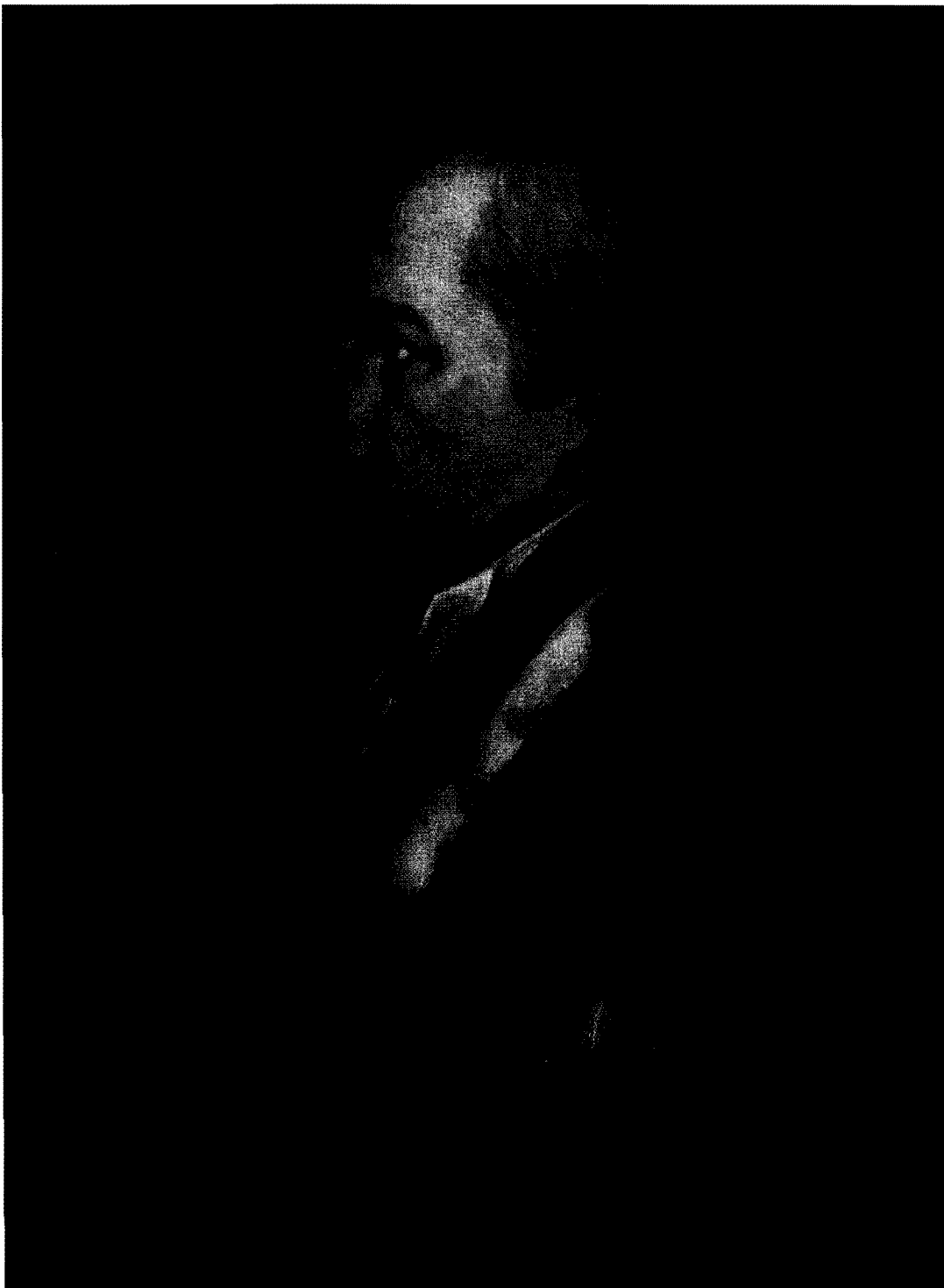


Journal of Supreme Court History

1992 YEARBOOK OF THE SUPREME COURT HISTORICAL SOCIETY



WILLIAM PATERSON
Associate Justice (1793-1806)

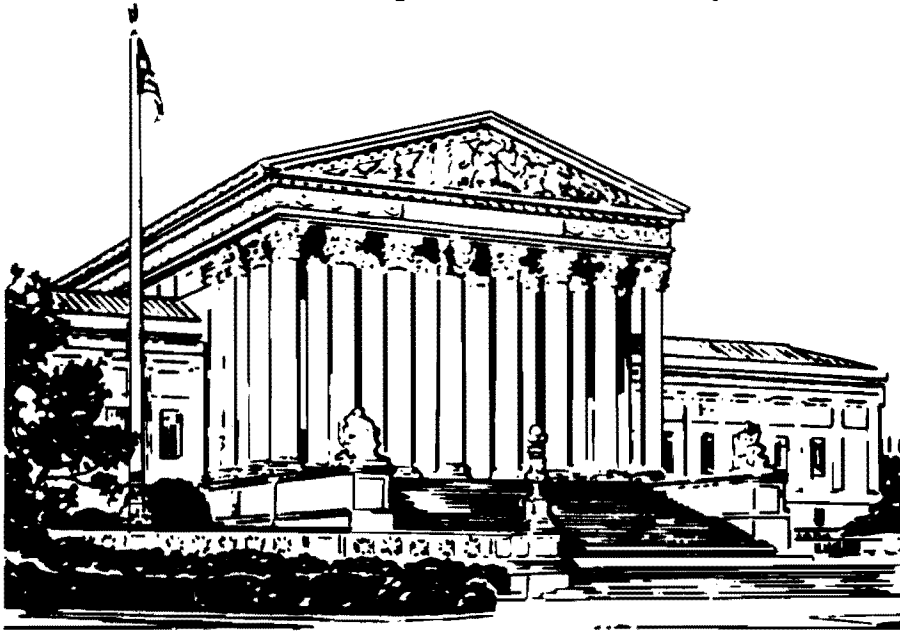
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General Statement

The Supreme Court Historical Society is a private non-profit organization, incorporated in the District of Columbia in 1974. The Society is dedicated to the collection and preservation of the history of the Supreme Court of the United States.

The Society seeks to accomplish its mission by supporting historical research, collecting antiques and artifacts relating to the Court's history, and publishing books and other materials which increase public awareness of the Court's contribution to our Nation's rich constitutional heritage.

The Society publishes a *Quarterly* newsletter, distributed to its membership, which contains short works on the Court's history and articles detailing the Society's programs and operations. In addition, the Society began publishing an annual collection of scholarly articles on the Court's history entitled the *Yearbook* in 1976 which was renamed the *Journal of Supreme Court History* in 1990.

The Society initiated the *Documentary History of the Supreme Court of the United States, 1789-1800* in 1977 with a matching grant from the National Historical Publications and Records Commission (NHPRC). The Supreme Court became a co-sponsor in 1979. Since that time, the Project has completed four of its expected eight volumes, with a fifth volume to be published in 1994.

The Society also co-publishes *Equal Justice Under Law*, a 165-page illustrated history of the Court, in cooperation with the National Geographic Society. It co-sponsored in 1986 the 300-page *Illustrated History of the Supreme Court of the United States*. It co-sponsored with the Court, the publication of the *United States Supreme Court Index to Opinions* in 1981, and is currently funding a ten-year update of that volume to be completed in late 1993.

The Society has also developed a collection of illustrated biographies of the Supreme Court Justices which will be published in cooperation with Congressional Quarterly, Inc. in the summer of 1993. This 450 plus page paperback book, entitled *The Supreme Court Justices: Illustrated Biographies 1789-1992*, will include biographies of all 106 Justices, rare photographs, and a look at the life and jurisprudence of the Justices.

In addition to its research/publications projects, the Society is now cooperating with the Federal Judicial Center to develop a pilot oral history project on the Supreme Court. The Society is also conducting an active acquisitions program which has contributed substantially to the completion of the Court's permanent collection of busts and portraits, as well as period furnishings, private papers and other artifacts and memorabilia relating to the Court history. These materials are incorporated into displays for the benefit of the Court's 800,000 annual visitors which are prepared by the Court Curator's Office.

The Society also funds outside research, awards cash prizes to promote scholarship on the Court and sponsors or co-sponsors various lecture series and other educational colloquia to further public understanding of the Court and its history.

The Society ends 1992 with approximately 4,300 members whose financial support and volunteer participation in the Society's standing and ad hoc committees enable the organization to function. These committees report to an elected Board of Trustees and an Executive Committee, the latter of which is principally responsible for policy decisions and for supervising the Society's permanent staff.

Requests for additional information should be directed to the Society's headquarters at 111 Second Street, N.E., Washington, D.C. 20002, Tel. (202) 543-0400.

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ACKNOWLEDGEMENT

The Officers and Trustees of the Supreme Court Historical Society would like to thank the Charles Evans Hughes Foundation for its generous support of the publication of this *Journal*.

A Tribute to Thurgood Marshall

William J. Brennan, Jr.

Editor's Note: *This article was originally printed in the November 1991 Harvard Law Review. It is reprinted by permission.*

The task of writing a tribute to Justice Marshall is daunting. Thurgood is one of our century's

legal giants; one cannot take his full measure within the compass of an essay, and even a summary is difficult. One can begin, of course, by noting that in his twenty-four Terms on the Supreme Court, Justice Marshall played a crucial role in enforcing the constitutional protections



Thurgood Marshall with President Lyndon Johnson in the White House. Two years after appointing Marshall Solicitor General, the President nominated him to succeed Tom Clark on the Supreme Court. Clark resigned after his son, Ramsey Clark, was named Attorney General.

that distinguish our democracy. Indeed, he leaves behind an enviable record of opinions supporting the rights of the less powerful and less fortunate. One can then add that, for more than twenty-five years before he joined the judiciary, Thurgood Marshall was probably the most important advocate in America, one who used his formidable legal skills to end the evils of discrimination. Thurgood would be the first to remind us that he was supported by a host of other talented lawyers, beginning with his mentor Charles Houston. But it was Thurgood who took the lead, and it was his presentations, in case after case, and in court after court, that helped bring about a society in which "equal protection of the laws" could be a reality and not merely a legal phrase.

Yet these profiles of Thurgood Marshall as Justice and as counsel leave the picture incomplete. Those who know him well recognize that a portrait of Thurgood must also reflect the dedication, the courage, the humanity, and the warm humor of the man. Perhaps, then, the only way to begin this tribute is to say that I have had the privilege of serving on the Supreme Court with twenty-two Justices and that my dear friend Thur-

good was unique among them. His departure from the Court brings a richly deserved retirement for him but, regrettably for the country, signals the twilight of a remarkable public career. Of no other lawyer can it so truly be said that all Americans owe him an enormous debt of gratitude.

What made Thurgood Marshall unique as a Justice? Above all, it was the special voice that he added to the Court's deliberations and decisions. His was a voice of authority: he spoke from first-hand knowledge of the law's failure to fulfill its promised protections for so many Americans. It was also the voice of reason, for Justice Marshall had spent half a lifetime using the tools of legal argument to close the gap between constitutional ideal and reality. And it was a voice with an unwavering message: that the Constitution's protections must not be denied to anyone and that the Court must give its constitutional doctrine the scope and the sensitivity needed to assure that result. Justice Marshall's voice was often persuasive, but whether or not he prevailed in a given instance, he always had an impact. Even in dissent, he spoke for those who might otherwise be forgotten--when, for example,



LITTLE ROCK CENTRAL

Thurgood Marshall argued before the Court to end the armed resistance to desegregation in Little Rock, Arkansas. Troops from the 101st Airborne Division escort nine African-American students into Little Rock's Central High School to attend their first full day of classes after the Supreme Court cleared the path for their attendance.



Thurgood Marshall, on the steps of the Supreme Court, September 11, 1958, after the Court heard arguments in the Little Rock case.

he chided the Court for doubting that a fifty dollar bankruptcy fee was a burden for the "over 800,000 families in the Nation [who] had . . . incomes of less than . . . \$19.23 a week",¹ or when he chastised his colleagues for concluding that a juvenile in police custody could invoke his *Miranda* rights only by requesting a lawyer,² or when he reminded the majority that "many families do not conform to th[e] ideal"³ and that parental notification requirements may therefore result in "physical or emotional abuse, [or] withdrawal of financial support" for minors seeking abortions.⁴

I joined the Court the year after its second decision in *Brown v. Board of Education (Brown II)*,⁵ and so I did not hear that urgent voice until the desegregation cases that followed in *Brown's* wake. I particularly remember the argument in *Cooper v. Aaron*,⁶ the case involving Arkansas' armed resistance to federal court desegregation orders in Little Rock. Although the issues before us in that case were largely procedural, Thurgood's forceful presentation helped influence the Court's unprecedented and decisive response: we reinstated the desegregation order on the day after oral argument,⁷ and our subsequent opinion was signed by all nine Justices.⁸

The Court addressed the most serious episodes of *Brown's* enforcement a decade later, after Thurgood joined our bench. Beginning in 1968, the Court issued three crucial decisions reaffirming the commitment to desegregation.

The Court overturned one school district's "freedom of choice" plan⁹ and then affirmed a court-imposed pupil reassignment plan in another district¹⁰ after finding failure to comply with *Brown* in both cases. In the third case, the Court found that proof of de jure segregation in a substantial portion of a school district could support a finding of a dual system of schools throughout the whole district.¹¹ Although Justice Marshall did not write in these cases, his strong statements during the Court's conferences--drawing on his familiarity with the problems--sharpened the Court's resolve to strive for unanimous decisions.¹²

Eventually, of course, the Court's consensus disintegrated in *Milliken v. Bradley*,¹³ the 5-4 decision that overturned a multi-district desegregation plan approved by a federal judge in Detroit. Justice Marshall filed a compelling dissent decrying the majority's holding that the remedy for decades of official segregation in Detroit could not extend beyond the city itself, even though two thirds of that city's students were now Afro-American.¹⁴ As Justice Marshall observed, a remedy thus confined "simply d[id] not promise to achieve actual desegregation at all,"¹⁵ and he warned that "unless our children begin to learn together, there is little hope that our people will ever learn to live together."¹⁶

Justice Marshall's dissent may well have made the Court more responsive to the plight of Detroit's schoolchildren when the case returned before us in *Milliken v. Bradley (Milliken II)*.¹⁷ On that occasion, the Court unanimously upheld a desegregation plan that, although limited to Detroit, broke new ground by requiring remedial education programs as part of the plan to redress discrimination.¹⁸ And Justice Marshall's influence was felt again two years later when the Court inferred de jure segregation from a series of administrative decisions in Columbus, Ohio that could not "reasonably be explained without reference to racial concerns."¹⁹ In sum, Justice Marshall's persuasive voice made all of us more sensitive to the legacy of discrimination. As President Johnson predicted at the time of his nomination, placing Thurgood Marshall on the Court was "the right thing to do, the right time to do it, the right man and the right place."²⁰ This was true not only in the desegregation era, but also in later years, when questions such as affirmative action reached the Court.²¹



In *Logan Valley Plaza*, Justice Marshall wrote the majority opinion expanding the "public forum" doctrine; suburban shopping centers, like this one in Mount Prospect, IL., could be targeted by picketing in the decision.

Justice Marshall was the "right man" in countless other ways, of course, ranging far beyond cases involving racial equality. His constitutional vision, like his courtroom experience, was broad, and so were his insights. To me, three crucial areas of his constitutional vision stand out: the First Amendment, the rights of criminal defendants, and the death penalty.

In his first Term on the Court, Justice Marshall wrote the majority opinion in *Amalgamated Food Employees Union Local, 590 v. Logan Valley Plaza, Inc.*,²² which significantly expanded the "public forum" doctrine. The issue in that case was whether owners of a large shopping mall could invoke private property rights to exclude picketers.²³ Justice Marshall recognized shopping centers as the suburban counterparts of central business districts and concluded that picketing and other protected expression could not be prohibited.²⁴

Logan Valley Plaza was soon followed by Thurgood's opinion in another landmark case: *Stanley v. Georgia*.²⁵ The defendant there had been convicted of possessing obscene material after officers who were searching his home for evidence of bookmaking came upon an allegedly

obscene film. In claiming that this arrest violated the First Amendment, the defendant had to overcome the Court's established view--reiterated in an opinion that I had recently written²⁶--that obscene material was not protected by the Constitution. Justice Marshall properly limited such prior holdings to cases involving some public activity; mere private possession of obscene materials, he concluded, could not be subject to prosecution.²⁷ "If the First Amendment means anything," he wrote, "it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch."²⁸

Three years later, Justice Marshall authored an equal protection decision that significantly curtailed content-based limitations on speech. In *Police Department v. Mosley*,²⁹ a black postal worker was prevented from protesting discriminatory policies on a sidewalk adjacent to a high school. The pertinent ordinance barred such demonstrations during school hours but exempted labor picketers from the restriction. Justice Marshall found this preference for certain picketers unconstitutional. He observed that government "may not select which issues are worth discussing or debating in



Justices Brennan and Marshall served on the Bench together for twenty-three years and developed a close friendship. They are shown here exchanging a private joke.

public facilities. . . . There is an 'equality of status in the field of ideas.'"³⁰ Justice Marshall extended this finding fifteen years later when he invalidated a sales tax that exempted certain journals such as religious and sports publications.³¹

Underlying each of these advances in First Amendment doctrine was a personal awareness of the First Amendment's central meaning. More than any other Justice on the Court, Thurgood Marshall knew what it was like to stand up for unpopular ideas. The voice of experience echoes in his reminder that "equal protection. . . is closely intertwined with First Amendment interests"³² and in his remark that restrictions on free speech might exclude not only the labor picketers arrested in *Logan Valley Plaza*, but also "consumers protesting . . . overpriced merchandise, and minority groups seeking nondiscriminatory hiring policies."³³

Thurgood also knew what it was like to stand up for unpopular clients. He often defended men and women who had no other lawyer. These experiences gave him a special appreciation for the constitutional rights of those accused of crimes. He viewed the Bill of Rights' key protections for the accused as magnificent but fragile creations—magnificent because they seek to shield individu-

als from the overweening power of the state; fragile because such shields can easily crumble if courts create exceptions or narrow their scope. More than any other recent member of the Court, Justice Marshall leaves a legacy of powerful dissents protesting the curtailment of defendants' rights—dissents with a vision of fairness and order that is stirring in its clarity.

In *Rawlings v. Kentucky*,³⁴ for example, Justice Marshall protested the Court's retrenchment in its Fourth Amendment doctrine. Rawlings was convicted of possessing contraband that had been seized in a search of a friend's purse. The purse search was concededly illegal, but the majority held that the defendant had no "subjective expectation" of privacy in the other person's purse and therefore lacked standing to challenge the seizure of items he himself owned. In dissent, Justice Marshall noted that "[t]he history of the Fourth Amendment," as well as the Court's prior enforcement of it, "shows that it was designed to protect property interests as well as privacy interests."³⁵ The Fourth Amendment's text, Justice Marshall reminded us, assures "[t]he right of the people to be secure in their persons. . . and effects against unreasonable searches and seizures,"³⁶ and thus, if "property was seized as the result of an unreasonable search, the seizure cannot be other than unreasonable."³⁷

Justice Marshall's essential point in *Rawlings* was that we should not adjust constitutional doctrine to enhance "the government's ability to obtain criminal convictions,"³⁸ because the proper "balance" between government interests and individual liberty was chosen long ago by those who framed the Bill of Rights. This important insight recurred often in Thurgood's writings.³⁹ A few years later, in *New York v. Quarles*,⁴⁰ he denounced a similar sacrifice of Fifth Amendment rights to the perceived needs of law enforcement. The *Quarles* Court created a "public safety" exception to the requirement that defendants in police custody be informed of their right to remain silent before interrogation. "Though the majority's opinion is cloaked in the beguiling language of utilitarianism," Justice Marshall warned, "the Court has sanctioned *sub silentio* criminal prosecutions based on compelled self-incriminating statements."⁴¹

Justice Marshall's most eloquent defense of constitutional protections, however, was likely his dissent in *United States v. Salerno*.⁴² In that

case, the Court approved the potentially unlimited detention of indicted defendants based on a showing of future dangerousness that need only satisfy the "beyond a reasonable doubt" standard. Justice Marshall denounced the detention law for violating the presumption of innocence and the protection against excessive bail. "Such statutes," Marshall wrote, "[which are] consistent with the usages of tyranny and the excesses of what bitter experience teaches us to call the police state, have long been thought incompatible with the fundamental human rights protected by our Constitution."⁴³ The closing paragraph of the *Salerno* dissent captured in somber tones Justice Marshall's sense of judicial duty toward the rights of the accused:

Throughout the world today there are men, women, and children interned indefinitely, awaiting trials. . . because their governments believe them to be 'dangerous.' Our Constitution, whose construction began two centuries ago, can shelter us forever from the evils of such unchecked power. Over 200 years it has slowly, through our efforts, grown more durable, more expansive, and more just. But it cannot protect us if we lack the courage, and the self-restraint, to protect ourselves.⁴⁴

The number and quality of Justice Marshall's dissents should not obscure his important successes in the realm of defendants' rights. Chief among these was his campaign to eradicate discrimination from jury selection procedures. In an opinion written during his fourth Term on the Court, *Peters v. Kiff*,⁴⁵ Justice Marshall upheld a white defendant's claim that his due process rights were violated by the systematic exclusion of blacks from grand and petit juries. He argued that, even if race was not an issue in the trial, such juror exclusions could render the trial unfair by narrowing the range of juror backgrounds. Notwithstanding the difficulty of proving such unfairness, Justice Marshall believed the very risk of its existence offended due process. Only two other Justices joined his plurality opinion.⁴⁶ It seems fair to say, however, that his view has ultimately prevailed. In the 1990 Term, in *Powers v. Ohio*,⁴⁷ the Court upheld by a decisive margin a white

defendant's claim that a prosecutor's discriminatory use of peremptory challenges against black potential jurors entitled him to a new trial. Although the focus in *Powers* upon the rights of excluded jurors differed somewhat from Justice Marshall's analysis in *Peters*, the decision clearly reflected his original concern, because it acknowledged that "discrimination in the selection of jurors. . . places the fairness of a criminal proceeding in doubt."⁴⁸

Justice Marshall's opinion in *Bounds v. Smith*,⁴⁹ has had a comparable impact on the rights of prisoners. *Bounds* required that prisoners be provided law libraries or legal assistance to preserve their right of access to federal courts. Justice Marshall's opinion for the Court bespoke a familiarity with the plight of unschooled litigants. A pro se prisoner, he noted, has as much need as any lawyer to "research[] such issues as jurisdiction, venue, standing, exhaustion of remedies, proper parties plaintiff and defendant, and types of relief available."⁵⁰ No one familiar with today's federal court dockets could fail to appreciate the impact of *Bounds*, for it has enabled prisoners not only to challenge unfair convictions, but also to place before the courts claims of prison mistreatment and unconstitutional conditions.

Because I have emphasized the effect that Thurgood's experiences in his early years had on his opinions, I should perhaps explain how I have come to know the details of his early life. The chief and surely the most enjoyable source of such knowledge has been Thurgood himself; he is simply unsurpassed as a raconteur. On many occasions, some fact or event will remind him of an earlier episode in his richly varied life. When that moment arrives, a flicker of recollected amusement passes over his face, the magic words "You know. . ." signal the onset of another tale, and soon Thurgood has plunged his audience into a different world. The locales are varied--from dusty courtrooms in the Deep South, to a confrontation with General MacArthur in the Far East, to the drafting sessions for the Kenyan Constitution. They are brought to life by all the tricks of the storyteller's art: the fluid voice, the mobile eyebrows, the sidelong glance, the pregnant pause, and the wry smile.

The stories are never self-aggrandizing; indeed, they often focus upon someone else. They have provided many with amusement, but they

have also given all of Thurgood's colleagues remarkable glimpses of his experiences--of the time when he was run down by hostile sheriffs who tried to frame him on a drunk driving charge, or when a preacher with whom he was working came within a few minutes of being lynched at the riverside, or when a young defendant facing the death penalty asserted his innocence and refused to accept a plea bargain of life imprisonment, or when the Ku Klux Klan warned him not to stay in town during trial (and the word went out in the black community that men were needed "to sit up with a sick relative" at the house where Thurgood stayed), or when a long-shot lawsuit unexpectedly created the Tuskegee Airmen, or of countless other episodes in and out of the courtroom.

