notions which comprise the "activist critique" should not be read in support of a view that such notions are implausible. The *Marbury* situation was an exceedingly complex one, characterized by an abundance of both legal and non-legal factors. Reasonable persons, when attempting to explain the decision, surely may honestly differ on the relative weights to be assigned to influences in either category.

On the other hand, just as there are good reasons for emphasizing "political" factors in the effort to explain, say, presidential elections (though "legal" aspects are often significant); there are likewise compelling reasons for placing primary emphasis upon the existing constraints of constitutional, statute, and common law, when one attempts to understand a legal dispute from a historical standpoint. This is all the more true when we attempt to extract from the resolution of such a dispute principles of judicial decision-making for use in the justification of subsequent decisions. In the spirit of Professor Farber's call for a return to "pedestrian" legal scholarship,¹¹ I shall offer, in the pages to follow, an exegesis of *Marbury v. Madison* which suggests strongly the plausibility of an alternative to the activist rendition of *Marbury v. Madison*.

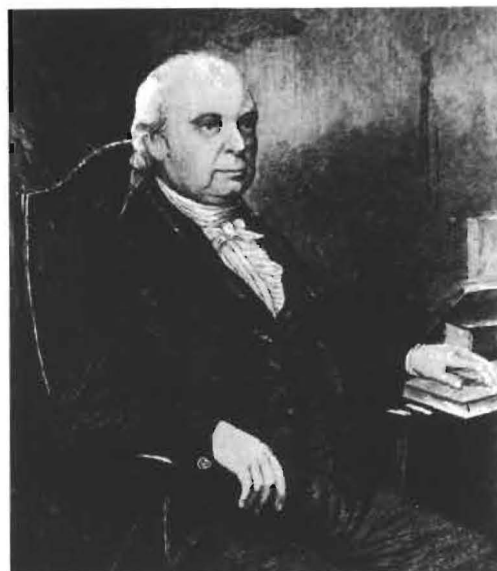
The Case

The facts in *Marbury's* case are well known. A lame duck Federalist Congress had, on February 13 and February 27, 1801, passed Acts, one of the effects of which was to create some new positions within the federal judiciary.¹² Four of the new appointees under the Act of February 27 failed to receive their commissions due to non-delivery, and on December 17, 1801,

sued for a writ of mandamus compelling delivery in an original action before the United States Supreme Court.¹³ Before the case came to trial, Congress, now dominated by Republican majorities, passed, on March 3, 1802, an Act repealing the Act of February 13.¹⁴ Shortly thereafter, on April 23, Congress passed another measure, the effect of which was to eliminate the June and December terms of the Supreme Court.¹⁵ The latter measure was clearly an attempt by Congress to prevent the Court from ruling upon the constitutionality of the Repeal Act before it took effect, and one of its incidental results was to postpone the Court's hearing of Marbury's case until its February term in 1803.¹⁶

Prior to initiation of the suit, the four plaintiffs--William Marbury, Dennis Ramsay, Robert Townsend Hooe and William Harper--had applied to both the Secretary of State and the Secretary of the Senate for information regarding the commissions.¹⁷ The Senate had, on January 31, 1803, refused to allow its secretary to produce copies from the journal reflecting its "advice and consent to the appointments."¹⁸ According to the testimony of Jacob Wagner, a subpoenaed witness from the State Department, Marbury and Ramsay had appeared and were referred to him by the Secretary of State. Wagner told the applicants that "two of the commissions had been signed, but the other had not."¹⁹ Wagner then stated that this fact had been communicated to him by others, but declined to reveal the identity of the informant(s).²⁰ A second employee of the State Department, Daniel Brent, testified that he was "almost certain" of the completion of Marbury's and Hooe's commissions, but not of Ramsay's; and that he (Brent) had been the person who "made out the list of names by which the clerk who filled up the commissions was guided."²¹ Brent did not believe that any of the commissions had been recorded; but Wagner believed that some of them had.²² Apparently neither Brent nor Wagner had been granted access to the relevant ledgers for confirmation of these beliefs.

The only other administration witness called was Attorney General Levi Lincoln, who had been acting Secretary of State when Marbury and Ramsay first made their application to the Department.²³ At first, Lincoln declined to answer questions because he "did not think him-



Attorney General Levi Lincoln was a witness for the Administration. He had been Acting Secretary of State at the end of John Adams' Presidency.

self bound to disclose his official transactions while acting as [S]ecretary of [S]tate"; and "ought not to be compelled to answer any thing which might tend to criminate himself."²⁴ Later, apparently in response to an argument of Charles Lee, counsel for the plaintiffs, Lincoln agreed to answer several questions, though stating that he would not answer the crucial question as to "what had been done with the commissions."²⁵ Lee's argument concerned the duties of the Secretary of State under the two then-existing acts of Congress dealing with that subject.²⁶

The first of these Acts had been passed on July 27, 1789, and had created the Department of Foreign Affairs, with the Secretary as its head.²⁷ Under this act, the Secretary was to "perform and execute such duties as shall from time to time be enjoined on, or entrusted to him by the President..."²⁸ The scope of the act is explicitly confined to matters "respecting foreign affairs,"²⁹ as the title of the newly created agency suggests. Lee conceded that, in regard to "the powers given and the duties imposed by this act, no mandamus will lie," since the Secretary is here "reponsible only to the President."³⁰

The second act was passed on September 15, 1789; and its purpose was to provide for the safekeeping of official documents of the United States.³¹ This act changed the name of the

Department of Foreign Affairs to the Department of State, and charged the Secretary with the duty to publish, print, preserve, and record all bills, orders, resolutions and notes of Congress which have been signed by the President; and to "make out," "record," and "affix the seal of the United States to all civil commissions, after they have been signed by the President."³² With respect to judicial process, the act also provided that all copies of official documents, including commissions, "shall be as good evidence as the originals."³³ According to Lee, the duties of the Secretary embodied in this act, unlike those in the earlier act, must be performed independently of the President, and may therefore be compelled by mandamus in the case of nonperformance, "in the same manner as other persons holding offices under the authority of the United States."³⁴

The last-quoted statement is a clear reference to Section 13 of the Judiciary Act of 1789, and indicates that Marbury and the other plaintiffs brought their complaint directly to the Supreme Court in reliance on the Act.³⁵ Later, in oral argument, Lee quoted the relevant sentence of Section 13: "The supreme court shall also have appellate jurisdiction from the circuit court, and courts of the several states, in the cases hereinafter specially provided for; and shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction; and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or *persons holding office*, under the authority of the United States."³⁶

That Lee interpreted the last-quoted phrase concerning mandamus as pertaining to the Court's *original* jurisdiction is clear from his next remark: "Congress is not restrained from conferring original jurisdiction in other cases than those mentioned in the constitution."³⁷ This remark is accompanied by a citation of *United States v. Ravara*, a 1793 decision of the Circuit Court for Pennsylvania involving prosecution of a German Consul for extortion.³⁸ The Consul's lawyers had argued against the Circuit Court's jurisdiction, relying on the provision of Article III which gives to the Supreme Court original jurisdiction in cases affecting Consuls.³⁹ Justices Wilson and Peters (Iredell dissenting) rejected this argument, since Con-

gress, in Section 13 of the Judiciary Act, had specified the Supreme Court's jurisdiction in cases involving Consuls to be original, but not exclusive.⁴⁰ It thus appears that Mr. Lee misinterpreted *Ravara* on the point in question, since the latter case involved no statutory enlargement of the Court's original jurisdiction; but only a clarification of it. Lee then moves on to citation of several cases wherein the Court earlier had entertained jurisdiction on mandamus or prohibition. In each case the requested writ was denied.⁴¹

Two additional witnesses submitted affidavits which supported the claims of the plaintiffs. The first was James Marshall, brother of the Chief Justice, who apparently had acted as a courier for the State Department in the delivery of several of the commissions. Marshall stated that he had been unable to deliver all the commissions, and that two of those left undelivered were those of Hooe and Harper.⁴² Hazen Kimball, who had been a clerk in the Department on March 3, 1801, the day before Jefferson's inauguration, stated that on that day there were, in the office, "commissions made out and signed by the president, appointing William Marbury a justice of peace for the county of Washington; and Robert T. Hooe a justice of the peace for the county of Alexandria, in the District of Columbia."⁴³

Several conclusions may be drawn from this brief survey of the preliminaries. First, the existence of the commissions of Marbury, Hooe and Harper was reliably established; though not that of Ramsay. Second, none of the evidence was challenged by any of the witnesses examined; not even those presumably hostile to the cause. Third, no significant response to the Court's original order to "show cause why a mandamus should not issue"⁴⁴ was entered either by Madison himself or by any of his subordinates. Finally, the issue of the constitutionality of Section 13 was raised, albeit obliquely, in oral argument.

Mr. Lee's argument, devoted to persuading the Court that it was entitled to issue a mandamus to the Secretary of State, stressed the equitable nature of the proceeding, and its basis in English law. According to Blackstone, a writ of mandamus is

a command issuing in the king's name from



Charles Lee, counsel for the plaintiffs, argued that the Court was entitled to issue a mandamus to the Secretary of State because such an action was equitable and had basis in English law.

*the court of king's bench, and directed to any person, corporation or inferior court, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the court has previously determined, or at least supposed, to be consonant to right and justice. It is a writ of a most extensively remedial nature, and issues in all cases where the party has a right to have any thing done, and has no other specific means of compelling its performance."*⁴⁵

According to Lee, since the Secretary in the *Marbury* situation is acting merely as recorder of laws, deeds, letters patent and commissions he is controlled only by the aforementioned laws imposing such duties, and is subject to indictment for refusal to perform them.⁴⁶ "A prosecution of this kind might be the means of punishing the officer, but a specific civil remedy to the injured party can only be obtained by a

writ of mandamus."⁴⁷ The argument concludes by noting the threat posed by the arbitrary acts of the administration to an independent judiciary,⁴⁸ and presents a number of English cases designed to show that mandamus is appropriate where there is "no other *adequate, specific, legal* remedy";⁴⁹ thereby rendering the issuance of the writ consistent with the "principles and usages of law," as required by Section 13.⁵⁰

Chief Justice Marshall's opinion for the Court was rendered on February 24, 1803. It may generally be subdivided into two sections. The first treats the related questions of *Marbury's* alleged right to receive his commission and the appropriate legal remedy to enforce that right, if such exists.⁵¹ The Court's rulings on these points were straightforward: (1) that *Marbury* had been duly appointed, that delivery of the commission was merely incidental to the appointment, and that the Secretary of State had not therefore the privilege of later withholding it;⁵² (2) that it is the duty of a government of laws to supply remedies for violated rights;⁵³ and (3) that the writ of mandamus is an appropriate legal remedy for resolution of a dilemma like *Marbury's*.⁵⁴ This section of the opinion thus follows closely the lines of argument laid down by Mr. Lee in his presentation of *Marbury's* case.

Not so with the second section of the opinion. This section deals with the power of the Court to issue the requested writ, and boils down to the question whether it may take jurisdiction of the case for such a purpose.⁵⁵ The Court's answer to the latter question is negative, upon the ground that the act on which *Marbury* relied is one which unwarrantably enlarges the original jurisdiction of the Supreme Court, a jurisdiction clearly spelled out in Article III of the federal Constitution.⁵⁶

The relevant phrase extends the Court's original jurisdiction to cases affecting "Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party..." Although this provision was clearly designed to protect the dignity of American states and foreign nations when haled into court,⁵⁷ Lee had premised *Marbury's* original action in the Supreme Court on the idea that the Secretary of State could be compelled by mandamus "in the same manner as other persons holding offices under the authority of the United States."⁵⁸

The Court thereby rejects Lee's assertion that Congress may confer original jurisdiction in cases other than those mentioned in the Constitution.⁵⁹ In short, *Marbury* is entitled to his Commission, has applied for an appropriate equitable remedy in the absence of an adequate legal one, but has applied for it in the wrong court.

The dominant modern view of *Marbury v. Madison* appears to rest upon several contentions regarding alternative ways in which the Court might have handled the case. I shall proceed shortly to analysis of the *Marbury* opinion in the light of these contentions. Most of them were advanced in an article, now regarded a classic, penned some years ago by William Van Alstyne.⁶⁰ Lief Carter has claimed that Van Alstyne's dissection of the opinion reveals on Marshall's part "a lack of legal integrity bordering on fraud."⁶¹ Many others have echoed like sentiments.

First, it has been suggested that since the Court ultimately declined to issue the requested writ of mandamus anyway it might as well have done so without opinion; or at least without having expressed an opinion regarding *Marbury's* "rights," or upon the theoretical power of the federal courts to enforce such rights via issuance of mandatory injunctions to executive officials.⁶² After all, such an approach would have circumvented Jefferson's charge that the Court had traveled beyond its case "to prescribe what the law would be in a moot case not before the court."⁶³ Likewise, summary dismissal would have comported nicely with such modern maxims of judicial restraint as nonanticipation of constitutional questions, and decision of constitutional cases on other than constitutional grounds whenever possible.⁶⁴

Closely related to the foregoing idea is the contention that the Court could have construed Section 13 narrowly, thereby avoiding the necessity of declaring the law unconstitutional. The Court might have assumed that Congress could not have meant to enlarge the original jurisdiction, and thereby resolved the matter on statutory grounds.⁶⁵ Alternatively, the Court might have ruled that the culprit mandamus provision could apply either in original or appellate jurisdiction, so long as the assumption of jurisdiction was justified on other grounds.⁶⁶ By this strategy, the Court would have avoided

imputation either of bad motives or of poor draftsmanship to the national legislature, whose decisions are entitled to the utmost respect.

It has also been said that since Congress is empowered to make exception to the Court's appellate jurisdiction, the distribution of jurisdiction in Article III might have been merely provisional.⁶⁷ In connection with this proposition, it has been asserted that Marshall himself later rejected the implication of *Marbury* on this point, and therewith threw out the baby with the bath water.⁶⁸

Finally, the famous argument in support of judicial review found in the closing paragraphs of Marshall's opinion has been criticized for an alleged assertion of judicial supremacy over Congress and the President in constitutional matters.⁶⁹ In the words of Judge Learned Hand: "It will not bear scrutiny."⁷⁰ Suspecting that the modern critique may bear it no better, I shall now examine relevant portions of the *Marbury* opinion in the light of that critique, hoping at very least to provide a more balanced view of the case.

Summary Dismissal

Under normal circumstances, where the law is considered settled, it is appropriate for the Supreme Court to dismiss a claim for want of jurisdiction without expressing opinion on the merits of the dispute. In appellate jurisdiction this result may be accomplished via denial of the writ of certiorari, a discretionary authority granted to the Court by statute in 1891.⁷¹ This procedure was, of course, unavailable to the Court in *Marbury's* day, and remains inapplicable when the Court sits as a court of original jurisdiction. It follows that, at least prior to 1891, the Court's discretionary authority was greater in original than in appellate jurisdiction. In the former instance, the Court might, with greater justification than in the latter, regard itself bound to offer explanation of its refusal to employ its jurisdiction in a particular way. When the court is invited to exercise its original jurisdiction, it is essentially being asked to perform the functions of a trial court, the most important of which consists in the determination of the rights and responsibilities of parties who have not had their claims previously adjudicated.

These considerations apply with even greater force when the Court is asked to invoke its equity powers while sitting as a court of original jurisdiction. Since the issuance of a writ of mandamus is an equitable remedy, such was the situation of *Marbury*, and the Court undoubtedly recognized this in declaring its threefold obligation: (1) "solely, to decide on the rights of individuals";⁷² (2) to consider whether a specific duty has been "assigned by law";⁷³ and (3) to determine whether "individual rights depend upon the performance of that duty."⁷⁴

To be sure, the case had implications extending far beyond Marbury's personal dilemma. As we have seen, the federal courts were under siege throughout the entire period in which Marbury's case was before the Court.⁷⁵ The Judiciary Act of 1801 had been repealed,⁷⁶ a federal judge had been impeached⁷⁷ and the 1802 term of the Supreme Court had been suspended.⁷⁸

With the judiciary involved in this imbroglio, it is hardly surprising that the Court would have been chagrined at the refusal of the Secretary of State to appear in order to "show cause why a mandamus should not issue."⁷⁹ The separation doctrine of the Federal Convention surely enables the Court to defend itself against brazen attempts by coordinate branches of government to impair the capacity of the judiciary to perform its functions properly. Arguably, this was the Convention's primary rationale for judicial review in the first place, reflected in its narrowing of the power to cases of a "judiciary nature," of which *Marbury* is an obvious example.⁸⁰

The *Marbury* situation is, in fact, somewhat analogous to that which led to the Court's unanimous holding in *United States v. Nixon*, that documents in the custody of executive officials, including the President, are subject to judicial process whenever such is essential to appropriate adjudication of the rights and duties of parties to a case pending in federal court, absent a clear showing of the necessity of exemption from such process.⁸¹ Notwithstanding the obvious factual and legal differences between the two cases—for example, that in the latter case the President was directly involved as an unindicted co-conspirator in a criminal prosecution—it remains to be noted that in *Marbury*, as in *Nixon*, important documents sorely needed by the courts had been withheld without

even the barest showing of necessity for such withholding. Furthermore, in *Marbury*, the executive refusal had occurred in the face of an act of Congress which *required* the production of the requested information. At any rate, it is against this threatening background that the Court's declaration of the law respecting the question whether, and in what circumstances, a right to a commission stemming from a judicial appointment "has vested or not" must be understood.⁸²

The answer to this question, according to the Court, depends upon the separability (or lack thereof) of the acts of appointment and commission. Since "the power to perform them is given in two separate and distinct sections of the constitution,"⁸³ and since one of those sections imposes without qualification a duty upon the President to "commission all the officers of the United States,"⁸⁴ some of whose appointments may be vested by Congress "in the President alone, in the courts of law, or in the heads of departments,"⁸⁵ it follows that the acts must be deemed separable, and that the commission is merely evidence of an appointment, not "itself the actual appointment."⁸⁶

Furthermore, since "the verity of the Presidential signature" demands that "the great seal

The case of *United States v. Nixon* is similar to *Marbury* in that documents needed by the courts were withheld by the Executive without demonstrating compelling reason.



is only to be affixed to an instrument which is complete,"⁸⁷ and since Congress has imposed upon the Secretary of State, independent of presidential authority, the duty to "make out," "record," and "affix the said seal to all civil commissions to officers of the United States";⁸⁸ it follows that delivery of the commission is merely incidental to the acts of appointment and commission, and that the failure of the Secretary either to produce evidence of an appointment (a commission), or to "show cause why a mandamus should not issue,"⁸⁹ constitutes a serious incursion upon the Court's power to perform adequately one of its most important functions: the determination as to when the Legislature has imposed upon a government official a particular duty to perform certain ministerial acts upon which the rights of individuals are dependent.⁹⁰ Under such conditions, "he is so far an officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others."⁹¹

In view of the attention that has been focused upon the Marshall-Jefferson conflict,⁹² and the usual reading of the foregoing portions of the *Marbury* opinion as a veiled attack upon the President, it should be noted that all the aforementioned remarks are prefatory to the Court's invocation of Blackstone, to the effect that

*injuries to the rights of property can scarcely be committed by the crown without the intervention of its officers; for whom the law, in matters of right, entertains no respect or delicacy; but furnishes various methods of detecting the errors and misconduct of those agents, by whom the king has been deceived and induced to do a temporary injustice.*⁹³

It is in this context also that the Court enunciates the distinction which is at the heart of the doctrine of political questions:

By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who

*act by his authority and in conformity with his orders. In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights....*⁹⁴

In other words, the first portion of the *Marbury* opinion is hardly a "lecture" to the Chief Executive by way of dicta.⁹⁵ Even less does it exhibit a Court's "traveling beyond the confines of the case," or reaching out to decide "issues that did not have to be decided."⁹⁶ The Secretary had exhibited behavior clearly unbecoming the dignity of his office, had failed to perform duties which had been assigned to his office by statute independently of his responsibility to the Chief Executive, and had thereby implicated the Presidency itself in an illegal effort to suppress information clearly relevant to the determination of the rights and duties of parties to a lawsuit, a determination which is the *duty* (not merely a right) of the courts to make. Summary disposition of *Marbury's* complaint would therefore have been disingenuous on the part of the Court. *Marbury* had relied upon a presumably valid statute, which had not been previously construed by the Court with respect to the point in question.⁹⁷ Had the Court chosen to deny *Marbury* his remedy without apprising him of his right (his ability to pursue the cause in another court), *Marbury's* fate would have, in effect, been determined by the retrospective non-application of a doubtful statute. Such a result is manifestly inconsistent with the fairness rightly expected of courts when engaged in the task of rendering judgment regarding the rights of individuals vis-à-vis the powers of government.

On the other hand, had the Court reached the constitutional issue without ruling upon these questions--without carefully distinguishing the acts of a subordinate official which are assumed to be the acts of the Executive itself, from the acts of such an official acting on his own--it would have rightly exposed itself to the charge of disrespect toward a coordinate agency of government. In the case that Section 13 was void and the writ could not issue, the Court would have acquiesced in an executive usurpa-

tion of judicial functions, since the outcome would have been made to appear dependent upon the mere arbitrary will of a subordinate executive official. In the alternative case, the Court would have intruded upon the prerogatives of the President, by issuing the writ in circumstances in which it was not perfectly clear whether the "failure to show cause" was properly within the executive discretion or not.

Statutory Construction

The relevant sentence of the provision to which the Court refused application in *Marbury's* case reads as follows:

*The Supreme Court shall also have appellate jurisdiction from the circuit courts and the Courts of the several states, in the cases hereinafter specially provided for; and shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed or persons holding office under the authority of the United States.*⁹⁸

One possible basis for a "narrow" interpretation of the aforementioned provision would be to hold that, since the mandamus provision is part of a sentence which commences with a statement about the appellate jurisdiction, the intent of Congress plausibly may be construed as applicable only in that jurisdiction.⁹⁹ In response, it may be said that the phrase "in the cases hereinafter specially provided for" seems not to refer to the mandamus provision at all, but suggests application to subsequent sections of the act, wherein appellate procedures are "specially" delineated. The most likely referent is, of course, Section 25, which authorizes Supreme Court review of decisions of state courts of last resort.¹⁰⁰ Additionally, the first three sentences (the remainder of Section 13) are devoted entirely to the original jurisdiction, suggesting again that the first phrase of the fourth sentence is merely a forethought, and not determinative of the second phrase.

The first three sentences of Section 13 read as follows:

*And be it further enacted, that the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction. And shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics or domestic servants, as a court of law can have or exercise consistently with the law of nations; and original, but not exclusive jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul or vice consul, shall be a party. And the trial of issues in fact in the Supreme Court, in all actions at law against citizens of the United States, shall be by jury.*¹⁰¹

The purpose of the first two sentences is clearly to distinguish those instances wherein the Court's original jurisdiction is exclusive from those wherein it is not. The third sentence merely says that when the Court sits as a trier of fact (exercises its original jurisdiction in actions at law against United States citizens), the determination of fact must be made by a jury.

Another basis for a narrow view would be to hold that the mandamus provision is intended to apply in either original or appellate jurisdiction, so long as the assumption of jurisdiction is justified on other grounds.¹⁰² In reply, one should be reminded of Marshall's tendency to read legal provisions literally, at least whenever language is relatively unambiguous. For example, Marshall read the term "contracts" in Article I, Section 10 so as to include "public" as well as "private" ones.¹⁰³ Many scholars have taken Marshall to task for this, claiming that the clause was intended to apply to "private" contracts only.¹⁰⁴ The trouble with this is that the Founders had explicitly rejected an invitation to qualify the term "contracts" with the adjective "private," leading one to the conclusion that they may have intended to make the scope of the contract clause as wide as possible.¹⁰⁵ But even were we ignorant of this history, it remains that the Founders left the word "contracts" without a qualifier, suggesting that they meant contracts generally to fall within the scope of

the provision.¹⁰⁶

Since the mandamus provision in Section 13 contains no specification whatever as to jurisdiction, a similarly literal reading demands the following conclusions: (1) that the provision applies generally to *any* "persons holding office, under the authority of the United States";¹⁰⁷ and (2) that the writ may therefore be issued in *both* appellate *and* original jurisdiction. So read, the provision is unconstitutional, and the Court is at liberty to refuse its application.

In justification of its refusal to apply Section 13, the Court (per Marshall) essayed the most famous portion of its *Marbury* opinion. Having established Marbury's right to his commission,¹⁰⁸ the propriety of the writ of mandamus as a remedial device in situations wherein no other remedy is available,¹⁰⁹ and the appropriateness of its issuance against an executive who "commits any illegal act, under color of his office, by which an individual sustains an injury,"¹¹⁰ and who cannot therefore pretend "that his office alone exempts him from being sued in the ordinary mode of proceeding,"¹¹¹ the Court turned to an examination of relevant constitutional doctrine bearing upon the question of its denial of the requested writ.

The Court first states that the instant case is one to which the judicial power of the United States applies, since this power "is expressly extended to all cases arising under the laws of the United States; and consequently, in some form, may be exercised over the present case; because the right claimed is given by a law of the United States."¹¹² This law, as we have seen, imposes upon the Secretary of State the ministerial duty to "make out," "record," and "affix" the seal of the United States to all civil commissions.¹¹³ It does not impose upon the Secretary the obligation to deliver a commission, "but it is placed in his hands for the person entitled to it; and cannot be more lawfully withheld by him, than by any other person."¹¹⁴ Marbury's claim "respects a paper, which according to law, is upon record, and to a copy of which the law gives a right, on the payment of ten cents...."¹¹⁵

This point has been overlooked in contemporary discussions of *Marbury*. The latter's notorious "right" is not that of *delivery* of the commission, but is rather the right to a mere copy from the record on demand. The right in question is therefore a *statutory* (not a constitu-

tional) one arising from the duty imposed by Congress upon the Secretary "to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the President, and the performance of which, the President cannot lawfully forbid, and therefore is never presumed to have forbidden...."¹¹⁶ In other words, the Secretary's duty is to perform a purely "ministerial" act not within executive discretion. It is within the power of a court to supply a remedy for an individual who has been harmed by the minister's failure to do his duty. It is worthwhile to note that this is the main reason why delivery of a commission cannot be considered essential to completion of an appointment. "The transmission of the commission is a practice directed by convenience, but not by law. It cannot therefore be necessary to constitute the appointment which must precede it, and which is the mere act of the President."¹¹⁷

In sum, the case falls squarely within the scope of Article III's "arising under" provision,¹¹⁸ in that: (1) the plaintiff is potentially a judicial officer of the United States; and (2) the defendant's response (or lack thereof) amounts at best to executive interference with the Court's effort to perform its own proper function, or at worst to executive usurpation of judicial authority. It is therefore a case of a "judiciary nature" in the strongest sense, as has already been suggested in an earlier section of this essay.¹¹⁹

The problem for Marbury, however, is that Section 13, the provision which supposedly authorizes the mandamus remedy in his case, when construed literally, runs afoul of Article III's distribution of federal judicial power. The second clause of the Article's second section reads as follows:

*In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and to fact, with such exceptions, and under such regulations as the Congress shall make.*¹²⁰

The "other cases before mentioned" obvi-

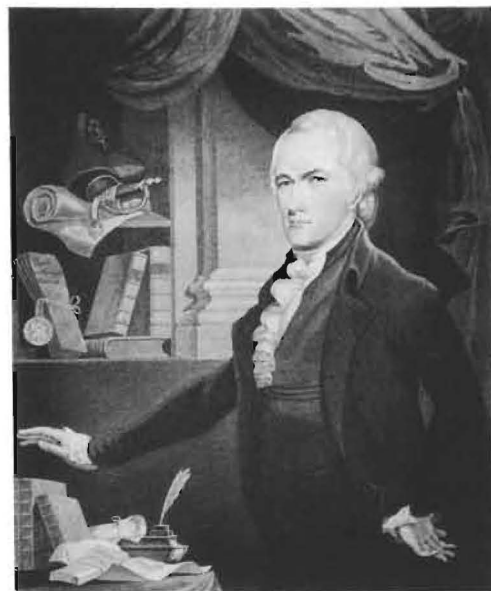
ously refers back to the first clause of the same section, which spells out the various kinds of cases over which the Court has jurisdiction, including those in which the Court is granted original jurisdiction in the second clause.¹²¹ A straightforward reading of the text therefore demands the conclusion that the Founders specified the appellate jurisdiction quite as clearly as they had the original, subject only to the qualification that empowers Congress to make "exceptions" to the former.