What prompts these stories? Justice Marshall thoroughly enjoys good (and even bad) jokes, of course, and the stories are peppered with them, even in the midst of grimmer narratives. But, as I have suggested, the anecdotes serve a deeper purpose. In some cases, I think, they are his way of preserving the past while purging it of its

ugliness in his life. But they are also a form of education for the rest of us. Surely Justice Marshall recognized that the stories made us--his colleagues--confront walks of life we had never known. That, too, has been part of the voice that Thurgood Marshall brought to the Court.

I have left for last my comments on one other aspect of Justice Marshall's jurisprudence: his views on the death penalty. Thurgood and I, of course, were alone on the Court in believing that capital punishment was in all cases barred as "cruel and unusual punishment" under the Eighth Amendment. In his sixty-page concurrence in *Furman v. Georgia*,⁵¹ Justice Marshall canvassed a vast array of historical and social science materials to demonstrate that punishments are deemed "cruel" if excessive and that, when judged by any acceptable theory of punishment, the death penalty is excessive. Justice Marshall held to that view, even when four years later the rest of the Court again permitted death penalties.⁵² But he never became complacent in his opposition. Rather, as one scholar has pointed out,⁵³ he challenged the majority view on its own terms by arguing that there were insufficient safeguards to ensure the "reliability" of capital sentencing--safeguards that several other Justices found constitutionality necessary. Justice Marshall's dedication to this task has been remarkable. Perhaps few outside the Court realize that, quite apart from his general opposition to all executions, Thurgood has filed more than 150 dissents from "denial of certiorari" in capital cases. These dissents called his colleagues' attention to particular problems, often involving procedural unfairness, in the imposition of individual death sentences that he thought warranted review.

In cases that the Court did review, Justice Marshall succeeded in implementing some crucial reforms. In *Ake v. Oklahoma*,⁵⁴ his majority opinion held that an indigent defendant was entitled to have a psychiatrist present his insanity defense to a murder charge and responded to the prosecutor's claim (in seeking the death penalty) regarding the defendant's future dangerousness. And in *Ford v. Wainwright*,⁵⁵ Justice Marshall persuaded a majority that the execution of insane prisoners violated the Eighth Amendment; in his opinion, he noted "the natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience."⁵⁶



John Major Young, Jr. sitting in his death row cell in Canon City, Colorado, June 1972. His sentence was overturned after the Supreme Court, in *Furman v. Georgia*, halted capital punishment temporarily.

Decisions like *Ake* and *Ford* mark substantial advances in the law, yet they also underscore the continuing wrong of capital punishment. Justice Marshall would not want us to forget that. Ten years ago, at the unveiling of a statue honoring him in his home city of Baltimore, Thurgood warned the assembled guests: "I just want to be sure that when you see this statue, you won't think that's the end of it. I won't have it that way. There's too much work to be done."⁵⁷ It was typical of Thurgood to eschew complacency even at that moment. He has never stopped challenging us to make the Constitution fulfill its promises for all Americans; he has never stopped calling upon (in Lincoln's words) "the better angels of our nature."⁵⁸ One can only hope that his voice will continue to resonate in the future work of the Court.

Endnotes

- ¹ *United States v. Kras*, 409 U.S. 434, 459 (1973) (Marshall, J., dissenting) (citation omitted).
- ² See *Fare v. Michael C.*, 442 U.S. 707, 730 (1979) (Marshall, J., dissenting).
- ³ *H.L. v. Matheson*, 450 U.S. 398, 437 (1981) (Marshall, J., dissenting).
- ⁴ *Id.* at 439.
- ⁵ 349 U.S. 294 (1955).
- ⁶ 358 U.S. 1 (1958).
- ⁷ See *id.* at 4-5 & n.*.
- ⁸ See *id.* at 4.
- ⁹ See *Green v. County Sch. Bd.*, 391 U.S. 430, 441 (1968).
- ¹⁰ See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 31 (1971).
- ¹¹ See *Keyes v. School Dist. No. 1*, 413 U.S. 189, 203 (1973).
- ¹² Only in *Keyes* did one member of the Court dissent from the Court's judgment. See *id.* at 254 (Rehnquist, J., dissenting).
- ¹³ 418 U.S. 717 (1974).
- ¹⁴ See *id.* at 800 (Marshall, J., dissenting).
- ¹⁵ *Id.* at 803.
- ¹⁶ *Id.* at 783.
- ¹⁷ 433 U.S. 267 (1977).
- ¹⁸ See *id.* at 280-81.
- ¹⁹ *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 461 (1979) (quoting *Penick v. Columbus Bd. of Educ.*, 429 F. Supp. 229, 241 (S.D. Ohio 1977)).
- ²⁰ John P. MacKenzie, "Thurgood Marshall" in *4 The Justices of the United States Supreme Court 1789-1969*, at 3064 (Leon Friedman & Fred L. Israel eds., 1969).
- ²¹ See, e.g., *City of Richmond v. J. A. Croson Co.*, 448 U.S. 469, 528 (1989) (Marshall, J., dissenting); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 295 (1986) (Marshall, J., dissenting); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 387 (1978) (Marshall,

- J., concurring in part and dissenting in part).
- ²² 391 U.S. 308 (1968).
- ²³ See *id.* at 309.
- ²⁴ See *id.* at 324-25.
- ²⁵ 394 U.S. 557 (1969).
- ²⁶ See *Roth v. United States*, 354 U.S. 476, 485 (1957).
- ²⁷ See *Stanley*, 394 U.S. at 564.
- ²⁸ *Id.* at 565.
- ²⁹ 408 U.S. 92 (1972).
- ³⁰ *Id.* at 96 (quoting Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* 27 (1948)).
- ³¹ See *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 227 (1987).
- ³² *Mosley*, 408 U.S. at 95; see also *Arkansas Writers' Project*, 481 U.S. at 227 n. 3 ("First Amendment claims are obviously intertwined with interests arising under the Equal Protection Clause.")
- ³³ *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 324 (1968).
- ³⁴ 448 U.S. 98 (1980).
- ³⁵ *Id.* at 119 (Marshall, J., dissenting).
- ³⁶ *Id.* at 117 (emphasis in original) (quoting U.S. Const. amend. IV).
- ³⁷ *Id.* at 118.
- ³⁸ *Id.* at 121.
- ³⁹ See, e.g., *United States v. Robinson*, 485 U.S. 25, 44 (1988) (Marshall, J., dissenting).
- ⁴⁰ 467 U.S. 649 (1984).
- ⁴¹ *Id.* at 686 (Marshall, J., dissenting).
- ⁴² 481 U.S. 739 (1987).
- ⁴³ *Id.* at 755 (Marshall, J., dissenting).
- ⁴⁴ *Id.* at 767.
- ⁴⁵ 407 U.S. 493 (1972).
- ⁴⁶ Justice Powell and I joined Justice White's concurrence in the judgment, which relied instead on a federal law barring discrimination against jurors.
- ⁴⁷ 111 S. Ct. 1364 (1991).
- ⁴⁸ *Id.* at 1371.
- ⁴⁹ 430 U.S. 817 (1977).
- ⁵⁰ *Id.* at 825.
- ⁵¹ 408 U.S. 238, 314 (1972).
- ⁵² See *Gregg v. Georgia*, 428 U.S. 153, 231 (1976).
- ⁵³ See Charles J. Ogletree, "Justice Marshall's Criminal Jurisprudence: 'The Right Thing to Do, the Right Time to Do It, the Right Man and the Right Place,'" 6 *Harv. BlackLetter J.* 111, 126-30 (1989).
- ⁵⁴ 470 U.S. 68 (1985).
- ⁵⁵ 477 U.S. 399 (1986).
- ⁵⁶ *Id.* at 409.
- ⁵⁷ "Thurgood Marshall," in *Current Biography Yearbook 1989*, at 377, 380 (Charles Moritz ed., 1989).
- ⁵⁸ 4 *The Collected Works of Abraham Lincoln* 271 (Roy P. Basler ed., 1953).

Thurgood Marshall: The Influence of a Raconteur

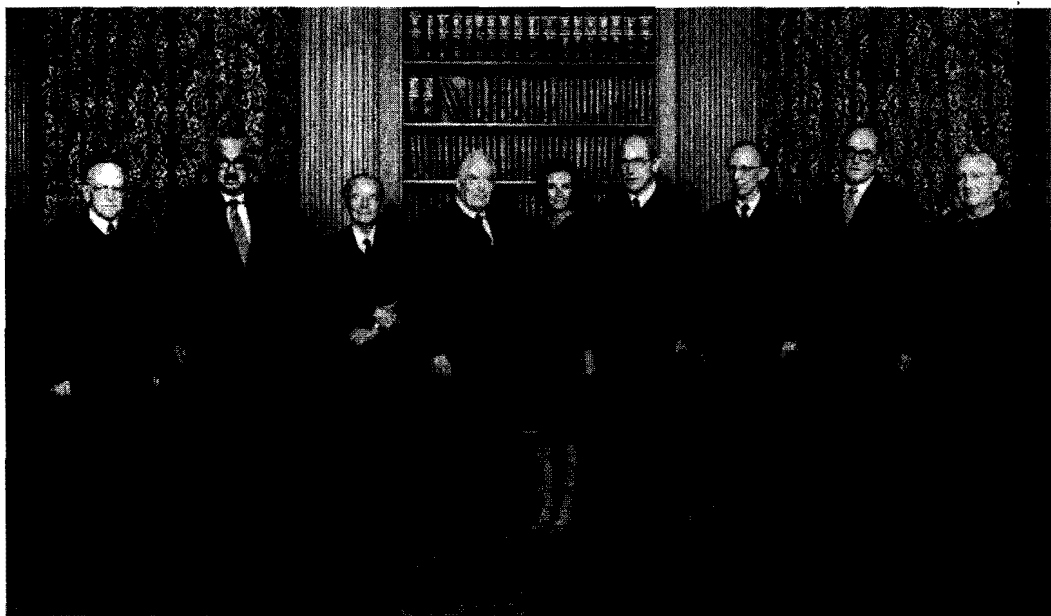
Sandra Day O'Connor

Editor's Note: *This article was originally printed in 44 Stanford Law Review 1217 (1992). It is reprinted by permission. © 1992 by the Board of Trustees of the Leland Stanford Junior University.*

I was fresh out of Stanford Law School, working as a civilian attorney in the Quartermaster Market Center, the day Thurgood Marshall

changed the nation. He had been chipping away at the building blocks of a separatist society long before 1954, of course, but it was through *Brown v. Board of Education*¹ that he compelled us, as a nation, to come to grips with some of the contradictions within ourselves.

Like most of my counterparts who grew up in the Southwest in the 1930s and 1940s, I had not



The Burger Court the day of Justice O'Connor's investiture. Justice Sandra Day O'Connor and Justice Thurgood Marshall served on the Court together for ten years. Both were firsts: the first woman and the first African-American to become an Associate Justice.

been personally exposed to racial tensions before *Brown*; Arizona did not have a large African-American population then, and unlike Southern states, it never adopted a *de jure* system of segregation. Although I had spent a year as an eighth grader in a predominately Latino public school in New Mexico, I had no personal sense, as the plaintiff children of Topeka School District did, of being a minority in a society that cared primarily for the majority.

But as I listened that day to Justice Marshall talk eloquently to the media about the social stigmas and lost opportunities suffered by African-American children in state-imposed segregated schools, my awareness of race-based disparities deepened. I did not, could not, know it then, but the man who would, as a lawyer and jurist, captivate the nation would also, as colleague and friend, profoundly influence me.

Although all of us come to the Court with our own personal histories and experiences, Justice Marshall brought a special perspective. His was the eye of a lawyer who had seen the deepest wounds in the social fabric and used law to help heal them. His was the ear of a counselor who understood the vulnerabilities of the accused and established safeguards for their protection. His was the mouth of a man who knew the anguish of the silenced and gave them a voice.

At oral argument and conference meetings, in opinions and dissents, Justice Marshall imparted not only his legal acumen but also his life experiences, constantly pushing and prodding us to respond not only to the persuasiveness of legal argument but also to the power of moral truth.

Although I was continually inspired by his historic achievements, I have perhaps been most personally affected by Justice Marshall as a con-



CONSERVATORY OFFICE
VIRGINIA CARTER, Secretary

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BALTIMORE, MD.

HAROLD BARNES, Manager

"Confitebor tibi quoniam
exaudisti me: ex factis
et mihi in salutem.
Laudem quem peccato-
baverunt & discant
hic factures in caput angeli."

February 22, 1956.

Corneilus Washington,
1333 Chapel St.,
Norfolk, Va.

Dear Sir:

I am sorry, but no colored stu-
dents are accepted at the Peabody Conservatory.

Very truly yours,

Henrietta N. Fouse

Thurgood Marshall spent much of his career using the legal system to fight racial discrimination. Racially restrictive admissions policies in education, such as those shown in this letter, were one of his major priorities.

teur. It was rare during our conference deliberations that he would not share an anecdote, a joke or a story; yet, in my ten years on the bench with him, I cannot recall ever hearing the same "TM" story twice. In my early months as the junior Justice, I looked forward to these tales as welcome diversions from the heavy, often troublesome, task of deciding the complex legal issues before us. But over time, as I heard more clearly what Justice Marshall was saying, I realized that behind most of the anecdotes was a relevant legal point.

I was particularly moved by a story Justice Marshall told during the time the Court was considering a case in which an African-American defendant challenged his death sentence as racially biased. Something in the conversation caused his eyebrows to raise characteristically, and with a pregnant pause, to say: "That reminds me of a story." And so it began, this depiction of justice in operation. "You know," he said:

I had an innocent man once. He was accused of raping a white woman. The government told me if he would plead guilty, he'd only get life. I said I couldn't make that decision; I'd have to ask my client. So I told him that if he pleaded guilty, he wouldn't get the death sentence.

He said, "Plead guilty to what?"

I said, "Plead guilty to rape."

He said, "Raping that woman? You gotta be kidding. I won't do it."

That's when I knew I had an innocent man.

When the judge sent the jurors out, he told them that they had three choices: Not guilty, guilty, or guilty with mercy. "You understand those are the three different possible choices," he instructed. But after the jury left, the judge told the people in the courtroom that they were not to move before the bailiff took the defendant away. I said, "What happened to 'not guilty'?" The judge looked at me, and said, "Are you kidding?" Just like that. And he was the "judge."

As he neared the end of his tale, Justice Marshall leaned forward, pointed his finger at no

one in particular, and said with his characteristic signal of finalé, "E-e-e-end of the Story. The guy was found guilty and sentenced to death. But he never raped that woman." He paused, flicking his hand. "Oh well," he added, "he was just a Negro."

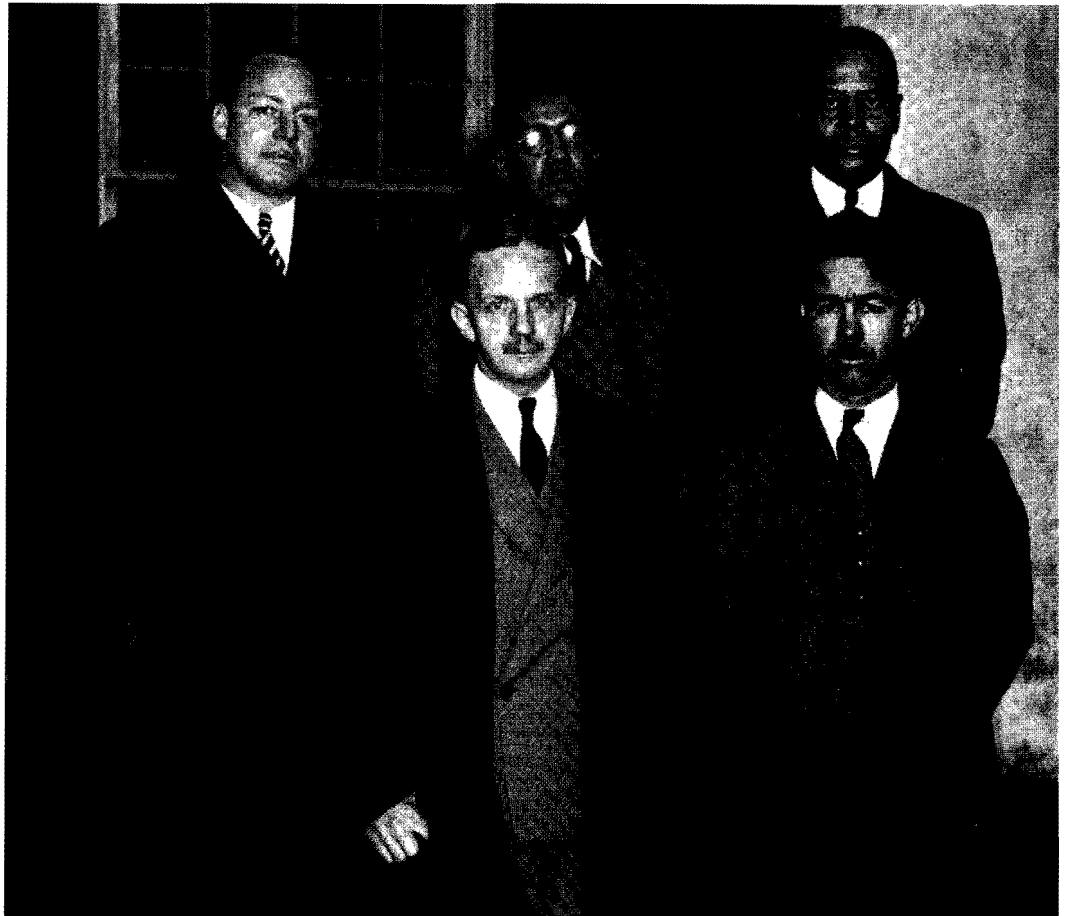
With the aid of this low-key narrative, Justice Marshall made his own legal position quite clear: in his view the death penalty was not only cruel and unusual punishment in violation of the Eighth Amendment, it had never been, and could never be, administered fairly and free of racial bias. Although I disagreed with Justice Marshall about the constitutional validity of the death penalty, his story made clear what legal briefs often obscure: the impact of legal rules on human lives. Through his story, Justice Marshall reminded us, once again, that the law is not an abstract concept removed from the society it serves, and that judges, as safeguarders of the Constitution, must constantly strive to narrow the gap between the ideal of equal justice and the reality of social inequality.

Justice Marshall's stories served for me another function. Beneath his wit and charm and rambunctiousness, he is an intensely private man; there are sides to him no one but his family will ever know. But over the years, as he shared stories of Klan violence and jury bias, of co-opted judges and dishonest politicians, I have gained an insight, a peephole really, into the character of a man who is at once eternally at peace and perpetually at war.

"S-a-a-a-n-d-r-a-a-a," he called out once, "did I ever tell you about the welcome I received in Mississippi?" It was early evening in a small town in Mississippi in the early 1940s and he was waiting to hop the next train to Shreveport. "I was starving," he told me, "so I decided to go over to this restaurant and see if one of the cooks would let me in the back to buy a sandwich. You know, that's how we did things then; the front door was so inconvenient!" Before he could go over, Justice Marshall recounted, "a man of your race holding a pistol sidled up. 'Boy,' he said, 'what are you doing in these parts?' I said, 'I'm waiting to catch the next train.' He said, 'Listen up boy because I'm only gonna tell you this once. The last train through here is at four p.m. and you better be on it cuz niggers ain't welcome in these parts after dark.'"

"Guess what," Justice Marshall added, a twinkle creeping into his eye, "I was on that train."

What Justice Marshall did not say, what he had no need to say, was how physically threatening



The arraignment of George Crawford on murder charges in Leesburg, VA in 1933 brought out an array of legal talent for his defense. Left to right, front, Walter White and Edward P. Lovette. Back, James G. Tyson, Leon A. Ranscome and Charles Houston. Houston was Marshall's mentor at Howard University and continued to influence his career long after graduation.

and personally humiliating the situation must have been. Left unspoken, too, was the anger and frustration any grown man must have felt at being called "boy" and run out of town. It is not surprising, really, that these sentiments are relegated to the backdrop; unlike many national figures, Justice Marshall is not interested in publicizing the risks he has taken or the sacrifices he made. Instinctively, he downplays his own role, as though it were natural to hide under train seats, or earn \$2,400 a year as a lawyer, or write briefs on a manual typewriter balanced, in a moving car, between his knees. To Justice Marshall, these hardships warrant no comment; they are simply the natural extension of a lifetime credo of "doing the best you can with what you've got."

But to those of us who have traveled a different road, Justice Marshall's experiences are a source of amazement and inspiration, not only because of what they reveal about him but also because of what they instill in, and ask of, us. I have not encountered prejudice on a sustained basis. But I have experienced gender discrimination enough, such as when law firms would only hire me, a "lady lawyer," as a legal secretary, to understand how one could seek to minimize interaction with those who are intolerant of difference. That Justice Marshall never hid from prejudice but thrust himself, instead, into its midst has been both an encouragement and a challenge to me.

I asked him, once, how he managed to avoid becoming despondent from the injustices he saw.

Instead of responding directly, he told me about the time he and his mentor, Charles Hamilton Houston, the vice-dean at Howard Law School, traveled to Loudon County, Virginia, to help a man on trial for his life. The man, George Crawford, had been indicted by an all-white grand jury of murdering a white woman from a well-to-do Virginia family, as well as her white maid. Despite their defense challenge to the exclusion of African-Americans from the jury, Crawford was convicted of murder by an all-white jury, and sentenced to life. "You know something is wrong with the government's case," Justice Marshall told me, "when a Negro only gets life for murdering a white woman."

After the trial, Justice Marshall said, the media asked if Crawford planned an appeal based on the exclusion of African-Americans from the jury. "Crawford said, 'Mr. Houston, if I have another trial, and I got life this time, could they kill me the next time?' Charlie told him yes. So Crawford told Charlie: 'Tell them the defendant rests.'"

"I still have mixed feelings about that case," Justice Marshall added. "I just don't believe that guy got a fair shake. But what are you going to do?" he asked. "There are only two choices in life: stop and go on. You tell me, what would you pick?"

Even now, I still think about Justice Marshall's backhanded response, wondering how one confronts, as he did, the darkest recesses of human nature--bigotry, hatred, and selfishness--and emerge wholly intact. Although I probably will never completely understand, part of the answer, I think, lies in his capacity for narration itself. His stories reflect a truly expansive personality, the perspective of a man who immerses himself in human suffering and then translates that suffering in a way that others can bear and understand. The past he relates--doused in humor and sadness, tragedy and triumph--is but a mirror of himself: a man who sees the world exactly as it is and pushes on to make it what it can become. No one could help but be moved by Justice Thurgood Marshall's spirit; no one could avoid being touched by his soul.

As I continue on the bench, a few seats down from where he once sat, I think often of Justice Marshall. I remember the morning we first met and the afternoon he left the bench. I remember the historic law suits he brought and the thoughtful opinions and dissents he wrote. I recall his

unwavering commitment to the poor, the accused, and the downtrodden, and his constant, impassioned repudiation of the death penalty. More than that, though, I think of the raconteur himself. Occasionally, at Conference meetings, I still catch myself looking expectantly for his raised brow and his twinkling eye, hoping to hear, just once more, another story that would, by and by, perhaps change the way I see the world.

Endnotes

¹ 347 U.S. 483 (1954).

Reflections on Justice Marshall

Robert L. Carter

My association with Thurgood Marshall, then National Association for the Advancement of Colored People (NAACP) Special Counsel, began in the waning months of 1944. He was looking for an assistant to help principally in legal research and pretrial preparation. I interviewed for the job, and he hired me on the spot, I believe. As a rule Thurgood made decisions of that sort swiftly. He either took to you or he did not. I worked closely with him for roughly the next dozen years, which formed probably the most gratifying period of my life, both professionally and personally. Much of the gratification was the fortuitous result of the circumstance that those years were a time of momentous change in the law as it affected minority rights, and those of us on the NAACP legal staff working under Thurgood Marshall had the exhilarating feeling that we were instruments making change possible. But the feeling of fulfillment and gratification was also the result of Thurgood's sure guidance and tutelage.