The Exceptions Clause

The *Marbury* opinion has been subjected to a variety of criticisms which revolve about the "exception" provision. Professor Van Alstyne has suggested that the Founders may have intended nothing more by the "original-appellate" division than to provide a guideline for the Court in the case that Congress failed to act.¹²² David P. Currie has claimed that such a "provisional distribution" is "precisely what they [the framers] did with respect to the appellate jurisdiction by empowering Congress to make 'exceptions.'"¹²³ The upshot of such arguments appears to be the position succinctly expressed by William Winslow Crosskey: "... the only legitimate question in *Marbury v. Madison* was whether Congress had made such an exception, by Section 13, in a constitutional manner. And that the answer to this question should have been in the affirmative is clear."¹²⁴ In other words, by drafting Section 13, Congress had merely "made an 'exception' to the appellate jurisdiction by providing original jurisdiction instead."¹²⁵

It requires little erudition to perceive that these notions, if taken seriously, reduce the entirety of the second clause in Article III, Section 2 to superfluity. The Court certainly realized as much in *Marbury*, and said so unequivocally: "That they [the Supreme Court] should have appellate jurisdiction in all other cases, with such exceptions as Congress might make, is no restriction; unless the words be deemed exclusive of original jurisdiction."¹²⁶

Professor Currie seems to add confusion to contradiction when he says that Marshall "... was to reject the implications of his *Marbury* reasoning in *Cohens v. Virginia*, where he declared that Congress could grant appellate



Alexander Hamilton had advocated attaching the exception clause to the appellate jurisdiction in order to counter fears that it might empower the Supreme Court to overrule determinations of fact rendered by lower courts.

jurisdiction in cases where the Constitution provided for original."¹²⁷ Yet, as Currie himself points out, Alexander Hamilton had outlined reasons for the provision of original jurisdiction in those cases involving the dignity of a State, whether domestic or foreign.¹²⁸ However, Currie fails to notice that Hamilton also spelled out reasons for attaching the exceptions clause to the appellate jurisdiction, and that those reasons involved an effort on the part of the Founders to counter widespread public fear that the appellate jurisdiction "both as to law and to fact" would empower the Supreme Court to overrule determinations of fact rendered by juries below.¹²⁹

The relevant language in the *Federalist* is the following:

To avoid all inconveniences, it will be safest to declare generally that the Supreme Court shall possess appellate jurisdiction both as to law and fact, and that this jurisdiction shall be subject to such exceptions and regulations as the national legislature may prescribe. This will enable the government to modify it in such a manner as will best answer the ends of public justice and security. This

view of the matter, at any rate, puts it out of all doubt that the supposed abolition of the trial by jury, by the operation of this provision, is fallacious and untrue. The legislature of the United States would certainly have full power to provide that in appeals to the Supreme Court there should be no re-examination of facts where they had been tried in original causes by juries. This would certainly be an authorized exception; but if, for the reason already intimated, it should be thought too extensive, it might be qualified with a limitation to such causes only as are determinable at common law in that mode of trial.¹³⁰

If Hamilton's suggestion is correct, there is no incompatibility between *Marbury* and *Cohens*; since under his interpretation, the appellate jurisdiction would be subject either to enlargement or restriction, whichever the "ends of public justice and security" require in the particular instance. To "grant appellate jurisdiction in cases where the Constitution provided for original," is therefore not equivalent to doing the reverse.

Marshall and his Court must surely have known this at the time of the *Marbury* decision; for, as was pointed out above, the first two sentences of Section 13 differentiate those instances wherein the Court's original jurisdiction is exclusive from those wherein it is not.¹³¹ Such, in effect, is to "enlarge" the appellate jurisdiction of the Court. The inescapable logic of the Section 13 division is pointed out by the Court later in *Cohens*, via *reductio ad absurdum* :

Can it be affirmed, that a State might not sue the citizen of another State in a Circuit Court? Should the Circuit Court decide for or against its jurisdiction, should it dismiss the suit, or give judgement against the State, might not its decision be revised in the Supreme Court? The argument [of counsel] is, that it could not; and the very clause which is urged to prove, that the Circuit Court could give no judgement in the case, is also urged to prove, that its judgement is irreversible. A supervising Court, whose peculiar province it is to correct the errors of an inferior Court, has no power to correct a judgement given without jurisdiction, because, in the same case,

*that supervising Court has original jurisdiction.... It is, we think, apparent, that to give this distributive clause the interpretation contended for, to give to its affirmative words a negative operation, in every possible case, would, in some instances, defeat the obvious intention of the article... It must, therefore, be discarded.... The Court may imply a negative from affirmative words, where the implication promotes, not where it defeats the intention.*¹³²

In other words, the Marshall Court refuses to "imply a negative from affirmative words," where, as in *Cohens*, the implication "defeats the intention." On the other hand, where, as in *Marbury*, the implication promotes the intention, a negative may be inferred. The Court addresses the issue squarely in *Marbury* :

*If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction.*¹³³

These remarks are unimpeachable. But in what immediately follows, it must be conceded that Marshall made a mistake: "If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance."¹³⁴ The mistake, however, is one of inappropriate expression, not of logic. Taken at face value the statement is entirely true. It is merely a hypothetical with two premises, both of which must be true if the conclusion is to follow. Since the first premise ("congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original") is true, as we have seen, and as the Court later held in *Cohens*, it follows that the second premise ("Congress remains at liberty to give this court



John Marshall was Secretary of State when John Jay declined President Adams' offer to become Chief Justice again. Marshall recommended that Associate Justice William Paterson be given the post, but ended up assuming it himself.

original jurisdiction where the constitution has declared it shall be appellate") must be false; else the conclusion ("the distribution of jurisdiction, made in the constitution, is form without substance") will follow. And the Court so held in *Marbury*. Later, in *Cohens*, Marshall says that the general "expressions in the case of *Marbury v. Madison* must be understood with the limitations which are given to them in this opinion; limitations which in no degree affect the decision in that case, or the tenor of its reasoning."¹³⁵

Judicial Review

After having shown the incompatibility of Section 13 with the constitutional distribution of judicial power, the Court entertains the question whether a jurisdiction inappropriately conferred may nevertheless be exercised. For its answer, recourse is clearly to the underlying logic of Article V:

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on

*which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, or ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.... It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.*¹³⁶

At this point the Court reaches the issue which eventually generated the great controversy over judicial review which has yet to subside. Granted that "The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts,"¹³⁷ does it nonetheless follow that an act, "repugnant to the constitution...notwithstanding its invalidity, bind the courts, and oblige them to give it effect?"¹³⁸ In its answer to this crucial question, the Court articulates the famous theory of judicial function for which *Marbury* is celebrated:

*It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the [C]onstitution; or conformably to the [C]onstitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.*¹³⁹

In light of the manner in which these lines have been frequently cited as precedential for a view of the judicial power which renders the Supreme Court ultimate arbiter of constitutional questions generally, much should be made of what is not said in them. No exclusive power to interpret the fundamental law is claimed for the Court here, or anywhere else in *Marbury*. To be sure, it is the "province and duty of the judicial

department to say what the law is."¹⁴⁰ But the Court says that this is so only "of necessity," whenever those "who apply the rule to particular cases" must determine which of two "conflicting rules governs the case."¹⁴¹ This portion of the *Marbury* opinion seems directed primarily toward provision of a justification for the idea that, in some cases, "the constitution must be looked into by the judges."¹⁴² There is no denial of the legislature's power to do likewise. Such is made clear a few paragraphs later in the opinion: "... it is apparent, that the framers of the constitution contemplated that instrument, as a rule for the government of courts, as well as of the legislature."¹⁴³

Even less does the language of *Marbury* suggest that the Court's determinations may legitimately transcend the confines of the particular case before it. After all, the Court has already said that its province is "solely, to decide on the rights of individuals," as we have seen.¹⁴⁴ And in the presence of a "repugnancy," it must only "disregard" either statute or Constitution (as a matter of logic) in its determination of "which of these conflicting rules governs the case."¹⁴⁵ In other words, the power of review claimed by the Court in *Marbury* is merely a power of discretion to disregard existing laws in the decision of particular controversies, provided that the constitutional and statutory provisions involved are, like those in Article III and the Judiciary Act, addressed to the Court itself. If the provisions in question are not addressed to the Court itself, then the Court is not compelled, as a matter of logic, to choose between them in order to decide the case. Since "precedents" are created by holdings on points of law necessarily decided in particular cases, it follows that the Court's choice between constitutional and statutory provisions, one or both of which are not addressed to the Court, should not be regarded as controlling in the decisions of subsequent cases. Nor should such unconstrained "choices" be read speculatively into the Court's opinion after the fact by historians, when the words of the Court itself are expressly to the contrary.

Marbury thus affords no basis for inferring the proposition that the Court is bound to disregard a statutory provision in conflict with the Constitution, except perhaps in that small number of instances where the Constitution

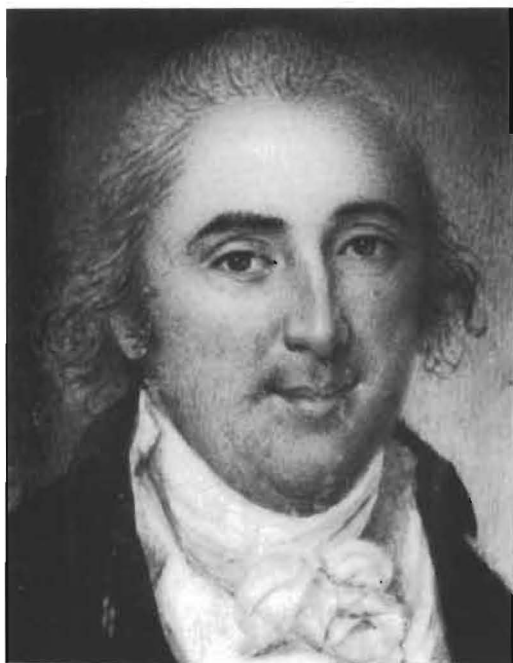
directly furnishes a rule for the courts. Indeed, the *Marbury* Court suggests precisely this view in its reference to the idea of political questions.¹⁴⁶ It is therefore plausible to draw the conclusion that, when the Court declares the superiority of the Constitution over ordinary legislation in *Marbury*, it does so not in derogation of legislative power, but only in justification of its judgment in that case: its determination of the respective rights and duties of Marbury and Madison.

Conclusions

The foregoing observations suggest that the twentieth century *Marbury* is largely a myth. Far from constituting an innovative decision, each important aspect of the opinion is grounded upon familiar principles of legal interpretation. First, the Court's rendering an opinion apprising Marbury and Madison of their respective rights and duties was appropriate, notwithstanding its "advisory" character. The relief requested by *Marbury* is equitable in nature (a mandatory injunction directing specific performance being an equitable remedy), and the function of a court of equity is to do as much justice as can be done under the circumstances of the case, when no adequate legal remedy is available.

Since the Court was powerless to issue the writ while sitting as a court of original jurisdiction, the maxim which holds that wrongs are not to be without remedies demands, at very least, a statement of the law of the case. Jefferson's retort notwithstanding, this is no advisory opinion in the sense in which the doctrine proscribing *ex cathedra* pronouncements on constitutional questions has since been developed. The purpose of that doctrine is fully accomplished when a court refuses to interpret constitutional provisions in the absence of a bona fide case or controversy. There is no question concerning Marbury's standing to litigate. The only question concerns the appropriate forum in which to do it.

Second, the Court's handling of the law issues in *Marbury* are fully accounted for by reference to three familiar principles of construction: (1) Interpret unambiguous language in a literal manner, unless such an interpretation would (2) render some other provision in



William Marbury was a wealthy man who did not need the commission he sought as justice of the peace for the District of Columbia. As a loyal Federalist, he probably felt duty-bound to demand the commission, which had not been delivered before Adams' departure.

the same document meaningless, or (3) defeat the intention of the drafters in some obvious way. Since literal interpretation of the fourth sentence in Section 13 does no violence to the remainder of the Section in the sense of the second or third principles, the Court is fully justified in adopting the first principle as its rule of construction. The familiar charge that the Marbury Court went out of its way to invalidate Section 13 is therefore questionable. To be sure, one might criticize the Court for failure to adopt a *strained* construction of the provision in order to avoid declaring it unconstitutional. But saying that the Court failed to follow modern maxims of judicial restraint to the limit in a particular decision is not the same as saying the decision amounted to gross abuse of judicial authority. In Marbury's case, the latter charge has been frequently made.

With respect to the Court's interpretation of the distributive jurisdictional provisions in Article III, a similar analysis may be applied. Even though these provisions appear to spell out the respective original and appellate juris-

dictions in such a way as to leave no overlap in the categories, the Court showed convincingly in *Cohens* that a literal reading of the clause pertaining to appellate jurisdiction would defeat the obvious intention of the drafters, thus violating the third of the principles stated above. Since the Court had already demonstrated in *Marbury* that non-literal application of both clauses (original and appellate) *simultaneously* would reduce the entire Section to superfluity, thereby violating the second principle of construction; it follows that if non-literal application is required in *Cohens* then literal interpretation is required in *Marbury*. And that is precisely the holding of the Court.

Finally, the Court's argument on judicial review in *Marbury* is defensive in character, and appropriately restricted to the circumstances of the case at hand. Assuming that an act in violation of the Constitution is a nullity, as a matter of law (an assumption which few have questioned), the Court proceeds to argue that in *some* cases it may say so. The cases in which it may say so are those (like *Marbury*) in which the performance of essential judicial functions would be impaired if it said otherwise. Anything less would, of course, destroy the separation of powers so carefully established in the Constitution, thereby reducing much of that document's language to meaninglessness, and defeating the purposes of its drafters in a most obvious way.

It appears that the Supreme Court must have agreed, throughout most of the previous century, with the view of *Marbury v. Madison* advanced in this essay. Between 1804 and 1894, *Marbury* was cited in 49 separate opinions in the United States Supreme Court. Of this total, 24 citations extend or reiterate *Marbury's* jurisdictional holding.¹⁴⁷ Fifteen extend or reiterate the mandamus holding.¹⁴⁸ Six support rulings on the distinction between ministerial and discretionary acts of executive officers.¹⁴⁹

Two refer to the *Cohens* clarification of the *Marbury* dicta previously discussed.¹⁵⁰ One refers to the right-remedy maxim.¹⁵¹ The remaining citation mentions *Marbury* as precedent for judicial power to invalidate laws, and did not appear until late in the nineteenth century, as we have seen.¹⁵² This is somewhat startling in view of the fact that, by 1894, the Court had already invalidated at least 21 national laws.¹⁵³

Yet in not a single one of those cases did the Court bother to cite *Marbury v. Madison*.¹⁵⁴ If *Marbury* had, in fact, asserted judicial supremacy over Congress and President in constitutional matters, as so many modern critics seem to think, surely the Court itself would have noticed before 1887!

Moreover, no one else seems to have noticed, either. Examination of major legal and political tracts penned during the pre-Civil War period reveal no indication that *Marbury* represented any such broad notion of judicial authority. Not even the most vocal opponents of the Court ventured to question any of *Marbury*'s holdings. Their guns were pointed elsewhere.¹⁵⁵ Only Jefferson, chagrined over what he evidently assumed to have been a personal attack, complained bitterly, yet never denied the propriety of the limited type of review sanctioned by the Court in *Marbury*.¹⁵⁶ The only disparaging contemporaneous reference to *Marbury*'s judicial review holding appears to have been that of Judge John Gibson of the Pennsylvania Supreme Court in a famous dissenting opinion in the case of *Eakin v. Raub*.¹⁵⁷ A close reading of that opinion will reveal, however, that Judge Gibson explicitly confined its scope to the question whether the Supreme Court of Pennsylvania might refuse to enforce an act of Pennsylvania's legislature on the grounds of conflict between the act and the state constitution.¹⁵⁸ He then goes on to distinguish between acts in violation of the state constitution, and those in violation of the federal Constitution, his opinion being that the courts are obliged "to execute the former, but not the latter."¹⁵⁹ In short, *Eakin v. Raub*, strictly speaking, has very little to do with *Marbury v. Madison*.¹⁶⁰

Perhaps it is time to substitute history for mythology, and to reclaim the tradition for which *Marbury* once stood. The period of gross judicial aggression which first spawned the *Marbury* straw man supposedly has been repudiated. Yet one may reasonably doubt whether the repudiation has been fully accomplished so long as its primordial symbol remains. That suspicion is confirmed when one observes, as recently as 1958, the entire membership of the Supreme Court of the United States joining in the following pronouncement. Referring to *Marbury*, the Court says:

*This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.*¹⁶¹

No disrespect to the Court intended, I would submit that It, the Country and the Constitution once got along without "that principle" for exactly a hundred years. It is arguable whether we have gotten along as well with it during our second hundred years. As we approach our third hundred, it might be appropriate finally to consider what may well be the authentic original precedent for modern judicial review: *Dred Scott v. Sandford*, where the Court, for the first time, invalidated a national law on policy, rather than legal, grounds.¹⁶² That decision stands as a poignant reminder that to ignore our origins is to ignore our destiny as well.

Endnotes

- ¹ 1 Cranch 137 (1803).
- ² See references in notes 147, 148, *infra*.
- ³ *Mugler v. Kansas*, 123 U.S. 623, 661 (1887). The *Mugler* reference is an obvious misreading of *Marbury*. The Court there uses *Marbury* in support of the developing idea of substantive due process, in a passage which is *obiter dicta*.
- ⁴ Albert J. Beveridge, *The Life of John Marshall*, 4 vols. (Boston: Houghton-Mifflin, 1916), III:132.
- ⁵ Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis: Bobbs-Merrill, 1962), p.1.
- ⁶ Charles R. Adrian and Charles Press, *American Politics Reappraised: The Enchantment of Camelot Dispelled* (New York: McGraw-Hill, 1974), p. 172.
- ⁷ James McGregor Burns, J. W. Peltason, and Thomas E. Cronin, *Government by the People*, 10th ed. (Englewood Cliffs: Prentice-Hall, 1978), p. 29.
- ⁸ Daniel M. Berman and Louis S. Loeb, *Laws and Men: The Challenge of American Politics* (London: MacMillan, 1970), p. 326.
- ⁹ Robert G. McCloskey, *The American Supreme Court* (Chicago: University of Chicago Press, 1960), p. 40.
- ¹⁰ P. Allan Dionisopoulos and Paul Peterson, "Rediscovering the American Origins of Judicial Review: A Rebuttal to the Views Stated by Currie and Other Scholars," 18 *The John Marshall Law Review* 49-76 (1984). See also Christopher Wolfe, "A Theory of U.S. Constitutional History," *Journal of Politics*, 43 (May 1981): 292, pp. 293-294; "John Marshall and Constitutional Law," *Polity*, 15 (Fall 1982): 5. Professor Wolfe argues convincingly that Marshall's jurisprudence was generally faithful to constitutional principle.
- ¹¹ Daniel Farber, "The Case Against Brilliance," 70 *Minn. L. Rev.* 917-930 (April, 1986), pp. 917, 929-30.
- ¹² For an excellent general survey of the background of this situation, including such aspects as attitudes toward the legal profession during the 1790's, movements for judicial reform in the states, and many others as well, see Richard E. Ellis, *The Jeffersonian Crisis: Courts and Politics in the Young Republic* (New York: Norton & Co., 1974), pp. 3-16. See also George Haskin and Herbert Johnson, Oliver Wendell Holmes Devise History of the Supreme Court of the United States, Vol. 2, *Foundations of Power: John Marshall, 1801-15* (New York: MacMillan Publishing Co., Inc., 1981), pp. 647-51. On the Judiciary Acts of 1801, see Ellis, *Jeffersonian Crisis*, p.15. See also Kathryn Turner, "Federalist Policy and the Judiciary Act of 1801," *William & Mary Quarterly* 22 (January 1965) 15-22; Erwin C. Surrency, "The Judiciary Act of 1801," *American Journal of Legal History*, 2 (1958): 53-65; Max Farrand, "The Judiciary Act of 1801," *American Historical Review* 5 (1899-1900) 682-686; Haskins and Johnson, *Foundations of Power*, pp. 183-186.
- ¹³ Ellis, *Jefferson Crisis*, p. 43.
- ¹⁴ *Ibid.*, pp. 183-186.
- ¹⁵ *Ibid.*, pp. 59-60.
- ¹⁶ Haskins and Johnson, *Foundations of Power*, p. 184.
- ¹⁷ *Marbury v. Madison*, 1 Cranch 137, 138 (1803).
- ¹⁸ *Ibid.*, p. 139.
- ¹⁹ *Ibid.*, p. 142.
- ²⁰ *Ibid.*
- ²¹ *Ibid.*, p. 143.
- ²² *Ibid.*, pp. 142-3.
- ²³ *Ibid.*, p. 143.
- ²⁴ *Ibid.*, p. 144.
- ²⁵ *Ibid.*, p. 145.
- ²⁶ *Ibid.*, pp. 139-42, 144.
- ²⁷ *Ibid.*, p. 139.
- ²⁸ *Ibid.*
- ²⁹ *Ibid.*, p. 140.
- ³⁰ *Ibid.*
- ³¹ *Ibid.*
- ³² *Ibid.*, pp. 140-1.
- ³³ *Ibid.*, p. 141.
- ³⁴ *Ibid.*
- ³⁵ Judiciary Act of 1789, 1 Stat. 73, 80-1 (1789).
- ³⁶ *Ibid.*, p. 81. Quoted in 1 Cranch 137, at 148.
- ³⁷ 1 Cranch 137, at 148.
- ³⁸ 2 Dallas 297.
- ³⁹ *Ibid.*, pp. 297-8.
- ⁴⁰ *Ibid.*, p. 298.
- ⁴¹ 1 Cranch 137, at 148-9.
- ⁴² *Ibid.*, p. 146.
- ⁴³ *Ibid.*, p. 153.
- ⁴⁴ *Ibid.*, pp. 153-4.
- ⁴⁵ 3 *Blackstone's Commentaries* 110. Quoted in 1 Cranch 137, at 147.
- ⁴⁶ 1 Cranch 137, at 149-50.
- ⁴⁷ *Ibid.*, p. 150.
- ⁴⁸ *Ibid.*, pp. 151-2.
- ⁴⁹ *Ibid.*, pp. 152-3.
- ⁵⁰ *Ibid.*, p. 152.
- ⁵¹ *Ibid.*, pp. 154-73.
- ⁵² *Ibid.*, pp. 159-62, 167-8.
- ⁵³ *Ibid.*, pp. 162-8.
- ⁵⁴ *Ibid.*, pp. 168-73.
- ⁵⁵ *Ibid.*, pp. 173-80.
- ⁵⁶ United States Constitution, Article III, Section 2, Clause 2.
- ⁵⁷ See note 128, and accompanying text, *infra*.
- ⁵⁸ 1 Cranch 137, at 141.
- ⁵⁹ *Ibid.*, p. 148.
- ⁶⁰ William Van Alstyne, "A Critical Guide to *Marbury v. Madison*," 1969 *Duke L. Journ.* 1, 15 (1969).
- ⁶¹ Lief Carter, "Think Things, Not Words," *Journal of Politics* 43 (May, 1981): 317-8.
- ⁶² Van Alstyne, "Critical Guide," p. 15.
- ⁶³ Thomas Jefferson, Letter to Justice Johnson, June 12, 1823. Quoted in Donald O. Dewey, *Marshall versus Jefferson: The Political Background of *Marbury v. Madison** (New York: Alfred A. Knopf, 1970), p. 145.

64. See *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-348 (1936) (Brandeis, J., concurring).

65. Van Alstyne, "Critical Guide," p. 15.

66. *Ibid.*

67. *Ibid.*, p. 31. See also David P. Currie, "The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801-1835," 49 *University of Chicago Law Review* 646, 654; William Winslow Crosskey, *Politics and the Constitution in the History of the United States* (Chicago: University of Chicago Press, 1953), Vol. 2(1), p. 1041.

68. Currie, "The Constitution in the Supreme Court," pp. 654-655.

69. E.g. Abraham Holtzman, *American Government: Ideals and Reality* (Englewood Cliffs Prentice-Hall, 1980), pp. 329-330: Judicial review elevates the judicial branch to a position of supremacy over the action of the other two branches of the national government with regard to the Constitution. This power was asserted by the Supreme Court in deciding the case of *Marbury v. Madison* in 1803. The controversy that came to the Court in that case was a political one. The Court's assumption of this power of judicial review in resolving the controversy was equally political.... Thus, by a decision of the Supreme Court, the doctrine of judicial review was built into the constitutional system. Also Kenneth S. Sherrill and David J. Vogler, *Power, Policy, and Participation: An Introduction to American Government*, 2nd Ed. (New York: Harper & Row, 1982), p. 103: "The decision in *Marbury* says that the final judgement as to what the Constitution means rests not with the legislative or executive branches but with the Supreme Court." Such statements could be multiplied almost endlessly.

70. Quoted in Bickel, *Least Dangerous Branch*, p.2.

71. Use of the writ of certiorari was first introduced in the Evarts Act of March 3, 1891 (26 Stat. 826), and was greatly expanded in the Judges' Bill of February 13, 1925 (43 Stat. 936). See Charles Alan Wright, *Handbook of the Law of Federal Courts* (St. Paul: West, 1963), pp. 5-6.

72. *Marbury v. Madison*, 1 Cranch 137, 170 (1803).

73. *Ibid.*, p. 166.

74. *Ibid.*

75. Ellis, *Jeffersonian Crisis*, pp. 19-52. Haskins and Johnson, *Foundations of Power*, pp. 136-182.

76. Ellis, *Jeffersonian Crisis*, pp. 36-52, esp. p. 71.

77. John Pickering, Judge of the Federal District Court of New Hampshire, on Feb. 4, 1803. See Ellis, *Jeffersonian Crisis*, pp. 69-82, esp. p. 71.

78. Ellis, *Jeffersonian Crisis*, pp. 53-68, esp. 57-60.

79. *Marbury v. Madison*, 1 Cranch 137, 153-154 (1803).

80. See Max Farrand, *Records of the Federal Convention* (New Haven: Yale University Press, 1911), II:43. According to Farrand, the Founders accepted the extension of the federal judicial power to cases "arising under the Constitution, Laws, and Treaties of the United States" only after it had been "generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature." Farrand, II, 430. According to B.F. Wright, "There is room to differ as to Madison's meaning of 'judiciary nature' here, but at least it would appear to represent a theory of judicial review which did not recognize the courts as the exclusive or final interpreters of all parts of the Constitution." Benjamin F. Wright, *The Growth of American Constitutional Law* (Chicago: University of Chicago Press, Phoenix Book, 1967), p. 18, note

24. See also Jesse H. Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* (Chicago: U. of Chicago Press, 1980), p. 395.

81. 418 U.S. 683 (1974).

82. *Marbury v. Madison*, 1 Cranch 137, 167 (1803).

83. *Ibid.*, p. 156.

84. *Ibid.*

85. *Ibid.*

86. *Ibid.*, p. 159.

87. *Ibid.*, p. 158.

88. *Ibid.*

89. *Ibid.*, pp. 154-155.

90. *Ibid.*, p. 166.

91. *Ibid.*

92. See Dewey, *Marshall Versus Jefferson*, pp. 129-131. Also Beveridge, *Life*, Vol. 3: 132.

93. 3 *Blackstone's Commentaries* 255. Quoted in *Marbury v. Madison*, at 1 Cranch 137, 165 (1803).

94. *Marbury v. Madison*, 1 Cranch 137, 165-166 (1803).

95. Dewey, *Marshall Versus Jefferson*, pp. 110-111.

96. *Ibid.*, p. 111. See also Currie, "The Constitution in the Supreme Court," p. 661.

97. Judiciary Act of 1789, Section 13. 1 Stat. 73, 81 (1789). The relevant provision authorized the Supreme Court to issue writs of mandamus to "persons holding office under the authority of the United States." The Secretary of State is obviously such a person, and Section 13 is devoted generally to the Court's original jurisdiction. No doubt this is why *Marbury* came to the Supreme Court first.

98. *Ibid.*, p. 81.

99. Van Alstyne, "Critical Guide," p. 15.

100. 1 Stat. 73, 85-86 (1789).

101. 1 Stat. 73, 80-81 (1789).

102. Haskins and Johnson, *Foundations of Power*, p. 199.

103. See *Fletcher v. Peck*, 6 Cranch 87 (1810); *Dartmouth College v. Woodward*, 4 Wheaton 518, (1819); *New Jersey v. Wilson*, 7 Cranch 164 (1812); *Green v. Biddle*, 8 Wheaton 1 (1823).

104. See Clement Hill, "The Dartmouth College Case," 8 *American Law Review* 189 (1874); John M. Shirley, "The Dartmouth College Cases" 4 *Southern Law Review* N.S. 857, (1879); Thomas M. Cooley, *General Principles of Constitution* (Boston: Little, Brown, & Co., 1880), p. 300; Edward S. Corwin, *John Marshall and the Constitution* (New Haven: Yale University Press, 1919), Chap. 7; B.F. Wright, *The Contract Clause of the Constitution* (Cambridge: Harvard University Press, 1938); John P. Roche, ed., *John Marshall Major Opinions and Other Writings* (Indianapolis: Bobbs-Merrill, 1967), pp. 119-121, 132-134; Gerald Garvey, *Constitutional Bricolage* (Princeton: Princeton University Press, 1971), p. 76.

105. See Winton U. Solberg, ed., *The Federal Convention and the Formation of the Union of the Several States* (New York: Liberal Arts Press (1958), p. 292.

106. See Wallace Mendelson, "B.F. Wright on the Contract Clause: A Progressive Misreading of the Marshall-Taney Era," *Western Political Quarterly* 38 (June 1985): 262. For a detailed examination of the wavering attitudes of legal scholars on the contract clause throughout American history, see Clinton, "The Obligation Clause of the United States Constitution: Public and/or Private Contracts," 11 *UALR L. Journ.* 343 (1989).

107. 1 Stat. 73, 81 (1789). Quoted in *Marbury v. Madison* 1 Cranch 137, 173 (1803).
108. *Marbury v. Madison* 1 Cranch 137, 154-162 (1803).
109. *Ibid.*, pp. 162-173.
110. *Ibid.*, p. 170.
111. *Ibid.*
112. *Ibid.*, pp. 173-174.
113. *Ibid.*, p. 158.
114. *Ibid.*, p. 173.
115. *Ibid.*, p. 170.
116. *Ibid.*, p. 171.
117. *Ibid.*, p. 160.
118. United States Constitution, Article III, Section 2. The judicial power "is expressly extended to all cases arising under the laws of the United States." 1 Cranch 137, at 173.
119. See note 80, and accompanying text, *supra*.
120. United States Constitution, Article III, Section 2.
121. Article III, Section 2, Clause 1 reads as follows: "The judicial power shall extend to all cases, in law and equity, arising under this constitution, the Law of the United States, and treaties made, or which shall be made, under their authority; -- to all cases affecting ambassadors, other public ministers and consuls; -- to all cases of admiralty and maritime jurisdiction; -- to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; -- between citizens of different States; -- between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States citizens or subjects.
122. Van Alstyne, "Critical Guide," p. 31.
123. Currie, "The Constitution in the Supreme Court," p. 654.
124. Crosskey, *Politics and the Constitution*, Vol. 2 (1), p. 1041.
125. Currie, "The Constitution in the Supreme Court," p. 654.
126. *Marbury v. Madison*, 1 Cranch 137, 175 (1803).
127. Currie, "The Constitution in the Supreme Court," pp. 654-655. See *Cohens v. Virginia*, 6 Wheaton 264, 394-403 (1821).
128. Currie, "The Constitution in the Supreme Court," pp. 654-655. See Clinton Rossiter, ed., *The Federalist Papers* (New York New American Library, 1961), p. 487.
129. Rossiter, *Federalist*, pp. 490-491.
130. *Ibid.*
131. See note 101, and accompanying text, *supra*.
132. *Cohens v. Virginia*, 6 Wheaton 264, 396-398 (1821).
133. *Marbury v. Madison*, 1 Cranch 137, 174 (1803).
134. *Ibid.*
135. *Cohens v. Virginia*, 6 Wheaton 264, 401-402 (1821).
136. *Marbury v. Madison*, 1 Cranch 137, 176-177 (1803).
137. *Ibid.*
138. *Ibid.*
139. *Ibid.*, pp. 177-178.
140. *Ibid.*, p. 177.
141. *Ibid.*, pp. 177-178.
142. *Ibid.*, p. 179.
143. *Ibid.*, pp. 179-180.
144. *Ibid.*, p. 170.
145. *Ibid.*, p. 178.
146. See note 94 and accompanying text, *supra*.
147. *Ex parte Bollman*, 4 Cranch 75, 100 (1807); *Same*, at 102-105 (Johnson, J. dissenting); *McClung v. Silliman* I, 2 Wheaton 369, 370-371 (1817); *Cohens v. Virginia*, 6 Wheaton 264, 394, 399-402 (1821); *McClung v. Silliman* II, 6 Wheaton 598, 604 (1821); *United States v. Ortega*, 11 Wheaton 467, 471 (1826); *Ex parte Crane*, 30, U.S. 190, 200 202-204, 206, 208-210, 217, 219 (1831) (Baldwin, J., dissenting); *Ex parte Watkins* 32 U.S. 568, 572-573 (1833); *Harrison v. Nixon*, 34 U.S. 483, 510 (1835) (Baldwin, J., dissenting); *Ex parte Whitney*, 38 U.S. 404, 407 (1839); *In re Metzger*, 46 U.S. 176, 191 (1847); *United States v. Chicago*, 48 U.S. 185, 197 (1849) (Catron, J., dissenting); *In re Kaine*, 55 U.S. 103, 119 (1852); *Florida v. Georgia*, 58 U.S. 478, 505 (1854) (Curtis, J., dissenting); *Ex parte Wells*, 59 U.S. 307, 317 (1855) (McLean, J., dissenting); *Ex parte Vallandigham*, 68 U.S. 243, 252 (1863); *Daniels v. R.R. Co.*, 70 U.S. 250, 254 (1865); *The William Bagaley*, 72 U.S. 377, 412 (1866); *Riggs v. Johnson County*, 73 U.S., 166, 188 (1867); *Ex parte Virginia*, 100 U.S. 339, 341 (1879) (Clifford, J., dissenting); *Ex parte Clarke*, 100 U.S. 399, 408 (1879) (Field, J., dissenting); *Ames v. Kansas*, 111 U.S. 449, 466-467 (1884); *Bors v. Preston*, 111 U.S. 252, 258-259 (1884); *California v. Southern Pacific Co.*, 157 U.S. 229, 261 (1895).
148. *United States v. Arrendondo*, 31 U.S. 691, 729-730 (1832); *Kendall v. United States*, 37 U.S. 524, 617-618, 651 (1838); *Same*, at 651 (Barbour, J., dissenting); *Same*, 38 U.S., at 609-612 (Catron, J., dissenting); *Decatur v. Paulding*, 39 U.S. 497, 602 (1840); (Baldwin, J., dissenting); *Reeside v. Walker*, 52 U.S. 272, 291-292 (1850); *Mississippi v. Johnson*, 71 U.S. 475, 498 (1866); *Gaines v. Thompson*, 74 U.S. 347, 349 (1868); *Ex parte Yerger*, 75 U.S. 85, 97 (1868); *United States v. Schurz*, 102 U.S. 378, 394-395 (1880); *Louisiana v. Jumel*, 107 U.S. 711, 743-744 (1882); *Cunningham v. Brunswick R.R. Co.*, 109 U.S. 446, 453 (1883); *United States v. Windom*, 137 U.S. 636, 643 (1891); *International Contracting Co. v. Lamont*, 155 U.S. 303, 308 (1894).
149. *Lapeyre v. United States*, 84 U.S. 191, 205 (1872) (Hunt, J., dissenting); *Sabariego v. Maverick*, 124 U.S. 261, 282 (1888); *United States ex rel. Dunlap v. Black*, 128 U.S. 40, 44-45 (1888); *McAllister v. United States*, 141 U.S. 174, 188 (1891); *Noble v. Union River Logging R.R.*, 147 U.S., 165, 171 (1893); *United States v. California & Etc. Land Co.*, 148 U.S. 31, 43-44 (1893).
150. *Carroll v. Carroll*, 57 U.S. 275, 287 (1853); *Leisy v. Hardin*, 135 U.S. 100, 135 (1890) (Gray, J., dissenting).
151. *Poindexter v. Greenhow*, 114 U.S. 270, 298 (1884).
152. *Mugler v. Kansas*, 123 U.S. 623, 661 (1887). See note 3 and accompanying text, *supra*.
153. *Dred Scott v. Sandford*, 19 Howard 393 (1856); *Gordon v. United States*, 2 Wallace 561 (1864); *Ex parte Garland*, 4 Wallace 333 (1866); *Reichart v. Phelps*, 6 Wallace 160 (1867); *The Alicia*, 7 Wallace 571 (1868); *Hepburn v. Grisold*, 8 Wallace 603 (1869); *United States v. Dewitt*, 9 Wallace 41 (1870); *The Justices v. Murray*, 9 Wallace 274 (1869); *Collector v. Day*, 11 Wallace 113 (1870); *United States v. Klein*, 13 Wallace 128 (1871); *United States v. Railroad Company*, 17 Wallace 322 (1872); *United States v. Reese*, 92 U.S. 214 (1875); *United State v. Fox*, 95 U.S. 670 (1875); *Trade Mark Cases*, 100 U.S. 82 (1879); *United States v. Harris*, 106 U.S. 629 (1882); *Civil Rights Cases*, 109 U.S. 3 (1883); *Boyd v. United States*, 116 U.S. 616 (1886); *Baldwin v. Franks*, 120 U.S. 678 (1887); *Callan v. Wilson*, 127 U.S. 540 (1888); *Counselman v. Hitchcock*, 142 U.S. 547 (1892); *Monongahela Navigation Company v. United States*, 148 U.S. 312 (1893). The remaining law was invalidated in *Marbury*.

¹⁵⁴ The first citation of *Marbury* in a case wherein a national law was invalidated appears to have been in *Pollock v. Farmer's Loan & Trust Company*, 157 U.S. 429, 554 (1895). For an extensive analysis of the Supreme Court's historical use of *Marbury* as a precedent for judicial review, see Clinton, "The Strange History of *Marbury v. Madison* in the Supreme Court of the United States," 8 *St. Louis Univ. Pub. L. Rev.* 13 (1989).

¹⁵⁵ See e.g. John Taylor's apparent approval of *Marbury* in a famous book largely devoted to an attack upon the Court's opinion in the case of *McCulloch v. Maryland*, 4 Wheaton 316 (1819). John Taylor, *Construction Construed and Constitutions Vindicated* (Richmond: Shepherd & Pollard, 1820), pp. 123-124. Thomas Cooper, perhaps an even more vitriolic opponent of the federal courts than Taylor, nonetheless says that "There is no gainsaying the able argument of Chief Justice Marshall on this point [judicial review] in *Marbury v. Madison*." Cooper, *Two Essays: On the Foundation of Civil Government: On the Constitution of the United States* (Columbia: D. & J. M. Faust, 1826), p. 52. Similar approval of *Marbury* is found in Benjamin L. Oliver, *The Rights of an American Citizen; with a commentary on State Rights and on the Constitution and Policy of the United States* (Freeport: Books for Libraries Press, 1832), p. 124. Even John C. Calhoun explicitly affirms the Court's power to invalidate national laws in cases which embrace such questions as are of a judicial character. Calhoun, *A Disquisition on Government* (Columbia: A.S. Johnson, 1851), p. 259. For

a more extensive analysis of the works cited in this note, and some additional ones as well, see Clinton, *Marbury v. Madison and Judicial Review* (Lawrence, Kansas: University Press of Kansas, 1989). Material in Chapter 6.

¹⁵⁶ It will be recalled that Jefferson was upset because the Court had not simply dismissed the case as "moot." See note 63, and accompanying text, *supra*. Professor Dewey has concluded that "at least in 1804, the judicial review exercised in *Marbury v. Madison* was acceptable to Jefferson because the Supreme Court was interpreting legislation involving its own judicial sphere." Dewey, *Marshall Versus Jefferson*, p. 142. I do not know of any subsequent statement of Jefferson which would upset that conclusion.

¹⁵⁷ 12 Sergeant and Rawle (Pennsylvania) 330, 343-358 (1825) (Gibson, J., dissenting).

¹⁵⁸ *Eakin v. Raub*, 12 Sergeant and Rawle 330, 344-345 (1825).

¹⁵⁹ *Ibid.* p. 345

¹⁶⁰ For a thorough examination of the relation between *Marbury* and *Eakin* see Clinton, "*Eakin v. Raub: Refutation or Justification of Marbury v. Madison?*" *Constitutional Commentary* 4:81-92 (Winter, 1987).

¹⁶¹ *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

¹⁶² *Dred Scott v. Sandford*, 19 Howard 393 (1856). Here, the Court invalidated the Missouri Compromise of 1820, essentially upon Fifth Amendment substantive due process grounds.

Justice Holmes: Law and the Search for Control

Michael H. Hoffheimer

*For two or three months I debauched
o' nights in philosophy. But now it is
law--law--law.*

Holmes to William James, 1867.¹

Apology for Psychoanalytic Perspective on Holmes' Intellectual Biography

In one of the reading lists that Oliver Wendell Holmes, Jr., kept methodically as an adult lies the entry for June 17, 1872:

*[June] 17 married. Sole editor of Law Rev.
July no. et seq.*²

Squeezed between two lines in a smaller hand, the entry conflated two contemporaneous events: his marriage to Miss Fanny Dixwell and his assumption of sole editorial responsibility for *The American Law Review*, which he had previously co-edited.³

I shall return to the diary entry, but I want to consider it first as emblematic of an odd problem in the Holmes literature.⁴ As far as I know, this illuminating entry and other important evidence of the dynamics of Holmes' unconscious marital life have been ignored by scholars, despite the fact that much of the evidence exists in published sources. It is, of course, not odd in general that slips and jokes have been neglected; they continue to occupy a lowly position in the hierarchy of accumulated historical sources. But the neglect of this evidence by intellectual and legal historians who have picked over Holmes is curious for several reasons.

First, both the historical genesis of Holmes' legal theory and its cultural assimilation have been described by some writers who have adopted the language of psychoanalysis. One of the most powerful and influential champions of Holmes' theory in the 1930s, Jerome Frank, described the history of law in psychoanalytic terms and treated Holmes as representing its highest achievement, the modern jurist who "has put away childish longings for a father-controlled world."⁵ More recently, Justice Kaplan has explained the posthumous decline of Holmes' stature among lawyers as manifesting Kaplan's generation's "oedipal" reaction against Holmes.⁶ Scholars have used the metaphor of psychoanalytic dynamics to describe the historical significance of Holmes' work, but they have avoided talking about Holmes' actual psychological development.

Second, scholars have widely recognized that there are important tensions or inconsistencies in both Holmes' legal opinions⁷ and in his philosophy.⁸ The tensions have been related variously to more basic personal and psychological tensions and inconsistencies. In 1869 William James observed of Holmes as a law student, "Wendell amuses me by being composed of at least two and a half different people rolled into one, and the way he keeps them together in one tight skin, without quarreling any more than they do, is remarkable."⁹ Holmes' voracious scholarship, personal detachment, and concern with strife have been noted, but no scholars have undertaken a sustained effort to provide an account of Holmes' intellectual biography by employing methods of any recognized theory of psychological development. There

have been biographers sensitive to unconscious factors, but their explanations have seldom risen above descriptive, common-sense treatments. In attempting to illuminate Holmes' mind, they have resorted most often to discussion of his personality and lifestyle, not to careful consideration of the historical evidence of the actual dynamics. Ironically, the failure to analyze the psychological evidence with more theoretical rigor has led to unwarranted inferences from the facts; reluctance to employ psychoanalytic theory has resulted at times in the kind of ahistorical speculation of which historians often accuse psychoanalysis. I shall refer to particular problems below. They include unwarranted assumptions about Holmes' conscious antagonism with his father during childhood and assumptions about his relations with women before the Civil War. For example, some of the familiar parlor sketches of the domestic life of the Holmes family are supported by precious little evidence and appear to be poetic extrapolations of scenes from Dr. Holmes' literary essays.¹⁰

Third, neglect of evidence of Holmes' unconscious is odd, because Holmes himself in later years evinced a remarkable awareness of unconscious dynamics; he referred to possible unconscious intellectual influences and identified the effect of early family influences upon his adult intellectual attitudes. In avoiding psychoanalysis scholars have not only neglected evidence of Holmes' jokes or verbal slips—evidence that is commonly neglected and the relevance of which is made apparent only after the acceptance of the validity of psychoanalytic method—they have shunned insights that Holmes himself provided about his own psychological and intellectual development. I might also add that the failure to apply psychoanalytic theory to Holmes cannot be defended by two arguments commonly raised against the general historical application of the theory, for Holmes was a Victorian and male.

In this essay I shall examine some of the neglected historical evidence and reconsider the dynamics of Holmes' intellectual development from a psychoanalytic perspective. Although I believe that the perspective illuminates important aspects of Holmes' biography and may, perhaps, add richness to the interpretation of his mature thought, the perspective



Holmes' mother, shown above with his father, was the daughter of a justice of the supreme judicial court of Massachusetts. She gave birth to a daughter when Holmes was two, and a son when he was five.

also demonstrates objective limits to historical reconstruction. Holmes is a particularly poor subject for psychoanalytic study, because of the lack of surviving evidence of his infantile and adolescent relationship with his mother. The possibility of such historical reconstruction is further frustrated by the fact that Holmes himself deliberately censored the historical record by destroying revealing documents.

The practice of self-censorship began with documents generated during the war. Holmes continued to destroy documents throughout his life. Writing to Lewis Einstein in 1932, he commented on a recent biography: "I have not read it, but I should think it was harmless. I had nothing to do with it. Perhaps when I die my executor...may do something with more materials, but I have done my best to destroy illuminating documents."¹¹

While a complete psychoanalytic account is thus impossible, a theoretically sound partial reconstruction is possible. Moreover, a psychoanalytically informed approach assists critical historical reconstruction by identifying the lim-

its beyond which narration becomes speculative.

Holmes' Mustache

Surviving evidence of Holmes' childhood experiences does not provide a meaningful foundation for explaining his later development. Of his infantile relations to his mother, we know little directly.¹² When Holmes was twenty months, his mother or father recorded his vocabulary in a memorandum. At that age he knew names of one object (milk), one activity (walk), three directional adverbs (out, in, off), and an expression of approval (all well). He knew four personal names: "Auber" (Oliver), "[H]enny" (Wendy), "Aahma" (grandma), and "Mamy" (Mary).¹³ Though he knew his nurse's name, he did not yet know his parents' names. A second entry when Holmes was twenty-six months recorded that he could "say almost anything" and called his father and mother "faver and mover."¹⁴

Later behavioral evidence is consistent with an early and possibly traumatic separation from his mother. Holmes smoked as an adult and repeatedly depicted himself with a pipe. He attempted more than once to quit pipe-smoking and recorded the dates he attempted to stop in diaries.¹⁵ Efforts to quit smoking apparently caused insomnia.¹⁶ As a young boy Holmes reacted with terror to an older boy's jocular comment, "See you when your mother is hung," and related many years later how he had been convinced that his mother was to be killed.¹⁷ Important early events that would further have shaped Holmes' relation to his parents were the birth of his sister when he was two and of his brother when he was five. In later years, after the war when Holmes returned to Boston, he apparently formed no intimate bonds with his sister or brother.¹⁸

One biographer of Holmes suggested that Holmes and his brother as children expressed hostility towards their father, for Alice James (invalid sister of William and Henry James) recorded in her diary in 1888 when she was forty:

I remember Father coming home one Saturday from the dinner [of the Saturday Club] and telling, among other things, that Dr.

*Holmes had asked if he did not find that his sons despised him and seemed surprised when F[ather] said no, that he was not oppressed in that way.--'But after all, it is only natural they should, for they stand upon our shoulders,' exclaimed the Doctor, a truly dizzy height for the accomplished and elongated Wendell! The figure immediately presents itself of the two a la church steeple.*¹⁹

There is no reason to doubt the accuracy of the quote. Holmes' father became increasingly concerned with psychiatric problems from the late 1850s and developed theories of psychological processes in his novels (1858, 1867, 1885) and other writings, which anticipated Freud.²⁰ But it is unlikely that this incident later recorded by Alice James occurred before Holmes was in college and virtually impossible that it occurred earlier than Holmes' adolescent years. Alice James was born in 1848, and it seems unlikely that a child under ten would have been present during or would have remembered the remarks of her father that she quoted years later. Moreover, if the additional remarks about Holmes' height and accomplishments related to Alice James' original associations upon hearing the statement, the remarks occurred probably later still, for Holmes' earliest accomplishment that Alice James would likely have recognized would have been his heroism during the war. It is thus most likely that the statement attributed to Holmes' father was made during the Civil War, when she was in her teens and the Saturday Club was still meeting. Such a date comports with the analysis I suggest for Holmes' relations with his father during and after college.

The scant and expurgated historical record indicates antecedents of later insubordinate behavior in Holmes' childhood. A surviving "Report of Recitations and Deportment for the week ending 19 June 1847" contains the entry for "conduct": "Talks too much."²¹ But a formal reference from 1851 (when Holmes was nine) survives, describing him as "uniformly docile, thoughtful, amiable and affectionate. Young as he is, his habits of application are confirmed..."²²

While the early records assume significance only to hindsight, later biographical evidence discloses the results of Holmes' early develop-

ment. By his first year at Harvard College Holmes had closely followed his celebrated father's steps in choice of college (Harvard), philosophical perspective (transcendentalism), and political commitment (pro-Union and anti-slavery). He had the same name as his father. His handwriting looked like his father's. Lanky, with a long straight nose and deep-set eyes, he looked strikingly like a taller version of his father. At the end of his college days he, like his father, was to be class poet. Indeed, Holmes' youthful repetition of his father's experiences was so pervasive that it has attracted little critical attention; his biographers have written with the assumption that he was predestined to follow his father's steps; it was unthinkable for Holmes to go somewhere other than Harvard.²³

Opportunities for following his father's steps--like reciting poems on class occasions²⁴--were doubtless available in greater measure to Holmes because of his father's fame. But it is nonetheless significant that Holmes took full advantage

of such opportunities, and it is equally significant that he apparently did so without reflection or choice. The lack of choice which makes such events of little interest to traditional biography is all the more astonishing, because it is accepted as normal, requiring no further explanation on an intuitive level. Holmes' conformity to his father expressed itself also at the highest intellectual levels. And the manner in which Holmes struggled, both to achieve individuality and to resolve tensions that lay at the root of his identification with his father, critically affected the contours of his intellectual biography. Though Holmes' mature legal philosophy is widely characterized as an extreme form of positivism, he remained a tenacious partisan of the philosophy of transcendentalism in college just at the time when positivistic ideas of Comte were becoming hotly debated within Unitarian circles and gaining acceptance among the younger generation of intellectuals in New England.²⁵ Holmes' later adoption of the worldview asso-

Oliver Wendell Holmes, Sr. (shown here in his study), was a celebrated physician and man of letters. His son followed in his footsteps by attending Harvard University, becoming class poet, and identifying with transcendentalism and anti-slavery politics. Holmes, Sr., studied law after college before turning to medicine.



ciated with his legal theory was the result of a critical rejection of key ideas that derived from his father. The intellectual transformation that made possible his later theory required repudiation of the identification with his father.

Holmes' imitation of his father manifested a familiar psychological process. With adolescence there is normally a resurgence of the Oedipus conflict, and identification with an adult male plays a role in the positive resolution of the complex, signaling a displacement of erotic drives: the adolescent behaves like his father in order to reproduce (with another woman) the father's relation with his mother. Although the process is familiar, the theoretical explanations of it are complex.²⁶ The constellation of the earliest drives, and their relation to later adolescent and adult identifications, is relevant to understanding Holmes. It may be observed generally that Holmes' intense identification went considerably beyond the ordinary initiative and competitive posturing of adolescence, and it revealed, on the one hand, unresolved erotic drives for his mother, while, on the other hand, it manifested defense or reaction formation to aggressive drives towards his father. By changing the ego, however, the process of identification also turned the aggression inward. It has long been known that intensity of identification is related to loss of an object.²⁷ Where the identification is with a competitor, intensity would derive from loss of the loved object, and Holmes' intense identification with his father would be the ironic yet natural result of early separation from his mother and childhood fantasy of her death.

Behavioral evidence indicates, however, that despite its power, Holmes' identification did not succeed in resolving the Oedipus conflict. On the contrary, the identification began to show important signs of deterioration before the outbreak of the Civil War. Deterioration did not begin at the highest intellectual levels, for Holmes in college continued to identify strongly with his father's moral and intellectual views.²⁸ Holmes was familiar with the controversy generated by Comte's new positivist teaching and with the orthodox academy's antagonistic reaction; but though his college writings evidenced some interest in the new theory, he continued to support transcendentalism and sought to accommodate aspects of the new

theory to a systematic transcendentalist philosophy that was heavily influenced by Emerson and Ruskin. Only at the end of college did Holmes announce his intention of going to law school, if he survived the war.²⁹ Only at the end of college was he interested in Hobbes and Austin.³⁰ And this evidence of intellectual interests may suggest a breakdown in the process of identification only in retrospect, since Holmes' father had studied law at Harvard after college before turning to medicine,³¹ and Holmes' interest in mastering a subject in which his accomplished father had not excelled represents equivocally the natural culmination of intellectual identification.