By 1944, Thurgood was already a heroic figure. He was undoubtedly the best known black lawyer in the country, and he had recently won a historic Supreme Court decision in *Smith v. Allwright*¹, outlawing the white primary in the South. Under his easy but sure guidance my colleagues and I at the NAACP learned the lawyer's craft--legal draftsmanship, analysis, litigation skills, brief writing, trial strategy and appellate argument. He had acquired mastery in all these areas, and by example and instruction he sought to help his staff achieve the same. Thurgood took an

active interest in the maturation of the staff's legal skills, and soon after a lawyer was admitted to the bar, Thurgood would have him or her traveling and litigating cases.

Although he and I were not buddy-buddy close personally, we were close professionally and operated with the mutual trust and affection of a successful boss-assistant combination. He was an easy person to work for. Although no overt demands were ever articulated, we knew he expected the best of us and that it was our duty to give it. I suppose in part that was because we had accepted his mission of change as our own and wanted as fervently as he to accomplish the goals he set out.

When Thurgood hired me, one of his two full-time assistants had just left, and he was overburdened. He had to file briefs in various pending cases challenging white primaries in several southern states as well as mount attacks on segregation at the graduate and professional school level. But he also had to find the means to finance the litigation being undertaken. This meant a great deal of public speaking, as well as appeals to foundations and individuals to provide help.

Despite these demands on his time, I do not recall Thurgood expressing any sentiment approaching discouragement about being overburdened. I look back now over the years of my own experience and am amazed. Due to Thurgood's workload, from 1945 onward he was unable to be personally involved in the research and initial drafting of every document and often had to rely on the staff for these matters. However, he was closely in-

volved in all of the work of the staff, and his imprimatur was on every court document that the NAACP lawyers filed.

The first argument in the Supreme Court I heard Thurgood make was in *Morgan v. Virginia*,² in which we were attacking the segregation laws of Virginia, which required bus companies transporting blacks through Virginia to relegate blacks to the back of the bus. That was the second occasion I had heard argument in the Supreme Court, and I was suitably impressed. What was most striking was the difference between Thurgood Marshall outside the courtroom and Thurgood before the Court. Thurgood outside was earthy, fond of street humor and slang, and a raconteur, with an endless series of humorous

stories to relate. Before the Court, however, he was the consummate professional, eloquent in his presentation, skillful and surefooted in overcoming queries from the Justices which might undermine the foundation of the constitutional edifice he was seeking to build.

The most lasting characteristic about Thurgood I recall from my time as one of his assistants was his fervid, almost religious faith in the efficacy of the national constitution in protecting the individual against government discrimination and abuse. He believed that the Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution were an updated Magna Carta ensuring equal citizenship rights for blacks, and that his mission was to see this concept of the



The NAACP and Thurgood Marshall were committed to opening law and graduate schools to blacks. In 1946, after filing suit in the United States Supreme Court, Ada Sipuel Fisher became the first black to enroll in the University of Oklahoma in the school's fifty-six year history.



Thurgood Marshall, accompanied by his wife Cissy and two sons, is sworn in as Solicitor General by Justice Hugo Black in 1965. Only two years later, Marshall would join Black on the High Court where they served together for four years before Black's retirement.

Constitution become a firm facet of constitutional jurisprudence. He never faltered in this belief. It showed through in all of his briefs and arguments before the courts as a civil rights lawyer.

I can remember two particular examples of Thurgood's faith in the Constitution as a redeeming charter for blacks. The first occurred during the trial in *Briggs v. Elliot*,³ the South Carolina desegregation case that would eventually be consolidated in the Supreme Court with the other cases comprising *Brown v. Board of Education*.⁴ Before the case began the state mounted a multi-million dollar construction program backed by the governor to equalize segregated facilities statewide. Relying on this program, the state's attorney began the case with an attempt to "buy off" both the court and the NAACP, by conceding the inequality of the segregated facilities and hoping to rely on the existence of the construction program to moot our case. Thurgood did not expect such an admission and was clearly shocked. However, Thurgood was vehemently opposed to the idea that violations of the constitutional rights of blacks could be remedied by promises of future action and, arguing this to the court, convinced it to let us continue. We proceeded to establish part of the factual

record that would eventually result in the Supreme Court's striking down segregation in *Brown*.

The second example of Thurgood's intolerance for delay in the realization of the rights of blacks and his faith in the efficacy of the Constitution was his approach to *Cooper v. Aaron*,⁵ a case in which the NAACP's desegregation effort came up against armed and militant opposition directed by the Arkansas legislature and governor. The ultimate test of the mandate of *Brown* seemed to be at hand as desegregation efforts were met with statewide opposition that might degenerate into mob violence at any moment. The threats of violence convinced the district court to accept the state's argument for an indefinite delay in the beginning of desegregation of Little Rock schools. However, Thurgood's faith that the Fourteenth Amendment could and would be used as a vehicle to vindicate the rights of blacks did not waiver, and he forcefully argued his position to the Court, resulting in an unprecedented unanimous order by the Court, sitting in Special Term, issued only one day after the argument, mandating that state officials comply with the Constitution and that desegregation efforts begin.⁶

As a Supreme Court Justice, Thurgood's faith

in the Constitution took a broader focus than it had as a civil rights lawyer. As a lawyer his concern was with presenting the Constitution as a protection against governmental discrimination and inequity directed at blacks. As a Supreme Court Justice he saw the protection provided by the Constitution as beyond color and racial constraints and as preventing all governmental abuse in dealing with individual citizens.

Early in his tenure on the Court, Thurgood exhibited his belief that equal protection indeed meant equal, regardless of color. In *Peters v. Kiff*,⁷ Thurgood delivered the opinion of the Court, upholding a white defendant's claim that the Constitution was violated by the wholesale exclusion of blacks from petit and grand juries. Thurgood wrote that "the existence of a constitutional violation does not depend on the circumstances of the person making the claim."⁸ Rejecting the argument that the white defendant was not harmed by the exclusion of blacks from juries, he wrote that exclusion of any large segment of the community from juries "deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented."⁹ Although Marshall wrote for a plurality, the majority of the Court has recently adopted his view.¹⁰

Thurgood's belief in equality of treatment extended to many other areas during his tenure on the Court, and his Supreme Court career was exemplified by his many dissents against the Court's neglect of the unfortunate. He dissented from what he believed to be the Court's disregard for the rights of the elderly,¹¹ women,¹² unpopular political causes,¹³ minors,¹⁴ and Native Americans¹⁵ among others. Likewise, his opinions expressed a desire to check the suppression of free speech,¹⁶ a belief that the imposition of the death penalty was unconstitutional,¹⁷ and a concern about violations of the rights of criminal defendants.¹⁸ Thurgood's concern about criminal defendants' rights was particularly acute because of his prior experiences as a civil rights attorney defending blacks who had been arbitrarily treated by the criminal justice system.

The irony is that Thurgood's faith in the efficacy of the Constitution to protect against racial discrimination was a belief more shared in the black community at the time than when raw racism was rampant and often state sanctioned

than it is today, when through his efforts government support for such discrimination has been eliminated from American life. Yet racial discrimination and differentiation remain indigenous to almost every aspect of American life: in access to adequate health care, entry level jobs and promotions, in buying and rental of shelter, in the purchase of automobiles, in the availability of education resources and career counseling in inner city schools largely populated by blacks, and in the criminal justice systems both state and federal. Indeed, there is no facet of American life in which some residue of racial discrimination does not persist, despite Thurgood's efforts and achievements as a civil rights attorney. Thus, many blacks have lost faith in the law as a vindicator of their rights.

Perhaps what is needed today is a new Thurgood Marshall to wake up the country to the need to cure the causes of the racism that have been a part of our society for so many years, and to inspire a younger generation of lawyers to combat it, as Thurgood inspired those of us under the umbrella of the NAACP to attempt to wed the country's action to its promise.

Endnotes

¹ 321 U.S. 649 (1944).

² 328 U.S. 373 (1946).

³ 98 F. Supp. 529 (1951).

⁴ 347 U.S. 483 (1954).

⁵ 358 U.S. 1 (1958).

⁶ See 358 U.S. at 5 n.*.

⁷ 407 U.S. 493 (1972).

⁸ 407 U.S. at 498.

⁹ 407 U.S. at 503-04.

¹⁰ See *Powers v. Ohio*, 111 S. Ct. 1364 (1991).

¹¹ See *Public Employees Retirement Sys. v. Betts*, 492 U.S. 158, 182 (Marshall, J., dissenting).

¹² See *Personnel Adm'r v. Feney*, 442 U.S. 256, 281 (1979) (Marshall, J., dissenting).

¹³ See *Munro v. Socialist Workers Party*, 479 U.S. 189, 200 (1986) (Marshall, J., dissenting).

¹⁴ See *Schall v. Martin*, 467 U.S. 253, 281 (1984) (Marshall, J., dissenting).

¹⁵ See *Rosebud Sioux Tribe v. Kniep*, 430 U.S. 584, 615 (1977) (Marshall, J., dissenting).

¹⁶ See *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968).

¹⁷ See *Furman v. Georgia*, 408 U.S. 238, 314 (1972) (Marshall, J., concurring.).

¹⁸ See *United States v. Salerno*, 481 U.S. 739 (1987).

The Noblest Roman of Them All: A Tribute To Justice Marshall

Louis F. Claiborne

THURGOOD MARSHALL. The name must be writ large, in bold, unadorned capitals. Straight Roman: no elegantly leaning English script or Gothic curlicues.

Come to think of it, Justice Marshall *is* very like a Roman. Not, needless to say, one of those stern marble busts that adorn public spaces. Our subject is not unsmiling stone. Nor truncated. But before immortality, Romans, too-- Romans, especially-- were very much alive. Only remotely do I invoke the severe and tragic heroes of ancient Rome: Horatius at the bridge, Cato the Elder, the Gracchi, Marius, Cicero, Brutus. And not at all the too frequent abusers of power mercilessly depicted by Suetonius and Tacitus. There is, however, a common thread with the giants: Julius Caesar, Pompey, Antony, Augustus, Trajan, Hadrian, Marcus Aurelius, Constantine, Justinian. Besides, the life of Rome offers innumerable exemplars, named and unnamed, who bring to mind--or, at least, to my mind-- the particular qualities of Thurgood Marshall.

One such attribute is largeness--largeness of body, of mind, of spirit. The first time I saw Marshall was in 1960 when I was an over-age law clerk to U.S. District Judge Skelly Wright in New Orleans. The huge federal courtroom was packed for one of the many disreputable chapters in

Louisiana's full-fledged resistance to school desegregation. If I remember right, a three-judge court was about to hear a challenge to a series of specially concocted state statutes designed to avoid or at least retard, the inevitable. At counsel table, on one side, were the Louisiana Attorney General, Jack Gremillion, along with a coterie of state lawyers. On the other side were the U.S. Attorney and the attorney for the New Orleans School Board, intent on obeying the Court's desegregation orders. Then, as I picture it, in came Thurgood Marshall, "bestriding this narrow world like a Colossus."

No doubt, Marshall, too, had assistants with him, local NAACP lawyers helping to represent the African-American plaintiffs in the case. But everyone else was eclipsed. When his turn came, the chief NAACP lawyer unbent to his full stature and, once silent expectation had taken hold, addressed the court with simple eloquence. He was forceful, clear, calm, understated, and to the point. A briefer Cicero, though not as pithy as the Marshall of the bench. He was winning and he won although there were other lawyers there of no mean talent. At all events, it was clear to everyone that Marshall had entirely dominated the scene.¹

Long before my time, Marshall had demonstrated the Roman qualities of courage and lead-

ership. But my next encounter with our Roman revealed two related virtues that Plutarch attributes to the best citizens of Rome, generosity and forbearance. I was one of the senior lawyers in the Office when Thurgood Marshall became Solicitor General in the Summer of 1965. Immediately, he showed restraint and kindness. Thus instead of insisting on the traditional prerogatives, he invited his predecessor, Archibald Cox, to preside in his place at the meeting of the Supreme Court Bar when it prepared memorial resolutions in honor of Justice Frankfurter in October, and permitted Dean Acheson to read those resolutions to the Court.² This was the generosity of a big man who knew how much Harvard graduates would cherish the honor. But it was also good Roman policy: winning gratitude at little cost.

And Thurgood Marshall did the same with us, his senior colleagues in the Solicitor General's Office. He flattered us with unusual deference. But, as we soon learned, although he was good at delegation, there was to be no abdication. Marshall read all the papers, with extraordinary speed and

retention. Nor was he reluctant to take the really important decisions himself. And he backed his lawyers to the hilt, assuming full responsibility for what was done, even when the controversial act was initiated by us.

There were other reasons, also, for Marshall's effectiveness as arbiter of federal litigating policy - a not unimportant role of the Solicitor General. Like the best of the Romans, he was entirely lacking in pompousness or affectation: his straightforward questions and unassuming manner, combined with a commanding presence and a keen sense of the jugular, disarmed those with contrary views. And, if this were not enough, Marshall could tell a story and charm the angry official who was being denied his plea. I remember a feisty director of the Selective Service System, and at another time, a bristling Secretary of the Interior, each entering the Solicitor General's Office in determined rage and leaving in laughter, despite having been given a firm "No" to his request to petition the Supreme Court. Not often has that happened--before or since.

Away from the office, too, Marshall was fun to be with. His mind is quick and joyous. No doubt this helped him win the exotic "lass unparrellel'd" we know as Cissy. For my part, I still savor the many lunches we had in those days-- when we could still drink martinis with relative impunity. At many a dinner party Marshall was the incomparable entertainer. One friend still reminds me of Marshall's mock serious advice (he was new on the Court) as to how to plead the case of her cat who had allegedly been mauled by the neighbor's dog. Neither she nor I can remember a word of the Justice's argument, but the mere mention of it sends us into peals of laughter because we know it did at the time.

The most Roman virtue of all, however, is an acute sense of justice. It is, of course, difficult to speak of a class-ridden society that included slavery and wholesale butchery in Games, as "just." Yet, the best Romans were passionate against injustice within the established regime and a few, like Ulpian, actually asserted that "all men are equal." At all events, *our* hero has always been the champion of "Equal Justice Under Law." He began as a tribune of his own race. Later as Hugo Black once said of him, he served as the lawyer for *all* the people of the nation-- rather than merely representing the parochial interests of the Federal



Solicitor General Thurgood Marshall with Attorney General Nicholas Katzenbach, left, in front of the Supreme Court October 11, 1965, opening day of the 1965 Term. This was Marshall's first "First Monday" as Solicitor General.



Justice Thurgood Marshall, with wife Cissy and their two sons, after being sworn in as an Associate Justice of the Supreme Court of the United States on October 2, 1967.

Government. And, finally, for more than a quarter century, he was to dispense justice with great distinction.

It is not my task to appraise Thurgood Marshall, the Justice of the Supreme Court of the United States. But I may perhaps make two points. Marshall knew at first hand what injustice was and did not forget when he came to judge. There were many times, in his administration of the criminal law, when he alone on the Court seemed to understand the true harm of some apparently innocuous procedure. And, similarly, he was sometimes the only one fully to appreciate that nominal equality can be very unequal. Clearly, he had an impact on his brethren. But, more than this, I saw Justice Marshall rejecting, where necessary, the notion of law as a stern tyrant above men. He knew Justice cannot afford the pretense of blindness and that Law, effectively to serve the citizen must

be human, not inflexibly divine.

I salute Thurgood Marshall, the noblest Roman of them all.

Endnotes

¹ See *Bush v. Orleans Parish School Board*, 188 F. Supp. 916 (E.D. La. 1960) *stay denied*, 364 U.S. 500, *aff'd*, 365 U.S. 569 (1961).

² See 382 U.S. xix.

The Privilege of Clerking for Thurgood Marshall

Susan Low Bloch

Thurgood Marshall is a giant. Over six feet tall, he is an imposing figure. But it is not his physical stature that makes him so impressive. It is his conviction, commitment, and courage--his passionate conviction that racial discrimination is morally reprehensible and has to be defeated, his strong commitment to the rule of law and the strength of morally irrefutable arguments, and his undying courage to fight to help man and society improve. As an advocate challenging the legality of segregation, it was, his contemporaries noted, as if the gods were

speaking.¹ As a Supreme Court Justice interpreting our laws, he became our "supreme conscience."²

Clerking for this giant of a man was both humbling and inspiring. We knew we could never equal Justice Marshall's accomplishments. But we also knew we could learn much from his example. His experiences as "Mr. Civil Rights" taught us the power of law to improve society and our special responsibility to use that power. He passed on to us the lessons of his mentor Charles Houston: lawyers can be social engineers dedicated to improving the workings of society and they dare not waste that potential. Given this guidance, it is no surprise to discover that many of Marshall's former clerks have gone on to work for the public interest -- in universities, in government, and in private foundations.

The Judge or "TM" -- titles he preferred over the more formal Mr. Justice -- taught us never to give up. His refusal to acquiesce in the imposition of the death penalty and his tenacious dissent in every death penalty case taught us the power of dissent and the obligation to utilize it responsibly. Not surprisingly, some of his greatest contributions, like those of Justice Holmes, came in dissenting opinions. Indeed, the last opinion he wrote as a Justice was a passionate dissent. When the Court overruled two very recent cases and held that, in death penalty cases, the prosecution can introduce evidence concerning the impact of the crime on the victim's family, Marshall was outraged not only by the decision but also by the Court's seeming eagerness to overrule two recent cases. Predicting more such attacks on precedent, Marshall warned: "Power, not reason, is the new currency of this Court's decisionmaking."³



Justice Thurgood Marshall served on the Court twenty-four years. Through the years he served as a role model, mentor, and friend to the men and women who clerked for him.

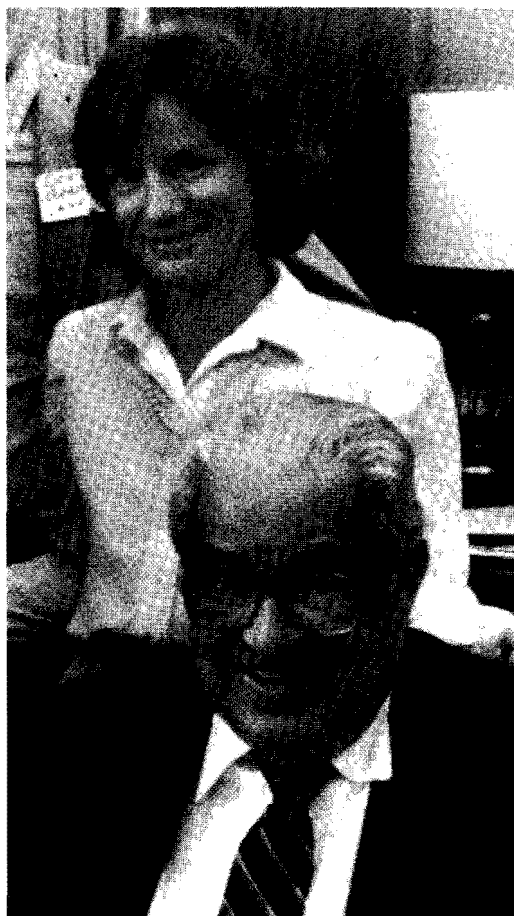
The Judge kept his clerks -- and his colleagues -- poignantly aware of the sufferings of the poor and downtrodden. He insisted we remember that we were deciding, not simply interesting legal questions, but the fate of real people in a real world. With his extensive experience and sensitive insight, he always detected -- and made sure we understood -- "whose ox was being gored;" characteristically, he reminded us with humor. As the ultimate raconteur, the Judge regaled us with stories that conveyed more knowledge and wisdom than had all our years of law school.⁴ Fortunately, this contribution was appreciated as well by his colleagues. As Justice Byron White recently noted: "Thurgood brought to the conference table years of experience in an area that was of vital importance to our work, experience that none of us could claim to match. Thurgood could tell us

the way it was, and he did so convincingly, often embellishing with humorous, sometimes hair-raising, stories straight from his own past. He characteristically would tell us things that we knew but would rather forget; and he told us much that we did not know due to the limitations of our own experience."⁵

Justice Marshall taught us the value of honesty and tenacity, never sugar-coating anything. When the country was caught up in the euphoria of the bicentennial of the Constitution, Marshall reminded us that, with its condonation of slavery, the Constitution was "defective from the start.... 'We the People' no longer enslave," said Marshall, but the credit belongs not to the framers who wrote the Constitution in 1787, but to those in the ensuing two hundred years "who refused to acquiesce in outdated notions of 'liberty,' 'justice,' and 'equality,' and who strived to better them.... *The true miracle was not the birth of the Constitution, but its life....* I plan to celebrate the bicentennial of the Constitution as a living document," Marshall said, "including the Bill of Rights and the other amendments protecting individual freedoms and human rights."⁶ And he did. Both as advocate and as jurist, Thurgood Marshall has consistently dedicated his life to advancing the rights of the poor, the unrepresented, and the downtrodden.

And he made sure we always remembered that, while the country has made progress in race relations, much is left to be done. In 1980, when the formerly segregated city of Baltimore honored Marshall, its native son, by erecting a statue of him, he cautioned the celebrants with characteristic candor: "Some ... feel we have arrived. Others feel there is nothing more to do. I just want to be sure that when you see this statue, you won't think that's the end of it. I won't have it that way. There's too much work to be done."⁷ More recently, Marshall could not resist reminding the ABA, as it bestowed upon him its highest honor, that "we've come a long way ... but we certainly know how far we have to go. I hope you will stick with me in fighting the fight for full civil rights, full civil liberties."⁸

But this solemnity should not suggest that clerking for Justice Marshall was all hard work and depressing bouts with reality. Marshall's irrepressible humor and innate optimism made depression impossible. He treated us with respect



Susan Low Bloch with Justice Marshall at a clerk's reunion in the early 1980s. Professor Bloch clerked for Justice Marshall during the 1976 Term.

and dignity, listening to our ideas and giving us significant responsibilities. At the same time, however, he made sure we never forgot that he was the boss. Once when I suggested a change in the draft of an opinion we were working on, he commented: "A pretty good idea, but you're missing two things." Panicked, I wondered what I had left out. I had cite-checked, shepardized, proof-read -- this was the olden days before Lexis and Spell-Check -- and could find no error. The Judge filled me in: "Nomination by the President and confirmation by the Senate!"

Marshall has always treated his clerks as part of his extended family. While often hidden beneath a seemingly gruff exterior, his warmth and compassion is undeniable. When he would call us "knucklehead," we knew we'd been accepted. Even today, years after our clerkships have ended, he welcomes our visits, remembering -- and caring about -- not only what we have been doing over the years, but even what our families' activities are.

As a law professor, I am constantly reminded of Justice Marshall's contribution to the law and society in general. Certainly, one cannot teach constitutional law without being continually impressed by the significant number of landmark opinions Marshall authored. He not only made sure everyone realized that real people were being affected by these lofty decisions; he proposed legal analyses that made it difficult for judges to hide behind sterile formalisms and instead forced them to focus on the realities of the cases and the people behind them.⁹

But his impact goes well beyond the content of the law. Thurgood Marshall's whole life dramatically illustrates the fact that one person can -- and should -- make a difference. This lesson is not lost on today's students who revere him as an impressive role model. Nor is his lesson lost on his colleagues, both on and off the bench. Marshall reminds us, as Justice Kennedy recently observed, of "our moral obligation as a people to confront those tragedies of the human condition which continue to haunt even the richest and freest of countries."¹⁰

Courageous, committed, and compassionate, Thurgood Marshall is one of the most important and impressive people ever to serve this country. No one could ask for a better mentor or a finer role-model. Judge, we knuckleheads thank you. You remain our "supreme conscience."¹¹

Endnotes

¹ Constance Baker Motley, "Standing on His Shoulders: Thurgood Marshall's Early Career," 6 *Harvard BlackLetter Journal* 9, 17 (1989).

² Drew Days, quoted in Juan Williams, "Marshall's Law," *Wash. Post Mag.*, Jan. 7, 1990, at 12, 15.

³ *Payne v. Tennessee*, 111 S. Ct. 2597, 2619 (1991) (Marshall, J. dissenting).

⁴ See e.g., Wilkins, "Justice as Narrative: Some Personal Reflections on a Master Storyteller," 6 *Harvard BlackLetter Journal* 68 (1989).

⁵ Byron White, "A Tribute to Justice Thurgood Marshall," 44 *Stan. L. Rev.* 1215, 1216 (1992). See also Sandra Day O'Connor, "Thurgood Marshall: The Influence of a Raconteur," 44 *Stan. L. Rev.* 1217, 1217 (1992), reprinted *supra* at 9, and William J. Brennan, Jr., "A Tribute to Justice Thurgood Marshall," 105 *Harv. L. Rev.* 23, 25 (1991), reprinted *supra* at 1.

⁶ Thurgood Marshall, "Reflections on the Bicentennial of the United States Constitution," 101 *Harv. L. Rev.* 1, 2, 5 (1987) (emphasis added).

⁷ Dale Russakoff, "Tribute to Marshall; City of Baltimore Dedicates Statue to 1st Native Son on High Court," *Wash. Post*, May 17, 1980, at C1.

⁸ Appleson, "ABA Supports Right to Abortion," Reuters, Ltd., August 11, 1992.

⁹ See Bloch, "Foreword, Thurgood Marshall: Courageous Advocate, Compassionate Judge," 80 *Georgetown L. J.* 2003, 2004-2007 (1992).

¹⁰ Anthony Kennedy, "The Voice of Thurgood Marshall," 44 *Stan. L. Rev.* 1221, 1221 (1992).

¹¹ See note 9 *supra*.

John Marshall Harlan I and a Color Blind Constitution

The Frankfurter-Harlan II Conversations

Liva Baker

Editor's Note: *This speech, The Seventeenth Annual Lecture of the Supreme Court Historical Society, was delivered on June 15, 1992 in the Supreme Court Chamber.*

I feel a little like an impostor in this crowd. I'm not a judge. I'm not even a lawyer. And I'm not a pedigreed historian.

What I am is a journalist. The whole point of my work is to untangle constitutional and historical obscurities for the general reader. Of course, I am that general reader. If I can understand it, anyone can.

I thought I'd like to talk today about a relatively obscure footnote to some larger events of history that has always interested me. It set no precedents. It had no influence on the course of events. I've always thought, though, it held some intrinsic interest. It adds texture, I believe, to certain landmarks of history and may even shed some light on the characters of the people involved.

This little sidelight on constitutional history I've chosen to tell you about poses the general question: What did the first Justice John Marshall Harlan, who sat on the Supreme Court during the latter decades of the 19th century and the first decade of the twentieth, really mean when he wrote in 1896, "Our Constitution is color blind."?

It appears a simple enough statement. But like

many of the seemingly simple statements out of which legends are made, its simplicity is deceptive,



Justice John Marshall Harlan (1833-1911). The first Justice Harlan served on the Supreme Court for thirty-four years. His portrait hung in his grandson's chambers when the second Justice Harlan sat on the Court.

as Justice Felix Frankfurter discovered when he tried to deconstruct its author's mindset half a century later.

Specifically, Frankfurter wanted to know, what were the implications for public school desegregation? The subject was very much on his mind at the time. The subject of the Constitution's color blindness came up in a conversation which took place in the summer of 1956 between Frankfurter, who sat on the Court from 1939 until 1962, and the second Justice John Marshall Harlan, who sat on the Court from 1955 until 1971. This almost contemporary Justice Harlan was, of course, the grandson of the first John Marshall Harlan.

According to his biographer, Tinsley Yarbrough, one of the second Justice Harlan's favorite family stories in fact involved this relationship. He loved telling of the time he was showing off his portrait of his grandfather to a Japanese visitor, and his visitor responded, "I did not realize, Justice Harlan, that the post was hereditary."

Frankfurter always referred to the first Harlan as Harlan I, and to his own colleague as Harlan II, which is the quick and easy way to do it, and I'll continue in the Frankfurter tradition. Harlan II was

fond of referring to his grandfather as "the old boy."

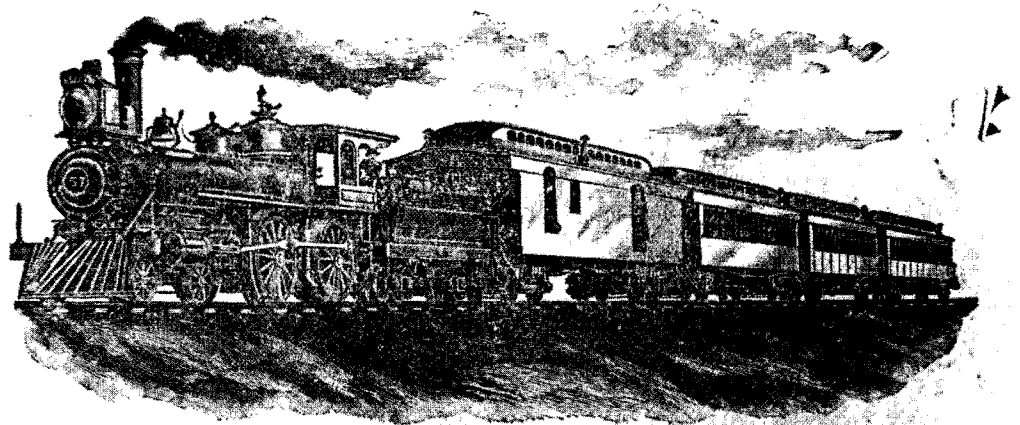
The first Harlan made his reputation, as you all know, with his vigorous dissent in *Plessy v. Ferguson* in 1896, which is, of course, where he wrote "Our Constitution is color blind."

Before I launch into the substance of their discussion, let me give you some background on it. I think it's important to know something about *Plessy*, about Harlan I, and about his approach to civil rights. I'll try to get to the point before the next annual meeting.

You probably know, too, but I'll include it for those who don't, Homer A. Plessy was an octo-
roon who challenged the Louisiana statute mandating "equal but separate accommodations for the white and colored races," on all passenger railways within the state. Plessy's lawyers would argue later the statute violated the Fourteenth Amendment's guarantee of "equal protection of the laws."

Let me take just a minute to describe this statute Plessy was challenging. It may give you some idea of the complexities of race relations in the years following Reconstruction and of the infinite pains Southerners took to insure the separation of white and African-American.

ER. J. LANGLES, PH. W. DIELMANN, H. LOCHTE, ALBT P. NOLL, GEO. FAEHNLE.



EAST LOUISIANA RAILROAD CO.

EXCURSIONS
\$1.00.

—TO THE—
GREAT ABITA SPRINGS.

E. S. FERGUSON,
G. P. A.

A ticket on the East Louisiana Railroad Company. The Ferguson listed on the ticket is not the same as the Ferguson in the *Plessy* case. It took nearly two years to assemble the circumstances to bring the test case before a court and another three years before it reached the Supreme Court on appeal.

First of all, not only passengers were subject to fines and/or jail terms, should they wander into the wrong railway coach, but liability extended even to the officers and directors of the company.

Only one category of passenger was excepted. That was "nurses attending children of the other race." But there was no exception for African-American attendants traveling with white adults, and a white man was not permitted to have his African-American servant with him in the same coach, even though his health might require the constant assistance of that servant. African-American maids travelling with white women were subject to the same restrictions.

The law applied equally to aliens and citizens. "White and colored" meant exactly that. The law recognized political status no more than it did domestic arrangements.

Plessy's case was, of course, a manufactured one, what we call today a test case. It was brought by a group of New Orleans African-Americans called the Citizens Committee to Test the Constitutionality of the Separate Car Law (make an acronym out of that if you can). It took the Committee nearly two years to assemble it, collect the money to prosecute it, to find

the right lawyer, the right plaintiff, and to arrange for his arrest when he refused to move from the car reserved for whites on the East Louisiana Railway.

Plessy's case made its way through the Louisiana courts which, to no one's surprise, upheld the state statute. Their decisions, just as the Citizens Committee had planned, gave the committee the legal prerequisites it needed to take the case to the United States Supreme Court. It arrived there in February 1893.

As was more customary then before the age of jet transportation than it is now, a Washington lawyer, former Solicitor General Samuel F. Phillips, who was a friend of the Louisiana lawyers involved, was engaged as co-counsel to advise them on Supreme Court procedures and to keep them up-to-date on developments in their case.

Although the newly created circuit courts of appeal were absorbing some of the Supreme Court's case load by 1893, about three years was still the

normal gestation period between the filing of a case and oral argument. Plessy's case was no exception. It was not scheduled for oral argument until April, 1896, a little more than three years after Plessy's request to the Court to hear his case had been received in the clerk's office.

The case for the defendant—officially Judge John Ferguson who had tried Plessy's case, but really the state of Louisiana—was presented by a local Washington attorney, a native Louisianan who had previously represented the state before the Supreme Court.

In 1896, the time between oral argument and announcement of the Court's decision was considerably shorter than that between granting the hearing and the hearing itself. Only five weeks after oral argument in Plessy's case, on May 8,

1896, the Supreme Court announced its decision. Justice Henry Billings Brown of Massachusetts (and later Michigan), a pragmatic Justice who usually leaned in the direction of the prevailing social and political winds, wrote it. In Plessy's case, the majority of the Justices leaned with him.

In 1896, the wind was blowing against African-Americans' civil rights.

Society in general, north as well as south, considered African-Americans inferior, uneducable, and socially unacceptable. The Court's opinion clearly reflected these sentiments. Squarely confronting the constitutional issue in Plessy's case, the Fourteenth Amendment, as well as the social and political implications, Brown wrote for the Court:

"Nurses attending children of the other race" were the only passengers exempt from Louisiana's law requiring "equal but separate accommodations" on railroads.

The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting and, even requiring, their separation in places where they are liable to be brought into con-



John Marshall Harlan in his 10th Kentucky Volunteers uniform during the Civil War.

tact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures.

That is, the Fourteenth Amendment's guarantees of "equal protection of the laws" notwithstanding, the states retained authority over many areas of their citizens' lives, particularly in the social context.

Although Homer Plessy had not challenged segregated education, Justice Brown did confront that issue. It was, he said, up to the individual states. Furthermore,

[T]he establishment of separate schools for white and colored children...has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced.

That is, in the North. And he launched into a narrative documenting the widespread custom of school segregation in his own state of Massachusetts. Then he bluntly distinguished between political and social equality. Political equality, he recognized, had been consistently supported by the Supreme Court. Social equality, he said, that is, in "schools, theatres, and railway carriages," had not. And he concluded:

If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.

The judgment of the Louisiana courts was thus affirmed. The Louisiana statute mandating separate but equal accommodations in public transportation had survived intact, and the Homer Plessys of the world were relegated to the back of the bus for another sixty years.

Plessy v. Ferguson is generally credited with legitimizing Jim Crow. The decision in fact established the legal cornerstone for segregated schools as well as for race relations and for American jurisprudence in racial matters until it was reversed by *Brown v. Board of Education of Topeka* in 1954.

As you all know from your high school American history, the decision was not unanimous. The big Kentuckian, Harlan I, known, among other things, as the last of the tobacco-spitting Justices, did not subscribe to the majority's view. Not by a long shot.

At first glance, perhaps, his position may seem anomalous. He grew up, after all, in a family with a long tradition of slave-holding, and he spoke out boldly against the Emancipation Proclamation. Although he supported the Union in the Civil War and fought with the 10th Kentucky Volunteers, he continued to defend the slave-holder's right to his human property. He freed his own slaves before the end of the war but only to keep them from falling into the hands of the enemy. After the war, he publicly denounced the Thirteenth and Fourteenth Amendments to the Constitution, two of the three Civil War Amendments designed to make first-class citizens of Negroes.

The barbarism of Reconstruction in Kentucky, however, apparently forced him to rethink some of his positions. Lynchings and beatings of Negroes by racists helped him to change his mind

about a lot of things, including his views on the Civil War Amendments to the Constitution. He joined the Republican Party, organized and rejuvenated it in his home state, and, in 1871, ran, though unsuccessfully, for governor of Kentucky on the Republican ticket, publicly apologizing for his former views.

Six years later, in 1877, he was appointed to the U.S. Supreme Court by a grateful President Rutherford B. Hayes; it was the agreed upon price of Harlan's loyalty to Hayes at the Republican Convention of 1876. This first Harlan had in fact been instrumental in securing Hayes's nomination by persuading the Kentucky delegation, which he headed, to throw its votes to Hayes from another candidate at a crucial moment.

Following the close general election in November, Republicans, in return for disputed electoral votes of South Carolina, Florida, and Louisiana promised withdrawal of federal troops and, in effect, federal support of African-American civil rights in the South; thus, the South was free to return the Negro to second-class citizenship. After that, Plessy's case was inevitable.

On the Supreme Court, Harlan I was a dedicated supporter of civil rights. He was the lone dissenter in the *Civil Rights Cases* of 1883 in which the Supreme Court dismantled congressional attempts to implement the Civil War Amendments, especially the Fourteenth. Now, in 1896, he was the sole dissenter in *Plessy v. Ferguson*. Writing with all the certitude and passion of the convert, he declared that

[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color blind, and neither knows nor tolerates classes among citizens.... The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when civil rights as guaranteed by the su-

preme law of the land are involved.

The operative phraseology regarding the Constitution's color blindness is one of the best known statements in American constitutional history.

The phraseology was not original with Harlan. He had discovered it in fact in the brief for *Plessy*, which argued

Justice is pictured and her daughter, the Law, ought at least to be color blind.

But the rationale he himself had articulated thirteen years before in his dissent to the *Civil Rights Cases*. The question presented to the Court then also involved racial discrimination, not in schools, but in public accommodations—inns, theaters, as well as

"public conveyances"—and the Court upheld the constitutionality of it. Harlan's argument was more laboriously but just as passionately stated in the *Civil Rights Cases* as it would be later in *Plessy*.

Indeed, his customary high emotional level had been further heightened by the fact that the ink flowing from his pen came from the quaint, old-fashioned inkwell Chief Justice Roger B. Taney had used in writing the Court's opinion in *Dred Scott*'s case. Harlan

had gotten it from the marshal not long after he was appointed to the Court, and his wife believed he had taken considerable satisfaction in the idea that he was using it to argue, in effect, for reversal of Taney's opinion in *Dred Scott*'s case. That delicious irony, she thought, helped to propel his pen that day when he wrote his first version of "Our Constitution is color blind."

[T]here cannot be in this republic, any class of human beings in practical subjection to another class.... The supreme law of the land has decreed that no authority shall be exercised... in respect of civil rights, against freemen and citizens because of their race, color, or previous condition of servitude.

The lynchings and beatings of Reconstruction forced Harlan to rethink some of his positions.

In other words, the Fourteenth Amendment had made first-class citizens of us all, African-Americans as well as whites, and all of us were entitled to its equal protection of the laws. Racial discrimination in public accommodations could not be tolerated.

Thirteen years later, in *Plessy*, Harlan reiterated his *Civil Rights Cases* position. The Civil War Amendments, he said, especially the Fourteenth, had removed the race line from our governmental systems.

Harlan also understood instinctively that, as he put it, the "destinies of the two races, in this country, are indissolubly linked together," and he warned against "the common government of all" permitting "the seeds of race hate to be planted under the sanction of law." Indeed, he predicted future trouble over the decision the majority of the Court had made in *Plessy*'s case:

[T]he judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* case.... What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments, which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens?

And he concluded that the Louisiana statute that prohibited the two races from having railway accommodations was

inconsistent with the personal liberty of citizens, white and black, in that State, and hostile to both the spirit and letter of the Constitution of the United States.

After Harlan died in 1911, scholars relegated him to the lower of ranks of undistinguished Supreme Court Justices for four decades. Then, following the Court's decision in *Brown v. Board of Education*, his ghost was disinterred, and new life breathed into his reputation.

His dissents in the *Civil Rights Cases* and *Plessy* were resurrected. Advocates of desegregation made a litany of constitutional color blindness. All of a

sudden Harlan I was a hero, fierce defender of African-Americans' civil rights and by an easy effort of transference, the prophet of public school desegregation, although in neither dissent had he even broached that delicate subject.

It is at about this point—mid-1956, two years after the first *Brown* and a year after the second—that Felix Frankfurter and Harlan II began their dialogue about the latter's grandfather. The quiet-spoken, scholarly Harlan II was relatively new to the bench at the time this exchange took place. He had been a practicing lawyer for most of his professional life, and had achieved considerable prominence at the New York bar. He had barely had time to settle in on the Court of Appeals for the Second Circuit, to which he had been appointed in 1953, when President Eisenhower appointed him to the Supreme Court. He had been there only a little more than a year in mid-1956, hardly enough time to mature jurisprudentially.

It's entirely possible that Frankfurter's initiating this discussion with the newest Justice was



Justice Felix Frankfurter at the funeral of President Franklin Roosevelt in 1945. Roosevelt appointed Frankfurter to the Court in 1939.



John Marshall Harlan (II) hunting as a young man. The second Justice Harlan had a life-long interest in the outdoors.

part of his courtship of Harlan II. Any new arrival, any new sort of case, any rearrangement of the Supreme Court's ecology, however slight, presented the peppery little Justice in the pince-nez with a challenge. The late Justice William O. Douglas once compared—in a notentirely friendly tone—Frankfurter's wooing of the other Justices to the behavior of a "Baptist preacher who had to get a convert."

We ought to look in passing at the timing of this conversation. Two years before, a unanimous Supreme Court had concluded in *Brown v. Board of Education of Topeka* that racially segregated public education was inherently unequal. It was, therefore, barred by the Fourteenth Amendment to the Constitution.

Almost from the day Chief Justice Earl Warren announced the Court's decision, discussion of Frankfurter's role in it has been vigorous. Because of his well known and often articulated view that the Fourteenth Amendment did not give the federal government blanket permission to regulate the affairs of the individual states, some observers had expected him to shrink from desegregating public schools. Others remembered that he had

unreservedly joined the Supreme Court's previous desegregation of state-run law and graduate schools, and that he had participated wholeheartedly in the Court's abolition of the Southern white primary. These people thought he might even have been instrumental in forging unanimity in *Brown*.

My own sense is that there is no question where Frankfurter stood on the practice of segregation. He had been counsel to the NAACP prior to his Supreme Court appointment. On the Court, he had hired the first African-American law clerk in 1948-49. Inequality determined by the color of one's skin offended his sense of decency. On the other hand, the Court's decision in *Brown* clearly violated his jurisprudential conceptions of the Fourteenth Amendment. Before he was appointed to the Court, he had talked about writing a book on the Fourteenth Amendment. Unfortunately, after he came to the Court, he never had the time.

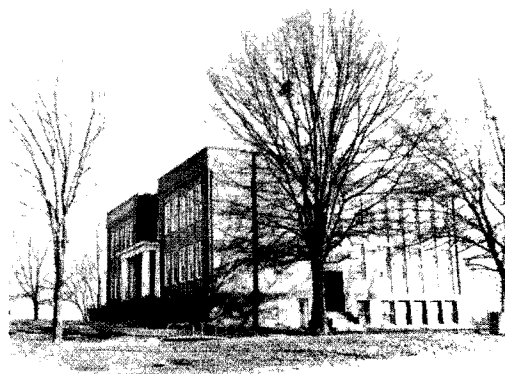
Politically, he feared the consequences if the Court struck down school segregation, which was so much a part of Southern life. In December, 1952, just after *Brown* and its companion cases had come to the Court, he had cried out:

[N]othing could be worse from my point of view than for this Court to make an abstract declaration that segregation is bad and then to have it evaded by tricks.

But he understood that what the Court was doing had to be done. It's doubtful he could have contemplated deciding that public school segregation was constitutional, that he could find legal sanction for it. And in the name of unanimity, he had in fact helped to persuade a recalcitrant Justice or two—most notably Stanley Reed—to join in. His judicial persona, however, never seemed entirely comfortable with all that was done that day in May 1954, and privately he continued to speculate on the constitutional questions involved in *Brown*.

Next term, as the Justices were fashioning the Court's decree, that is, determining how this earthquake of a decision would be implemented, one of them, Robert H. Jackson, died, and the second John Marshall Harlan was named to succeed him.

Nominated in November 1954, Harlan had hoped to join the Court immediately, at least in time to hear the parties to the segregation cases make their suggestions for the decree at the oral reargument scheduled for December. Delaying



The disparity between African-American schools and white schools in Georgia and the lack of high schools for African-Americans was the origin of *Cumming v. Georgia*. At left, Macedonia School, an African-American school in Fannin County. Built in 1901, the building has a broken window, doors that could not completely close and an unstable foundation. At right, Sendia Elementary School, a white school in Coweta County. Built in 1897, it is markedly more solid than the Macedonia School.

tactics in the Senate, however, had been successful, and Harlan had not been confirmed until the following March. The reargument had to be postponed, and Harlan II finally was able to sit with the Court to hear it in April. Having been furnished with comprehensive background materials by law clerks at the Court, he was able to participate fully, and over the following two months, he joined in the discussions regarding the all-important decree.

Like Frankfurter, he believed unanimity was important, and he did in fact join wholeheartedly in the final *Brown* decision—which was known as *Brown II* and was announced in June, 1955. It has been said that he even contributed a bit of rhetoric to Chief Justice Warren's opinion which seems appropriate for the grandson of the man who had written that the Constitution is color blind:

[I]t should go without saying [he declared] that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.

During the first two years after *Brown* (I), while people tried to figure out exactly what it all meant, Southern resistance had been somewhat muted. By the summer of 1956, it had begun to accelerate. Southern states resorted to every legal device they could find to avoid compliance. State legislatures swung into action to create statutory barriers to school desegregation. Private schools sprang up to replace public systems. And 101

members of Congress signed the Southern Manifesto in March, 1956. In so doing, they condemned the *Brown* decision specifically, the Supreme Court generally, and gave defiance of both the Southern establishment's seal of approval.

All Frankfurter's fears were confirmed. For a former professor of law at Harvard, and the scholar among the Justices at the time, it was perhaps an appropriate moment to review precedents and preludes. Discovery of some old court records in his files early that summer encouraged his explorations. One of the items that especially piqued his interest was the lower court record of an old Georgia case called *Cumming v. Richmond County Board Of Education*.

School segregation per se was not involved, but the Fourteenth Amendment rights of African-Americans were, as was Harlan I. Filed in 1897, just a year after *Plessy* was decided; *Cumming* involved a suit by Negroes against the local board of education which was spending tax money for white high schools while public education for local Negroes ended with grammar school.

Frankfurter was astonished to find that the lower court judge in *Cumming*, one E.H. Callaway, Georgia born and bred, had supported the African-Americans' cause, and had enjoined the board of education from spending any more public money on high schools for white students until African-Americans were afforded equal facilities.

The Supreme Court of Georgia reversed Callaway, and the case went to the U.S Supreme Court. Frankfurter was even more astonished to

find that Harlan I, who had so recently written that "Our Constitution is color blind," had written the Supreme Court's opinion in *Cumming* which also reversed Callaway and upheld the Georgia Supreme Court.

Gone was the rhetoric about the inclusiveness of the Fourteenth Amendment. Gone were the denunciations of class and caste. Gone was the emotion Harlan I had invested in the *Civil Rights Cases* and *Plessy*. *Cumming* was a straight forward, bare-bones opinion, limited to the facts of that case and the United States Supreme Court's answer to the African-Americans.

Maintenance of public schools, Harlan I declared for the Court, was a state responsibility

except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land.

The facts of *Cumming*, he concluded, showed no such "clear and unmistakable disregard of rights."