Deterioration of the identification was rather first expressed nonintellectually by petty criminal and destructive acts. Holmes was fined one dollar for defacing the posts in a tutor's room; he was admonished for participating in a disturbance; he was admonished for "gross indecorum" during class; he was fined ten dollars for breaking windows of an underclassman.³² With the exception of the one hazing incident, all of Holmes' acts reflected not only hostility towards authority generally in the sense that all criminal acts reveal contempt of authority; the acts reflected also aggressive urges that were directed specifically against authority figures--the tutor, the professor, and the college. Common knowledge about social enforcement mechanisms supports an inference that he engaged in similar acts that were undetected. His destructive and rebellious behavior expressed his inability to contain the underlying hostility, which he redirected against school buildings, property, and personnel-substituted paternal authority. His writings in college reflected his ambivalent relation to authority, for while he ridiculed the conservative theology that he associated with the college, and while he defended, or at least tolerated, student rowdiness, his theoretical criticism relied heavily for authority on intellectuals of his father's generation, especially Emerson and Ruskin. The outbursts of physically aggressive behavior and the iconoclastic spirit of Holmes' college writings reveal that the mechanics of identification were not effective in containing underlying aggressive feelings towards his father. And the tentative career choice at the end of college as well as the intellectual interest in Hobbes and

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Austin reveal a more or less conscious concern with the problem of aggressiveness.³³

Channelling hostility in college away from its paternal object to the substituted authority was reinforced by his father's support of his son in skirmishes with college authorities---reflecting, perhaps, the elder Holmes' fear of replicating his own traumatic adolescent college experience, when he had identified with liberal religious tendencies against which his minister father was crusading publicly.³⁴

Holmes' father recorded in autobiographical notes the trauma caused by his early exposure to and subsequent rejection of Calvinist demonology.

*No child can overcome these early impressions without doing violence to the whole mental and moral machinery of his being. He may conquer them in later years, but the wrenches and strains which his victory has cost him leave him a cripple as compared with a child trained in sound and reasonable beliefs. I had long passed into middle age before I could analyze the effect of these conflicting agencies...*³⁵

And in his novels, Holmes' father traced adult neuroses and personality characteristics to infantile or prenatal traumas suffered by individuals who were motherless or orphaned.³⁶ Like Emerson, Holmes' was critical of the Harvard orthodoxy, and Holmes' rebellion was fostered at high intellectual levels by the object against which it was unconsciously directed.

Holmes' physical appearance during the war years signals the end of the identification. Holmes looked remarkably like his clean-shaven father in early portraits. He first sported a thin mustache sometime between April 1862 and January 1864, and he retained the mustache, grooming it ever more luxuriantly, until his death.³⁷

Study War No More

Holmes was committed to pro-Union anti-slavery politics in college, and at the outbreak of the Civil War in his senior year, he eagerly sought a commission in the Twentieth Regiment of Massachusetts Volunteer Infantry. His receipt of a commission and move to camp

prior to graduation ended the last smoldering disciplinary dispute with the college authorities. The context within which Holmes moved immediately from Harvard to the war--and soon to actual combat--suggests that Holmes found in the war an outlet for powerful hostility that even at college had not been contained and had expressed itself in acts of vandalism and insubordination directed against authority.³⁸ His entry into the war thus indicates a further deterioration of the identification; yet at the same time his father was again encouraging the direction in which the aggression was directed, for Holmes shared Unionist abolitionist convictions with his father and was unquestionably fulfilling his father's expectations by going to war. To be sure, Holmes' motives for joining the war were complex, overdetermined; but to the extent that he sought military experience as an outlet for hostility originating in aggressive feelings towards his father, the emergence of such aggressive impulses reflected the ultimate failure of the process of identification to channel and restrain the hostility.

Acknowledging the complexity of Holmes' motives for joining the war and seeking combat detracts neither from his conscious quest for valor nor from his honest belief in the rightness of the Union cause. Nor does the determination of one significant unconscious moving force--the deterioration of the identification--diminish the force of others, including other unconscious drives. Pre-war, pro-Union sentiment was itself laden with the mystical and erotic force that Whitman embraced and explored and was further to elaborate after the war.³⁹ As perhaps no other war in American experience, the Civil War manifested--and satisfied--dark drives for the death of self and others. God himself was celebrated in popular song as Juggernaut.

Deterioration of the identification provides neither a full account of Holmes' entry into the war nor a complete explanation of the psychological context within which a meaningful assessment of the war experience may be made. The deterioration of the identification does, however, illuminate the critical problem of Holmes' subsequent disenchantment with the war effort and the problem of his decision to muster out before the end of the war. And it provides context for the source of open conflicts

between Holmes and his father which broke out repeatedly during the war.

The extreme hostility that Holmes manifested towards his father during the war is consistent with a theory that Holmes' relation to his father was shaped by a deep-seated infantile fantasy that his father wanted to kill him. Holmes' father both supported his son's entry into the war and questioned his decision to leave the war before its conclusion. Holmes expressed particular anger in a letter attacking the Boston news coverage of an encounter that had resulted in many unnecessary casualties: "...I was glad to see that cheerful sheet [*Boston Daily Advertiser*] didn't regard the late attempt in the light of a reverse--It was an infamous butchery in a ridiculous attempt--in wh[ich] I've no doubt our loss doubled or tripled that of the Rebs."⁴⁰

Professor Howe first recognized that Holmes experienced a personal crisis during the war and that the resolution of the crisis affected deeply the philosophical perspective of Holmes' mature work. Howe provided two different accounts of Holmes' intellectual development. He related Holmes' growing disenchantment with the war to "Copperhead" influences, and in both accounts Howe treated Holmes' profound disillusionment with the war as the stimulus for his move from transcendentalism to thoroughgoing skepticism.⁴¹

While Howe's account dealt with the conscious expressions of Holmes' attitudes, such a reconstruction is severely limited by the fact that Holmes and his mother in later years edited Holmes' correspondence and papers from the critical war years.⁴² While we cannot know the content of what was destroyed, the process of later editing itself suggests strongly that Holmes had expressed views in a manner that later caused him some shame or embarrassment--conflicting with the image that he later cultivated consciously for the public and for posterity.

Surviving correspondence nevertheless illuminates the unconscious context of crisis. By 1862, Holmes had become convinced that military victory was impossible.⁴³ He apparently first expressed his convictions in a letter to his sister at home, knowing surely that his views would be brought to the attention of his father.⁴⁴ His father's predictable reaction--negative and

judgmental--was forthcoming, and Holmes' answer to his father dated December 20, 1862, survives. The letter resounds with anger and resentment. Addressing his father as "My Dear Governor," Holmes reasserts forcefully his conviction that victory was impossible, flaunts his greater knowledge and authority as a combatant, and accuses his father of ignorance:

*It is in my disbelief in our success by arms in wh[ich] I differ from you.... I think in that matter I have better chances of judging than you-and I believe I represent the conviction of the army-& not the least of the most intelligent part of it.... I think you are hopeful because (excuse me) you are ignorant.*⁴⁵

Abundant evidence survives of Holmes' tensions with his father during the war. One episode entered folklore. In 1861, after Holmes' first wound, his father traveled to Philadelphia to meet him.⁴⁶ After Holmes' near fatal wound in 1862, he specifically wrote en route home: "I neither wish to meet any affectionate parent half way nor any shiny demonstrations when I reach the desired haven."⁴⁷ Against his wishes his father traveled to meet him, recording the experience in a histrionic article published in *Atlantic Monthly*. Tension is reflected throughout the surviving letters, which he often addressed separately to his mother and father. In letters to his father about the military situation, confrontation and hostility were expressed openly and directly. Attacking what Holmes knew to be one of his father's deepest beliefs and hopes, the correspondence reveals the depth of hostility, the collapse of the identification, and the failure even of the bloodletting of the war experience to restrain and channel the hostility.

Holmes' conflict with his father during the war appears sudden and anomalous without the emotional context, but in context the hostility emerges as unconscious motive for, rather than consequence of, the views Holmes expressed to his father. In a letter to "Dear Old Dad," in 1863, he apologized for a "blow off" in his last letter and wrote of being "melancholy just now."⁴⁸ In a letter to his parents in 1864 he acknowledged receipt of their letters--"the latter [letter] fr[om] dad, stupid."⁴⁹ The conflict continued and smoldered for years after the war. In 1873, after visiting the Holmes home, Henry

James wrote to his father: "no love is lost between W[endell]. *pere* and W. *filis*."⁵⁰ In 1889, Holmes and his wife moved to his father's house, and Holmes complained, "My winter has not been sprightly, what with not feeling very well, and the adjustment to a new situation--living in my father's house instead of in my own, etc."⁵¹

Funny Mother Law

Holmes came close to death four times during the war; he suffered three gunshot wounds and contracted dysentery. Only those who have been in combat can probably imagine what he experienced as his friends suffered and died. For all his later use of military imagery, Holmes never talked of his personal experience in killing others. Despite the selective destruction of documents from the war years, it is evident that Holmes' decision to leave his unit (when it was dissolved and merged into another) was a difficult one, and one fraught with conflict with his father.⁵²

While Holmes engaged in continuous conflict with his father during the war and sought (literally) to prevent his father from coming to him, Holmes returned home after each wound to maternal care--care which by replicating the mother-infant relationship connected trauma and pleasure and concealed and legitimized pleasure-seeking erotic drives beneath Holmes' convalescent status. Of the letters from the war that survive, most were addressed to his mother. He wrote first to his mother with news of two of his three wounds and with news of his illnesses.⁵³

We know little of Holmes' relation with his mother at critical points. He destroyed his mother's and father's letters to him during the war, and he was also vigilant in destroying correspondence and other records that evidenced his relation with his wife.⁵⁴ The surviving record seems to indicate that Holmes maintained a dispassionate intellectual relation with women. One Holmes biographer observed that "Holmes's friendships, whether with men or with women, were primarily intellectual."⁵⁵ Another wrote expansively of Holmes' self-imposed personal isolation.⁵⁶ But as Holmes destroyed much revealing documentation, appearances may be deceptive, and they con-

flict with important contemporary accounts.

Surviving letters reveal occasionally flirtatious relations with women. He addressed Lady Pollock "Beloved Lady" in responding to a letter and wrote, "I love seeing your dear handwriting again..."⁵⁷ In 1910 he wrote to Lady Scott about reading sexual literature.⁵⁸ His flirtatious conduct towards the young teenage daughter of Tom Hughes, during his first trip to England in 1866, led to some misunderstanding between him and the girl's father, which is alluded to in the few letters relating to the episode that have survived.⁵⁹ During the Holmeses' trip to England in 1874 his flirting continued, and he teased his wife by signing an entry in her diary, "I sat next to Mrs. Willoughby whom I love."⁶⁰ She recorded later that week, "Wendell off on the rampage."⁶¹ From 1896 till 1926 Holmes engaged in an intimate correspondence with Lady Castletown in Ireland, whom he visited during trips to Europe in 1896, 1898, 1903, 1907, 1909, and 1913.⁶² His wife's toleration for such flirting may have changed. According to contemporary rumors, Holmes' flirting deeply upset his wife, and she refused to

Holmes was shot three times while serving three years in the military during the Civil War. When he returned from duty, he enrolled at Harvard Law School and was graduated in 1866.



read the letters he wrote from later trips to Europe until after his return for fear that he would describe his flirtatious conduct.⁶³

Holmes' flirtatious behavior was notorious to contemporaries. Alice James, living in seclusion, wrote in her diary when Holmes returned to England in 1889,

*They say he [Holmes] has entirely broken loose and is flirting as desperately as ever.*⁶⁴

Later that year she reported,

*Henry says that Wendell Holmes has had a most brilliant success in London and that he was as pleasant as possible, young-looking, and handsomer than ever. Flirting as desperately too.—I suppose that his idea of 'Heaven is still flirting with pretty girls,' as he used to say.*⁶⁵

Anecdotes about Holmes' flirting might be multiplied.⁶⁶ He continued to engage in such behavior in his later years. The surviving evi-

Holmes' wife, Fanny, was rumored to be upset by the flirtatious behavior for which her husband was notorious. For the most part, however, Holmes maintained a dispassionate intellectual relationship with women.



dence of flirting shows that it was especially carried on during trips away from home (with and without his wife), with married women and girls, with whom there was little risk of actual sexual affair, and in correspondence at a safe distance. Moreover, the flirting apparently never rose to the ardent poetic expression of feeling in his post-war correspondence to William James: "Sing, sparrow--kissing with thy feet the topmost tassels of the pines."⁶⁷ Rather the flirting appears to have corresponded to and received safety from a self-controlled distance from women.⁶⁸

The distance evidently also characterized his relations with his mother. Writing of his mother's death to Pollock in 1888, Holmes communicated emotion but expressed distance by writing in the third person and adopting passive voice: "My mother's death was not to be regretted on her account but such an event whenever it happens must be a shock and give one a tug that goes far down to the roots."⁶⁹ His detachment and distance in personal relations, especially pronounced in his relations with women and reflected paradoxically in his urge to flirt, appears to have repeated his early relationship with his mother which he had sought to recreate during the Civil War. Holmes was himself aware of the defenses that were raised to provide such distance: "Every man sees something of Mrs. Nickleby in his own mother."⁷⁰

The reference to Mrs. Nickleby is itself rich in unresolved conflicting feelings rooted in the oedipal complex. The character, based on Dickens' own mother, is enriched by the oedipal undercurrent of the plot which proceeds from the death of Nicholas' father, follows his mother's witless complicity in sending Nicholas off to be mistreated at a boarding school and her witless complicity in the attempted seduction of his sister. The conflicts are resolved at last by Nicholas' freeing his family, by his marriage, and by the eventual violent death of all the elder, evil male characters.⁷¹

The latent conflict behind Holmes' strong identification with his father in college and the hostility that Holmes expressed towards his father during the war were rooted, according to psychoanalytic theory, in infantile drives. Legal scholarship after the war provided Holmes with new means for displacing erotic drives, on the one hand, and for channeling and controlling

aggression towards his father, on the other hand.

Legal scholarship and a legal career provided Holmes with methods for resolving deep conflicts, for creatively channeling powerful drives, for mastering the ego, and for constructing an identity for himself. Holmes himself associated the development of his mature legal philosophy with his independence from his father; he emphasized that important aspects of his adult world view derived from his mother:

My father was brought up scientifically...and I was not. Yet there was with him as with the rest of his generation a certain softness of attitude toward the interstitial miracle--the phenomenon without phenomenal antecedents, that I did not feel.... Probably a skeptical temperament that I got from my mother had something to do with my way of thinking.⁷²

The biographical accuracy of Holmes' view of his own intellectual growth is problematic, but the view illuminates Holmes' desire to sever himself from his father's influence and to make real the fantasy--perhaps counterfactual--of his mother's influence.

Holmes devoted extraordinary labor and emotional energy to legal study after the war. His preoccupation attracted the attention and concern of contemporaries. Before his 1866 trip to England his mother had counseled him by letter not to feel obliged "as you did at home that you must accomplish so much each 24 hours."⁷³ By the early 1870s Holmes was working on an ambitious new edition of Kent's *Commentaries on American Law*,⁷⁴ a standard legal authority. Mrs. Henry James described in a letter his obsession with the project, which was manifested by physical attachment to the manuscript:

His whole life, soul and body, is utterly absorbed in his last work upon his Kent. He carries about his manuscript in his green bag and never loses sight of it for a moment. He started to go to Will's room to wash his hands, but came back for his bag, and when we went to dinner, Will said, "Don't you want to take your bag with you?" He said, "Yes, I always do so at home." His pallid face, and this

fearful grip upon his work, makes him a melancholy sight.⁷⁵

William James noted with sadness the narrowing of Holmes' interests as early as 1868: "the sympathies we have in common are growing very narrowed."⁷⁶ By 1872 James observed, "Wendell Holmes spent an evening here this week. He grows more and more concentrated upon his law. His mind resembles a stiff spring, which has to be abducted violently from it, and which every instant it is left to itself flies tight back...."⁷⁷

Holmes carefully recorded the extraordinary range and intensity of his studies after the war.⁷⁸ He also left evidence in comments and unintentional references that reveal the power of his drive to attain scholarly achievement after the war. In the diary entry recording his marriage and assumption of sole editorial responsibility for a legal periodical, he amalgamated two events--achievements--that reflected the unconscious unity of the two in drives that stemmed from powerful, unfulfilled, and displaced drives for maternal love. The fact that both events were recorded at a later time--an afterthought--into a list of book readings reflects the operation of the unconscious in ranking priorities and resisting challenges to the pleasure of continued intensive book study.⁷⁹

Intense scholarship, combining asceticism and intellectualism, is itself a defense, an attempt to control urgent drives by denial and sublimation.⁸⁰ But scholarship, especially reading, was not just a denial of reality, it gave Holmes great pleasure. In reading and scholarship the ego sustains itself in pleasure and rebels against the adversity of external reality, simultaneously abandoning and reasserting itself in the reading process. Holmes himself toyed on a conscious level with the sexual drives manifested in the commitment to scholarship. His 1867 letter to William James recorded humorously how nocturnal debauchery with philosophy had given way to study of law. In later years, he alluded humorously to the law as a lady or mistress and described the process of sublimation by which the all-absorbing fascination of legal scholarship assumed attributes of romantic or erotic attraction.⁸¹ In a short speech to the Suffolk Bar Association Holmes eulogized law by extensive and repeated analogy: "If

we are to speak of the law as our mistress, we who are here know that she is a mistress only to be wooed with sustained and lonely passion--only to be won by straining all the faculties by which man is likeliest to a god."⁸² On another occasion he referred expansively to enthusiastic students who serve "Truth, their only queen."⁸³ In comparing the lure of legal scholarship to romantic attraction, Holmes was deliberately playing upon a theme that was familiar to his audience. Justice Story in a famous speech taking the chair as Dane Professor of Law at Harvard in 1829 had referred to law: "It is a jealous mistress, and requires a long and constant courtship. It is not to be won by trifling favors, but by lavish homage."⁸⁴ By 1860, the phrase had become hackneyed.⁸⁵

Attempting to identify the source of humor in the allusion and the allusion's appeal for Holmes poses analytic problems. The seeming simplicity of humorous allusion makes it hard to explain its effectiveness,⁸⁶ but because of the minimal role of technique, allusion provides the opportunity for more direct insight into the process of play or displacement that lies behind the humor.

According to psychoanalytic theory, the process of joking entails a playing with unconscious and infantile material.⁸⁷ The partially concealed nature of the allusion--to speak of law as mistress (itself euphemistic)--generated humor by disclosing an attractive idea at the same time that a taboo (broadly speaking) was threatened. Here the taboo was both personal (the early displacement of erotic by intellectual drives) and situational (the situational taboo against "dirty" jokes in the polite contexts in which Holmes made the allusions).

That Holmes' humorous allusions were not original does not diminish their value for illuminating unconscious dynamics of his intellectual biography. To be effective as social humor the displacement mechanism itself must have been shared by the audience. Yet reconstructing the process poses historical as well as analytic problems. Holmes, like others of his generation, was evidently concerned with the process of sublimation and projection--the attribution of sexuality to external objects. The humor behind the comparison of law and an object of sexual desire lay in the deliberate recognition of the act of sublimation and projection which

Holmes shared with his audience.⁸⁸ It is easier to demonstrate from context the specific object with which Holmes associated the activity of projection than to untangle the irony operative behind the humor. For Holmes, the source of the allure lay in the intellectual demands of legal scholarship, not the time demands of a busy practice.

The irony behind the allusion emerges from a consideration of the classification of humor.⁸⁹ Although the displacement toyed situationally with a taboo, the humor for Holmes was obviously not obscene; rather the allusion fell into the class of "skeptical" humor--humor that attacked "not a person or an institution but the certainty of our knowledge itself, one of our speculative possessions."⁹⁰ The irony of the allusion operated by an implicit double negation: at one level the analogy was patently false (inappropriateness of law as romantic object), while at another it was true (recognition of the transfer behind sublimation). The recognition of sublimation in the allusion revealed both at conscious and unconscious levels that Holmes identified legal scholarship with females.

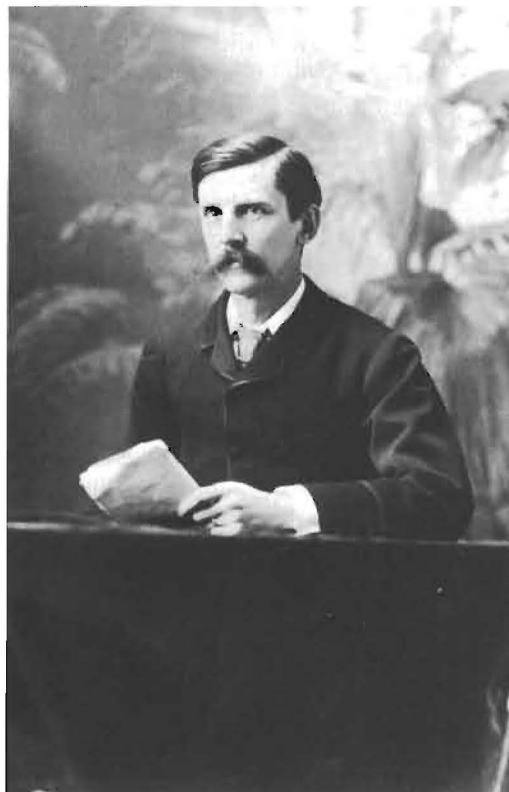
Explaining the mechanics of the humor does not, however, account fully for its pleasure-producing effect for Holmes. Holmes did not jest often, even during speeches where humor was socially accepted, if not expected. His repeated use of this particular humorous allusion corresponds, it seems, to the high degree of pleasure that he derived from this source. According to Freud's later elaboration of his theory, intellectual humor operated by simultaneous assertion (or rebellion) of the ego and the recognition of its control by the super-ego.⁹¹ The pleasure that Holmes derived from this humor reflected the power of his ego, the vindication of the pleasure principle against adversity. The dynamics of the humor thus replicated in miniature the dynamics of the intense appeal of scholarship and reading--both operated by negating the reality of external adversity.

The assertion of the self in the midst of destructive forces was a theme to which Holmes returned many times in many contexts. He usually did not present it humorously but often invoked irony. His fascination with military images has been recognized by most students. He likened love and life generally to armed combat, and it is not hard to find in this precon-

Theory of Torts." Holmes believed that a decision by the judge later in 1872 revealed the influence of his own article. The judge did not acknowledge Holmes' work, and for decades Holmes carried a grudge against the judge; he recalled the experience in 1910 with bitterness, and the experience affected his evaluation of the judge's work and character—"longwinded," "second rate discourses," "unfair," "not a great deal of brandy in his water."¹⁰¹

Holmes' resentment contrasts sharply with his own failure to attribute ideas. Holmes' failure has bemused both theorists and biographers. Howe claims that *The Common Law* "borrowed from Maine,"¹⁰² but Touster points out that Holmes does not acknowledge Maine in *The Common Law*.¹⁰³ Indeed, Holmes identified virtually no one as a significant influence on his intellectual development after college. Despite the close scholarship and authoritative attribution that he engaged in while editing *The American Law Review* and Kent's *Commentar-*

Holmes rushed to have *The Common Law* printed in time for his 40th birthday. This photo was taken in 1883, two years after its publication.



ies, one searches in vain for citations that reveal sources of general theory or that disclose Holmes' extensive contemporaneous readings in philosophy or literature. When Holmes was questioned directly about intellectual influence, he responded evasively. For example, he read Spinoza's writings repeatedly, but when Wu asked if Spinoza had influenced him, he denied that Spinoza had been a "conscious influence," conceding only that "the probability of an influence, even if indirect, is great."¹⁰⁴

The caution as to direct and indirect influence reveals insight into the complexity of influence, but the failure to attribute important ideas manifests deep-seated drives behind the conscious quest for intellectual preeminence--drives of which Holmes was not entirely aware. Evidence of such forces is revealed by another trivial episode that biographers have neglected. In 1919, Cohen asked Holmes about the influence of Voltaire on Holmes' skepticism, and Holmes responded: "Oh no--it was not Voltaire--it was the influence of the scientific way of looking at the world... I never have read much of Voltaire..."¹⁰⁵ His denial of having read "much" Voltaire is curious, for his own meticulous records disclose that he had read *Candide* and other works of Voltaire in 1877, 1883, and 1899.¹⁰⁶

The denial appears to be the result of faulty memory, which is especially difficult to explain in this case without the aid of psychoanalytic theory. Non-Freudian psychological models of memory generally stress that excited attention and repetition promote memory. But Holmes had read Voltaire repeatedly and had even read *Candide* and other works by Voltaire aloud in 1899, and Voltaire's works are generally engaging and not especially forgettable.¹⁰⁷

Moreover, denial of having read "much" Voltaire conflicts with Holmes' predilection for displaying the breadth of his reading; the denial reveals rather the power of Holmes' need for originality and novelty. The underlying impulses of Holmes' oblivion are illuminated by a similar autobiographical episode that Freud recounted. In Freud's case, Freud proposed a certain explanation to a colleague; the colleague reminded Freud that the colleague had himself suggested the explanation two years earlier to Freud but that Freud had rejected the explanation at that time. Freud observed, "It is

painful to be requested in this way to surrender one's originality. I could not recall any such [prior] conversation or this [prior] pronouncement of my friend's."¹⁰⁸

Reflecting on the dynamics of memory, Freud convinced himself that he was mistaken, and he subsequently recalled the original conversation. Both Holmes and Freud forgot precisely in contexts where questions of influence and originality were the subject of deliberate reflection. The pain of conceding nonoriginality for both thinkers effectively frustrated memory.

Denial of having read Voltaire is a clear and troubling example of Holmes' emphasis on novelty and his effort to free himself from the influence of earlier generations of thinkers. Denying the influence of Voltaire, he emphasized his youthful enthusiasm for Emerson and Ruskin, whose works were hardly skeptical. The relation of oblivion to continuing hostility originating in the oedipal complex is revealed by the context of Holmes' discussion of the origin of his skepticism, for he denied having read Voltaire in association with his emphasis of the gulf between his views and those of his father's generation.¹⁰⁹ And the pain-avoiding dynamics were bolstered by pleasure, for Holmes, in forgetting Voltaire, traced the origins of his own skeptical temperament to his mother.¹¹⁰

To the extent that Holmes' relationship to intellectual antecedents was affected by powerful unresolved emotions originating in his antagonistic relation towards his father, a rational intellectual historical reconstruction of his intellectual biography faces difficulties. Holmes did not just obliterate parts of the record by deliberately destroying documents; his unconscious censored his own memory, limited his attribution of sources, and slanted his testimony. What he did remember and the sources he did identify must be approached with caution by the intellectual biographer.

Conflict in Legal Theory

Holmes' working out of his own identity was intimately bound up with his struggle to control and master the internal world of conflicting drives. Legal scholarship was itself a method of control. And his theory of law reflected the quest for control of conflict. The controlling role of the super-ego against assertions of the

pleasure principle, which appears in the intense appeal of scholarship as well as in Holmes' characteristic flirting, is manifested also in many characteristic ironic expressions in which Holmes reduces the self to an actor, a self-pretentious "cosmic ganglion." Passages scattered throughout Holmes' speeches and writings many years after the war reflect his continuing struggle with intellectual and moral causes that had been substituted for the father through the deterioration of identification.