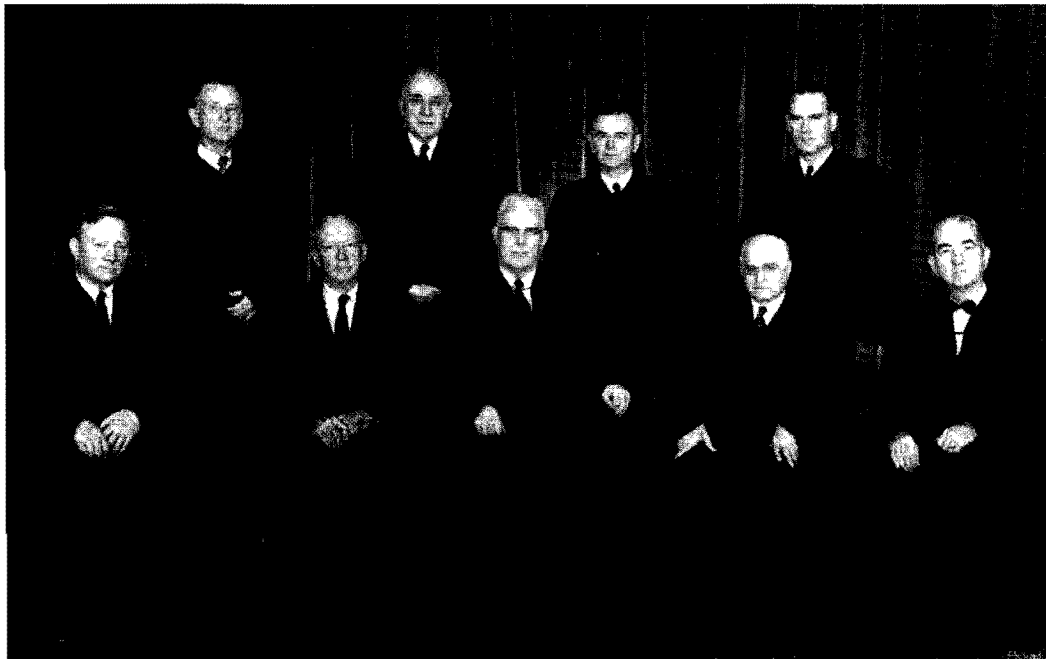
Frankfurter began to wonder. Did Harlan I in fact deserve his reputation as the progenitor of school desegregation? When he wrote that "Our Constitution is color blind," did he connect that concept to schools, or was he limiting it strictly to

public transportation--the public highways he spoke of? Frankfurter thought he would discuss it with his new friend, Harlan II.

In July 1956, Frankfurter shot off a letter to his colleague who was vacationing at his home in Westport, Connecticut. Their conversation apparently had begun before this, undoubtedly in face-to-face meetings, perhaps in one or the other's chambers, or in the drawing room of one or the other's Georgetown home. It probably concluded similarly. Fortunately for the claims of history, however, the middle portion took place during the summer, when both parties were on vacation, and they were compelled to set down the main points of their dialogue on paper.

Reintroducing the subject which the two men had discussed previously, Frankfurter began

You will probably recall that some time ago I expressed to you the belief that there is no evidence whatever that Harlan I thought that segregation [and Frankfurter meant school segregation] was unconstitutional and that it was my hunch that he would have sustained segregation, had the issue squarely come before the Court.



The Warren Court in 1958, after Potter Stewart joined the Court. Justices Frankfurter and Harlan served together for seven years and developed a close friendship and a judicial alliance in that time.

The elder Harlan's reputation, Frankfurter declared firmly, had been quite unreasonably based on his dissent in *Plessy*.

Attacking the reputation of a man's grandfather may seem a strange way to court a judicial ally. Frankfurter, however, certainly didn't mean it personally. He simply enjoyed intellectual tilting, and he had won the hearts of generations of Harvard Law School students with his provocative methods of teaching. It's been said that he also alienated a lot of young men. He seemed to think of himself as his generation's self-appointed gadfly, perpetuating the tradition of the ancient Athenian. He undoubtedly saw the scholarly Harlan II as a fresh new intellectual sparring partner.

For evidence of his charges against Harlan I, he cited Harlan's opinion for the Court in *Cumming*, which he enclosed, along with a brief biography of E.H. Callaway, the lower court judge. Frankfurter was nothing if not thorough.

It was hard for Frankfurter to believe, he said,

that a judge who
thought segregation
was unconstitutional
would have written that opinion.

He found it even harder to believe when he set Harlan's opinion against Callaway's finding against racial discrimination in that case. Callaway was, after all, what Frankfurter described as a "true-blue southern Southerner," and Harlan I was the acknowledged champion of African-American civil rights.

Harlan II was just leaving for a couple of days of golf at Pine Valley, New Jersey, when Frankfurter's letter arrived. There being no urgency, he delayed answering it until his return.

In his answer Harlan II appears not to have minded Frankfurter's implied criticism of his grandfather, and his tone was temperate, all things considered. He, however, preferred the accepted perception of Harlan I.

He recognized, he said, the inferences that might be drawn from the Georgia school case, but he thought that the most that could be said was

Plessy is little basis for thinking that the old boy would have voted against school segregation. While he did say in *Cumming* that a state system of education was a state matter, he also qualified it by stating that it could not run afoul of the Const.—and earlier he went out of his way to note the anti-segregation argument—and left it open.

Harlan II couldn't prove it, he added, but his "instinct was that [Harlan I] would have been against segregation—voted against it I mean."

He had found Judge Callaway's opinion "interesting," especially because it came from a Southern judge. But he read it rather differently than

Frankfurter did. Harlan thought Callaway was not against school segregation, but was only insisting that the local African-Americans be afforded *Plessy*'s required separate-but-equal facilities, that is, in this case, a high school education.

Harlan II returned the opinion to Frankfurter who replied almost by return mail. He apologized for

steering Harlan wrong regarding Callaway's opinion. Harlan was, of course, right, Frankfurter said, in finding the basis of Callaway's decision in the separate-but-equal doctrine and not in the "constitutional invalidity in segregation" Frankfurter's point was, and he deemed it important that

if a Georgia judge could have found in the *Cumming* case a violation of the equal protection of the law, even though he based it on separate-and-equal doctrine, it is rather surprising that Harlan should not have been at least as uncolor blind as was that Georgia judge.... Anybody who felt passionately against school segregation could easily have reached at least the result that the Georgia...judge reached.

Besides, Frankfurter continued, Harlan I repeatedly referred in *Plessy* to the fact that the

Frankfurter saw Harlan II as "a fresh new intellectual sparring partner."

segregation involved was discrimination on "the public highway." He had never once referred to school segregation, even though the majority opinion had.

Harlan II was not to be put down, but he also seemed to be wearying of the conversation. What else was there to be said, after all?

He interrupted his packing for a trip to Tanglewood to dash off a rebuttal. Frankfurter, he thought, pushed "things too far." Although Harlan II found his grandfather's language in *Plessy* "undeniably sweeping," Harlan I, argued his grandson, did talk about "all 'civil rights' being caught in the 14th Amendment" and he himself could find

nothing to indicate that he would not have considered the right to attend state-maintained schools as a "civil right." The fact that he does not refer to schools specifically does not seem to me particularly significant....

At this point, Harlan II thought the argument as to where his grandfather stood on school segregation was "pretty much of a stand off." He was "not at all sure that the popular view of *Plessy* [was] not correct." He realized however, "it [could] not be demonstrated."

But the indefatigable Frankfurter refused to surrender. He pursued the matter to Tanglewood, daring "to intrude...with a disharmonious note." He was sorry, he said, to stand his ground, but he could not, he insisted,

get away from the incongruity that a fellow who indulged in the broad rhetoric that the Constitution is color blind should have sponsored such a narrow result in *Cumming*.... I submit that any judge who thought that the Constitution, as a legal proposition, is color blind, would at least have been able to reach the lawyer-like result, which, in my opinion, Judge Callaway did reach in Superior Court in Georgia, in not leaving colored high school children out in the cold.

The correspondence on this subject breaks off there, undoubtedly to the relief of Harlan II. Whether it continued orally and which of the two

men had the better of the argument are unanswered questions. They were two strong intellects, neither of them given to ceding intellectual points easily. They may simply have agreed to disagree, neither yielding. Or so it seemed from their letters.

They did become close friends and judicial allies for the six remaining years they sat on the Court together: the conservative consciences of an activist Court.

Frankfurter left the court in 1962 following a stroke. He was replaced by Arthur J. Goldberg who became a principal catalyst on the Warren Court.

Harlan was left to carry on the Frankfurter tradition alone for nine years, until a few months before his death in December, 1971. His frequent dissents during those years—as many as sixty-two a term—his increasing blindness notwithstanding, served to keep what the late Justice Abe Fortas called "exactly the right mix in the carburetor."

The Constitution, of course, turned out to be color blind, as those of us saw who watched the formal legal walls between the races tumble down, first in schools, then in restaurants, theaters, parks, and the "public highway" that Harlan I wrote about. If "the old boy," as his grandson called him affectionately, could not convince his own America, his concept, whatever he meant by it, was not interred with his bones but came into its own a half century later.

Thank you.

The correspondence between Felix Frankfurter and John Marshall Harlan is in the Frankfurter papers at Harvard Law School and is used here with the permission of the Harvard Law School Library.

Reviews of three biographies on Justices Harlan and Justice Frankfurter appear in The Judicial Bookshelf, beginning on page 109.

Chief Justice Taney and the Shadow of *Dred Scott*

Robert L. Stern

Editor's Note: This article was originally published as a book review in the *Arizona Law Review* in 1975.

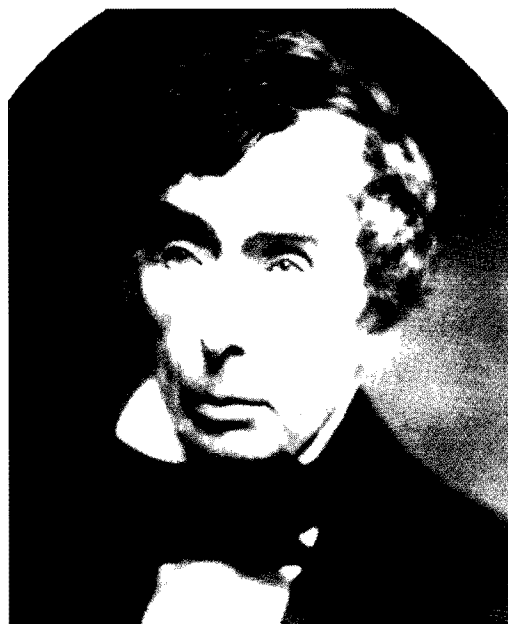
The Taney Period has been probably the least known period in our national judicial history. It was the time in which the controversy over sla-

very came to affect a large part of the Supreme Court's work, even in seemingly unrelated areas, culminating in the thunderbolt of *Dred Scott v. Sandford*.¹ That decision sapped the Court's prestige and authority, at least in the North, until after the Civil War. The opinion in the *Dred Scott* Case, written by Chief Justice Roger B. Taney, put Chief Justice Taney into disrepute during the next century of Supreme Court history.

Two excellent book-length biographical works about Chief Justice Taney have been published: *Roger B. Taney*, 1935, by the late Carl B. Swisher, and *The Taney Period, 1836-64*, also by Professor Swisher, in Volume V, 1974, of the Oliver Wendell Holmes Devise *History of the Supreme Court of the United States*, edited by Professor Paul A. Freund. Those works will enable a reader to appraise the contribution of Chief Justice Taney to the Court and the nation. Credit for much of the data in this article goes to Professor Swisher, whose writings, as I have stated in my review of his book on *The Taney Period*, are a magnificent contribution to American history, not just to legal history.

The Justices of the Taney Period

If modern lawyers are asked--and I have asked a number of them--whether they can identify members of the Court during the middle third of the last century, the almost uniform answer is "no"



Roger Brooke Taney, fifth Chief Justice of the United States, succeeded John Marshall and served as Chief Justice from 1836-1864.

as to all except Taney himself and Justice Story. Story, who sat from 1812 to 1845 and who is better known for treatises on a number of subjects on which he lectured at the Harvard Law School than for his judicial opinions, was a holdover from the Marshall regime. Few recall or have ever heard of Justices Smith Thompson, John McLean, Henry Baldwin, James M. Wayne, Philip P. Barbour, John Catron, John McKinley, Peter V. Daniel, Samuel Nelson, Levi Woodbury, Robert Grier, Benjamin R. Curtis, John A. Campbell, and Nathan Clifford. The four Lincoln appointees in 1862 and 1863--Swayne, Davis, Miller, and Field--are primarily associated with the post-Civil War period during which Miller and Field, in particular, played prominent though different roles.

It is not surprising to learn that Supreme Court appointments during those years reflected the policies of the presidents. All but one of the Justices appointed during the pre-1862 Taney period were chosen by Democratic presidents beginning with Jackson. Since the Justices spent the major portion of their time trying cases on circuit, it was obviously reasonable to assign

Justices to the areas in which they lived. Thus, appointments were largely treated as belonging to a particular circuit, and Congress, which was also controlled by the Democrats, determined the geographical boundaries of the circuits.

Perhaps because of this, five of the nine circuits² were composed of slave states, the eleven states that seceded and the border states, and were filled by Justices from Maryland, Virginia, Georgia, Alabama, and Tennessee. Indeed, Congress was slow to create any circuits for the newer states west of Ohio. And except for Justice Curtis of Massachusetts, appointed by Whig President Fillmore in 1851, even those appointed from the Northern circuits were chosen largely because of their known sympathy with Southern positions.

Thus, after Story's death, only Justice McLean from Ohio, appointed by Jackson in 1830 before the slavery issue came to the fore, and Justice Curtis, who served from 1851 to 1857, represented even a moderate Northern viewpoint. This changed, of course, with Lincoln's four appointments in 1862 and 1863 and his selection of Chief Justice Chase as Taney's successor in 1864. It was doubtless not by happenstance that the first president from the Midwest appointed Justices from Ohio (Swayne and Chase), Iowa (Miller), Illinois (Davis), and California (Field). Samuel Miller, who served for twenty-eight years, is regarded as one of the great Supreme Court Justices. Field, whose tenure of thirty-four years has been exceeded only by Justice Douglas, was one of the most conservative members of the Court.

It is difficult to tell which of these Justices were outstanding lawyers. The general impression is that most were regarded as among the able lawyers in their respective circuits at the time of their appointments, although some did not seem to amount to much as Justices.

Chief Justice Taney, born into the Southern landed aristocracy in 1777, had served in the Maryland legislature and as President Jackson's Attorney General and Secretary of the Treasury. In the latter positions, he played an important role in Jackson's successful campaign to prevent the renewal of the charter of the Bank of the United States. His service to Jackson was undoubtedly responsible for his Supreme Court appointment. Nevertheless, he had been at the top of the Maryland

Justice	Mileage
John McLean	4,000
Henry Baldwin	2,500
James M. Wayne	2,500
Philip P. Barbour	2,500
John Catron	2,500
John McKinley	2,500
Peter V. Daniel	2,500
Samuel Nelson	2,500
Levi Woodbury	2,500
Robert Grier	2,500
Benjamin R. Curtis	2,500
John A. Campbell	2,500
Nathan Clifford	2,500

This log shows the mileage the Justices on the Taney Court traveled between Circuit assignments and the Court.

bar and had argued many cases before the Supreme Court. Justice Story once described him as "a man of fine talents."³ Though unimpressive in appearance and voice, his arguments were thoroughly prepared, simple, clear, and impressively sincere—which still are the traits most likely to win cases. In addition to being an able lawyer, he was known as "a courteous gentleman of high integrity."⁴

Jackson's first attempt to appoint Taney to the Court as an Associate Justice in 1835 was narrowly blocked in the Senate by the Bank and Whig forces, even though Chief Justice Marshall supported the appointment. Later in 1835, after Marshall's death, Taney was nominated to fill his place. By then the Senate contained more friends of the Jackson administration, and in 1836 Taney, then fifty-nine years old, was confirmed by a wide margin.

Two events in Taney's personal life throw light, though in different directions, on the Southern sympathies manifested in his later decisions. Though once a slave owner, he freed his slaves early in life. Second, in 1855, a son-in-law asked if Taney's youngest daughter, Alice, could join his family in vacationing in Newport, Rhode Island, instead of going with her parents to Old Point Comfort near the mouth of the Chesapeake Bay in Virginia. Taney's letter in reply stated he had "not the slightest confidence in superior health of Newport over Old Point, and look[ed] upon it as nothing more than that unfortunate feeling of inferiority in the South, which believes every thing in the North to be superior to what we have."⁵ Accordingly, Alice went to Old Point, where she and her mother died of yellow fever.

Justice Story, who had been appointed in 1812, at the age of thirty-two, lamented the passing of the old order after Marshall's death. He was never reconciled to the Jacksonian era. Perhaps the outstanding intellect on the Court at the time, he wrote voluminously, both in opinions on circuit and in his famous commentaries and treatises, but not many opinions for the Court. His best known opinion was *Swift v. Tyson*.⁶ *Swift* was a landmark decision holding that the provision of the Judiciary Act of 1789 that the federal courts shall be bound by "the laws" of the states extended only to state statutes and not to judicial decisions, at least with respect to commercial matters. This was overruled in 1938 in *Erie Railroad v. Tompkins*.⁷ A visiting Englishman once described Story in

words which might have been equally apt for another Harvard law professor, Felix Frankfurter, on the Court a century later: "[W]hen he was in the room few others could get in a word; but it was impossible to resent this, for he talked evidently not to bear down others, but because he could not help it."⁸

Though appointed by Jackson in 1830, John McLean of Ohio was Story's closest associate on the Court. An able but not a great Justice, McLean "flirted" with every political party's nomination for the presidency. He was the only abolitionist on the Court. He carried a heavy load of circuit work, and by 1856, his Midwest circuit had a heavier caseload than the total for the five Southern circuits each of which had its own Justice. As senior Associate Justice, he also bore more than his share of Supreme Court duty, presiding during Taney's frequent illnesses. At the age of seventy-six, while dining with President Buchanan, he was told the President was considering removing Major Robert Anderson for defending Fort Sumter too vigorously. He emphatically asserted, "'You dare not do it, sire' . . . [and the President] did not."⁹ A few weeks later, shortly after Lincoln's inauguration, McLean died, after having served thirty-one years on the Court, and was replaced by another Ohioan, Justice Swayne.

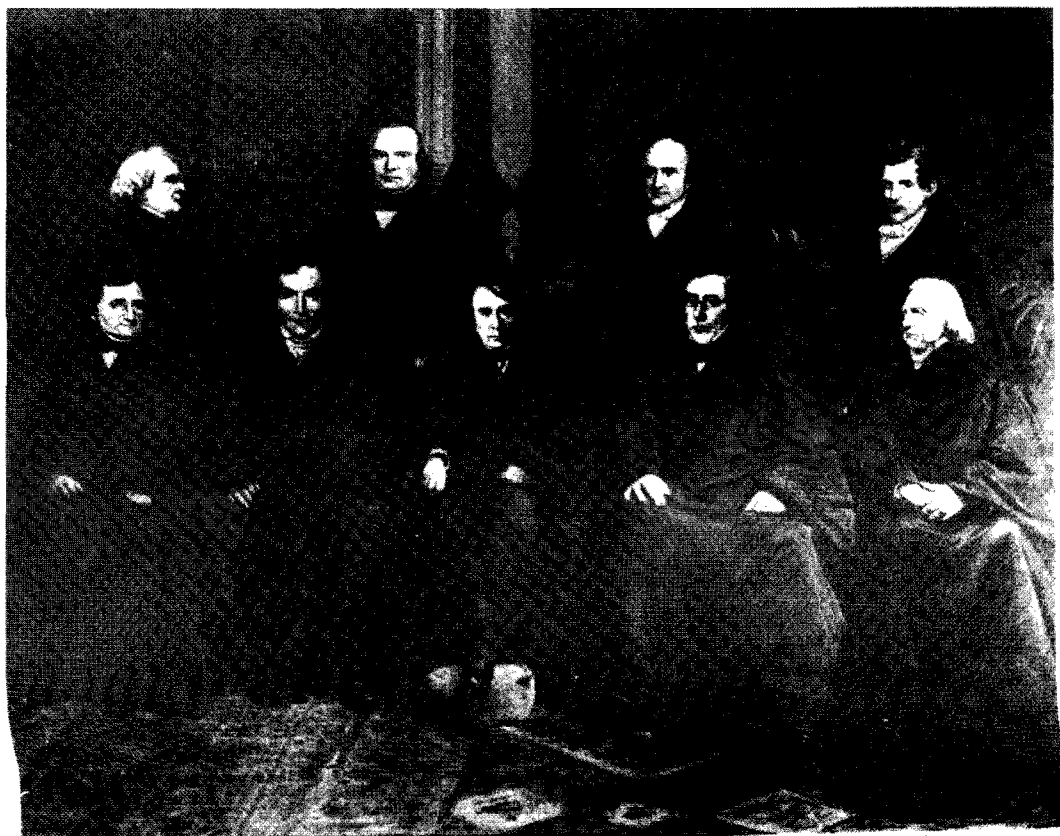
The services of Justices Wayne of Georgia and Catron of Tennessee were substantially contemporaneous with Chief Justice Taney. Both were strong Jackson supporters and strong unionists as well, though by no means opposing slavery. Both stayed on the Court during the Civil War, Catron striving unsuccessfully to keep Tennessee from seceding. Wayne was an influential member of the Court. Catron retained an active interest in politics, serving as adviser to several presidents, including Buchanan, and as the Court's representative in dealings with Congress. He died in 1865, Wayne in 1867.

Justice Daniel, who served from 1841 to 1860, was noted for his staunch loyalty to Virginia, slavery, and states' rights. As a result, he took an extreme position on many subjects. Justices Grier of Pennsylvania and Nelson, a former chief justice of the highest court of New York and a member of a slave-owning family, were undistinguished Justices of long tenure—chosen by Southern presidents who would not have been disappointed with their records.

The careers of Justices Curtis of Massachusetts and Campbell of Alabama, both men of great ability, were strikingly similar despite their differences on major issues. Both were appointed at the age of forty-one and served only a few years. Curtis resigned in 1857, largely because of inability to stomach Taney's behavior after the Dred Scott decision. Campbell resigned in 1861 to return to the South to become the Confederacy's Assistant Secretary of War and eventually to serve a term in prison as a result. Both became distinguished and active members of the Supreme Court bar, Campbell until 1889. Curtis was succeeded by Nathan Clifford of Maine, a pedestrian appointee of President Buchanan.

THE FUNCTIONING OF THE COURT

The lawyer accustomed to appellate structures of this century finds difficulty in conceiving of a Supreme Court whose members spent most of their time traveling through several states trying cases. Before the days of superhighways, air flight, and even fast trains, this was an immense burden to impose on distinguished and usually elderly Justices. A trip to Washington from Texas or Minnesota--not to mention California--was in itself long and difficult. The Supreme Court met in Washington for a few months beginning in December, but the rest of the time the Justices were on circuit. The burden of circuit riding led the first



Robert Grier, Benjamin Curtis, Levi Woodbury, and John McKinley. Front Row: John Catron, Philip Barbour, Roger B. Taney, Peter V. Daniel and Samuel Nelson.

Chief Justice Taney served with nineteen Associate Justices during his twenty-eight years on the Court. He is shown here with eight of them. Back row: Robert Grier, Benjamin Curtis, Levi Woodbury, and John McKinley. Front Row: John Catron, Philip Barbour, Roger B. Taney, Peter V. Daniel and Samuel Nelson.

Chief Justice, John Jay, to propose its elimination.

On occasion, Justices trying cases on circuit were too busy to get to Washington until the term of the Court was well underway. On circuit, the jurisdiction of the Supreme Court Justices to a substantial extent overlapped that of the district judges, who indeed handled the calendar out of necessity when the circuit justice was not available. Often circuit justices and district judges sat together. In certain types of cases, there was no appeal unless the two judges certified to the Supreme Court that they were unable to agree. It came to be accepted practice for such a certificate to be submitted when the two judges, acting in complete harmony, believed Supreme Court review was called for. And, strangely enough by modern standards, the circuit justice sat as a member of the Supreme Court reviewing his own decision.

As a result of the burden of riding the circuits, the Supreme Court for the first time began to fall behind in its own work, even though its calendar was small compared to the modern court's. A resolution allowing the Court to appoint a clerk to do research for the Justices and copy opinions--which, before typewriting, were handwritten and often not very legible--was ridiculed in Congress, with Representative, later Justice, William Strong leading the attack. It was said the clerk researcher would "doubtless in many cases control the judgments of the Court,"¹⁰ a complaint heard in more recent years but not taken seriously.

As early as 1845 there was a proposal to create intermediate courts of appeals, such as was finally approved forty-six years later. A less drastic suggestion, which was made in 1854, called for the appointment of separate circuit judges to try cases in each circuit in addition to the Supreme Court Justice. This proposal was finally accepted in 1869.¹¹ Congressmen reiterated, in the words of Senator Stephen A. Douglas, that "judges should be required to go into the country . . . and mingle with the local judges and with the bar."¹² It was feared if they did not sit in various localities, gaining the feel of the country, they would exercise concentrated power. This has a bit of truth to it, but the highest court of a nation, which had grown from four to over thirty million people, was having its hands full acting as the only appellate court for federal question cases coming from state courts. All of which proves, as seems still to be true, that judicial reform is a slow process, with few initiators of

needed reform living to see the fruition of their handiwork.

THE COURT'S DECISIONS

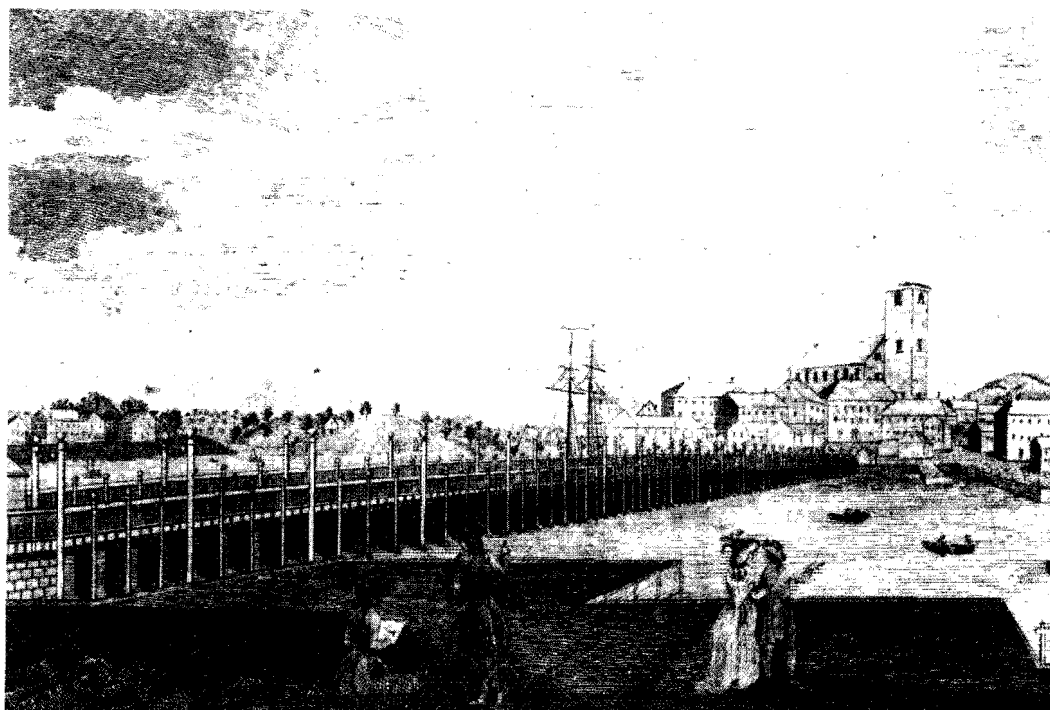
Significant Developments

Most of the Court's work during the pre-Civil War years consisted of diversity cases not presenting issues of federal law, although under *Swift v. Tyson*¹³ the Court was free to determine many common law issues for itself. Many cases presented questions of contract or property law. There was little federal regulatory legislation and not many federal crimes. The Fourteenth Amendment, which vastly enlarged the scope of constitutional limitations upon the states, was still beyond anyone's imagination. Thus, only a few of the decisions of the Taney Court have more than historical interest now.

The familiar decisions of the Marshall era had determined the structure of the government. The Taney Court, though mainly of the opposite political persuasion, did not undermine the Marshall Court to any great extent, and it did perform the useful function of clarifying and narrowing sweeping statements that proved impractical when applied to unanticipated circumstances.

This does not mean the turnover in personnel was of little consequence. *The Charles River Bridge case*,¹⁴ a famous decision under the contract clause, was first argued in 1831, but remained on the docket until 1837 because of inability to obtain a majority for any position. In 1785, Massachusetts had authorized a private company to construct a toll bridge over the Charles River between Boston and Charlestown. The bridge turned out to be highly profitable, as well as inadequate for the growing traffic, and by the 1820s there was a public demand for a competing toll-free bridge. At issue was whether such a bridge would impair the charter of the original bridge company, which was not expressly exclusive and which made no mention of other bridges. A second bridge, paralleling the first, was authorized by the Massachusetts legislature in 1828. The effect of the free competing bridge was to force the original bridge to close.

Marshall, Story, and Thompson would have found the new bridge a violation of the contract clause of the Constitution. By the time a full bench



"View of Bridge Over Charles River" 1789. This toll bridge connecting Charlestown and Boston was popular and highly profitable until a second, toll-free bridge, was built in 1828. The Court first heard the case in 1831 but was unable to find a majority until 1837.

could sit, however, Taney and Barbour of Virginia had replaced Marshall and DuVall. The case was argued for seven days, by four lawyers, including Daniel Webster for the old bridge company and Simon Greenleaf, Story's colleague on the Harvard law faculty, for the opposition. Finally, in 1837, the Court, speaking through the new Chief Justice, held that public grants must be construed strictly in favor of the public, and that an exemption from competition should not be implied when it had not been written into the contract. The emphasis was on the interest of the public, not merely the private parties involved. Despite a violent dissent by Story, this first leading decision of the Taney Court has stood the test of time.

The legality of a bridge across the Ohio River at Wheeling, Virginia, now West Virginia, also came before the Supreme Court several times. Virginia wanted to make what is now Interstate 70 a main route across the country and Wheeling a main riverport. This required building a bridge at Wheeling. Pennsylvania strongly opposed competition with what is now U.S. 30 which crossed the Ohio River at Pittsburgh and made that port the main upstream terminal for Ohio River traffic.

With Congress unable or unwilling to act because of the disagreement between the states, Virginia proceeded to construct the bridge over the river. The bridge was ninety-three feet above the river, lower than the stacks of some, but not most, river steamers. Relying in part on a congressionally-approved interstate compact stating that navigation of the river "shall be free . . . to the citizens of the United States,"¹⁵ the Supreme Court held, despite the absence of any specific federal statute, that the bridge was an obstruction to navigation and ordered that it must be raised to 111 feet or removed.¹⁶ Only Taney and Daniel dissented. Virginia then turned to Congress, which declared the existing bridge a lawful structure. Shortly thereafter the bridge was blown down by a storm, but when reconstruction began Pennsylvania attacked the validity of the federal statute. The Supreme Court held by a vote of 6-3 that the commerce power allowed Congress to determine what obstructions to navigation should be permitted.¹⁷

Important to the banking and business interests of the country was *Bank of Augusta v. Earle*,¹⁸ which held that corporations chartered in one state could do business in other states as a matter of

comity, except to the extent specifically forbidden by state law. Only Justice McKinley, whose ruling on circuit was reversed, dissented. Although the decision seemed to allow the states great leeway, its immediate effect was to permit out-of-state corporations to discount bills of exchange in Alabama. As a result, the case was regarded as a victory for commercial interests and a blow to states' rights. Both positions seem in retrospect to have been highly exaggerated. This was only a first step by the Court in dealing with the problem of the extent to which states may regulate, burden, or discriminate against extrastate enterprises.

Several other significant areas of the law were touched by the Taney Court. In a series of cases, the Court finally concluded for purposes of determining diversity of citizenship and the consequent right to sue and be sued in federal courts that corporations should be treated as citizens of the states in which they were incorporated or did business without regard for the citizenship of their officers or stockholders.¹⁹ After years of litigation, patents on Samuel Morse's telegraph were sustained and found infringed,²⁰ but in *McCormick v. Talcott*,²¹ Cyrus McCormick's reaper was held not to have been infringed. In the *Genesee Chief*,²² the jurisdiction of the federal courts in admiralty was finally extended to inland lakes and rivers and not merely to tidewater, overruling earlier decisions.

The political question doctrine was used--indeed invented--to avoid judicial determination as to which of two legislatures was the lawful government of Rhode Island. The Dorr Rebellion of 1841 had challenged the state government, which still rested upon a charter granted by Charles II in 1663. Under that charter, the legislature had limited suffrage to landowners and created districts which were grossly malapportioned. Dorr was convicted of treason against Rhode Island and sentenced to life imprisonment, but was soon amnestied. Dorr challenged the constitutionality of the government which had prosecuted and convicted him. By the time of the 1849 Supreme Court decision in *Luther v. Borden*,²³ the rebellion was long over, and Rhode Island had adopted an improved constitution. The time had thus long passed when a judicial determination would have been consequential. The Court, avoiding judgment on the merits, found that determination of which legislature was legal was committed to the political departments of the government and it had

no jurisdiction. The political question doctrine thereafter had substantial growth up to *Baker v. Carr*,²⁴ which provided a judicial remedy for malapportionment of legislative districts, and more recently has had vitality in connection with judicial reluctance to determine the legality of the Vietnam War.²⁵

The Commerce Clause

Despite an original diversity of views among the Justices, the Taney Court made a major contribution to commerce clause doctrine. The Marshall Court's broad pronouncements in *Gibbons v. Ogden*²⁶ as to the scope of the commerce power of Congress still underlie modern commerce decisions, but they did not offer much guidance as to how far states could regulate commercial matters having an interstate effect. *Gibbons v. Ogden* could be and was interpreted as making the power of Congress both exclusive and nonexclusive. Subsequently, in *Willson v. Blackbird Creek Marsh Co.*,²⁷ Marshall recognized that in the absence of congressional action, a state could place a dam across a navigable creek. Nevertheless, some Justices still took the broad position that the power of Congress was exclusive and that all state legislation with respect to commerce was precluded. Others, including Taney, took the opposite position that since the Constitution by its terms merely gave Congress power to regulate, it did not deprive the states of any power except to the extent Congress had acted.

The Taney Court at first adhered closely to the Chief Justice's position. In *City of New York v. Miln*,²⁸ it sustained a New York law requiring masters of vessels carrying passengers to New York to make detailed reports on each passenger to state officials, to post a bond for each, and to remove anyone who was found likely to become a public charge, although the last two provisions were not strictly before the Court in the case. At the first argument before the Court in 1834, Marshall thought the statute unconstitutional. In 1837, after Taney succeeded Marshall, six Justices held otherwise, with only Story dissenting; the basic theory was that the law was "a regulation not of commerce but of police," an unhelpful formula which endured for many years. But Justice Barbour's opinion for the Court went further and declared, amazingly, that goods, not persons, were the subject

of the commerce power—a statement which might have been motivated by a desire to keep Congress from meddling with the problems of slavery. A subsequent opinion by Justice Wayne in the *Passenger Cases*²⁹ in 1849, stated that this language was included in the opinion without due consideration by other members of the Court and only Justice Barbour and Chief Justice Taney agreed with it at the time.³⁰

The *Passenger Cases*³¹ discarded the dictum as to the commerce power not applying to the movement of persons. In response to the flood of immigrants landing in New York and Boston—hundreds of thousands per year by that time—New York and Massachusetts had enacted laws requiring masters of vessels to pay a tax for each person landed and, in Massachusetts, to post a bond to insure that “lunatics” and the “maimed, aged, or infirm” did not become public charges. These cases were thrice argued and resulted in separate opinions by eight Justices covering 180 pages. By a vote of 5-4, with Southern-Unionist Wayne writing the principal majority opinion and Taney in dissent, the laws were held unconstitutional. As in *Groves v. Slaughter*³² and *The License Cases*,³³ decided in 1841 and 1847 respectively, the Justices expressed varying views as to whether the power of Congress over commerce was exclusive or concurrent, leaving the law as to the extent of state police power over commerce in complete confusion, as must have been obvious to the Court itself. In *Groves v. Slaughter*, the question was whether an 1831 Mississippi constitutional prohibition against the bringing of slaves into the state for sale, which would have undermined the local slave market, was barred by the commerce clause. If it was not, the slave seller would not have been able to collect from Mississippi buyers. The Court avoided the issue by holding that the Mississippi constitutional provision was not self-enforcing and was thus ineffective until the passage of a Mississippi statute after the sale involved in the case.

The advent of a fresh mind in 1851, that of Justice Curtis of Massachusetts, managed to bring the Court together in *Cooley v. Board of Port Wardens*.³⁴ The Board of Wardens of the Port of Philadelphia provided pilots for vessels using the port. A Pennsylvania statute required vessels refusing to employ the pilots to pay one-half of the pilotage fee “for the relief of distressed and decayed pilots” and their families. Thus, in *Cooley*,

the Court was presented with a state regulation of interstate and foreign commerce, but in a local setting. The Court upheld the Pennsylvania law, rejecting both the position of Justices McLean and Wayne in dissent that the federal power was exclusive, and the extreme states’ rights views of Justice Daniel in concurrence. The majority of five³⁵ concluded that in some circumstances the power of Congress should be exclusive, while in others it should not be. The distinction was between those subjects which “are in their nature, national, or admit of only one uniform system, or plan of regulation, [and thus] may justly be said to be of such a nature as to require exclusive legislation by Congress,” and those which were essentially local in nature in which diversity of regulation was appropriate.³⁶

This formula, though indefinite, was pragmatic, sensible, and manageable. It indicated what factors should be given weight in future cases. Because of its inherent reasonableness, it has stood the test of time. Thus in 1945, the Court, citing *Cooley*, invalidated an Arizona law limiting the length of freight and passenger trains because the subject was one requiring national uniformity.³⁷ Indeed, the *Cooley* case was cited and its doctrine applied in at least twenty cases decided by the Court in the last twenty years.³⁸

In another area, the Court’s interpretation of the commerce clause was not so enduring. There had long been disagreement, usually along party lines between Democrats and Whigs, as to whether Congress had authority to build what were then called “internal improvements,” such as highways, canals, and railroads within a state, though as a part of a national transportation system. President Monroe in a famous veto message had declared that Congress had no such power without a Constitutional amendment. Nevertheless, Congress continued sporadically to authorize such projects, of which the Cumberland Road, now U.S. 40 from Maryland through Ohio, was the best known.

The issue did not reach the Court for years, although Justice Daniel had personally stated that such departures from “principle and public integrity” constituted a “greater calamity than would be actual war.”³⁹ He managed to incorporate his views in a unanimous opinion in *Veazie v. Moor*,⁴⁰ which held that Maine could grant to a single company exclusive navigation rights on a river running only through that state to the sea. The

opinion broadly stated, however, that the power to regulate commerce did not include "the control over turnpikes, canals, or railroads, or the clearing and deepening of water-courses exclusively within the States, or the management of the transportation upon and by means of such improvements."⁴¹ This remarkable statement--that the commerce power did not extend to improving the principal means of interstate transportation because the different segments thereof were located within individual states--has subsequently been neither cited nor expressly overruled; it has simply been forgotten and ignored. It is, of course, inconsistent with subsequent decisions.⁴²

It is difficult to see how at any time the commerce clause could have been so narrowly construed, even on the basis of a strict literal reading of its words. Certainly *Gibbons v. Ogden*⁴³ had embodied a far different approach. Perhaps, as with Justice Barbour's statement in *City of New York v. Miln*⁴⁴ that the commerce clause did not extend to passengers, the other judges may never have concentrated on Justice Daniel's dictum. Since only a local intrusion on commerce was concerned, the *Veazie* decision could simply have rested on the *Cooley* doctrine announced the year before without going further. On the other hand, no matter how outlandish it may seem to the modern lawyer, perhaps in 1853 the statement would not have seemed unusual and should be taken at face value as representing the views of the Justices of that era.

FUGITIVE SLAVES, DRED SCOTT, AND THE CIVIL WAR

Most of us have long forgotten that the Constitution contained a clause requiring the return of fugitive slaves to their owners.⁴⁵ The Fugitive Slave Act of 1793⁴⁶ permitted slave-owners to take a fugitive before a state or federal judge who on satisfactory proof was to order his return. Since elected state magistrates in the North had little enthusiasm for enforcing the act, a heavy burden fell on the federal circuit justices and district judges

in the Northern states to which the fugitives were fleeing. They could not possibly handle the flow. The Compromise of 1850, which allowed California to join the Union as a free state but which in general favored the Southern position, included an agreement to strengthen the Fugitive Slave Act. The revised act of 1850⁴⁷ empowered the circuit courts to appoint commissioners with authority to return fugitive slaves. A commissioner was to receive a fee of \$10 if he issued a certificate of removal, but only \$5 if he did not. The alleged fugitive was not permitted to give testimony. United States marshals were made personally liable if they refused to execute warrants or if fugitives escaped.

In their capacity as circuit justices, the Northern members of the Supreme Court attempted conscientiously to enforce these harsh provisions. Nevertheless, a substantial portion of the population of the North would not accept the new law. Not only would Northern officials not cooperate, but rebellious Northern mobs would often free the fugitives and send them on to Canada. Federal judges and marshals were impotent to stop them.

In Wisconsin, a mob headed by Sherman Booth freed a fugitive, and when Booth was arrested for aiding in the escape and held by the federal judiciary, the Wisconsin supreme court ordered his release on *habeas corpus*. After Booth's federal conviction, the state court again granted a writ of *habeas corpus* freeing Booth on the ground that he was unlawfully detained. Thus, a Northern state was asserting the superiority of state over federal law, as South Carolina had done twenty-five years before. In 1859, an unanimous Supreme Court, speaking through Chief Justice Taney, upheld the supremacy of federal law in a case which was then highly significant,⁴⁸ although the point now seems pretty obvious. Thus, six years after the fugitive had reached Canada, Booth actually was imprisoned for a short time before being pardoned.

During the Booth controversy, the case of *Dred Scott v. Sandford*⁴⁹ reached the Supreme Court. Scott was a slave who had been taken by

Fugitive slave commissioners received \$10 if they issued a certificate of removal, but only \$5 if they did not.

CAUTION!!

COLORED PEOPLE OF BOSTON, ONE & ALL,

You are hereby respectfully CAUTIONED and
advised, to avoid conversing with the
Watchmen and Police Officers
of Boston,

For since the recent ORDER OF THE MAYOR &
ALDERMEN, they are empowered to act as

KIDNAPPERS

AND

Slave Catchers,

And they have already been actually employed in
KIDNAPPING, CATCHING, AND KEEPING
SLAVES. Therefore, if you value your LIBERTY,
and the *Welfare of the Fugitives* among you, *Shun*
them in every possible manner, as so many *HOUNDS*
on the track of the most unfortunate of your race.

Keep a Sharp Look Out for
KIDNAPPERS, and have
TOP EYE open.

APRIL 24, 1851.

The Fugitive Slave Act of 1793, as revised in 1850, contributed to increased tensions between proponents of slavery and abolitionists. This poster reminded freed and escaped slaves that even in a non-slave state, like Massachusetts, they were still in danger of being returned to slavery.

his owner north of the line drawn by the Missouri Compromise of 1820 between free and slave territories. After his master took him back to Missouri, which permitted slavery, Scott, relying on prior Missouri decisions, brought suit to establish his freedom because he had been taken to territories in which slavery was forbidden. The Missouri supreme court, however, reversed itself. Barred from a direct appeal to the United States Supreme Court by a recent decision,⁵⁰ Scott's



Dred Scott, left, was the focus of one of the Court's most famous cases. Benjamin Curtis, right, dissented from the Court's decision ruling that African-Americans were not citizens of the United States, and detailed in his dissent instances since the time the Constitution was first drafted where slaves were considered citizens. Curtis and Taney exchanged bitter correspondence in the aftermath of the case and Curtis resigned a few months later as a result.

attorneys invoked the diversity jurisdiction of the federal circuit court in Missouri, suing the administrator of his prior owner's estate, a citizen of New York, for trespass. After losing at the trial level, Scott appealed to the Supreme Court.

By this time, over the violent objection of Northern abolitionists, the Missouri Compromise had been superseded by the Compromise of 1850, which rejected extension of the Missouri Compromise line to new territories gained from Mexico. It also rejected the Wilmot Proviso which would have forbidden slavery in these territories.

This, combined with other measures, allowed the people of each territory or state to decide for themselves whether slavery should be permitted and led to a prolonged and violent struggle in Kansas and Nebraska.⁵¹ Southern strategists, who had not, however, planned Scott's litigation, hoped that the Supreme Court would settle one source of contention by declaring the Missouri Compromise unconstitutional on the ground that Congress could not prohibit slavery in any of the territories. At least in its later stages, the litigation may have been of a "friendly" character, since Scott's owner (by inheritance) married a New England abolitionist and then transferred title to her brother, a New Yorker. Horace Greeley, in the *New York Tribune*, objected violently to submitting the is-

sue to a Court composed of five slave-holders and three other proslavery men.

Greeley's predictions proved correct to within one vote. Although each Justice submitted an opinion of his own, Taney's principal opinion for the majority of seven--the five Southern Justices and Justices Nelson and Grier--held that the federal courts lacked jurisdiction because: (1) a Negro, even though free, could not be a citizen of a state for purposes of invoking the diversity jurisdiction of the federal courts; (2) Congress lacked power to prohibit slavery in the territories since the territories were held for the benefit of the people of the states and their property rights; the grant to Congress of power "to make all needful rules and regulations respecting the territory . . . belonging to the United States" was held inapplicable to territory acquired after the Constitution was adopted, thereby invalidating the Missouri Compromise; and (3) the Missouri courts were not bound to give effect to Scott's status while in Illinois.

If the Court had rested its decision on the third of the above grounds alone--that a slave state to which a slave returned with his owner need not recognize the status which he acquired in free territories--it probably would not have caused much commotion. But the majority sought to settle once and for all the power of Congress over,

and the rights of slave-owners in, the territories. For if most of the large areas acquired from France in 1803 and from Mexico in 1848--most of the United States west of the Mississippi--became free states or free territories, the South feared, and with good reason, that its power in the federal government would decline and that its vital institution might be endangered.

Justice McLean, who favored abolition, and Justice Curtis, who was no extremist in that direction but "primarily a lawyer" without partisan interest, wrote long dissenting opinions which had wide circulation in the North. Curtis, in particular, "adduced an enormous amount of evidence to show"⁵² that at the time the Constitution was adopted Negroes had been regarded as citizens in a number of states, thereby undermining Taney's first premise. Also, the approval by the first Congress of the Act of August 7, 1789,⁵³ confirmed and continued in effect the Northwest Ordinance of 1787, a provision of which prohibited slavery in the then Northwest Territory,⁵⁴ and the Missouri Compromise of 1820, prohibited slavery in other territories north of a specified line. These actions demonstrated that there was no basis in contemporaneous understanding for reading into the Constitution a limitation on the power of Congress to regulate the territories, which clearly could not be found in the words used by the framers. A result of Curtis's dissent was to goad Taney into modifying his opinion after it was announced to meet Curtis's review of the historical evidence. When Taney refused to let Curtis see the changes until after the revised opinion was published, a bitter correspondence ensued, which induced Curtis several months later to resign from the Court.

Although the Court majority and the Buchanan administration, which had been informed as to how the case would be decided, may have hoped or believed that a Supreme Court ruling would have been accepted by the public, thus calming the intersectional controversy, the effect was quite the opposite. The decision, of course, did not settle anything, at least for many Northerners. It also did not settle anything for Dred Scott, who was freed by his owner and died shortly afterward.⁵⁵ When Senator Stephen A. Douglas supported the majority opinion, Abraham Lincoln relied on the dissents in his famous debates with Douglas in Illinois in 1858, which, though unsuccessful in electing Lincoln to the Senate, pro-

pelled him into national prominence and eventually the presidency. Since Lincoln's election caused the South to secede and commence hostilities by seizing Fort Sumter, *Dred Scott* was at least a factor in bringing on the Civil War.