Holmes formed the philosophical perspective that supported his legal theory in opposition to the transcendentalism of his father. From an intellectual standpoint, "The clash between father and son may be regarded as symbolic of the impact on New England's transcendentalism of the positivism encouraged by the new theories of physics and biology."¹¹¹ But from a psychoanalytic perspective, Holmes' effort to elaborate a science of law resulted from the clash with his father and from his internal struggle with the transcendentalism that he had assimilated through the process of identification. The origins of the new theory help explain the emotional force with which it was expressed and illuminate Holmes' deep-seated hostility to the old theory that had once been his own. The legal philosophy associated with transcendentalism was natural law, and Holmes wrote in later years with sarcasm and scorn of the "fallacy and illusion" of Justice Story's theory of natural law.¹¹² He characterized the theory as "irreconcilable with primary juridical notions."¹¹³ He ridiculed it and likened it to a child's bugaboo, "a brooding omnipresence."¹¹⁴

In later years, Holmes engaged in extensive correspondence with younger male intellectuals--sparring partners, towards whom he frequently adopted antagonistic intellectual postures that continue to bewilder biographers.¹¹⁵ In these relationships, Holmes replicated his relation with his father, avoiding confrontation with his chronological or social superiors and assuming an antagonistic paternal relation with his inferiors. The relationships also demonstrate the extraordinary plasticity of Holmes' super-ego, and the lengths to which he would go to cultivate polite pugilism.

Holmes rejected vehemently all utopian schemes premised on the elimination of ten-

sion. Though he expressed conviction infrequently after the 1860s, he expressed forcefully his rejection of utopian ideologies that assumed the eventual elimination of social conflict. He characterized socialist theories as "drool."¹¹⁶ He reacted cynically to Franklin Ford's optimistic view of the future development of society on "the basis of science."¹¹⁷ His frequent jibes at pacifism are well known, and he characterized egalitarian economic theories as "drivelling cant."¹¹⁸

A central feature of Holmes' thought was recognition and acceptance of the tension. In his magnificent 1897 article, "The Path of the Law," Holmes wrote,

*If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct...in the vaguer sanctions of conscience.*¹¹⁹

This "bad man" construct excited extraordinary critical attention. Likewise, Holmes' theory of criminal law¹²⁰ was widely criticized, because his attempt to reduce criminal law principles to risk-reduction at the expense of inquiry into moral blame-worthiness resulted in questionable predictions about the development of criminal law.¹²¹ Although the "bad man" construct has been misunderstood---it was a scientific thought-experiment---the method that Holmes adopted reflected his recognition that most men were not motivated by a desire to conform to legal ideals. A theory of law, to be intellectually honest, had to recognize the reality that, as Freud put it, "as regards conscience God has done an uneven and careless piece of work, for a large majority of men have brought along with them only a modest amount of it or scarcely enough to be worth mentioning."¹²² In rejecting the transcendentalist dream of a lawless world of good men,¹²³ Holmes recognized implicitly the permanent conflict within the individual of those forces that were held in check only by the internal constabulary and

which required its external counterpart.

The acceptance and control of conflict informs Holmes' mature political values and characterizes the legal and constitutional positions for which he is best known, from his toleration of labor organization to his defense of free speech and deference to social welfare legislation. Moreover, the internalization and reproduction of conflict provides the operative mechanism for his theory of legal history. Legal history for Holmes was a process of evolutionary growth, characterized both by external social conflict and the role of law in ordering society and by internal conflict of competing ideas and theories. Law developed through a constant process analogous to natural selection and adaptation.¹²⁴ The goal of law was not elimination of conflict, for law progressed as a result of constant tension between anachronistic and legislative in the present.¹²⁵ Holmes' goal in law and in legal theory was to make the process explicit to understanding: "Hitherto this process has been largely unconscious. It is important, on that account, to bring to mind what the actual course of events has been."¹²⁶ By making law and legal history self-aware, Holmes expanded the scope of freedom. But freedom resulted from the creative channeling of previously unconscious drives and conflicts not by abolishing them.¹²⁷

A sympathetic reading of the evidence demonstrates the inadequacy of applying the Jerome Frank myth in detail, either as an explanation of the psychodynamics of Holmes' growth or as a coherent reading of Holmes' work. Law was obviously a self-authority. Yet the irreducible need for control indicates that Holmes neither destroyed the authoritative claims of law nor ultimately constructed a consistent view of the world in which law operated instrumentally as means to some end. In law reconstructed as historical process, authority resulted rather from pervasive and permanent tension, not resolution. Holmes' theories sought to elaborate the grounds of the tension and to explain legal historical change¹²⁸ as a complex system of progressive response to and repetition of the tension.¹²⁹

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Dr. Watson's and Professor Gay's expert help had the greatest effect on my reworking of the psychoanalytic treatment.

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Endnotes

¹ Letter to William James, December 15, 1867, 1 R. Perry, *The Thought and Character of William James* 505 (1936).

² O. Holmes, Oliver Wendell Holmes, Jr., Papers, Harvard Law School Library; American Legal Manuscripts, *The Oliver Wendell Holmes, Jr. Papers* (University Publications of America, 1985) (Microfilm Project), reel 16. Cf. Little, "The Early Reading of Justice Oliver Wendell Holmes," 7 *Harvard Library Bulletin* 184 (1954).

³ In 1870 Holmes and Arthur G. Sedgwick assumed co-editorial responsibility, replacing the *Review's* founding editors. See M. Howe, *Justice Oliver Wendell Holmes: The Shaping Years 1841-1870* 273 (1957); Kellogg, "Bibliographical Essay," in O. Holmes, *The Formative Essays of Justice Holmes* 277 (F. Kellogg ed. 1984). Holmes edited the *American Law Review* from volume V (October 1870) through volume VII (July 1873). The *Review* itself identified neither the editors nor the authors of individual contributions, though the identification of Holmes' articles has long been known. See Frankfurter, "The Early Writings of O.W. Holmes, Jr.," 44 *Harv. L. Rev.* 717, 718 (1931). I have been unable to determine whether Sedgwick in fact withdrew from editing the *Review* in 1872 or 1873. Howe writes (without citation to source) that Holmes and Sedgwick turned over responsibilities to the new editors. M. Howe, *Justice Oliver Wendell Holmes: The Proving Years 1870-1882* 93-94 (1963).

⁴ Holmes is one of the most studied writers in American legal history, and the literature is vast. For a valuable but dated bibliography, see H. Shriver, *What Justice Holmes Wrote, and What has been Written about Him* (1978). More recent bibliographies do not purport to be complete. Holmes' changing reputation is discussed insightfully by White, "The Rise and Fall of Justice Holmes," 39 *U. Chi. L. Rev.* 51, 51-77 (1971); White, "Looking at Holmes in the Mirror," 4 *Law and History Rev.* 439, 439-65 (1986). Over a dozen new publications have appeared in the last several years, spurred in part by the

centennial of the publication of O. Holmes, *The Common Law* (1881). The most ambitious recent study is H. Pohlman, *Justice Oliver Wendell Holmes and Utilitarian Jurisprudence* (1984).

⁵ *Law and the Modern Mind* 253 (1931). Frank's work remains a classic. I may state my differences from his psychoanalytic treatment dogmatically. First, as a matter of theory, the superego contains internalized functions of both father and mother. Second, as a matter of biography, the evidence suggests that Holmes did not overcome oedipal conflicts.

⁶ Kaplan, "Encounters with O.W. Holmes, Jr.," in B. Kaplan, P. Atiyah, and J. Vetter, *Holmes and The Common Law: A Century Later: The Holmes Lectures, 1981-12-14* (1983).

⁷ For example, inconsistency and change in Holmes' treatment of First Amendment rights are discussed in recent articles: Hunter, "Problems in Search of Principles: The First Amendment in the Supreme Court from 1791-1930," 35 *Emory L. J.* 59, 107 (1986); D. Rabban, "The Emergence of Modern First Amendment Doctrine," 50 *U. Chi. L. Rev.* 1205, 1303-20 (1983).

⁸ Daniel J. Boorstin notes, "Although his legal philosophy continually lends itself to characterization as Legal Pragmatism, Mr. Justice Holmes in his personal philosophy was often inclined to take refuge in a kind of mysticism." "The Elusiveness of Mr Justice Holmes," 14 *The New England Q.* 485 (1941). D. Burton writes, "It must be clear that, when he moved away from the Law, Holmes was a curious mix of the old truths and the new scientific mentality." *Oliver Wendell Holmes, Jr.* 89 (1980).

⁹ Letter to Henry P. Bowditch, May 22, 1869, 1 R. Perry, *The Thought and Character of William James* 297.

¹⁰ See, e.g., C. Bowen, *Yankee from Olympus: Justice Holmes and his Family* 109-10 (1944); F. Biddle, *Mr. Justice Holmes* 29-30 (1946).

¹¹ 1 O. Holmes, *The Holmes-Einstein Letters* 349 (J. Peabody ed. 1964).

¹² I have been unable to locate Holmes' mother's letters or any diary or other material that might illuminate her relationship with Holmes.

¹³ Manuscript note, "20 Months--Wendy," Oliver Wendell Holmes, Sr., Papers, The Houghton Library, Harvard University. The manuscript note is included in a scrapbook which includes material from the 1860s. Howe discusses attribution of the manuscript. M. Howe, Justice Oliver Wendell Holmes: The Shaping Years 289 n. 4.

¹⁴ Manuscript note, "26 Months," Oliver Wendell Holmes, Sr., Papers, Houghton Library, Harvard University.

¹⁵ Cf. diary entries for January 17, 1871 and July 21-22, 1891 in Little, "The Early Reading of Oliver Wendell Holmes," *supra* note 2, at 182, and the so-called "Black Book," Oliver Wendell Holmes, Jr., Papers, Harvard Law School Library, at 151, col. 2.

¹⁶ Henry James wrote in his Autobiography 532 (1956): "How does Mr. Holmes persevere about smoking? I pity him if he can't sleep, and I wish I had a vicious [sic] habit so that I might give it up."

In self-portraits during the Civil War, Holmes sketched himself with pipe in mouth. See below note 36.

¹⁷ Holmes related the story to Charles P. Curtis, Jr., who related it to Bowen. C. Bowen, Yankee from Olympus 93-94, 436, 439.

¹⁸ Though few records survive, Howe writes: "[T]here are no indications that Holmes and his sister were close to one another, or that Holmes followed with any special sympathy the misfortunes of his younger brother, Edward, whose ill health...ended with his death in 1884 at the age of thirty-eight." M. Howe, Justice Oliver Wendell Holmes: The Proving Years 255. Howe is writing, however, about the period in the late 1870s and early 1880s when Holmes was intensely withdrawn and compulsively preoccupied with his work.

¹⁹ A. James, The Diary of Alice James 69 (L. Edel ed. 1964). The diary entry is discussed by M. Howe, Justice Oliver Wendell Holmes: The Shaping Years 11-12, in the context of Holmes' childhood.

²⁰ See generally C. Oberndorf, The Psychiatric Novels of Oliver Wendell Holmes pp. 6-19 (2nd ed. 1943) (reprint 1971).

²¹ Oliver Wendell Holmes, Jr., Papers, Harvard Law School Library, Manuscript Box 69, Folder 1.

²² Letter of J.R. Sullivan to E.S. Dixwell (Holmes' instructor and future father-in-law) of September 29, 1851, Oliver Wendell Holmes, Jr., Papers, Harvard Law School Library, Manuscript Box 69, Folder 2, (mounted with border decorated by Holmes' wife and the addressee's daughter).

²³ E.g., C. Bowen, Yankee from Olympus 93, 115.

²⁴ [O. Holmes], "Alma Mater," 7 The Harvard Magazine 48 (1860). Senior poem 1861 (lost), discussed in M. Howe, Justice Oliver Wendell Holmes: The Shaping Years 75-76.

²⁵ Richard Laurin Hawkins discusses the spread of positivism and the negative reaction of Holmes' college teacher Professor Bowen. Positivism in the United States (1853-1861) 23-26, 36-39 (1938). Holmes' college essays reveal that he had read work by the positivist-influenced writer Lewes. [O. Holmes], "Notes on Albert Durer," The Harvard Magazine 41-47 (1860). But his college writings do not advocate positivism and continue to reveal the influence of transcendentalism. Goldsmith, arguing for direct

influence of Holmes' father's theory on Holmes' mature thought neglects the shift in Holmes' views and mistakenly associates his father's transcendental novels with positivist psychology. See Goldsmith, "Oliver Wendell Holmes: Father and Son," 48 J. Crim. L. & Criminal 394 (1957).

²⁶ Freud's own explanation of identification evolved over time, and he may have accepted the existence of two different types of identification. See generally Compton, "The Concept of Identification in the Works of Freud, Ferenczi, and Abraham," 54 Psychoanalytic Q. 200, 200-33 (1985). Some psychoanalysts have classed it as a defense mechanism. E.g., W. Toman, An Introduction to Psychoanalytic Theory of Motivation 40-44 (1960).

²⁷ See Compton, "The Concept of Identification in the Works of Freud, Ferenczi, and Abraham," *supra* note 26, at 220.

²⁸ In a study of Holmes' college writings, I have elsewhere suggested that while Holmes was developing critical attitudes towards aspects of transcendentalism, his last college writings reveal defense of transcendentalism with renewed vigor. See The Early Writings of Justice Holmes, 30 Boston College L. Rev. (1989).

²⁹ See O. Holmes, "Autobiographical Sketch," in Mind and Faith of Justice Holmes 8 (M. Lerner ed. 1946): "If I survive the war I expect to study law as my profession or at least for a starting point."

³⁰ M. Howe, Justice Oliver Wendell Holmes: The Shaping Years 76-77.

³¹ 1 O. Holmes [Sr.], Life and Letters of Oliver Wendell Holmes, 78-79 (J. Morse ed. 1896). E. Hoyt, The Improper Bostonian: Dr. Oliver Wendell Holmes 38-39 (1979).

³² See M. Howe, Justice Oliver Wendell Holmes: The Shaping Years, 38, 45, 62, 69.

³³ Holmes' experience seems to support Dr. Watson's contemporary observation about attributes of persons selecting a legal career, which include "an increased concern over the expression and nonexpression of aggressiveness." Watson, "The Quest for Professional Competence: Psychological Aspects of Legal Education," 37 U. of Cincinnati L. Rev. 101 (1968). See also Watson, "Some Psychological Aspects of the Trial Judge's Decision-Making," 39 Mercer L. Rev. 939 (1988).

³⁴ See E. Hoyt, The Improper Bostonian: Dr. Oliver Wendell Holmes 32-36.

³⁵ "The Autobiographical Notes," in 1 O. Holmes [Sr.], Life and Letters of Oliver Wendell Holmes 39-40. See also *id.* at 43.

³⁶ See C. Oberndorf, The Psychiatric Novels of Oliver Wendell Holmes, 22, 200-02.

³⁷ Compare M. Howe, Justice Oliver Wendell Holmes: The Shaping Years plates 6, 7, 13 and 1 O. Holmes, Holmes-Pollock Letters 10 plate opposite (M. Howe ed. 1941). Holmes' self-portrait sketch in his May 1, 1861 letter to his mother depicts a stubble on his lip and a cleanshaven chin. The sketch has a note "moustache cut like hair." See O. Holmes, Touched with Fire: Civil War Letters and Diary 3 (1946). His self-portrait sketch in his letter of April 28, 1862 depicts him as cleanshaven. See *id.* at 45. Both self-portraits depict Holmes smoking a pipe.

³⁸ Holmes' letters from the front convey unmistakably his eagerness to engage in combat and his disappointment in delays. See O. Holmes, Touched with Fire: Civil War Letters and Diary 8, 9-10, 43.

³⁹ Even before the war, in the first edition of Leaves

of Grass, Walt Whitman (1819-92) endowed the Union with sexual allure. The poem that commences "Come closer to me, /Push close my lovers and take the best I possess, /Yield closer and closer and yield the best you possess...." continues freely and later proclaims, "We thought our Union grand and our Constitution grand; /I do not say they are not grand and good--for they are, /I am this day just as much in love with them as you. . ." [W. Whitman,] Leaves of Grass 57, 60 (1966) (facsimile of 1st ed., 1855).

⁴⁰ Letter of December 20, 1862, O. Holmes Touched with Fire: Civil War Letters and Diaries 79. Later in the letter Holmes reminded his father that he remained "as ready as ever to do my duty..." (*id.* at 80), but Holmes' destruction of correspondence makes it impossible conclusively to establish the existence or effect of such a fantasy.

⁴¹ M. Howe, "The Positivism of Mr. Justice Holmes," 64 *Harv. L. Rev.* 536-37 (1951); M. Howe, Justice Oliver Wendell Holmes: The Shaping Years, 84, 109, 133, 136-38, 171-72. There are problems with the details of Howe's biographical account of Holmes' transformation, and Howe's biography was informed by his own interpretation of Holmes' later writings as evidencing an extreme form of legal positivism and skepticism. Nevertheless, Howe's fundamental insight into the role of his Civil War experience in provoking a crisis that resulted in an intellectual transformation remains firmly established.

⁴² Howe states that Holmes and his mother went through his letters and destroyed "an appreciable number of his letters to his family." M. Howe, Introduction to O. Holmes, Touched with Fire: Civil War Letters and Diary ix. Holmes probably also destroyed a diary that he kept during the war. A few loose pages were saved, which he inserted in a second diary, which survives. *Id.*

⁴³ The view was widespread at the time and was supported by the apparent military impasse.

⁴⁴ Letter to his father, December 20, 1862, in O. Holmes, Touched with Fire: Civil War Letters and Diary 79-80.

⁴⁵ *Id.* at 79-80; M. Howe, Justice Oliver Wendell Holmes: The Shaping Years 138.

⁴⁶ *Id.* at 101.

⁴⁷ Letter of September 22, 1862, O. Holmes, Touched with Fire: Civil War Letters and Diary 67.

⁴⁸ Letter of March 29, 1863, *id.* 86, 91. He evidently destroyed the previous letter to which he referred.

⁴⁹ Letter of May 30, 1864, *id.* at 135.

⁵⁰ Letter of March 18, 1873, quoted in M. Howe, Justice Oliver Wendell Holmes: The Shaping Years 18.

⁵¹ Letter of February 3, 1890, 1 Holmes-Pollock Letters 33. From the elder Holmes' letters, we know that Holmes' wife did much to brighten his father's last years and that Holmes was often out of the house. See 2 O. Holmes [Sr.], Life and Letters of Oliver Wendell Holmes 86-87, 263-64.

⁵² The severity of Holmes' trauma, the compulsive intensity with which he withdrew into his work after the war, and the repeated use of military imagery in his later writings--all indicate the force of the trauma and are consistent with trauma-induced neurosis. Such a possibility raises limits to a theoretical explanation grounded on mental forces deriving from the oedipal complex. See generally S. Freud, "Beyond the Pleasure Principle," 18 The Standard Edition of the Complete Psychological

Works of Sigmund Freud 7-64 (J. Strachey trans. 1955). Freud noted that the concurrence of physical injury with psychic trauma reduced the likelihood of development of traumatic neurosis. *Id.* at 10.

⁵³ See O. Holmes, Touched with Fire: Civil War Letters and Diary 11, 13, 55, 56, 74, 92.

⁵⁴ He asked one writer to remove a reference to his wife in a published article. See letter to Elizabeth Shepley Sergeant, December 5, 1926, The Oliver Wendell Holmes, Jr. Papers, reel 37. Holmes explained that his wife wanted no public attention.

⁵⁵ M. Howe, Justice Oliver Wendell Holmes: The Shaping Years 254. See also M. Howe, Justice Oliver Wendell Holmes: The Proving Years 256.

⁵⁶ Rogat, "The Judge as Spectator," 31 *U. Chi. L. Rev.* 227-28 (1964).

⁵⁷ Letter of January 10, 1904, 1 Holmes-Pollock Letters 115; letter of April 11, 1897, *id.* at 73.

⁵⁸ "...I took up Casanova...That was just what I wanted...I don't like dirty books or care for indecent ones, but there sometimes goes with the freedom they imply, a temperament--a smack--a gusto, as I said, that puts life into one." Letter of May 27, 1910. Quoted in M. Howe, Justice Oliver Wendell Holmes: The Proving Years 259.

⁵⁹ See M. Howe, Justice Oliver Wendell Holmes: The Shaping Years 231.

⁶⁰ The Oliver Wendell Holmes, Jr. Papers, reel 57. See M. Howe, Justice Oliver Wendell Holmes: The Proving Years 99.

⁶¹ *Id.*

⁶² Holmes destroyed Lady Castletown's letters to him. Despite his request that she destroy his letters, at least 103 survived, and copies of them were donated to Harvard Law School Library. The propriety of public treatment is moot. J. Monagan, "The Love Letters of Justice Holmes," The Boston Globe Magazine 15 (March 24, 1985); J. Monagan, The Grand Pan'andrum: Mellow Years of Justice Holmes 71-94 (1988); "Justice Holmes and Lady C" Yearbook, 26-36 (1988). Though it obviously cannot be proven that Holmes and his correspondent did not have a sexual affair--a possibility that preoccupies Monagan--Holmes' intimacy is entirely consistent with his characteristic flirting, which did not result in sexual affairs and which, indeed, was motivated by Holmes' deliberate self-willed decision not to carry to completion the erotic drive disclosed by suggestive romantic behavior.

Holmes undoubtedly loved Lady Castletown and was closer to her than most other persons in his life. But the expressions of intimacy that survive do not unambiguously suggest, let alone establish, anything further. Monagan does not give equal emphasis to evidence to the contrary, such as the fact that Holmes asked his correspondent's husband to "give her my love..." Letter to Castletown, August 27, 1926, quoted in *id.*

⁶³ Mark DeWolfe Howe, typescript notes of interview with Mrs. James B. Ayer, October 25, 1955, The Oliver Wendell Holmes, Jr. Papers, reel 41.

⁶⁴ A. James, The Diary of Alice James 35.

⁶⁵ *Id.* at 61. Quotations *sic*, but cf. A. James, Alice James: Her Brothers, Her Diary 115 (A. Burr ed. 1934).

⁶⁶ In discussing examples of Holmes' "flirting," I have relied on published correspondence or events that have been referred to in previously published sources. There is evidence of similar incidents in Holmes' unpublished papers, which is consistent with the events described in

published sources. But Holmes conscientiously destroyed personally revealing correspondence in his possession, and there is reason to believe that he would have preferred to prevent the survival of the record of such incidents by others.

^{67.} Letter to William James, April 19, 1868, 1 R. Perry, *The Thought and Character of William James* 511; O. Holmes, *The Mind and Faith of Justice Holmes* 414. For a time Holmes struggled to find a more expressive salutation in his correspondence with Pollock, experimenting with "My Beloved Frederick" and "Dear F" before lapsing to "Dear Pollock," "My Dear Pollock" and, occasionally, "Dear F.P." See generally *Holmes-Pollock Letters*.

^{68.} For a discussion of a different context in which distance increased the pleasure derived from an experience, see 1. P. Gay, *The Bourgeois Experience: Victoria to Freud* 392-93 (1984).

^{69.} 1 *Holmes-Pollock Letters* 30.

^{70.} Alice James quoted this statement from memory in *The Diary of Alice James* 61. She recalled the statement in association with Holmes' statement about heaven being flirting with pretty girls and further recalled in association with these quotations: "which reminds me of Alice repeating Prof. Farlow's asking at their club table one night, 'why is every man's Aunt so entirely different from his Mother?'" *Id.*

^{71.} Mythic aspects of the plot and Mrs. Nickleby's character are discussed by H. Stone, *Dickens and the Invisible World: Fairy Tales, Fantasy, and Novel-Making* 82-85, 91 (1979). Dickens' mother as prototype for Mrs. Nickleby and similar characters is treated by G. Watkins, *Dickens in Search of Himself: Recurrent Themes and Characters in the Work of Charles Dickens* 21-31 (1987).

^{72.} Letter of February 5, 1919, O. Holmes, "The Holmes-Cohen Correspondence," 9 *Journal of the History of Ideas* 14-15 (F. Cohen ed. 1948). See also manuscript letter to Fisher, November 3, 1897, The Huntington Library.

^{73.} Letter to Holmes, quoted in part in M. Howe, *Justice Oliver Wendell Holmes: The Shaping Years* 280. See also letter of William James to Henry P. Bowditch, August 12, 1869, 1 W. James, *The Letters of William James*, 154-155 (H. James ed. 1920) ("I should think Wendell worked too hard."). John Ropes told William James that he never knew anyone who studied law as intensively as Holmes. William James letter to Bowditch, May 22, 1869, 1 R. Perry, *The Thought and Character of William James* 297. James wrote again in December that "Wendell Holmes is hard at work,--I fear too hard." Letter to Bowditch, *id.* at 321. In 1873 William James wrote his brother Henry, "I fear he [Holmes] is at last feeling the effects of his overwork..." *Id.* at 337.

^{74.} J. Kent, *Commentaries on American Law* (12th ed. O. Holmes ed. 1873) (4 vols.).

^{75.} Quoted in 1 R. Perry, *The Thought and Character of William James* 519. See also M. Howe, *Justice Oliver Wendell Holmes: The Proving Years* 22. Howe relates that Holmes' wife told Mrs. Henry James that the publication of the work was a tremendous relief to "them." *Id.* The exchange between Mrs. Holmes and Mrs. James appears to suggest that Mrs. Holmes was burdened emotionally by Holmes' scholarship, but in fact Mrs. Holmes played an active role in preparing the text for publication. See Little, *The Early Reading of Justice Oliver Wendell Holmes*, *supra* note 2, at 186.

^{76.} Letter to Thomas W. Ward, December 16, 1868, 1 R. Perry, *The Thought and Character of William James* 290.

^{77.} Letter to Henry James, November 24, 1872, 1 R. Perry, *The Thought and Character of William James* 332.

^{78.} See Little, "The Early Reading of Justice Oliver Wendell Holmes," *supra* note 2, and O. Holmes, "Black Book," *Holmes Papers*, Harvard Law School Library. *The Oliver Wendell Holmes, Jr. Papers*, reels 15 and 61.

^{79.} The powerful appeal and intense pleasure of book study--and its potentially adverse affects on mental health--was, of course, known long before Freud. See *Ecclesiastes* 12:12. (I am grateful to Professor William Staton for this reference.) See also M. Cervantes, *The Ingenious Gentleman Don Quixote de la Mancha* 27 (S. Putnam trans. 1949) ("In short, our gentleman became so immersed in his reading that he spent whole nights from sundown to sunup and his days from dawn to dusk in poring over his books, until, finally, from so little sleeping and so much reading, his brain dried up and he went completely out of his mind.")

^{80.} G. Blum, *Psychoanalytic Theories of Personality* 143-46 (1953). These defenses arise typically in adolescence and are evident in Holmes' college writings, but their continuance and intensification after the war corresponds to his delayed or incomplete resolution of the resurgent oedipal complex. A. Freud, *The Ego and the Mechanisms of Defence* 77-78 (C. Baines trans. 1946).

^{81.} "I would not speak of Blackstone's 'superficial acquaintance' with the law. He was on pretty intimate terms with his lady." Letter to Wu, February 9, 1923, in O. Holmes, *Justice Holmes to Dr. Wu: An Intimate Correspondence 1921-1932* 8 (Wu ed. [?] n.d.).

^{82.} "Speech at Suffolk Bar Association Dinner" (1885), in O. Holmes, *The Occasional Speeches of Justice Oliver Wendell Holmes* 21 (M. Howe comp. 1962). He concluded: "But when for the first time I was called to speak on such an occasion as this, the only thought that could come into my mind, the only feeling that could fill my heart, the only words that could spring to my lips, were a hymn to her in whose name we are met here tonight--to our mistress, the Law." *Id.* at 23. Cf. Pollock's touching use of the analogy in a note to Holmes after Holmes' wife had died. 2 *Holmes-Pollock Letters* 245.

^{83.} "The Use of Law Schools: Oration Before the Harvard Law School Association" (1886), in *The Occasional Speeches of Justice Oliver Wendell Holmes* 37.

^{84.} J. Story, *The Miscellaneous Writings of Joseph Story* 523 (W. Story ed. 1852).

^{85.} An 1860 memoir on Blackstone referred to the common use of the phrase. See generally Wigmores, "Diversities de la Ley," 27 *Ill. L. Rev.* 329 (1933). Cf. R. Emerson, "The Conduct of Life" (1860), in *Ralph Waldo Emerson: Essays and Lectures* 1004 (J. Porte ed. 1983) ("Art is a jealous mistress...").

^{86.} Freud, in cataloguing types of joke techniques, found humorous allusions to present a signal problem, because their humorous effect does not derive from the mechanics of the process of analogy or comparison. S. Freud, *Jokes and their Relation to the Unconscious*, 8 *The Standard Edition of the Complete Psychological Works of Sigmund Freud* 87-88 (1960).

^{87.} See *id.* at 170.

^{88.} The experience of sublimation and projection was recognized in the nineteenth century. For various contem-

poraneous approaches to the problem of sublimation and projection, see 2 P. Gay, *The Bourgeois Experience: Victoria to Freud* 256-57 (1986).

⁸⁹ Freud found four classes of tendentious jokes: obscene, hostile, cynical, and skeptical. See Freud, *Jokes and their Relation to the Unconscious* 115. Application of the classification to tendentious allusion assists analysis, but the classes are not necessarily exclusive.

⁹⁰ *Id.* Freud considered this to be the rarest kind of joke.

⁹¹ See the 1928 essay "Humour," in S. Freud, *Character and Culture* 267-69 (J. Riviere trans. P. Rieff ed. 1963).

⁹² [O. Holmes], "Plato," 2 *The University Q.* 217 (1980).

⁹³ Quoted in M. Howe, *Justice Oliver Wendell Holmes: The Shaping Years* 75.

⁹⁴ Alice James, reflecting on her own neurosis, referred to the "constabulary functions" of the moral power in policing the drives of the body. *The Diary of Alice James* 149.

⁹⁵ The intensity of Holmes' need to reassert the pleasure principle against adversity is reflected in both his humor and his flirting. Because the need was very likely excited by his traumatic experiences during the war, it is impermissible to infer that his pre-war relations with women were also characterized by such flirting.

⁹⁶ He returned to this theme repeatedly. See, e.g., Holmes, "Speech at Brown Commencement" (1897), in *Collected Legal Papers*, 166; letter to Pollock, 1881, 1 *Holmes-Pollock Letters* 16; letter to Emerson, 1876, quoted in M. Howe, *O.W. Holmes, Jr.: Counsellor-at-Law* 8 (1948).

⁹⁷ Letter of July 26, 1914 to Clara Sherwood Stevens, quoted in M. Howe, *Justice Oliver Wendell Holmes: The Shaping Years* 19.

⁹⁸ Letter to Henry P. Bowditch, December 29, 1869, 1 R. Perry, *The Thought and Character of William James* 321.

⁹⁹ Letter of October 12, 1930, to Mrs. Charles S. Hamlin, quoted in M. Howe, *Justice Oliver Wendell Holmes: The Proving Years* 135.

¹⁰⁰ See, e.g., *id.* at 10.

¹⁰¹ Letter of January 14, 1900, to Wigmore, quoted in *id.* at 84.

¹⁰² Howe, "Introduction," O. Holmes, *The Common Law* xiv (M. Howe ed. 1963). Howe's interpretation is questioned by H. Pohlman, *Justice Oliver Wendell Holmes and Utilitarian Jurisprudence* 2 (1984).

¹⁰³ "But Maine is conspicuous in *The Common Law* by his absence, suffering the additional indignity of having his thesis on the movement of the law from status to contract associated in a footnote with Blackstone!" Touster, "Holmes's *Common Law*: a Centennial View," 51 *American Scholar* 527 (1982). Touster also observes, "Another great influence on Holmes, John Austin, is also neglected in *The Common Law*." *Id.*

¹⁰⁴ Letter of February 5, 1923, O. Holmes, *Justice Holmes to Dr. Wu* 7-8; O. Holmes *Justice Oliver Wendell Holmes: His Book Notices and Uncollected Letters and Papers* 159 (H. Shriver ed. 1936).

¹⁰⁵ Letter of February 5, 1919, "Holmes-Cohen Correspondence," *supra* note 72, at 14-15 (emphasis added).

¹⁰⁶ See Little, "The Early Reading of Justice

Holmes," *supra* note 2, at 196; O. Holmes, "Black Book," Oliver Wendell Holmes, Jr., *Papers*, Harvard Law School Library, at 143 col. 1, at 155 col. 2.

¹⁰⁷ Memory loss is the most probable cause of the statement. I exclude the possibility of intentional misstatement, though it is possible that Holmes in referring to works of Voltaire meant only more technical works of philosophy. But Voltaire expressed his skepticism in his literary work as well as in his more didactic philosophical essays; indeed the distinction between literary and philosophical writings hardly applies to Voltaire's work.

Notwithstanding the memory lapse in 1919, Holmes wrote to Laski in 1924 referring to his having "glanced" at Voltaire's *Coquilles*. See 1 *Holmes-Laski Letters* 580 (M. Howe ed. 1953). Holmes expressed negative evaluations of Voltaire in letters to Laski. *Id.* at 580; 2 *Holmes-Laski Letters* 1337. In 1931 Holmes read two or three volumes of Voltaire's letters. *Black Book* at 71 col. 1. Although I suggest that Holmes had forgotten that he had repeatedly read Voltaire, there is no reason to suspect that Voltaire was an important influence. Holmes read Voltaire after the development of his skeptical world view. But the incident demonstrates problems in relying on Holmes' autobiographical observations about his intellectual development.

¹⁰⁸ S. Freud, *The Psychopathology of Everyday Life*, in 6 *The Standard Edition of the Complete Psychological Works of Sigmund Freud* 144 (1960). See also Watson, "Freud the Translator: Some Contacts with Philosophy," 39 *The International Journal of Psycho-Analysis* 1-2 (1959) (discussing possible influences on Freud's theory of the pleasure, pain, and reality principles, which Freud forgot).

¹⁰⁹ "Holmes-Cohen Correspondence," *supra* note 72, at 15 n. 27.

¹¹⁰ See *id.* at 14 ("Probably a skeptical temperament that I got from my mother had something to do with my way of thinking."). The close association of Holmes' memory of his mother's influence with the demonstrable oblivion of Voltaire suggests the need for caution in assuming the accuracy of the memory. The dynamics that caused the oblivion could equally cause paramnesia.

¹¹¹ P. Wiener, *Evolution and the Founders of Pragmatism* 173 (1969).

¹¹² *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting).

¹¹³ Letter to Pollock, in 1 *Holmes-Pollock Letters* 39-40.

¹¹⁴ *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

¹¹⁵ See e.g., O. Holmes, *Progressive Masks: Letters of Oliver Wendell Holmes, Jr. and Franklin Ford* 17 (D. Burton ed. 1982). He corresponded extensively with Sheehan, Laski, Pollock, Wu, Ford, and Einstein. Only Pollock was his contemporary and only Pollock had comparable social standing. Holmes was born in 1841, Pollock in 1845, Ford in 1849, Sheehan in 1852, Einstein in 1877, Laski in 1893, and Wu in 1899.

¹¹⁶ See, e.g., 1 *Holmes-Laski Letters* 96.

¹¹⁷ O. Holmes, *Progressive Masks: Letters of Oliver Wendell Holmes, Jr. and Franklin Ford* 109.

¹¹⁸ O. Holmes, *Justice Oliver Wendell Holmes: His Book Notices and Uncollected Letters and Papers* 197 (H. Shriver ed. 1936).

¹¹⁹ O. Holmes, *Collected Legal Papers* 171 (1921).

¹²⁰. O. Holmes, The Common Law 39-76 (1881).

¹²¹. For Lon L. Fuller's critique, see, e.g., The Law in Quest of Itself 93 (1940). For criticisms of Holmes' theory of the grounds of criminal liability, see, e.g., F. Allen, "Criminal Law," 31 *U. Chi. L. Rev.* 257 (1964); Atiyah, "The Legacy of Holmes through English Eyes," in Kaplan, Atiyah, and Vetter, Holmes and The Common Law 29-36; Rogat, "The Judge as Spectator," *supra* note 56, at 213-24.

¹²². S. Freud, New Introductory Lectures on Psycho-Analysis (1933), 22 The Standard Edition of the Complete Psychological Works of Sigmund Freud 61 (1964).

¹²³. See R. Emerson, "Essays: Second Series," in Ralph Waldo Emerson: Essays and Lectures 566-69 (1983).

¹²⁴. Holmes' evolutionary treatment of legal process is discussed by Wiener, Evolution and the Founders of Pragmatism 175-82, and Elliott, "Holmes and Evolution: Legal Process as Artificial Intelligence," 13 *J. Legal Studies* 113, 114-43 (1984).

¹²⁵. See e.g., O. Holmes, The Common Law 35 (1881).

¹²⁶. *Id.* at 36.

¹²⁷. Holmes' attitudes towards American political and legal history confirm this. See J. Hurst, Justice Holmes on Legal History 123-29 (1964).

¹²⁸. His appreciation of the quantity of change over time itself changed in later years, but the basic operative mechanics remained constant. For a discussion of Holmes' theory of change and his changing attitude towards the rate of change, see Elliott, "Holmes and Evolution: Legal Process as Artificial Intelligence," *supra* note 124, at 135-36.

¹²⁹. This essay was completed and typeset before I had the opportunity to benefit from three works that have materially advanced my understanding of Holmes: G. Aichele, Oliver Wendell Holmes, Jr.: Soldier, Scholar Judge (1989); S. Novick, Honorable Justice: The Life of Oliver Wendell Holmes (1989); and Grey, "Holmes and Legal Pragmatism," 41 *Stanford L. Rev.* 787-870 (1989).

The Judicial Bookshelf

D. Grier Stephenson, Jr.

In April 1788, when Alexander Hamilton imagined the Supreme Court and a national judicial power in *Federalist* No. 78, he defended the "independence of the judges" as "an essential safeguard against the effects of occasional ill-humors in the society." Of primary concern to Hamilton were "infractions of the constitution" which the anticipated power of judicial review would not only check once they had occurred but perhaps even discourage at their outset. Thus, the separated powers mandated by the Constitution have made judicial independence possible; its shared powers have made occasional breaches of that independence probable and have allowed the federal judiciary to become a partner in governing the nation.

This constitutional dimension of the business of the Supreme Court has contributed mightily to the institution's prominence in American government. Even though the Court performs an important conflict-resolution function--essential in any political system--and even though the great majority of its cases have not raised constitutional questions, the Court achieved the stature it enjoys through its role as chief expositor of the nation's fundamental charter. As then Attorney General Robert Jackson observed on the 150th anniversary of the establishment of the Supreme Court, "Few tribunals have had greater opportunity for original and constructive work, and none ever seized opportunity with more daring and wisdom."¹ Issues which other nations regard as purely political have become legal ones here. Judicial review has made the Court a compelling force in the plan of union the framers devised. The

Court's power has contributed to the design James Madison envisioned to overcome the twin difficulties of statecraft: those of "enabl[ing] the government to control the governed" and oblig[ing] the government to control itself."² Attempting to resolve issues which divide and perplex the nation, the Court has contributed both symbolically and substantively to the strength and vitality of constitutional government.

The Court occupies a key place in the American scheme of democratic government in spite of professed weakness. "Courts are mere instruments of the law, and can will nothing," Chief Justice Marshall explained in 1824.³ In answering charges during the debates over ratification of the Constitution that the Court would be too powerful, Hamilton maintained that "the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them."⁴ Lacking the "sword" of the executive and the "purse" of the legislature, the Court was to possess "merely judgment." The practicalities of starting up a new government bolstered Hamilton's argument. Since the judiciary's establishment required the consent of both the President and Congress, there could be no Court until the other two branches came into being and acted. Thus, the new House and Senate transacted their first business on April 2 and April 5, respectively, with George Washington's inauguration following on April 30. Legislation creating the Supreme Court and setting February 1, 1790, as the day of its first session was signed by Washington on September 24. Confirmation by the Senate of the first

nominees followed on September 26, one day shy of Congress' adjournment, meaning that the Supreme Court as a functioning branch of the national government followed the other two by nine months.⁵

From practical and constitutional dependency came strength. From the outset, the Justices claimed the duty to interpret the Constitution, taking on the burden of settling disputes the framers had not anticipated or had been unwilling or unable to resolve. Because of the widespread acceptance throughout most of American national history of constitutional interpretation as peculiarly a judicial function, the Court has converted Hamilton's characterization of the judicial power as "merely judgment" into one of the greatest understatements of all time.

Since the Supreme Court matters politically as well as jurisprudentially, it has understandably been subject to continuing scholarly and journalistic oversight. Such scrutiny has been particularly beneficial 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 consequently been a source of the institution's legitimacy as a check on popular power. As William Howard Taft observed nearly a century ago,

*Nothing tends more to render judges careful in their decisions and anxiously solicitous to do exact justice than the consciousness that every act of theirs is to be subjected to the intelligent scrutiny of their fellow-men, and to their candid criticism.... In the case of judges having a life tenure, indeed, their very independence makes the right freely to comment on their decisions of greater importance, because it is the only practical and available instrument in the hands of a free people to keep such judges alive to the reasonable demands of those they serve."*⁶

Recent books about the Court are amply supplied with what Taft called "comment" and "reasonable demands." As with any political institution, study of the Supreme Court is aided by a framework of analysis. Helpful in understanding the Supreme Court are five key elements: political and intellectual environment,

personnel, past, process, and product.

The first refers to the governmental system and societal context in which the Court operates. The second includes the individual Justices who decide cases. The third encompasses not only the history of the nation, but the body of decisions rendered by former Justices. The fourth alerts the student of the Court to the manner in which the Court arrives at its decisions, including the role of advocacy and the institution's internal dynamics. Product, the fifth and last element, consists of the Court's current rulings--the end result of the decision-making process--and their acceptance and implementation. Each element is reflected in varying degrees in the books selected for this review article.⁷

Political and Intellectual Environment

The political and intellectual environment influences the selection of Justices who come to the Bench with various values and approaches to constitutional interpretation. The environment also largely determines the kinds of issues at stake in cases presented to the Court for decision. Moreover, the political acceptability of decisions and the degree to which the Court's decisions accomplish their objectives affect the impact of the Supreme Court.

Herman Schwartz's *Packing the Courts* is evidence of how judicial selection intersects with the politics of the times. The book is not a detached study, nor does the author pretend it to be. "This is not a book written in tranquil recollection of things past," Schwartz acknowledges. "I wrote it while engaged in many of the controversies it discusses, with more in the offing.... This book is about...the conservative efforts to overturn what the courts have done in the past half century on behalf of the constitutional imperative to 'establish justice ... and ensure the blessings of liberty.'" ⁸ While the subject has been addressed in the periodical literature,⁹ this is the first book-length account of the appointment of federal judges at all levels during the Reagan years.

A book with the title of this one prompts a question at the outset. What was so special or different about judicial politics in the Reagan Administration to warrant a book on the subject? Schwartz freely admits that many previ-

ous Presidents have tried, often with considerable success, to make the Supreme Court in their image. "What is...almost without parallel," Schwartz responds, is that "the recent court-packing campaign...reaches to so much of the constitutional landscape in such fundamental ways."¹⁰ Other Presidents were concerned about a single issue, as when President Franklin Roosevelt insisted on judges who were sure to validate his economic recovery program. By contrast, Schwartz explains, judicial selection during the Reagan years was designed to advance a broad conservative agenda, including topics such as school desegregation, affirmative action, voting rights, discrimination against the handicapped, school prayer, abortion, antitrust policy, regulation, and criminal procedure.¹¹ By the second term especially, congressional resistance to some of this agenda "increased the pressure for 'friendly' judges to promote the Reagan Revolution in the legal sphere."¹² Finally, Reagan judicial politics differed in another way: "Except perhaps for the school prayer issue, there is certainly no great groundswell of support for the right's social agenda, as there was for FDR's, TR's, and Lincoln's policies."¹³ Schwartz seems to be say-

ing that the voters had twice elected with comfortable margins a President whose views they rejected. Moreover, Schwartz might have said that the conservative judicial agenda was as broad as it was because judges had been active on so broad a front. Reagan's court-conscious predecessors had not faced that problem. "Whether they realized it or not, the Justices in *Brown* [v. *Board of Education* in 1954] had committed the federal courts to an enterprise of profound social reconstruction."¹⁴

With it understood that Schwartz is not a disinterested observer, *Packing the Courts* is an important publication for two reasons. First, Schwartz plainly documents the priority given to ideology in judicial selection in both the first and second Reagan terms. While debates over a nominee's ideology dominated the news in the high-visibility Supreme Court confirmation proceedings of Justice Rehnquist and Judges Scalia, Bork, and Kennedy,¹⁵ most nominations to the district and appeals benches, as customary, attracted no national publicity. For example, one of President Reagan's first appeals court nominees was Richard Posner, whose name came before the Senate in November, 1981. According to Schwartz,

*Posner's confirmation hearing took place on a Friday afternoon, in a joint session with four other nominees, and with only Chairman Strom Thurmond and the conservative Howell Heflin of Alabama in attendance. Posner's part of the hearing took but a few minutes, and he was quickly confirmed without debate. Although few realized it, the court-packing campaign had begun....*¹⁶

By contrast, those nominees who provoked controversy (as in the cases of Daniel A. Manion and J. Harvie Wilkinson, for example) were prominent by their infrequency.

Schwartz's thesis that nominees had to pass the rigorous ideological screening of the President's Committee on Federal Judicial Selection takes on added meaning, therefore, when one realizes the number of judicial seats that had to be filled. By the end of 1988, not only did President Reagan's nominees account for slightly more than half the entire federal bench, but he had been able to appoint more judges than any previous President, surpassing Jimmy

By the end of his second term, Ronald Reagan's judicial nominees composed more than half the federal bench. In *Packing the Courts*, Schwartz argues that most were selected to advance a broad conservative agenda.



Carter, the prior record holder. In describing sixteen of the nominations to the lower federal courts (in addition to the nominations to the Supreme Court), Schwartz thus highlights this significant dimension of the President's appointment power. Nominations to the lower courts are crucial since those courts are effectively the courts of last resort for almost all litigants in the federal judicial system.

The book is important for a second reason as well: its usefulness as a resource.¹⁷ In documenting his thesis, Schwartz cites personal observation and interviews to a degree, but makes his case primarily from secondary sources, including newsletters, magazines, newspapers and official publications. Having gathered together and relied upon information already available in print, he is open to the "there's nothing new here" charge. Yet, the author has performed a service. The book's 25 pages of notes are a road map, usefully pointing the way for others investigating the same subject.

There is a vast ideological distance between Herman Schwartz and Gary L. McDowell, author of *Curbing the Courts*.¹⁸ Nonetheless, the two authors occupy at least some common ground: each deplores judicial activism in certain forms and worries about public perceptions of the judiciary. Schwartz was alarmed by the Reagan Administration's efforts to roll back liberal judicial decisions by reshaping the federal courts not only because he disagreed with the political goals of such efforts but because the open politicizing of the bench might impair the public confidence on which judicial authority ultimately depends. McDowell, whom Schwartz characterizes as "one of [Attorney General Edwin] Meese's chief theoretician-assistants,"¹⁹ rejects the activist posture the Supreme Court and other federal courts have assumed during the past half century, which Schwartz admires. McDowell, however, also frowns on congressional proposals to "curb the courts" because they have failed and risk undermining popular respect for the judiciary and the idea of the rule of law.

Since 1790, McDowell believes, the Supreme Court has engaged in excessive activism during two periods: from 1890 to 1937, and from 1954 to the present. The former was characterized by "proscriptive activism," and the latter has been marked by "prescriptive

activism." Justices have been "more concerned with natural than with legal justice.... What is constitutional is what the jurist thinks is reasonable or just, and the basis of judicial power is understood to be an active concern for vindicating notions of abstract justice or for advancing a particular jurist's view of what constitutes 'human dignity.'"²⁰ This departs from the judicial role envisioned by the framers of the Constitution and has enabled judges to "roam at large in the trackless fields of their own imaginations."²¹ As Hamilton cautioned in *Federalist* No. 78, "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them." If judicial power, like other forms of political power, is of an "encroaching nature," as James Madison argued in *Federalist* No. 51, then the courts must be subject to limits. In this way, they can perform their essential functions within a system that trims or prevents excesses.

How does one curb the courts? McDowell contends that "[t]he American political system operates to the advantage of the judiciary." Contrary to Schwartz, McDowell concludes that presidential court-packing schemes "are notoriously ineffective." Likewise, of little help is the congressional impeachment power, and piecemeal congressional attacks on individual court decisions only "treat symptoms at the expense of curing causes." When tried, such measures usually fail for two reasons. First, it is difficult to build political support for an attack on the Court because a decision or even a constitutional theory that alarms one group is bound to please another. No line of decisions gores all oxen. Second, any attack on the Court seems to threaten the constitutional principle of an independent judiciary, as President Franklin Roosevelt discovered in his ill-fated Court-packing plan of 1937. Even judicial restraint, stemming as it does from the Justices' perception of their role, is an "empty reliance."

Instead, what is needed is congressional enforcement of "constitutional restraint." A fundamental approach, aimed not at particular decisions but at the process itself, is in order because "judicial activism is not so much a case of judicial usurpation as it is of congressional

abdication." As a basis for this route to reform, McDowell looks to Article III, which authorizes Congress not only to make "exceptions" to the Court's appellate jurisdiction but "regulations" as well. Congressional resurgence should take the form of legislation constricting rules of standing, the breadth of class actions, the ease of intervention by those not actual parties to a suit, the expanse of consent decrees, and the scope of declaratory and equitable relief.²³ These changes in the Rules of Civil Procedure would reverse the trend from what McDowell calls "concrete standards" to "abstract standards," with the enlarged discretion the latter have allowed.

While well designed to accomplish the objective McDowell has in mind, one suspects that his fundamental procedural remedy for judicial activism might suffer from the same weakness which has defeated most decision-specific measures in recent years. If it is difficult to marshal a majority in Congress against the Court because almost any decision will have its supporters as well as detractors, will there not also be substantial numbers who perceive their interests advantaged by the current rules?²⁴ Moreover, by allowing judges to do more, rather than less, governing, Congress relieves itself of the burden of making some decisions and retains the courts as a useful scapegoat when the judges "go too far." The success of McDowell's plan ultimately depends on building a majority coalition in Congress in favor of a principle: that there are limits within the Constitution to what judges can and should do and that it is Congress's obligation to enforce those limits by setting additional statutory restrictions on the exercise of judicial power. One wonders whether Congress can be mobilized by a principle unattached to coalitions of powerful interests and whether Congress and the nation have not grown too accustomed to an activist judiciary for that to happen.

In *The Limits of Judicial Power*, William Lasser²⁵ would agree with Herman Schwartz that Presidents can change the direction of the Court through appointments, but he would accept Gary McDowell's assessment that the federal judiciary otherwise enjoys ample independence and operates most of the time free of external constraints. Lasser argues that the Court enjoys greater power today than ever

before in its history, that it has rushed passed the amber lights of caution many times, and that it seems unlikely to suffer major political setbacks. Lasser ponders the warning issued in 1960 by Robert McCloskey, before the second and even more activist half of the Warren Court. The Court had pushed forward at a rate that McCloskey thought was "perilous and perhaps self-defeating."²⁶ The Court was running the risk of repeating its greatest historical blunders. (See the discussion of McCloskey in the section on "The Past" in connection with William M. Wiecek's *Liberty Under Law*.)

Why then has the Court not been successfully curbed in the years since 1960? Lasser takes as major tests of judicial power the decision in the *Dred Scott* case,²⁷ the Court's involvement in the Civil War and Reconstruction, and the Court's challenge to the New Deal. He then posits two questions the book will answer. "First, what do the crises of the past tell us about the Court's strengths and weaknesses as an institution?... By what mechanism did the Court weather its most severe storms, and how can its survival be explained? Second, what does such a study...tell as about the modern era? Did Court-watchers like McCloskey and others misjudge the danger to the modern Court because they misunderstood history, or, because the modern era is fundamentally different from the past--or might it be both?"²⁸

Lasser believes both that the older Court's power was greater than previously thought and that the limits of judicial power have expanded beyond their former boundaries. In each of the three major crises of history, "the Court's opponents lacked the will, the desire, and the ability to crush the Court." At best, argues Lasser, they wanted to change (or have the Court change) only one or a small number of decisions. "Once they did so, the Court quickly reassumed its accustomed position, paradoxically strengthened by the very weakness of the arguments against it even at its weakest moments." In the main, attacks on the Court were attacks on its decisions, not attacks on judicial power. In this context, the modern Court's political entanglements are "not an aberration, but a continuation of a long-established historical pattern."²⁹ McCloskey and others were therefore correct in saying that the Court could not for long block the popular will, but were

incorrect in concluding that it was dangerous for the Court to try. The "salient fact" is that none of the modern Court's rulings has generated a persistent and massive wave in the public and Congress for reversal. Where that came close to happening, other issues soon appeared to deflect attention away from the judiciary.

Does this mean that the Justices should be unconcerned about their power? Lasser thinks not. Instead, he accepts Justice Stone's admonition in *United States v. Butler*: "While unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint."³⁰ That is, "judicial restraint is necessary not because the Court is weak but because it is strong." The Court should avoid issues where decisions might create full-scale crises, "thereby revealing the limits of its political strength." While nothing the Court has done since 1960 has precipitated such a crisis, he gives little guidance on predicting the breadth and depth of public outcry in order to avoid an institution-shattering event. Short of such a calamity, "the storms that swirl around the Court will [not] become severe enough to force it to alter course." The Court's strength therefore makes "the responsible exercise of judicial power...so vitally necessary."³¹

Personnel

The interest which accompanies each appointment to the Supreme Court exemplifies the force of individuals on the Bench. Since Washington's day, Presidents, Senators, and others have recognized that Justices do not decide cases in a vacuum, that "judicial decisions are not babies brought by constitutional storks."³² The Justices' values and role perception combine to help shape the Court's decisions.