The *Dred Scott* decision discredited the Supreme Court in the North for many years--creating what Chief Justice Hughes called "a self-inflicted wound" of great severity,⁵⁶ and it was the only decision which took a war to overcome. Thereafter, the North regarded the Court as controlled by Southern sympathizers and, until the war was over, paid little heed to it, at least insofar as matters relating to the basic conflict between the sections of the nation were concerned.

With respect to Taney, there was good reason for the Northern attitude. Although not attached to the institution of slavery, he had been born and raised in a Southern environment and regarded himself as a Southerner. His unpublished writings show that he believed the South had a right to secede. A son-in-law served in the Confederate Army, and although no case had brought the matter before him, he wrote a draft opinion, apparently published long after he died, stating that Congress had no power to raise any army by compulsory conscription because that would invade the powers of the states.⁵⁷ For a judge to write an opinion on a matter of great importance which had not come before him and upon which he had heard no argument is highly unusual and unjudicial, to say the least, and only can be explained by a strong emotional involvement.

In an actual case, *Ex parte Merryman*,⁵⁸ Taney issued a writ of habeas corpus releasing a prominent Marylander whom the federal army had locked up for participating, as a lieutenant in a secessionist cavalry company, in the destruction of railroad bridges in order to prevent Union troops from reaching Washington from the North. Because of the Southern rebellion, Lincoln had suspended the writ of habeas corpus, but Taney held that only Congress had authority to do so, a point which was certainly arguable. The Army, with Lincoln's support, refused to allow Taney's marshal to enter Fort McHenry to free the prisoner, who in substance was a prisoner of war, though Taney chose to treat him as a civilian. Taney's decision has been highly praised as an assertion of civil authority over the military, and undoubtedly he was acting courageously and con-

scientiously. But his ruling may hardly be said to be untainted by his personal predilections as to who should prevail in the oncoming struggle. In the context of that time, after *Dred Scott* and in the light of actual military necessity, should Lincoln have honored the orders of a judge reasonably believed to be sympathetic to the Southern effort to destroy the Union? Compare the internment of Japanese-Americans to prevent a Japanese invasion of California in 1941-42, which certainly had far less justification in military necessity than the actual obstruction of the Union army in Maryland in 1861, but which was nevertheless unanimously upheld by the Supreme Court in the controversial *Hirabayashi* case⁵⁹ in 1943.

The other Southern Justices, Wayne and Catron, remained loyal to the Union and seem to have avoided Taney's clashes with the military.

On October 12, 1864, while General Sherman was in Georgia sealing the fate of the Confederacy, Taney died at the age of eighty-seven. The absence of any program for paying pensions to Supreme Court Justices if they retired may have been a reason for Taney's remaining on the Court to such an advanced age, despite ill health which often kept him from sitting. The law allowing Justices to retire at full pay at seventy after ten years of service was not enacted until 1869, largely to induce Justice Grier, then seventy-five and showing such signs of senility as falling asleep on the bench, to retire.⁶⁰

Taney's life spanned that of the nation from one year after the Declaration of Independence. He served substantially longer as Chief Justice than any person except John Marshall. And of the Associate Justices, only Holmes served to a greater age, ninety, with Hugo Black being next at eighty-five. Catron died in 1865 and Wayne in 1867. Grier and Nelson retired in 1870 and 1872, respectively.

With the appointment of Chase--not a very good Chief Justice who longed to be President⁶¹--as Taney's successor, Lincoln's appointees from the North comprised a majority of the Court. The war soon came to a close. The Thirteenth, Fourteenth and Fifteenth Amendments overturned *Dred Scott*, and produced a new set of judicial problems not remotely foreseen at the time and over which Lincoln's appointees and their successors have continued to divide for well over a hundred years.

APPRAISAL OF THE TANEY COURT

How should Taney and the Taney Court be appraised? The Taney Court, to the surprise of some of its contemporaries, did not overturn John Marshall's interpretations of the Constitution, though it leavened some of them in large part as a practical response to new problems. It had a stronger feeling for states' rights than Marshall's Court and less for national power, but apart from the *Dred Scott* decision it did not go overboard in either direction. It was not as concerned with the rights of corporations, which were largely dominated by Northerners. Taney himself came from a predominantly rural area, and his instincts were to oppose financial interests, as evidenced by his struggle against the Bank of the United States before his appointment to the Court, but not property rights as such.

The Taney Court was essentially pragmatic and unphilosophical. In areas not affected by the sectional conflict, its decisions were on the whole sensible, and most of its members competent. A few--Taney, Story, Curtis, Campbell, and perhaps Wayne--seem to have been brilliant or outstanding. The Court lost prestige during this period in which the rule of law was superseded by the rule of force, in large part because the public believed the judgments of its members were swayed--as has been true on other occasions but not to as great an extent--when issues arose to which they had deep personal commitments. The reaction of most of the Taney Court to such issues was predictable because their views on these very matters had been responsible for their appointments by Southern or Southern-sympathizing presidents. The growing and continuing moral abhorrence of slavery, which finally prevailed in the nation as a whole, did not leave in high repute a judicial body whose members did not share it.

What has been said of the Court applied to Taney himself. Former Justice Curtis, after Taney's death, attested to his power of analysis, his ability as a lawyer, his good practical sense, and his traits of dignity, gentleness, and courtesy. Even during the war, those who came to know him personally, such as Lincoln's Attorney General Bates, became friends and admirers. Chief Justice Hughes⁶² and then Professor Frankfurter⁶³ years later spoke highly of his contribution to many

fields of law and sought to revive a reputation which they thought had been unduly affected by the *Dred Scott* episode.

My own interpretation, however, leaves me with the impression that while Curtis was on the whole right, the eulogies were somewhat exaggerated, as eulogies often are, and that Taney was an able but not a great Chief Justice, even apart from matters relating to slavery and the sectional conflict. But I see no reason why his response to the latter should be disregarded. *Dred Scott* was one of the most disastrous and insupportable Supreme Court decisions from every point of view, including the language and history of the Constitution, and not merely because the South lost the Civil War. It seems to me appropriate to give Taney's reaction to slavery, as exemplified in *Dred Scott*, and his sympathy and support for the effort to destroy the Union, substantial weight in evaluating the career of a Chief Justice of the United States.

Endnotes

- ¹ 60 U.S. (19 How.) 393 (1857).
- ² In 1863, a tenth circuit was created for California, which none of the other Justices could cover.
- ³ C. Swisher, *History of the Supreme Court of the United States, Vol. V: The Taney Period 1836-64* 16 (1974).
- ⁴ *Id.* at 23.
- ⁵ *Id.* at 719.
- ⁶ 41 U.S. (16 Pet.) 1 (1842).
- ⁷ 304 U.S. 64 (1938).
- ⁸ C. Swisher, *supra* note 2, at 43.
- ⁹ *Id.* at 727.
- ¹⁰ *Id.* at 289.
- ¹¹ Act of April 10, 1869, ch. 22, 16 Stat. 44.
- ¹² C. Swisher, *supra* note 2, at 290.
- ¹³ 41 U.S. (16 Pet.) 1 (1842).
- ¹⁴ *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837).
- ¹⁵ *Pennsylvania v. Wheeling & Belmont Co.*, 54 U.S. (13 How.) 518, 565 (1852).
- ¹⁶ *Id.* at 578.
- ¹⁷ *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856).
- ¹⁸ 38 U.S. (13 Pet.) 519 (1839).
- ¹⁹ C. Swisher, *supra* note 2 at 464-70.
- ²⁰ *O'Reilly v. Morse*, 56 U.S. (15 How.) 62 (1854).
- ²¹ 61 U.S. (20 How.) 402 (1858).
- ²² *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1852).
- ²³ 48 U.S. (7 How.) 1 (1849).
- ²⁴ *Baker v. Carr*, 369 U.S. 186 (1962).
- ²⁵ See *Massachusetts v. Laird*, 451 F.2d 26 (1st Cir. 1971).
- ²⁶ 22 U.S. (9 Wheat.) 1 (1824).
- ²⁷ 27 U.S. (2 Pet.) 245 (1829).

- ²⁸ 36 U.S. (11 Pet.) 102 (1837).
- ²⁹ 48 U.S. (7 How.) 283 (1849).
- ³⁰ *Id.* at 429-34.
- ³¹ 48 U.S. (7 How.) 283 (1849).
- ³² 40 U.S. (15 Pet.) 449 (1841).
- ³³ 46 U.S. (5 How.) 504 (1847).
- ³⁴ 53 U.S. (12 How.) 299 (1852).
- ³⁵ Justice McKinley was ill.
- ³⁶ 53 U.S. (12 How.) at 319. On the basis of Taney's failure to cite *Cooley* in subsequent cases, then Professor Frankfurter speculated that Taney "certainly did not become a convert" to the views expressed in *Cooley* and that he must have joined in the majority opinion for unknown reasons not relating to its merits. F. Frankfurter, *The Commerce Clause Under Marshall, Taney and Waite* 57 (1937).
- ³⁷ *Southern Pac. v. Arizona*, 325 U.S. 761, 767 (1945).
- ³⁸ By actual count. E.g. *Goldstein v. California*, 412 U.S. 546, 553-54 (1973); *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 625 (1973).
- ³⁹ C. Swisher, *supra* note 2, at 400.
- ⁴⁰ 55 U.S. (14 How.) 568 (1853).
- ⁴¹ *Id.* at 574.
- ⁴² See *Wickard v. Filburn*, 317 U.S. 111, 121 (1942) (limiting less sweeping statements in *Veazie*).
- ⁴³ 22 U.S. (9 Wheat.) 1 (1824).
- ⁴⁴ 36 U.S. (11 Pet.) 102 (1837).
- ⁴⁵ Article IV, section 2, clause 3 of the Constitution, as originally adopted, provided: "No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due."
- ⁴⁶ Act of Feb. 12, 1793, ch. 7, 1 Stat. 302.
- ⁴⁷ Act of Sept. 18, 1850, ch. 60, 9 Stat. 462.
- ⁴⁸ *Abelman v. Booth*, 62 U.S. (21 How.) 506 (1859).
- ⁴⁹ 60 U.S. (19 How.) 393 (1857).
- ⁵⁰ *Strader v. Graham*, 51 U.S. (10 How.) 82 (1851).
- ⁵¹ In 1854, the Kansas-Nebraska Act completely repealed the Missouri Compromise line, substituting the notion of "Popular Sovereignty" in the Louisiana Purchase territories to which the compromise had originally applied. See 1 A. Nevins, *Ordeal of the Union* 219-315 (1947); 2 A. Nevins, *supra* at 78-160; J. Randall & D. Donald, *The Civil War and Reconstruction* 78-100 (1969).
- ⁵² C. Swisher, *supra* note 2, at 628.
- ⁵³ Act of Aug. 7, 1789, ch. 8, 1 Stat. 50.
- ⁵⁴ See 60 U.S. (19 How.) 393, 616-17 (1857).
- ⁵⁵ C. Swisher, *supra* note 2, at 652.
- ⁵⁶ C. Hughes, *The Supreme Court of the United States* 50 (1936).
- ⁵⁷ C. Swisher, *supra* note 2, at 951.
- ⁵⁸ 17 F. Cas. 144 (No. 9487) (C.C.D. Md. 1861).
- ⁵⁹ *Hirabayashi v. United States*, 320 U.S. 81 (1943).
- ⁶⁰ Act of Apr. 10, 1869, ch. 22, 16 Stat. 44.
- ⁶¹ C. Fairman, *History of the Supreme Court of the United States Vol. VI: Reconstruction and Reunion 1864-88, pt. 1*, 1479-81 (1971).
- ⁶² C. Swisher, *supra* note 2, at 973.
- ⁶³ F. Frankfurter, *The Commerce Clause Under Marshall, Taney and Waite* 46-73 (1937).

William Paterson

Charles F. Hickox III
Andrew C. Laviano

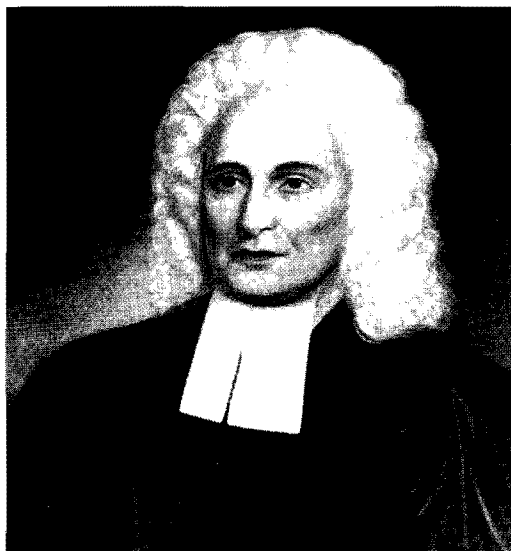
The names of the men and woman who have served as Justices on the Supreme Court read like a "Who's Who" of American History. Six were foreign born.¹ One of these, William Paterson, was Irish.² He was born on December 24, 1745, in County Antrim. His father, Richard, was a tin



Aaron Burr, second Vice-President of the United States, ran a school in New Jersey that William Paterson attended before going to the College of New Jersey (later Princeton University.)

plate worker; little is known of his mother, Mary. In 1747, the family sailed from Londonderry and landed in Newcastle, Delaware. Over the next few years, the family moved to New York, then to Connecticut before settling permanently in Princeton, New Jersey. Once in Princeton the family opened a general store catering to the students and faculty of The College of New Jersey, now Princeton University. This doomed William to hours of menial tasks but gave him early exposure to the intellectual environment of a major university. He was accepted to The College of New Jersey in 1759 after having done preparatory work to prove his proficiency in Latin and Greek at a school run by Aaron Burr. His college curricula included both secular and religious studies. The trustees attempted to ensure considerable intellectual freedom within the religious and social bounds of the eighteenth century. One of the stated aims of the college was that care be taken "to cherish a spirit of liberty, and free enquiry; not only to permit, but even to encourage their right of private judgement."³ As an undergraduate Paterson listened as President Samuel Davis instructed the graduates of the class of 1760:

Whatever, I say, be your Place, permit me my dear Youth to inculcate upon you this important Instruction, IMBIBE AND CHERISH A PUBLICK SPIRIT. Serve your Generation. Live not for yourself, but the Publick. Be the Ser-



Samuel Davis was President of The College of New Jersey while William Paterson was a student there.

vants of the Church; the Servants of your Country; the Servants of all. Extend the Arms of your Benevolence to embrace your Friends, your Neighbours, your Country, your Nation, the whole Race of Mankind, even your Enemies.⁴

After his graduation in 1763, Paterson began a master's degree program, and apprenticed himself to Richard Stockton to study law. He earned his master's degree in 1766. He was admitted to the bar three years later, and relocated to establish his practice in New Bromley, New Jersey. Although impatient at times with the growth of his legal practice, he was soon appointed to the position of surrogate by Royal Governor William Franklin.

In 1775, Paterson was selected to be a delegate to and the secretary of the First Provincial Congress of New Jersey. He earned a reputation as a leading architect of the state's independence. From 1776 to 1783 he served as the first Attorney General of the state, actively prosecuting English loyalists. In 1783, he retired as Attorney General to devote his full time to the practice of law.

In 1777, he met Cornelia Bell, the daughter of a Somerset County land owner. Smitten by Cornelia, he described her as "the sweetest pattern of female excellence."⁵ They married in February 1779. Cornelia died in 1783, leaving him with two small children to raise. In 1784, he

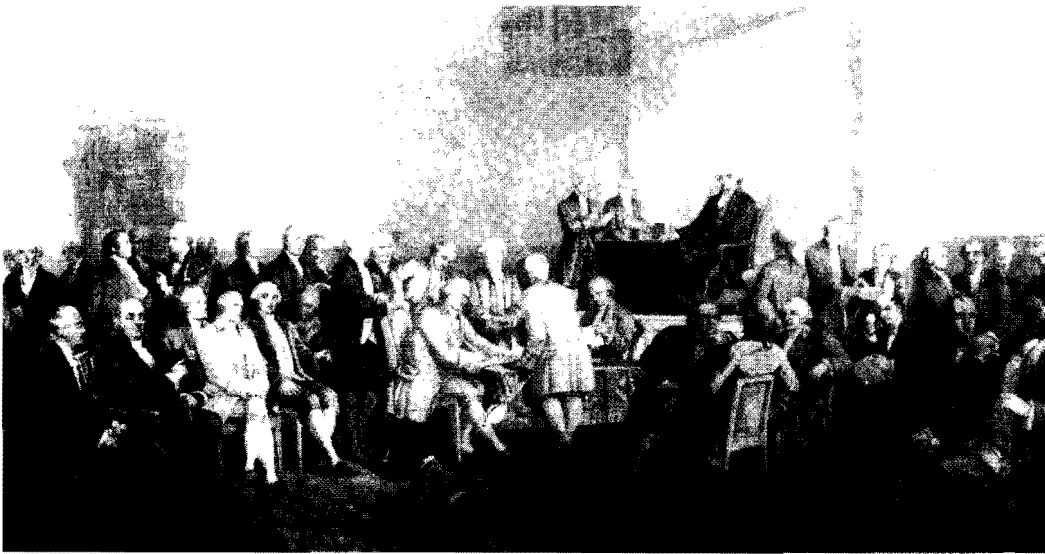
married his wife's best friend, Euphemia White.

Paterson represented New Jersey at the Constitutional Convention of 1787 which was held in Philadelphia. Most histories mention his name with reference to the Paterson Plan or New Jersey Plan as it is also called. "...In the dynamics of debate and compromise that gave birth to a new and durable formula for American government, Paterson proved himself a consummate politician as well as a great lawyer and statesman."⁶ The new Republic had existed since its independence under the Articles of Confederation, but this loose association proved too weak for the continued existence of a cohesive nation. The Constitutional Convention was an attempt to restructure the government. Headed by James Madison, the Virginia delegation proposed a bicameral legislature, calling for popular election of the first house with the second selected by the first. Paterson was aghast.

Let them unite if they please, but let them remember that they have no authority to compel the others to unite. Jersey will never confederate on the plan before the Committee. She would be swallowed up.⁷

Paterson proposed a single chamber, representing the states, not the population, where every state had an equal vote regardless of its population or wealth.⁸ Delaware, Connecticut, Maryland, and North Carolina supported his plan. According to James Madison, the chronicler of the Convention, Paterson and others like-minded, having won equal senate votes for the smaller states, were thereafter ardent in granting powers to the national government.⁹ The two plans were consolidated to form the present American legislative scheme, with a lower house proportioned by population and the Senate consisting of two members from each state selected by the state legislatures. His contribution made, Paterson wrote to his wife on July 17th, "The business is difficult and unavoidably takes up much time, but I think we shall eventually agree upon and adopt a system that will give strength and harmony to the Union and render us a great and happy people."¹⁰

In November 1788, the New Jersey legislature selected William Paterson as one of two senators to represent the state in the federal government.



William Paterson attended the Constitutional Convention of 1787, shown above, as a delegate from New Jersey. He was a vocal advocate of the New Jersey Plan—a single chamber legislature representing states. His proposal was incorporated into the bicameral legislature still used in the United States.

He received forty-five votes, well above the twenty-nine garnered by the next closest nominee. He had second thoughts about accepting the nomination, in part because he feared that the job would force him to give up much of his legal practice. In March 1789, he arrived in New York City, then the capital of the United States, ready to begin work. However, the necessary quorum of twelve Senators failed to arrive for almost three weeks. Paterson complained of all the time spent during those three weeks in “idle ceremony and show.”¹¹ The Senate finally began its work on April 6, certifying the electoral ballots so that George Washington could be inaugurated. Paterson acted as a teller on behalf of the Senate by totaling the votes and was subsequently appointed to help prepare the certificate of election for President George Washington and Vice President John Adams.

Next, the Senate organized the Judicial Branch of the federal government. “The Framers had provided only for a Supreme Court in Article III, [of the Constitution,] leaving all further details of lower courts entirely to the discretion of Congress.”¹² On April 7, Paterson and other Senators¹³ were ordered to “bring in a bill for organizing the judiciary of the United States.”¹⁴ This eventually resulted in the Judiciary Act of 1789, which was drafted by Paterson and his old college classmate, Senator Oliver Ellsworth of Connecticut. Their

construct, appealing to Antifederalists who believed that there was a danger of the new government running “roughshod over state sovereignty and individual liberty,”¹⁵ left the vast majority of American legal cases to the state courts. The system provided two distinct advantages. First, it authorized a sufficient number of federal circuit judges to allow the federal system to function, something not possible with only six Supreme Court Justices. Second, it provided for the possibility of appeal since there was now an inferior court.

Paterson also participated in establishing the first federal tax, an impost on imports and an excise on liquor.¹⁶ Like the Judiciary Act, his first federal tax legislation was an attempt to ease the fears of Antifederalists who disapproved of the extensive taxing power granted in the Constitution.¹⁷ Paterson also spoke out against the granting of titles to government officials—a throwback to his Irish heritage and his view of British nobility.

The following year, Paterson served on committees which established the census, framed copyright laws for “the encouragement of learning”¹⁸ and drafted “a Bill defining the crimes and offences that shall be cognizable under the authority of the United States, and their punishment.”¹⁹

As a senator, Paterson was a strong federalist voice for a centrally controlled economic structure. He supported Secretary of the Treasury Alexander Hamilton’s Federalists policies with

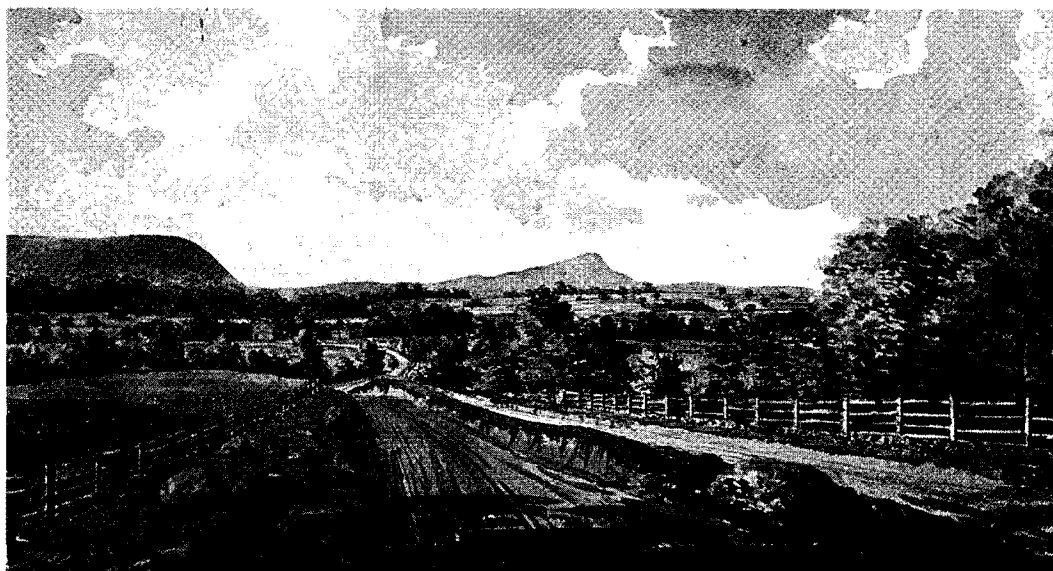
such enthusiasm that a hostile critic described him as a member of Hamilton's "gladiatorial band".²⁰ He was alternatively described as a "*summum jus*"²¹ man showing the other side of his upbringing. This was demonstrated on June 16, 1790, when in the midst of an open debate funding, Paterson spoke out. The committee on the debt bill reported a compromise to reduce the interest on the domestic debt to four percent. Paterson, once a committee member himself, spoke out against its recommendations and called for the full six percent. A colleague described the scene:

Now rose up Paterson with a load of notes before him. To follow him would be to write a pamphlet, for he was up near an hour. Near the beginning he put a question: "What principle shall we adopt to settle this business? If we follow Justice, she says *three per cent or even two is as much as the holders of the certificates can demand*. But what says law? -six per cent," and he was a *summum jus* man to the end of the chapter.²²

In November 1790, Paterson's friend William Livingston, Governor of New Jersey, died. Paterson resigned his seat in the Senate, and was

unanimously elected by the New Jersey legislature to complete Livingston's term. Leaving New York was no burden because he could be closer to his family, and in his own words "Gay life has never been my wish: my disposition is naturally pensive."²³ However, he had to put aside his continuing desire for anonymity and relief from the pressures of public office to pursue his civic duty. He was reelected as governor of New Jersey three times for consecutive one-year terms until 1793 when a greater duty called.