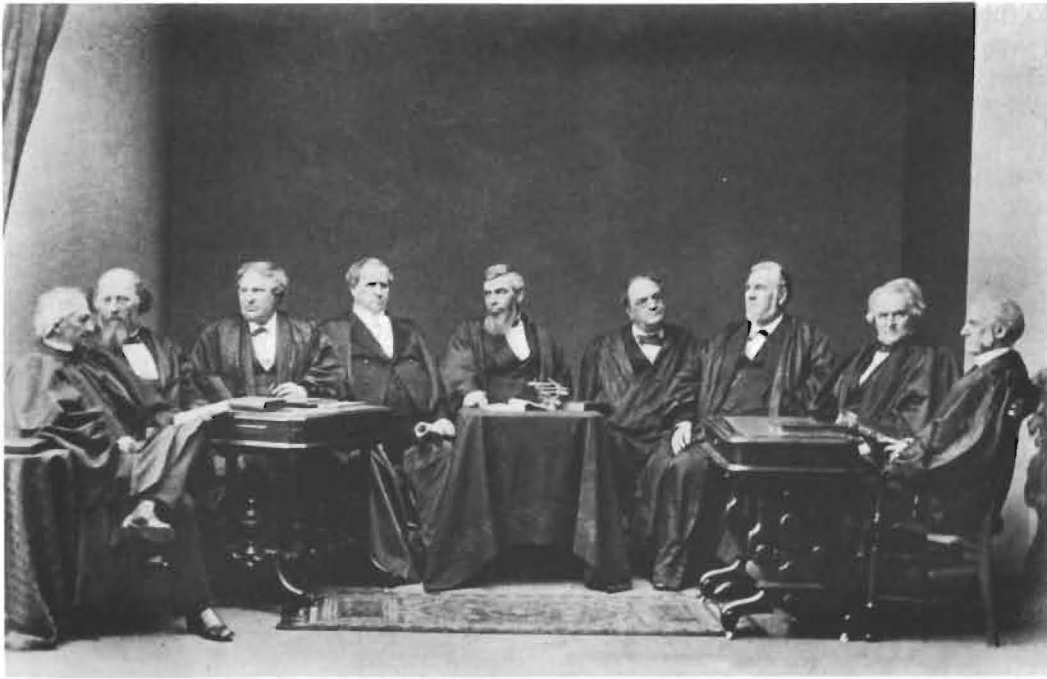
The impact of individual Justices as well as the political and intellectual environment appears clearly in Charles Fairman's *Reconstruction and Union 1864-88* (Part Two), which covers the years of the Waite Court.³³ This volume is one of three contributions Professor Fairman made to The Oliver Wendell Holmes Devise History of the Supreme Court of the United States. Part One (Volume VI) appeared in

1971 as one of the first books in the series and covered the years of the Chase Court. A supplement to Volume VII (Five Justices and the Electoral Commission of 1877) was published in 1988.³⁴

Given the number of Justices (14) who served with Waite and the variety of issues which confronted the Court at that time, it is noteworthy that Fairman devoted a tenth of the book to the appointment of Chief Justice Chase's successor.³⁵ Controversy over the nominations of some recent Presidents may have been among the most intense in the nation's history, but no President in this century has experienced the frustration surely felt by President Grant in 1873 and 1874. The President made an offer of the chief justiceship to at least five individuals. By one account he offered it to seven.³⁶ Of the five, Grant's tenders first to Senator Roscoe Conkling and then to Secretary of State Hamilton Fish were declined. The nominations of Attorney General George H. Williams and then Caleb Cushing met such resistance in the Senate that they had to be withdrawn. Finally, on January 19, 1874 (over eight months after Chase's death), Grant sent Waite's name to the Senate. As Fish wrote Robert Schenck on the 19th, "We had 'a time' over the Chief Justiceship.... It has been a hard parturition...." Gideon Welles confided to his son, "It is a wonder that Grant did not pick up some old acquaintance, who was a stage driver or bartender for the place. We may be thankful that he has done so well."³⁷ *The Nation* expressed a similar sense of relief in an editorial.

*The President has, with remarkable skill, avoided choosing any first-rate man. Mr. Waite stands in the front rank of second-rate lawyers.... But he undoubtedly is a man of the highest character, and has the best possible standing at the bar of his own State.... On the whole, considering what the President might have done, and tried to do, we ought to be very thankful, and give Mr. Waite a cordial welcome.*³⁸

While the record of every period of the Court contains significant cases, the Waite era (1874-1888) contains a larger number than the relatively short span of years might suggest. The Court confronted and helped to clarify the



The Waite Court: (from left) Joseph P. Bradley, Stephen J. Field, Samuel F. Miller, Nathan Clifford, Chief Justice Morrison R. Waite, Noah Haynes Swayne, David Davis, William Strong, and Ward Hunt. Waite was a 57-year-old attorney from Ohio when he was appointed Chief Justice in 1874. His Court ruled on the controversial Granger laws, upholding them with a seven-vote majority.

extent of the state police power (especially with respect to rates), the authority of the national government to protect civil rights under the Thirteenth, Fourteenth, and Fifteenth Amendments, the scope of congressional investigations, and tensions between religious freedom and civic responsibility. It took over a half century to settle the first and almost a century to settle the second and third. The republic continues to grapple with the fourth.

The Waite years were a watershed time in American constitutional law. Particularly regarding the reach of the state police power, the 1870s and 1880s witnessed a debate on and off the Court over the protection of rights. Were the people to look to the polls (that is, to the electoral process) or to the polls and the courts? The Waite Court in *Munn v. Illinois*³⁹ chose the former and in the process encouraged creation of the American Bar Association, which campaigned for an invigorated judicial review. When the Court later turned its back on *Munn*,⁴⁰ judicial review itself became a major national political issue for the first time.⁴¹

Generally, however, the Court was not in-

clined either during Waite's time or in the remaining 12 years of the century (and even for some years afterward) to extend judicial protection of civil rights in matters of race. A majority of the Justices reflected the dominant opinion of the day that no extraordinary reach of national power was justified in such cases, even with the addition of the Civil War amendments to the Constitution. This attitude seemed especially present in the Civil Rights Cases.⁴²

The Court decided these five cases together, each raising the issue of the constitutionality of the Civil Rights Act of 1875, which created a right to be free of racial discrimination in public accommodations. With only Justice Harlan dissenting, the Court invalidated the statute as being unwarranted by the Constitution since it regulated private, not state, action. Solicitor General S. F. Phillips submitted a brief applicable to three of the cases, and *Reconstruction and Reunion* includes generous excerpts. Fairman concludes, however, that no driving force was present to sustain the Act. The persons whose exclusion had given rise to the litigation were of course not parties

to the cases. The Justice Department had shown little interest in enforcement of the law during the preceding several years, because of strong opposition in locales where discrimination in private establishments was most persistent. Moreover, the government "had not built up a strong and persuasive line of reasoning whereby the statute might be sustained.... Oral argument over opposing positions, which normally serves to put the issues clearly in focus, was lacking. The Court was left to its own reflections in deciding an issue which to the parties immediately involved seemed of little consequence, yet which in the future would loom large as a denial of racial equality before the law."⁴³

What would have been the impact on the Court (and the nation) had there been a vigorous defense of the statute? Justice Bradley, author of the majority opinion, "had a phenomenally penetrating mind with, however, some blind spots."⁴⁴ Fairman recalled former Justice John A. Campbell's attack as counsel on the Louisiana law in the Slaughterhouse Cases and his spirited defense of liberty: "Conscience, speech, security, freedom, and whatever else is essential to the liberty, or is proper as an attribute of citizenship, are now held under the guarantee of the Constitution of the United States." In obtaining four votes (including Bradley's), just one short of a majority, Campbell demonstrated the potential power of an argument. "But nothing of that sort was offered to lift the thought of the Justices in the work now in hand."⁴⁵

Eighty-two years after the Civil Rights Cases were decided and 91 years after Morrison Waite took his seat on the Court, President Lyndon Johnson selected Abe Fortas to take the place vacated by departing Justice Arthur Goldberg. Someone unfamiliar with Fortas's years in Washington might wonder why he has become a biographer's subject. Of the 95 Justices who have completed their work on the Court, only six served a shorter time than Fortas's three years and nine months.⁴⁶ Moreover, a sketch of his life would reveal that he had held several administrative posts in the federal government during the 1930s and 1940s, none higher than an assistant secretary in the Interior Department. Otherwise, he was an influential attorney and lobbyist in a city with many of both.

Fortas's career on and off the Court was much more than such a brief outline reveals, however. Not only had he been a prominent New Dealer and Washington lawyer, he was a close, long-standing, and confidential counselor to, and friend of, the President who named him an Associate Justice in 1965. With great disinclination Fortas accepted the position and even then only at the irresistible urging of Johnson.⁴⁷ In 1968, Johnson picked him to succeed Earl Warren as Chief Justice. If Johnson had had his way, Fortas would have joined that very small club of Chief Justices who were named from the ranks of Associate Justice. In 1968, the only members were Edward D. White and Harlan F. Stone.⁴⁸ Johnson hoped that Fortas, aided by his analytical brilliance and eloquence, would continue the thrust of the liberal constitutional jurisprudence fostered during the second half of the Warren Court. (Fortas very possibly could have served as Chief Justice into the Reagan Presidency; he died in 1982.) When a filibuster in the United States Senate prevented the nomination from coming to a vote and when Johnson reluctantly withdrew Fortas's name, Fortas became the first (and so far the only) nominee for the center chair in this century to fail to win confirmation.⁴⁹ Then in 1969 he became the first Supreme Court Justice to resign under fire, giving the new Nixon Administration its second (and unexpected) vacancy on the Court to fill. The controversy over Fortas has since reached well beyond the man himself. It ushered in almost two decades of some of the most rancorous and vituperative debates ever seen over Supreme Court nominees.

Into Fortas's impressive record of professional accomplishments and into the personally tragic sequence of events has stepped Bruce Allen Murphy. Publication of his *Fortas: The Rise and Ruin of a Supreme Court Justice* has yielded one of the most important and revealing of recent books about the modern Court. The volume also provides insight into national politics during the Kennedy and Johnson Presidencies. As the author of *The Brandeis-Frankfurter Connection*, Murphy is no stranger to the Court nor to the issues, problems and dangers presented by extra-judicial conduct. Despite years of political involvement while wearing the judicial garb, both Brandeis and Frankfurter



As a Washington attorney, Abe Fortas argued Clarence Earl Gideon's case before the Supreme Court in 1963. In a unanimous decision, the Court established that if a defendant cannot pay for a lawyer to defend him against a felony charge, the state court must appoint one for him. Two years later, Fortas was appointed to the Supreme Court by President Lyndon B. Johnson, an old friend.

A partner at the Washington, D.C., firm of Arnold, Fortas & Porter, he was initially reluctant to accept the appointment. When Fortas took his seat he continued to act as Johnson's advisor and confidant.

Abe Fortas was the son of a Jewish cabinetmaker who had emigrated from England to Memphis, Tennessee. He earned his way at an early age by playing the violin at dances. Fortas continued this musical pastime after he joined the Court by playing once a week with a string quartet.

have been lionized. Each retired with respect and admiration after a long career. Respectively, they enjoy "great" and "near-great" status. So, the motivating question for Murphy is "Who or what killed the public career of Abe Fortas?"⁵⁰

To write about Fortas and especially to answer that question pose a major challenge for an author. During more than three decades in public life, Fortas touched and was touched by many people and issues. A book about Justices who have spent most of their professional lives on the Bench removed from the rough and tumble of partisan politics of course requires prodigious research. One must have a thorough grounding in the era during which a particular Justice served and must examine and study the judicial opinions, papers and reflections of colleagues as well. With Fortas, one must do all that, and more. Especially when enmeshed in a time when more and more government business was conducted on the telephone, an author must reach wide and far. For these reasons, it is commendable, but not

surprising, that Murphy seems to have left few stones unturned. Along with the expected and numerous published sources (including court opinions, congressional reports and hearings, other official documents, newspapers, articles and books), Murphy consulted no fewer than 131 oral history "memoirs" and 54 manuscript collections in at least thirteen different libraries. The documentation, which comprises 87 pages (12%) of the book, also includes citations to dozens of interviews which Murphy conducted with acquaintances of Fortas (including one in 1981 with Fortas himself).

The results are eye-opening in places. While he largely substantiates the findings of the first book-length study of the Fortas affair,⁵¹ Murphy came across copies of documents thought to be unavailable, if even extant. These were the documents Attorney General John Mitchell showed Chief Justice Earl Warren in 1969 after Fortas's short-lived relationship with the Wolfson Foundation was revealed in a story by William Lambert in the May 9 issue of *Life* magazine. Apparently unknown to others, Warren made

copies and stored them with his papers which were later lodged in the Library of Congress. The impression has long been that the documents from Mitchell must have contained additional damaging information which led Warren to pressure Fortas to resign for the good of the Court. In fact, Murphy shows that the documents contained nothing significant that was not already known. But even that was evidently enough for Warren. Fortas apparently got little if any encouragement from the other Justices to remain and ride out the storm.⁵²

In tracing Fortas's road to ruin, Murphy concludes that Fortas was the wrong man, in the wrong place, at the wrong time. Does this statement excuse Fortas? While generally a sympathetic volume, *Fortas* does not pretend to wipe clean actions and attitudes which were plainly mistakes. "It was not just what Fortas did, but how and when he did it." Fortas may have had "the right stuff" for a lawyer, but

*he did not have it as a judge. The intellect was certainly there, but not the temperament.... Rather than changing his manner of action and ethical code once on the court, he continued to follow the same standards that had previously guided his legal career. And that got him into trouble. But the major mistake that Fortas made was one of a man seemingly panicked by the prospect of 'dying on the Court,' after being forced to take the post by someone more certain than he in a moment of weakness.*⁵³

Still, all of this simply made Fortas vulnerable. Others had to bring about his fall. Fortas was caught in what Murphy terms "a riptide of history," meaning that greater forces closed off any possibility of escape. Ruin was assured by a coming together of three "shifts" in Washington: one was institutional, one was political and the other was generational. Fortas entered the spotlight of scrutiny at a time when power was shifting from the Presidency to the Congress. Partly because of growing congressional opposition to the Administration's policy in Vietnam (from both "hawks" and "doves") Johnson could no longer count on having his way on Capitol Hill. Influence was also shifting from liberals to conservatives, as illustrated by the impressive combined popular vote garnered by presiden-



Spencer Roane of Virginia, an ardent defender of states rights, would probably have been Chief Justice instead of John Marshall if President John Adams had--like his distant successor Lyndon Johnson--neglected to make the appointment before leaving the White House.

tial candidates Richard Nixon and George Wallace in November 1968. The old New Deal Democratic coalition was in trouble. Finally, older leaders like Senators Everett Dirksen and Richard Russell did not come to the President's aid, and most of the rising younger leaders did not want to be "tainted by the issue." Ironically, just when Fortas, at age 59, should have been coming into his prime in Washington, "his career ended so suddenly that he went out with the older generation.... The young man on the fast track became the middle-aged man careening off it, while the plodders his age maintained their slower pace to the top."⁵⁴

Murphy does not probe one of the intriguing questions about Johnson's last weeks in the White House. Why did he not submit another name to the Senate? His failure to do so guaranteed that the choice of Warren's successor would fall to Richard Nixon. According to one study, advisers put forth the names of Erwin Griswold and former Justices Clark and Goldberg. To avoid a recess appointment, they wanted the President to act immediately or when the Senate reconvened in January of 1969.

Apparently persuasive, however, was a memorandum dated December 9, which evaluated probable opposition in the Senate Judiciary Committee and on the floor: "[I]f a nomination were submitted I think it unlikely that it could be confirmed. To reject Goldberg might prove slightly embarrassing for the Republicans but to be repudiated again by the Senate on a Chief Justice nomination would also be embarrassing to the President. I would recommend against the nomination of a Chief Justice...."⁵⁵

Finding himself in a similar situation in 1801, President John Adams, much to President-elect Thomas Jefferson's chagrin, followed an altogether different course. A few weeks before he left the White House, Adams named Secretary of State John Marshall Chief Justice. If Adams had taken President Johnson's route, Chief Justice Ellsworth's successor probably would have been Spencer Roane of Virginia, an ardent defender of states rights. In that event, history during the crucial formative years would have been drastically altered.

The Past

Whether a Fortas from the twentieth century or a Waite from the nineteenth century, no Justice since Chief Justice Marshall's time writes on a blank slate. The past is a factor. The past includes the nation's history to be sure, but also the Court's own decisions: the legacy of jurists, themselves part of history. "Our jurisprudence is distinctive in that every great movement in American history has produced a leading case in this Court."⁵⁶ The past contains the gloss that the Justices have spread over the Constitution.

An important part of the constitutionally significant past is the legacy of commentators on American law and institutions. In the early days of the Republic, decisions of many courts were published only irregularly, if at all, and frontier conditions often deprived attorneys of those which were in print. In such surroundings, legal commentaries not only helped to educate the bar and the public but were among the few sources of the law at hand. Virginia's St. George Tucker published an "Americanized" edition of Sir William Blackstone's Commentaries in 1803. While Blackstone's work was already widely known on this side of the Atlantic as "an intelligible description of the whole

system of the common law,"⁵⁷ Tucker attempted to place all legal knowledge within it, as "the ready instrument for the apprentice or self-trained lawyer." Later, the four volumes of New York Chancellor James Kent's Commentaries, published between 1826 and 1830, "immediately became the standard general treatise on law in the United States.... As a constitutional law treatise, they were widely used for college instruction, apart from their usefulness to lawyers; their use in this respect evidenced the place that lawyers had made for themselves and their point of view in American affairs."⁵⁸ This was a tradition quickly followed by Justice Joseph Story and later by figures such as Thomas Cooley, Christopher Tideman, and John F. Dillon. Even as law libraries multiplied and court reports became widely accessible, the role of commentators did not diminish. While no longer being the sole text for an apprentice or the only locally available guide to the law, legal commentary became a major influence on the growth of the law, whether in books or law reviews.

Of prominent twentieth-century constitutional scholars whose careers are now part of history, Edward S. Corwin stands out. He illustrated his own incisive observation: "If judges make law, so do commentators."⁵⁹ "Elevating Corwin into the front rank of immortals among American constitutional commentators are the quantity, timeliness, profundity, comprehensiveness, and objectivity of his writings as well as their relationship to the law that came before and after." Corwin's writings "are a resource for training citizens, as well as judges and lawyers, in the nature of the Union and the purpose of American government."⁶⁰ Among the weaknesses of a written Constitution, claimed Thomas Cooley, was "that it is often construed on technical principles of verbal criticism rather than in the light of great principles."⁶¹ Corwin's work never suffered from that failing, assuring its usefulness even today in understanding American constitutional government.

Corwin differed from nineteenth-century commentators partly because he specialized in constitutional law. The writings of Kent, Story, and the others were concerned with other areas of the law too. Corwin was also different because he was neither an attorney nor a pro-

fessor in a law school (his doctorate was in history, and his professorship was in Princeton's Department of Politics). Corwin's major publications spanned a half century, from 1906 to the late 1950s. Measured on a time line of major constitutional decisions, this means Corwin was professionally active from *Lochner v. New York*, through the Court-packing fight of 1937 (which led, in Corwin's own words, to the "Constitutional Revolution, Ltd."), until after *Brown v. Board of Education*.⁶² The expanse of that constitutional landscape is breathtaking.

Corwin also differed from the leading nineteenth-century commentators in that he was an essayist. Much of his best work appeared as articles during the five decades of his professional life. There was no single, massive treatise---no Corwin's *Commentaries*.⁶³ Partly to compensate for this absence, Richard Loss has undertaken a project to publish Corwin's major articles in a multi-volume set entitled *Corwin on the Constitution*. The articles, representing a scholar's work of a lifetime, are thus combined to form the treatise Corwin never wrote. The first volume, *The Foundations of American Constitutional and Political Thought, the Powers of Congress, and the President's Power of Removal* appeared in 1981. The second volume, *The Judiciary*, has now been published and contains 16 articles, plus Corwin's sixty pages of testimony before the Senate Judiciary Committee in 1937 on "Reorganization of the Federal Judiciary," alias President Roosevelt's Court-packing plan.⁶⁴

The result is impressive. In one place are essays originally published in many journals, some of which are now fairly obscure. Moreover, because Loss arranged the articles by their date of publication, one has the advantage of seeing Corwin's thought develop from the first ("The Supreme Court and Unconstitutional Acts of Congress" in 1906) to the last one ("John Marshall, Revolutionist *Malgre Lui*" in 1955). Since Corwin changed his views on the basis of judicial review, Loss believes "readers are therefore compelled to think for themselves."⁶⁵ The reader can thus use it as a dual resource: to understand better American constitutional interpretation and to peer into the thinking of one of the century's preeminent scholars as well.

Apparently, Corwin considered his articles on the judiciary among his most important. "I

consider that my most creative work has been in digging out the foundational doctrines and assumptions underlying American constitutional law, and especially those doctrines and assumptions which have been in the past enforced by the Supreme Court against legislative power, both state and national. It is these articles... which have drawn most attention from judges and students of law and political science."⁶⁶ Loss believes that someone reading Corwin for the first time "will find a golden harvest" of reflection. These essays "are inevitably controversial in that Corwin and other skilled commentators disagree on important matters such as the basis of judicial review."⁶⁷ Questions Corwin faced still engage the Court and the world of scholarship.

The Supreme Court is the focus of William Wiecek's *Liberty Under Law*.⁶⁸ If Loss's volume presented one commentator's running evaluation of the Court's work, Wiecek's monograph provides an interpretative account of the Court's history. This history is the necessary starting point for any discussion about the Justices and their relation to American life today.

Publication of *Liberty Under Law* is noteworthy in at least one respect. Even with the vast outpouring of books and articles about the Court and its decisions, there have been few well-written, short, historically oriented appraisals of the Court. For three decades, students have turned to Robert G. McCloskey's *The American Supreme Court*. Valuable still, McCloskey's book was completed before the second (and very activist) half of the Warren Court had begun. In the conclusion, McCloskey advised, "The Court's greatest successes have been achieved when it has operated near the margins rather than in the center of political controversy; when it has nudged and gently tugged the nation, instead of trying to rule it."⁶⁹ Because that sentence was written before decisions such as *Mapp v. Ohio*, *Reynolds v. Sims*, *Miranda v. Arizona*, *Duncan v. Louisiana*, *Swann v. Charlotte-Mecklenburg Board of Education*, and *Roe v. Wade*,⁷⁰ it is gratifying to see a new overview of the Court's history, complementary to McCloskey's and of similar length.

There are at least two levels to *Liberty Under Law*. In the first, Wiecek provides the reader with a conventionally arranged account of the institutional development of the Su-

preme Court and the mainly simultaneous growth in the Court's constitutional authority. Five chapters (1-5) are organized chronologically, the rest (6-8) topically. The latter by and large discuss the post-1937 Court, and even here the organization, especially within each chapter, is chronological.

At the outset, Chapter One ("The Origins of American Constitutionalism") alerts the reader to the fact that the Supreme Court "is heir to a constitutional tradition now some eight hundred years old."⁷¹ There may be no more effective way to place contemporary debates, whether over the President's powers or abortion, in perspective. Discussion moves from Magna Carta, to the American colonial experience, the ratification debates of 1787-1788, and the first years under the new Constitution. The second chapter reviews the challenges to, and the accomplishments of, the Marshall Court. Chapter Three surveys the problems of democracy, slavery and capitalism as they confront the Taney Court. The fourth chapter treats the novel constitutional issues posed by the Civil War and Reconstruction, especially regarding protection of the rights of the newly freed slaves. Chapter Five ("The Formalist Era") mainly recounts the struggles over state regulatory authority and the extent of national power during

the tenures of Chief Justices Waite, Fuller, White, Taft, and Hughes. The final three chapters deal with issues which have occupied the modern Court: separation-of-powers concerns (especially executive power), equal protection and due process.

At the second level of *Liberty Under Law*, Wiecek displays this historical development within the context posed by James Bradley Thayer's question in his essay of 1893.⁷² "Put simply," writes Wiecek, "this problem is: how can an institution that is not at all democratic in its composition and methods legitimately exercise the power of holding void the laws enacted by the democratically elected branch of government, the people's representatives? This question of legitimacy has provoked another: can Supreme Court adjudication be objective?"⁷³ The task is really one of trying to maintain the rule of law, which, as John Adams formulated the matter for the Massachusetts Constitution of 1780, is one of assuring "a government of laws and not of men."

While judicial review has been part of the Supreme Court for almost as long as there has been a Supreme Court, Wiecek acknowledges that judicial review itself did not become politically controversial until about a century ago. This of course coincided with the rise of an activist Court bent on restricting legislative power over property. Like Lasser, Wiecek believes that most of the external constraints on judicial power have proved to be of "dubious utility." Only the President's power to reshape the Court through appointments has had much effect. Justices and Court scholars have consequently turned their attention to checks on judicial discretion which are "internal" to the decision-making process. These internal checks are criteria which are supposed to guide and therefore to corral the discretion of individual Justices. According to the author, five such criteria exist:⁷⁴ the text of the Constitution itself, the framers' intent, structuralism (that is, how one part of the Constitution or government institution relates to another), history in the form of *stare decisis*, and application of fundamental values (the consensus approach). As legal commentary for at least the past 75 years reveals, no one of these criteria has been found unassailable or has been able to command general assent. This debate over objective

In his new book, Wiecek concludes that the Supreme Court has done its best to carry out John Adams' plea to the Massachusetts Constitution in 1780 to assure "a government of laws and not of men."



criteria became even more unsettled with the advent of "critical legal studies" in the law schools.

Within this blur of uncertainty the Court has approximated Adams' ideal, Wiecek concludes, largely because of the possibility of correction by the political process and because of the Court's own internal decisional procedures. He identifies four. For two centuries, the Court has not long pursued policy objectives greatly at odds with the strongly held views of a majority of the people. Second, the common law tradition of deciding cases means the evolution of doctrine takes place within a "dialogue that refines concepts, often over long periods of time." Third, self-denying rules have worked to keep some controversies out of the highest court altogether. Finally, "history serves as an anchor or constraint on judicial whim." The past is always a yardstick by which present performance can be judged.⁷⁵ The American constitutional tradition has allowed the Court both to check the political process and to be bound by that same process.

In constitutional adjudication, one prominent feature of the past remains among the most significant and provocative: the Fourteenth Amendment. It figures prominently in Wiecek's *Liberty Under Law*. Furthermore, there has been no shortage of studies in recent years devoted solely to this amendment.⁷⁶ Joining their ranks is *The Fourteenth Amendment* by William E. Nelson.⁷⁷

The Fourteenth Amendment was such a significant addition to the Constitution that it is sometimes referred to alone as the "Second Constitution." It altered the federal system by placing within the Constitution for the first time broad, but unspecified, limits on the power of the states. Heretofore, with only a few exceptions such as the contract clause and the dormant commerce power, the Constitution constrained the national government, but not the states. Since most governmental activity in this country has historically been performed by state and local governments, the amendment *potentially* placed a wide realm of public policy, previously uncontrolled by the Constitution, within its reach. The word "potentially" must be emphasized, however, because Section One -- the part, along with the enforcement clause in Section Five, that has proved of lasting import-

ance--catalogs the new limitations in an open-ended manner: "the privileges or immunities of citizens of the United States," the "liberty" which must not be "deprived" without "due process of law," the "equal protection of the laws" which no state can deny.⁷⁸

The amendment has been provocative and indeed controversial because the open-ended provisions of Section One invite debate on the precise limitations now applicable to the states. Are the restrictions on state power designed mainly to achieve racial justice? Do they consist of the constraints contained within the first eight amendments alone? Are other fundamental rights protected against abridgement by state action? If other rights are included, how do judges discern the rights deemed fundamental? The words of the amendment do not say.

William Nelson, who clerked for Justice White during the October 1970 Term of the Supreme Court, begins his study of the Fourteenth Amendment with a recognition of an "impasse" in scholarship. There is simply no agreement among historians and legal scholars on the amendment's meaning. Each interpretation finds supporting evidence, but the evidence is not conclusive. One is left wondering whether those in Congress and the ratifying state legislatures had any particular intention in mind for their handiwork. In part, the impasse arises from conflicting views of the Reconstruction period. Some see the amendment as the fruition of the labors of idealistic statesmen who fought for the expansion and protection of individual rights. Others stress the partisan motivation to hold the Republicans together by retaining political power and assuring a climate conducive to economic growth.

To break through this impasse, Nelson explains that he examined sources "most previous historians have ignored" (such as state ratification debates, newspapers and the private papers of congressmen) and asked "questions about the sources that previous historians have not asked." The latter task is the more productive, he believes, because one must avoid asking questions the Reconstruction generation did not ask (such as whether the amendment would affect anti-abortion legislation). A question that did not occur to that generation "cannot be answered by examining records of its actual thought." Nor should one ask how the

framers of the amendment would resolve issues they did consider but in fact did not resolve (such as how voting rights were to be protected). Rather, one should try to discover the meaning the amendment had for its proponents, "even if that meaning is not dispositive of the issues pending in the courts today."⁷⁹

Among leaders in the Republican Party in 1866 and much of the northern electorate, the amendment's meaning "existed on a conceptual level different from the doctrinal level on which most scholars have tended to examine it...." That meaning combined a commitment to apparently opposite objectives: federal protection of the civil rights of blacks and the preservation of the federal balance between the national and state governments. They wrote the amendment "to reaffirm the lay public's longstanding rhetorical commitment to general principles of equality, individual rights, and local self-rule." Was not the conflict between these ends surely foreseeable? Nelson thinks that the generation of the late 1860s did not think it inevitable. Instead, the amendment was designed "to persuade people to do good, rather than a bureaucratic venture intended to establish precise legal rules and enforcement mechanisms." Rather than placing particular rights in a federally protected status, the amendment left definition of rights in the hands of the states, subject to the stipulation that state laws not be "arbitrary" or "unreasonable."⁸⁰

Initially, in the Slaughterhouse Cases,⁸¹ five Justices on the Supreme Court refused to give the Fourteenth Amendment even this limited meaning. Shortly and for the rest of the nineteenth century, however, the Court accepted and applied the amendment's rhetorical purpose.⁸² Rights and local rule would be balanced as the Court increasingly confronted contests between laws aimed at securing the public good and litigants seeking private advantage. Even the decision in the Civil Rights Cases, discussed earlier in connection with Charles Fairman's volume, was in accord with this view. "[I]ndividual civil rights did not preexist law and were not created by federal law; individual civil rights were the creations of state law. The federal government could have no power to determine the content of civil rights if it was to remain the government of limited power that all Americans wanted. The only power that the Four-

teenth Amendment granted to Congress and the federal courts was power to hold the states to the rule of law: the power to insure that the states extended the same rights to all individuals equally except on those occasions when the good of the public at large demanded that distinctions between individuals be drawn."⁸³

According to Nelson, only in *Lochner v. New York*⁸⁴ in 1905 was there a departure from this approach. "The *Lochner* court...began to give the impression that the right of free contract was of such fundamental stature that no government could infringe it."⁸⁵ Despite the Court's abrupt shift from protecting economic liberties in 1937, it is really the *Lochner* approach to the Fourteenth Amendment which has prevailed and not that of the Reconstruction generation. Justice Stone's adumbration of the preferred status of new rights in his now famous Footnote Four⁸⁶ meant that the Court, as in *Lochner*, would not be concerned with whether certain liberties were regulated reasonably but whether they were restricted at all. For Nelson, a half century after Stone's footnote, "the nineteenth century's approach to the limited reach of the Fourteenth Amendment" has been forgotten.⁸⁷

Process

The Court's decision-making process as well as its past shapes its decisions. At the most basic level, litigants must pursue objectives through the courts, often at enormous expense and with months and even years going by before a resolution is reached. Once the Supreme Court has accepted a case for decision, briefs and oral argument inform the Justices and further define the issues the case presents. They often supply the reasoning the Court uses in justifying its decisions. Moreover, because all Justices normally participate in each case, collegial interaction becomes a factor. Discussion in conference and persuasive comment by one Justice on an opinion drafted by another contribute to the form a decision eventually takes. They sometimes cause Justices to change positions in a case.

Books examining the judicial process typically take one of three forms. The work may be an overview of the entire process, drawing examples from numerous cases.⁸⁸ It may focus

on a single case and stress the political forces that coalesce to encourage and even finance the litigation because of the issue it raises.⁸⁹ Or it may focus on a single case and stress the Court's internal deliberations and ways of reaching a decision. Bernard Schwartz's *Behind Bakke* is of the third type.⁹⁰

Denying his intent to write a "mini-Brethren,"⁹¹ Schwartz clarifies his purpose: "to give students of the Supreme Court further insight into the Court's largely unrevealed decision processes.... It is my hope...that the actual operation of the Court will be made clearer by this account of the decision process in an important case." Schwartz has selected a fascinating subject for this case study. *Regents v. Bakke*⁹² was one of the more celebrated cases of the decade and was the Court's first decision on the merits in an affirmative action case. At issue was a special quota used for admissions at the medical school of the University of California at Davis.⁹³ As of 1989, *Bakke* remains the Court's only statement about the constitutionality of affirmative action in higher education.

Most of the sources Schwartz employed in this study are not readily available to others. He conducted personal interviews with members of the Court, former law clerks, and others familiar with the case. "Every statement not

Schwartz's coverage of the *Bakke* case is notable for the quantity of information that comes from personal interviews, particularly from Justice Brennan, who says he recommended against taking the case.



otherwise identified was either made to me personally or I was given information about it by an unimpeachable source."⁹⁴ Moreover, and probably more significantly, Schwartz had access to conference notes, docket books, correspondence, and memoranda, as well as draft opinions of the Justices. Much of this material was apparently provided by Justice Brennan. Of particular value are the memoranda of five Justices addressed "to the Conference" which discuss the case and lay out the individual Justice's views as of the date of writing. (Because Schwartz apparently relied heavily on facts and documents provided by Justice Brennan, it is entirely possible that other information not available to Schwartz but pertinent to the story of *Bakke* could affect the way the case is understood. Here as in other instances, no book should be taken as the "last word.")

The book reveals some things about *Bakke* which are not widely known. For example, the reader is told that Justice Brennan strongly urged his colleagues *not* to grant certiorari in the case, but that he carried only three others (Chief Justice Burger and Justices Blackmun and Marshall) with him. Brennan apparently feared that a majority would rule out all uses of race in admissions. Second, just before the October 1977 Term began, Justice Marshall urged Brennan to "find some pretext to get rid of the case because he believed quotas were often indispensable to affirmative action programs." By this point, Brennan thought that everyone except the Chief Justice was inclined to uphold the quota system at Davis.⁹⁵ Third, at conference on December 9, the Court divided five to three to affirm the California Supreme Court which had held against the constitutionality of the Davis program (Justice Blackmun was in Minnesota recovering from surgery; his views would not become fully known until later). However, as Schwartz tells the story, Brennan (who would uphold the program) was able to get an oral concession from Powell, "that the judgment must be reversed insofar as it enjoins Davis from taking race into account."⁹⁶ Here presumably is the source of the lasting outcome of the case, where one coalition of Justices struck down the Davis quota but another coalition of Justices (with Powell alone in both coalitions) upheld the principle of affirmative action. It was this latter point which Justice

Brennan called "the central meaning" of the decision:⁹⁷ that government may take race into account when it acts to remedy disadvantages cast on minorities by past racial prejudice but not when it seeks to demean or harm any racial group. While Powell's opinion in *Bakke* has long been seen almost as an "opinion of the Court" (even though Powell was speaking only for himself), Schwartz believes that it was Brennan's "central meaning" that has become in practice the holding in the case.

What is *Behind Bakke's* contribution to the understanding of the Court? What "further insight" does Schwartz make known? In terms of new perspective, the book adds little. Beginning at least with publication of Alpheus Thomas Mason's *Harlan Fiske Stone* in 1956, students of the Court have had access to many studies which depict the role of bargaining, interplay and other extra-legal factors presumably long a part of the judicial process. In terms of information about *Bakke*, however, the book is unique among published accounts of the case. It is not only a well-told story but an indispensable source for someone interested in *Bakke* as well as the Justices' developed and developing attitudes on affirmative action.

Product

The Court's process is of interest because of its impact on product: the Court's decisions. Because the Court decides politically significant cases like *Bakke*, it has been a major institution in American government nearly from the beginning.

Publication of the *Encyclopedia of the American Judicial System* is evidence of the importance of decisions by the United States Supreme Court and other courts in this nation. According to editor Robert J. Janosik, the project was undertaken because "the voluminous literature on the law is often inaccessible to the layperson, university student, and academic researcher not trained in the ways of the law library." To remedy this problem, the encyclopedia addresses both the substance of American law "and the process that produces and utilizes legal precepts."⁹⁸

The three-volume work contains 88 articles written by 91 scholars and practitioners and is divided into six parts: Legal History, Substan-

tive Law, Institutions and Personnel, Process and Behavior, Constitutional Law and Issues, and Methodology. Of the 88 articles, 18 treat subjects in American constitutional law and theory, and 13 focus on the Supreme Court's decisions and institutional development. The shortest ("The Civil Law System" by Henry W. Ehrmann) is ten pages; the longest ("The Taney Court and Era" by Milton Cantor) is 32. Janosik describes all of them as "introductory studies," meaning they are written at a level appropriate for the legal novice; at the same time, they are useful to the informed reader as well. No one is an expert in everything. Each article concludes with a bibliographical essay, cross references to other articles and, where appropriate, a list of cases. The authors did not employ a single method of analysis; they are too eclectic a group to have made that possible. Some use case analysis, some stress historical context, and others discuss their topics in terms of political pressures and blocs on the Court.

There are two ways a reviewer may approach an encyclopedia. One may simply start from the beginning and read as far as time permits. Or one may turn to topics of interest to learn how they have been developed. Using the latter method, I examined several essays, including Paul R. Benson, Jr.'s "The Commerce Clause."

At least since *Gibbons v. Ogden*,⁹⁹ the commerce clause has had a prominent role in American constitutional law. Unlike some provisions in the Constitution, it has had two very distinct dimensions. On the one hand, it is a direct grant of power to Congress, and on the other it has been construed as a limit on the states even without congressional action. Benson explores this duality.

With the first, the commerce clause amounts today to plenary power for the national government. With few exceptions, the Court reads "commerce" so broadly that hardly anyone now seriously argues that Congress has exceeded its authority under that grant. With the second, however, judicial discretion remains a factor. In a survey of the Court during the 1940s on the question of limits the clause places on the states, Benson found three different attitudes. One, associated with Justice Black, was highly tolerant of state regulations; another, associated with Justice Jackson, was suspicious of

state regulations which affected commerce; and a third, associated with Chief Justice Stone, occupied a middle position. "[T]he Stone approach," writes Benson, embodied "a deference to legislative judgments, a clear-headed appreciation of the complexities endemic in federalism, and a sympathy for the legislative needs of the states [and] result[ed] in the most acceptable resolution of the whole vexatious problem." Overall, Benson finds that the Court's record in interpreting the commerce clause "has been commendable. One of the main animating reasons for the framing of the Constitution was to promote the general welfare and ensure domestic tranquility in economic and social relationships.... Thus, it may be argued that over

the long stretch of American history the Court has been remarkably faithful in utilizing the commerce clause to advance the best interests of all the people of the United States."¹⁰⁰

Benson's article, much of the rest of the Janosik *Encyclopedia*, and the other works surveyed here amply illustrate the five elements this review has suggested are helpful in understanding the Supreme Court. From various perspectives the authors portray facets of the Court's political and intellectual environment, its personnel, its past, its process, and its product. The intent in all of them is a better grasp of an institution that has evolved, in Hamilton's words, as the "essential safeguard" in a political system now in its third century.

The volumes surveyed in this article are listed alphabetically by author below.

CHARLES FAIRMAN, *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States; Volume VII; Reconstruction and Reunion 1864-88; Part Two*. New York: Macmillan, 1987. Pp. xxiii, 836.

ROBERT J. JANOSIK, ed., *Encyclopedia of the American Judicial System*. 3 vols. New York: Charles Scribner's Sons, 1987. Pp. xii, 1420.

WILLIAM LASSER, *The Limits of Judicial Power: The Supreme Court in American Politics*. Chapel Hill: University of North Carolina Press, 1988. Pp. x, 354.

RICHARD LOSS, ed., *Corwin on the Constitution; Volume Two; The Judiciary*. Ithaca, N.Y.: Cornell University Press, 1987. Pp. 399.

GARY L. McDOWELL, *Curbing the Courts: The Constitution and the Limits of Judicial Power*. Baton Rouge: Louisiana State University Press, 1988. Pp. xiv, 214.

BRUCE ALLEN MURPHY, *Fortas: The Rise and Ruin of a Supreme Court Justice*. New York: William Morrow and Co., 1988. Pp. 717.

WILLIAM E. NELSON, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine*. Cambridge, Mass.: Harvard University Press, 1988. Pp. ix, 253.

BERNARD SCHWARTZ, *Behind Bakke: Affirmative Action and the Supreme Court*. New York: New York University Press, 1988. Pp. x, 266.

HERMAN SCHWARTZ, *Packing the Courts: The Conservative Campaign to Rewrite the Constitution*. New York: Charles Scribner's Sons, 1988. Pp. xiv, 242.

WILLIAM M. WIECEK, *Liberty under Law: The Supreme Court in American Life*. Baltimore, Md.: The Johns Hopkins University Press, 1988. Pp. xi, 226.

Endnotes

1. Address, February 1, 1940. 84 L. Ed. 1428.
2. *The Federalist*, No. 51.
3. *Osborn v. Bank*, 22 U.S. (9 Wheaton) 738, 866 (1824).
4. *The Federalist*, No. 78.
5. J. Bassett, *The Federalist System 1789-1801* 21 (1906).
6. W. Taft, "Criticisms of the Federal Judiciary," 29 *American Law Review* 641, 642-643 (1895).
7. Books are listed in full citation above the endnotes section.
8. H. Schwartz, *supra* n. 7, ix, xi.
9. For example, see Goldman, "Reaganizing the Judiciary: The First Term Appointments," 68 *Judicature* 313 (1985).
10. H. Schwartz, *supra* n. 7, 43.
11. *Id.*, 179-200.
12. Cohen, "Conservatives Step Up Efforts to Promote Reagan-Minded Judges to U.S. Bench," *National Journal* 1560 (July 6, 1985).
13. H. Schwartz, *supra* n. 7, 44.
14. Chayes "Public Law Litigation and the Burger Court," 96 *Harvard Law Review* 4, 6 (1982).
15. Opposition to Judge O'Connor's nomination in 1981 came only from "pro-life" groups; Judge Ginsburg's name was withdrawn before Senate hearings could begin in 1987.
16. H. Schwartz, *supra* n. 7, 68.
17. In a reference to the defeat of the nomination of Judge John Parker to the Supreme Court in 1930, it is not clear what Schwartz means by the following: "since his defeat made it possible to appoint the saintly Benjamin N. Cardozo two years later, the nation hardly suffered." *Id.*, 47. When Parker's nomination failed, President Hoover nominated Owen J. Roberts whom the Senate confirmed that same year. This was the seat which had been held by Justice Edward Sanford. Hoover then nominated Cardozo upon Justice Holmes' retirement in 1932.
18. McDowell, *supra* n. 7.
19. H. Schwartz, *supra* n. 7, 32.
20. McDowell, *supra* n. 7, 197.
21. J. Kent, 1 *Commentaries on American Law* 321 (1826).
22. McDowell, *supra* n. 7, 2, 10, 11, 205.
23. See *id.*, 168-196.
24. See R. Morgan, *Disabling America: The 'Rights Industry' in Our Time* (1984).
25. Lasser, *supra* n. 7.
26. R. McCloskey, *The American Supreme Court* 231 (1960).
27. *Scott v. Sandford*, 60 U.S. (19 Howard) 393 (1857).
28. Lasser, *supra* n. 7, 5-6.
29. *Id.*, 7.
30. 297 U.S. 1, 78-79 (1936) (dissenting opinion). Stone's comment was tested the very next year when President Roosevelt put forth his Court-packing plan. FDR lost the battle but won the war.
31. Lasser, *supra* n. 7, 263, 270, 272.
32. Max Lerner, as quoted in H. Abraham, *The Judicial Process* 348 (5th ed., 1986).
33. Fairman, *supra* n. 7.
34. See Stephenson, "The Judicial Bookshelf," *Yearbook* 1988 98, 99-100.
35. Fairman, *supra* n. 7, 3-83.
36. C. Magrath, *Morrison R. Waite* 8 (1963).
37. Quoted in *id.*, 2.
38. *Nation*, January 22, 1874. Waite seemed to make a good first impression. On his first circuit tour in the Southeast, one reporter wrote: "This legal luminary is not peculiarly striking in general appearance. He is of medium height, stoutly built and apparently robust in health. He has a mass of dark hair tinged with gray, clean-shaven upper lip, and full iron-gray beard. A big mouth, prominent nose, large dark eyes, deepset and overhung by thickish eye-brows, and a fine, broad forehead, make up his physiognomy. The face certainly indicates strong intellectual powers. In his manner he is exceedingly genial and pleasant. Evidently Chief Justice Waite is not only a thorough lawyer with mental faculties of a high order, but in addition a thorough gentleman, courteous, refined and high-toned. He has made a most favorable impression upon the bar here." *Raleigh [N.C.] Sentinel*, quoting the *Charlotte [N.C.] Observer*, June 11, 1874. Clipping from the Waite Papers, Library of Congress, a copy of which is in this reviewer's possession. The days before the widespread use of illustrations in newspapers obviously demanded great descriptive powers of reporters.
39. 94 U.S. 113 (1877).
40. *Chicago, Milwaukee & St. Paul Railway Co. v. Minnesota*, 134 U.S. 418 (1890).
41. See Brewer, "The Nation's Safeguard," 16 *Report of the New York State Bar Association* 37 (1893); Marshall, "A New Constitutional Amendment," 24 *American Law Review* 908 (1890); Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law," 7 *Harvard Law Review* 129 (1893).
42. 109 U.S. 3 (1883). See Fairman, *supra* n. 7, 550-558; see also the discussion of William Nelson's *The Fourteenth Amendment*, *infra*.
43. *Id.*, 556-557.
44. *Id.*, 565. Fairman's scholarly interest in Bradley is longstanding. While he never wrote a biography of Bradley, he did author several shorter pieces on the Justice. See his "Mr. Justice Bradley's Appointment to the Supreme Court and the Legal Tender Cases," 54 *Harvard Law Review* 977, 1128 (1941); "The Education of a Justice: Justice Bradley and Some of His Colleagues," 1 *Stanford*

Law Review 217 (1949) "What Makes a Great Justice? Mr. Justice Bradley and the Supreme Court 1870-1892," 30 *Boston University Law Review* 49 (1950); "The So-Called Granger Cases, Lord Hale, and Justice Bradley," 5 *Stanford Law Review* 587 (1953); "Mr. Justice Bradley," in A. Dunham and P. Kurland, eds., *Mr. Justice* (2d ed., 1964). Bradley also figures prominently in Fairman's *Mr. Justice Miller* (1939).

⁴⁵ Fairman, *supra* n. 7, 557.

⁴⁶ John Rutledge, Thomas Johnson, Robert Trimble, Howell Jackson, James Byrnes, and Arthur Goldberg.

⁴⁷ One oral history biographer Bruce Murphy consulted yielded this later reflection attributed to President Johnson: "He's been victimized and it's terrible. We're cruel people. I made him take the justiceship. In that way, I ruined his life." Even before 1969, Fortas continued to question the wisdom of his acceptance, describing his life on the Bench to his biographer as "dying on the court." Murphy, *supra* n. 7, 1, 687.

⁴⁸ Chief Justice Rehnquist is now the third member of the club.

⁴⁹ Illustrative of the problems brought on by his close relationship with Johnson, Fortas drafted the statement for Johnson announcing the withdrawal.

⁵⁰ Murphy, *supra* n. 7, 591.

⁵¹ R. Shogan, *A Question of Judgment* (1972).

⁵² Fortas later disputed the account Justice Douglas gave in his memoirs of having urged Fortas to remain on the Court. Compare Murphy at 571 (Fortas: "It's an absolute fabrication...") with Douglas, *The Court Years* 358 (1980).

⁵³ *Id.*, 593.

⁵⁴ *Id.*, 594-596.

⁵⁵ N. McFeeley, *Appointment of Judges: The Johnson Presidency* 120 (1987).

⁵⁶ R. Jackson, *supra* n. 7, 1429.

⁵⁷ W. Seagle, *Men of Law* 205 (1947).

⁵⁸ J. Hurst, *The Growth of American Law* 257 (1950).

⁵⁹ Corwin, Book Review, 22 *Michigan Law Review* 84 (1923).

⁶⁰ Loss, *supra* n. 7, 11.

⁶¹ T. Cooley, *The General Principles of Constitutional Law* 22 (1891).

⁶² 198 U.S. 45 (1905); 347 U.S. 483 (1954); see Corwin's *Constitutional Revolution*, Ltd. (1941).

⁶³ Corwin was the editor and director of a research project for the Legislative Reference Service of the Library of Congress which resulted in the massive volume, *The Constitution Annotated: Analysis and Interpretation* (1953). Also, *The Constitution and What It Means Today* first appeared in 1920 and went through twelve editions before his death in 1963, but this book was written for general audiences, not for scholars or the Supreme Court bar. Among Corwin's other books are *The Doctrine of Judicial Review* (1914), *John Marshall and the Constitution* (1921), *Commerce Power versus States Rights* (1936), *Twilight of the Supreme Court* (1934); *Court Over Constitution* (1938), *Liberty Against Government* (1948), and *The President: Office and Powers 1787-1957* (4th ed. 1957), as well as the book cited in n. 62 *supra*.

⁶⁴ Loss, *supra* n. 7. Loss earlier edited *Presidential Power and the Constitution: Essays by Edward S. Corwin* (1976). Moreover, a dozen of Corwin's articles were published in A. Mason and G. Garvey, eds., *American Constitutional History: Essays by Edward S. Corwin* (1964). This

collection contains a listing of all Corwin's books, articles, and reviews, at pages 216-229.

⁶⁵ Loss, *supra* n. 7, 23.

⁶⁶ Corwin to E. G. Conklin, April 15, 1942. Quoted in *id.*, 12.

⁶⁷ *Id.*

⁶⁸ Wiecek, *supra* n. 7.

⁶⁹ R. McCloskey, *supra* n. 26, 229. There are other books similar to McCloskey's, written during the years 1940-1960: for example, B. Wright, *The Growth of American Constitutional Law* (1942), and C. Swisher, *The Supreme Court in the Modern Role* (1958). I discuss McCloskey's and not the others because his was one of the more recent and is still widely considered one of the most comprehensive. McCloskey had begun, but not finished, a book concentrating on the post-1937 Court at the time of his death. This work forms the first 126 pages (in chapters entitled "The Stone Court" and "The Vinson Court") of his *The Modern Supreme Court* (1972). The remainder of this later volume consists of articles McCloskey wrote between 1956 and 1965.

⁷⁰ 367 U.S. 643 (1961); 377 U.S. 533 (1964); 384 U.S. 436 (1966); 391 U.S. 145 (1968); 402 U.S. 1 (1971); 410 U.S. 113 (1973).

⁷¹ Wiecek, *supra* n. 7, 5.

⁷² Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law," 7 *Harvard Law Review* 129 (1893).

⁷³ Wiecek, *supra* n. 7, 1.

⁷⁴ *Id.*, 183-193.

⁷⁵ *Id.*, 191-192.

⁷⁶ For example, M. Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* (1986); J. Baer, *Equality Under the Constitution: Reclaiming the Fourteenth Amendment* (1983); R. Cortner, *The Supreme Court and the Second Bill of Rights: The Fourteenth Amendment and the Nationalization of Civil Liberties* (1981); and R. Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (1977). Serious scholarly attention to the origins and meaning of the amendment began with publication of William D. Guthrie's *Lectures on the Fourteenth Article of Amendment to the Constitution of the United States in 1898*, Henry Brannon's *A Treatise on the Rights and Privileges Guaranteed by the Fourteenth Amendment of the Constitution of the United States in 1901*, and especially Horace E. Flack's *The Adoption of the Fourteenth Amendment in 1908*.

⁷⁷ Nelson, *supra* n. 7.

⁷⁸ By comparison with the single objectives of the Thirteenth and Fifteenth Amendments, the Fourteenth is actually five amendments rolled into one. Section one contains the statement on state and national citizenship and the undefined restrictions on state power discussed above. It is primarily responsible for keeping the Amendment in court for most of its existence. Of more immediate importance in 1868, however, was the expectation that section one, coupled with the enforcement clause in section five, removed any doubts about the constitutionality of the Civil Rights Act of 1866. Section two represented a compromise between doing a lot to promote black suffrage and doing nothing. States excluding blacks from the polls ran the risk of losing representation in the House and votes in the electoral college. Section three politically disabled former Confederate leaders, and by placing the

disability in the Constitution, made it impossible for a simple majority in Congress to lift the ban. Section four headed off any drive to assume Confederate debts or to compensate former slave owners for the value of their emancipated property. Again, by placing the restriction in the Constitution, the ban was put beyond the reach of shifting partisan lines in Congress.

⁷⁹ Nelson, *supra* n. 7, 5-6.

⁸⁰ *Id.*, 7-10.

⁸¹ 83 U.S. (16 Wallace) 36 (1873).

⁸² In *Chicago, Milwaukee and St. Paul Ry. Co. v. Minnesota*, 134 U.S. 418 (1890), for example, the majority insisted that the reasonableness of rates was ultimately a judicial, not a legislative, matter.

⁸³ Nelson, *supra* n. 7, 195.

⁸⁴ See *supra* n. 62.

⁸⁵ Nelson, *supra* n. 7, 199. Nelson might have read *Allegre v. Louisiana*, 165 U.S. 578 (1897), as doing much the same thing because the law was found to interfere with a "right to contract." In this earlier case, Justice Peckham wrote for the majority just as he did in *Lochner*.

⁸⁶ *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

⁸⁷ Nelson, *supra* n. 7, 200.

⁸⁸ D. O'Brien, *Storm Center* (1986).

⁸⁹ B. Craig, *Chadha: The Story of an Epic Constitutional Struggle* (1988).

⁹⁰ B. Schwartz, *supra* n. 7.

⁹¹ Schwartz's reference is to B. Woodward and S. Armstrong, *The Brethren* (1979), a controversial journalistic "inside peek" at the Burger Court.

⁹² 438 U.S. 265 (1978).

⁹³ In *DeFunis v. Odegaard*, 416 U.S. 312 (1974), the Court disposed of the case on grounds of mootness.

⁹⁴ B. Schwartz, *supra* n. 7, ix.

⁹⁵ *Id.*, 42-43.

⁹⁶ *Id.*, 96.

⁹⁷ *Id.*, 139.

⁹⁸ Janosik, *supra* n. 7, vii.

⁹⁹ 22 U.S. (9 Wheaton) 1 (1824).

¹⁰⁰ *Id.*, 952, 956.

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