Paterson's terms as governor proved to be quite routine. While the position was time-consuming and carried with it a number of prestigious titles, the office was basically that of a figurehead. Only two developments are noteworthy. The first was the founding of The Society for Establishing Useful Manufactures (SUM), which attempted to build a model city to harness the water power of the Passaic River and make New Jersey a prominent manufacturing state. This plan, one of the most interesting chapters in the early history of American industrialization, was implemented under the guidance of Alexander Hamilton. Although the model city did not come to fruition for many years, Paterson, New Jersey, now stands on the proposed site. The second development was a revision of New Jersey's laws, which reflected Paterson's conservative philosophy. He stated



"View on the Road from Newark to Paterson, New Jersey" by Benjamin Henry Latrobe. 1800. Paterson, New Jersey stands on the site of an early experiment in industrialization that took place during William Paterson's terms as Governor of the state.

that there was "danger in departing from known and establishing regulations and usages [because] whenever this happens the law is perplexed."²⁴

In March 1793, Paterson was appointed to the United States Supreme Court by President

Washington. Washington wrote to Paterson on February 20, 1793:

I think it necessary to select a person who is not only professionally qualified



Pennsylvania's Wyoming Valley on the banks of the Susquehanna River was the site of controversy in the Circuit Court case, *Van Horne's Lessee v. Dorrance*. The case was a precursor to *Marbury v. Madison* which later established the principle of judicial review.



William Marbury sued to force President Jefferson to release his judicial appointment. His suit became one of the most famous cases in American legal history.

to discharge that important trust, but one who is known to the public, and whose conduct meets their approbation. I shall have the satisfaction to believe that our country will be pleased with and benefited by the acquisition.²⁵

This appointment carried with it great prestige and the then handsome salary of \$3,500, but there were associated burdens. At that time, in addition to their appellate responsibilities, Supreme Court Justices also had Circuit Court duties. Since he was the newest appointee to the Court, Chief Justice Jay assigned Paterson to the Southern Circuit. Once a year Paterson had to travel from New York to attend trials in North Carolina, South Carolina, and Georgia, a round trip of several thousand miles. Riding the circuit was no joy for Paterson: the roads were bad, the lodgings were uncomfortable, and transportation was slow and unpredictable.

While on the Court Paterson participated in several of the most famous and important cases in

American jurisprudence. The first of these, and the one for which he was best known in his own lifetime, was *Van Horne's Lessee v. Dorrance*.²⁶ This Circuit Court case prefigured the seminal case of *Marbury v. Madison*,²⁷ which established federal judicial review. The case dealt with conflicting claims to land in Pennsylvania's Wyoming Valley. The plaintiffs' chain of title could be traced to a grant from the family of William Penn, while the defendant's more speculative title arose from an Indian claim and a Connecticut land grant. A Pennsylvania statute putatively confirmed the defendant's claim. The Circuit Court invalidated the Pennsylvania statute as being in conflict with the federal and state constitutions as a violation of the inalienable rights of property.²⁸ To illustrate the principle Paterson contrasted the British, in which there is no written constitution and the "power of Parliament is absolute and transcendent,"²⁹ with the American system in which every state's constitution is "reduced to written exactitude and precision."³⁰ Paterson then proceeded to deliver a lecture on the nature of constitutional governments:

What is a Constitution? It is the form of government, delineated by the mighty hand of the people, in which certain first principles of (or?) fundamental laws are established. The Constitution is certain and fixed; it contains the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the Legislature, and can be revoked or altered only by the authority that made it...What are Legislatures? Creatures of the Constitution; they owe their existence to the Constitution: they derive their powers from the Constitution: It is their commission; and, therefore, all their acts must be conformable to it, or else they will be void. The Constitution is the work or will of the People themselves, in their original, sovereign, and unlimited capacity. Law is the work or will of the Legislature in their derivative or subordinate capacity. The one is the work of the Creator, and the other of the Creature. The Constitution fixes limits to the exercise of legislative authority and prescribes the

orbit within which it must move. In short, gentlemen, the Constitution is the sun of the political system, around which all Legislative, Executive and Judicial bodies must revolve. Whatever may be the case in other countries, yet in this there can be no doubt, that every act of the Legislature, repugnant to the Constitution, is absolutely void.³¹

In 1796, Paterson wrote the opinion in *Hylton v. United States*.³² The Supreme Court considered whether in taxing carriages Congress had unconstitutionally enacted an unapportioned direct tax. Concluding that the tax was not a direct tax, the Court did not have to decide whether it could declare an act of Congress unconstitutional. Paterson's discussion in this case relied on both the Framers' intent and Adam Smith's definition of a direct tax as a tax either on population or on land. Almost one hundred years later, this opinion proved pivotal when the Court declared the federal income tax unconstitutional.³³ The Sixteenth Amendment was passed and ratified in 1913 to dispense with the requirement of apportionment.

In the election of 1800, the Federalist Party of Presidents Washington and Adams was swept out of office by Thomas Jefferson and the Republican Party. However, before the new government was installed, the Adams administration appointed a number of new federal judges. One of these appointees was William Marbury. His appointment had been approved by the Senate and signed by Adams. Before it could be registered by the Secretary of State, Adams' term of office expired, and Jefferson ordered that all appointments made and commissions issued by Adams be withheld. Marbury brought suit to force Jefferson to release his commission.³⁴

*Marbury v. Madison*³⁵ is probably the most glorified and celebrated opinion in American history.³⁶ The decision established the right of the Judicial Branch to review and void acts of the Executive and Legislative Branches if the acts are violative of the Constitution. Both parts of this decision, the voidness of the act, and the power of the Judiciary to make that determination, were preordained by and, in fact, paraphrase Paterson's decision in *Van Horne's Lessee v. Dorrance*. First, in deciding the validity of an unconstitutional act, Paterson wrote, "there can be no doubt, that every act of the Legislature, repugnant to the

Constitution, is absolutely void."³⁷ Eight years later, Chief Justice Marshall penned these substantially similar words, "that an act of the legislature, repugnant to the constitution, is void."³⁸ As to the Court's right to review statutes, Paterson wrote, "I take it to be a clear position; that if a legislative act oppugns a constitutional principle, the former must give way, and be rejected on the force of repugnance. I hold it to be a position equally clear and found, that, in such case, it will be the duty of the Court to adhere to the Constitution, and to declare the act null and void."³⁹ *Marbury v. Madison* restated this principle in these words: "So if a law be in opposition to the constitution... the court must determine which of these conflicting rules governs the case. This is of the very essence of the judicial duty."⁴⁰

In 1803, Paterson was severely injured when his coach went off the road and rolled down a ten foot embankment. He never fully recovered, but continued on the Court until his death in 1806. The issue of the last case Paterson ever heard was



Francisco de Miranda was helped in his attempt to overthrow the Spanish government of Venezuela by Samuel Ogden and William S. Smith.



Francisco de Miranda, near center holding sword, at the signing of the Venezuelan Declaration of Independence on July 5, 1811. After failing in 1806 to overthrow the Spanish government, de Miranda commanded the Patriot Army after the 1810 revolution.

remarkable in its similarity to the issues raised in the Iran Contra Affair during the Reagan administration. On July 15, 1806, Samuel G. Ogden and William S. Smith⁴¹ were tried for violating the neutrality laws which prohibited the setting on foot a military expedition against a nation with which the United States are at peace.⁴² Both men were land speculators and financiers who would benefit by a decrease in Spanish strength in North America. To this end, they supplied Francisco de Miranda, a foreign adventurer, with men, money and the use of Ogden's ship, *The Leander*, for transport in his attempt to overthrow the Spanish government in Venezuela. Although military enterprises of this type against friendly foreign governments were illegal, the defendants sought to excuse their participation by proof that President Jefferson approved their activities. They maintained that this approval immunized them from liability. Ogden and Smith had four governmental officials subpoenaed to testify in their favor. These included Secretary of Navy, Robert Smith and Paterson's old nemesis, Secretary of State James Madison. The officials failed to appear, because the President made it clear to

them that their official duties prevented them from leaving Washington, D.C.⁴³ John O'Connor's biographical notes that in "Paterson's long and carefully reasoned decision... he established that the simple declaration of the President that his cabinet members were needed in Washington was not sufficient justification to ignore the summons of the court. He had not, however, been convinced that the witnesses' testimony was pertinent to the defense. Even if the President had approved Miranda's scheme the defendants would not be absolved."⁴⁴ In spite of the absence of the subpoenaed parties, Ogden and Smith were acquitted by a jury the following day.⁴⁵

William Paterson was successful in each role offered to him, lawyer, senator, governor, statesman, and jurist. He won fame, made many influential friends, and amassed a sizeable personal fortune. He died on September 9, 1806, at his daughter's home in Albany, New York. "It was men such as Paterson, men who knew when to stand firm and when to compromise, who enabled the young republic to grow more democratic gradually, without a social upheaval."⁴⁶ He had come a long way from County Antrim.

Endnotes

¹ Paterson of Ireland, Wilson of Scotland, Iredell and Sutherland of England, Frankfurter of Austria, and Brewer of the Ottoman Empire.

² Although James Iredell was English, born in Sussex County in 1751, his mother Margaret McCulloh was born in Dublin.

³ Blair, Samuel. *An Account of the College* (Woodbridge, N.J. by order of the trustees of The College of New Jersey, 1764), p. 28.

⁴ Sloan, Douglas. *Scottish Enlightenment and the American College Ideal*, Teachers College Press, Columbia University, New York, 1971, p. 51.

⁵ O'Connor, John E., *William Paterson: Lawyer and Statesman 1745-1806*, Rutgers University Press, New Brunswick, New Jersey, 1979, p. 88.

⁶ *Id.* at p. 131.

⁷ Farrand, Max. *The Records of the Federal Convention of 1787*, (4 vols. [New York, 1937], Yale University Press, New Haven, 1966) vol. 1, p. 179.

⁸ Friedman, L. and F. Israel, *The Justices of the United States Supreme Court 1789-1969*, Chelsea House Publishers, New York, 1969, vol. I, p. 165.

⁹ *Id.* at p. 166.

¹⁰ *Supra* note 7, vol. 4, p. 70.

¹¹ William Paterson to Euphemia Paterson, March 27, 1789, Paterson Papers, Rutgers University Library.

¹² Shnayerson, Robert, *The Illustrated History of the Supreme Court of the United States*, Harry N. Abrams Inc., New York, 1986, p. 60.

¹³ Other Senators serving were Oliver Ellsworth of Connecticut, William Maclay of Pennsylvania, Caleb Strong of Massachusetts, Richard Henry Lee of Virginia, Richard Bassett of Delaware, William Few of Georgia, and Paine Wingate of New Hampshire.

¹⁴ *Documentary History of the First Federal Congress of the United States of America* Vol. I, Senate Legislative Journal, Johns Hopkins University Press, Baltimore p. 11.

¹⁵ *Supra* note 5 at p. 170.

¹⁶ Ferguson, E. James, *Power of the Purse: A History of American Public Finance, 1776-1790*, University of North Carolina Press, Chapel Hill, 1961, p. 291.

¹⁷ *Id.*

¹⁸ *Supra* note 14 at pp. 227, 242, 302.

¹⁹ *Id.* at p. 227.

²⁰ *Supra* note 8 at p. 167.

²¹ *Supra* note 5 at p. 177.

²² *Id.*

²³ *Supra* note 8 at p. 167.

²⁴ Paterson's observations in mss. law volume, Paterson Papers, Rutgers University Library, pp. 635-640.

²⁵ *Supra* note 8 at p. 168.

²⁶ 2 Dall. 304 (1795).

²⁷ 1 Cranch 137 (1803).

²⁸ "The Constitution of the United States of America, Analysis and Interpretation," Legislative Reference Service, Library of Congress, Washington, D.C., 1964, p. 628, fn 49.

²⁹ *Supra* note 26 at p. 308.

³⁰ *Id.*

³¹ *Id.*

³² 3 Dall. 171 (1796).

³³ *Pollock v. Farmers Loan and Trust Company* 157 U.S. 429, (1895).

³⁴ Smith Page, *The Shaping of America*, McGraw-Hill Book Company, New York, 1980, p. 479.

³⁵ *Supra* note 27.

³⁶ Levy, Leonard. *Original Intent and the Framers' Constitution*, Macmillan Pub. Co., New York, 1988, p. 75.

³⁷ *Supra* note 26 at page 308.

³⁸ *Supra* note 27 at page 177.

³⁹ *Supra* note 26 at page 309.

⁴⁰ *Supra* note 27 at page 178.

⁴¹ It is interesting to note that Samuel Ogden was the brother-in-law of Gouverneur Morris and William Smith was the son-in-law of John Adams.

⁴² Act of June 5, 1794.

⁴³ *U.S. v. Smith* (Case No. 16342) 27 Fed. Cas. page 1192.

⁴⁴ *Supra* note 5 at p. 277.

⁴⁵ *U.S. v. Smith* (Case No. 16342b) 27 Fed. Cas. page 1246.

⁴⁶ *Supra* note 5 at p. 285.

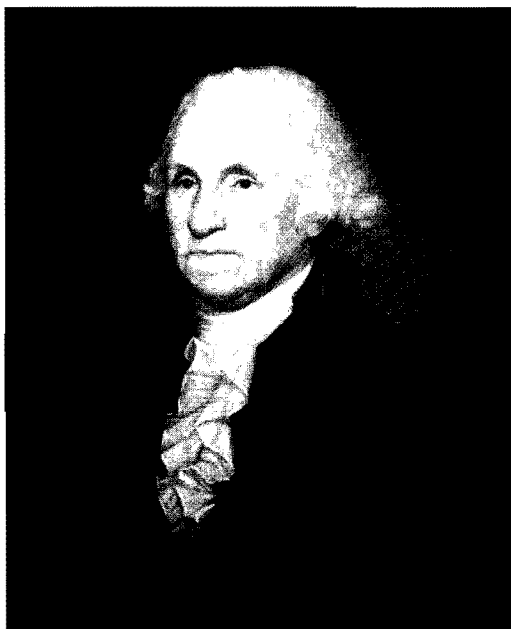
President Washington's Appointments to the Supreme Court

Brooks D. Simpson

Among the recurrent themes in the controversies marking the selection and confirmation of recent Supreme Court nominees has been the degree to which partisan concerns have come to dominate the appointment process. Both supporters and opponents of various nominees have waxed so eloquently about the dangers of "politicizing" the nomination and confirmation process that those unfamiliar with the Court's history might not realize that political considerations have been a factor in Supreme Court nominations since the beginning of the Republic; for not only were political considerations present in the nomination and confirmation of Justices during George Washington's presidency, they were also crucial in the Senate's first rejection of a presidential nominee in 1795.¹

When the framers debated over the powers of the Supreme Court at the Philadelphia Convention of 1787, they said precious little about its composition and the qualifications necessary to serve on the nation's highest court, in contrast to the elaborate guidelines established for members of Congress, the president, and the vice president. Nor was the question raised in the *Federalist*. The Judiciary Act of 1789, while deciding the Court would be composed of one Chief Justice and five Associate Justices, remained silent on the qualifications of Justices. Thus George Washington was basically left to his own devices as to how to select nominees. The new president took the responsi-

bility seriously. He considered the Supreme Court "the Key-stone of our political fabric" and "the chief Pillar upon which our national Government must rest."² The "due administration of justice," he believed, was "the strongest cement of good



George Washington served as the first President of the United States from 1789-1797. He faced many challenges in the uncharted waters of the Presidency, including how to select Supreme Court Justices.

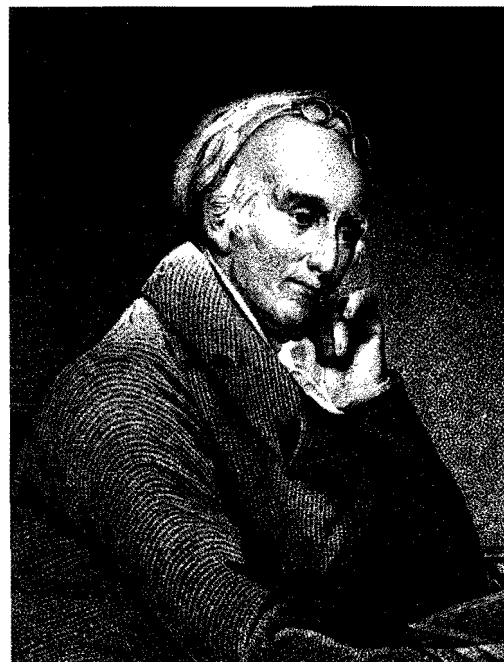
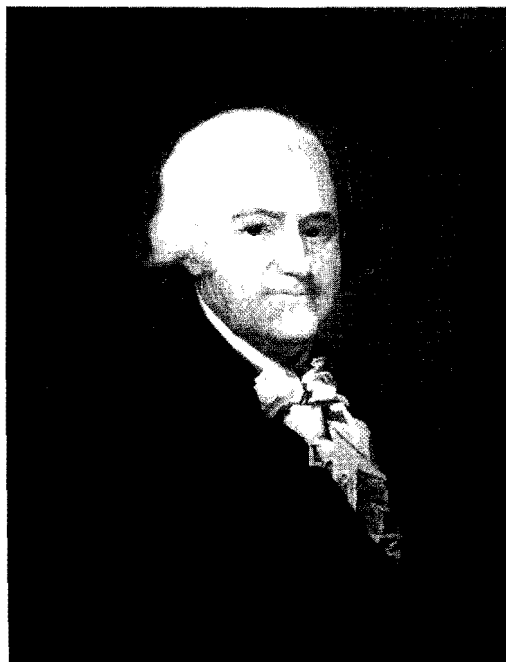
government." With that in mind, he made it "an invariable object of anxious solicitude . . . to select the fittest Characters to expound the laws and dispense justice." Such men "would give dignity and lustre to our National Character."³

Others cited similar standards. Benjamin Lincoln of Massachusetts outlined his expectations in a letter to his old commander. "I consider, my dear General," he told Washington, "that not only the happiness of the people under the new government but that the very existence of it depends in a great measure upon the characters and abilities of those who may be employed in the judiciary and executive branches of government."⁴ Always concerned with the behavior of others, the new vice president, John Adams, declared that "the morals of the nation and perfection of the constitution: The national character, public credit, private confidence, public liberty, private property: every thing that is sacred, precious or dear, depends so much upon these judges, that the President will choose I presume with caution."⁵

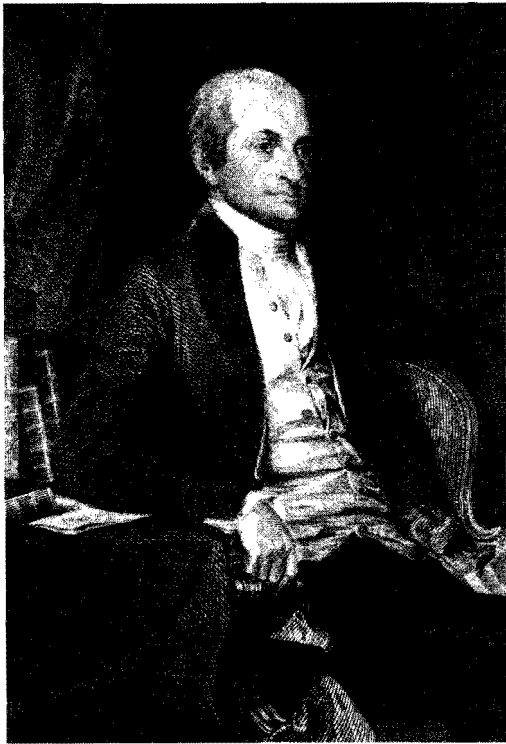
But character, ability, and prior judicial experience alone did not suffice. Prospective nominees had to meet other, more explicitly political, crite-

ria. Only active supporters of both the Revolution and the Constitution would be considered. And equally important in the minds of many observers was a proper distribution of seats by state and section. Each state wanted one of its own to be represented on the high court. One Philadelphia paper, noting that "the southern states give a President and the eastern states a Vice-President," urged the Chief Justiceship be bestowed on a Pennsylvanian—preferably James Wilson. Francis Dana reminded John Adams of the claims of Massachusetts to a seat.⁶

Nor was satisfying state pride Washington's only concern when it came to achieving a balanced distribution. The President also contemplated the possible political consequences which would ensue in each state from his selection of a nominee. While Virginians currently occupied the offices of president and secretary of state, Washington, determined that one of his Supreme Court nominees should hail from the Old Dominion, made inquiries as to the willingness of several candidates to serve.⁷ In Massachusetts, Federalists shared with Vice President Adams their fear that the selection of the commonwealth's chief justice, William Cushing,



Many tried to advise or lobby the President with names for the Court. John Lowell, left, was pushed by Benjamin Lincoln, while Benjamin Rush, right, advocated the nomination of James Wilson of Pennsylvania.



John Jay, first Chief Justice of the United States, served only six years before the burden of circuit riding and his diplomatic missions contributed to his resignation to become Governor of New York.

would allow Governor John Hancock to appoint arch-Antifederalist James Sullivan as Cushing's replacement.⁸ Not coincidentally, those correspondents who shared this vision also shared a preference for John Lowell, one of Cushing's competitors for a seat on the Supreme Court. Frustrated, Adams noted, "there is no system nor Harmony among the men from Massachusetts."⁹

While Fisher Ames claimed Washington "does not ask the advice of the Senators individually, in order to determine beforehand whom it will be proper to nominate to office," the President did in fact consult with others about his choices.¹⁰ He conferred with John Jay and James Madison before deciding to offer the New Yorker the Chief Justiceship.¹¹ The President kept his decisions to himself, however, despite the efforts of close associates to read his mind.¹² As he would later explain, "although I do at all times make the best enquiries my opportunities afford, . . . where *my own* knowledge does not give a *decided* preference . . . no one knows my ultimate determi-

nation until the moment arrives when the nomination is to be laid before the Senate."¹³

Several of Washington's correspondents took it upon themselves to assist the President in making his selections. Benjamin Lincoln pushed for the appointment of John Lowell, writing both Washington and Secretary of War Henry Knox; Benjamin Rush, although aware of James Wilson's unpopularity in some quarters, argued the Pennsylvanian would always advocate "a vigorous—ballanced, and triple powered Constitution."¹⁴ In rare cases candidates lobbied for themselves. Cyrus Griffin, having lost his position as president of the Confederation Congress with the ratification of the Constitution, sought an appointment. So did John Lowell, as he sensed the appointment would fall upon his rival from the Bay State, William Cushing.¹⁵ Never someone noted for shyness, Maryland's Samuel Chase assured the President, if appointed, he would "exert myself to execute so honorable and important a station with Integrity, fidelity, and Diligence."¹⁶ And James Wilson, whose heart ached for the top spot, bluntly informed Washington "that my Aim rises to the important Office of Chief Justice of the United States."¹⁷

On September 24, 1789, following the passage of the Judiciary Act, Washington submitted his list of nominees to the Senate. Occupied by a continuing debate over the future location of the federal capital, the senators barely paused to confirm the nominees two days later. New York's John Jay, who had played a prominent role in both the diplomacy of the republic and the struggle to ratify the Constitution, was named Chief Justice. Although disappointed by Jay's selection to the top spot, James Wilson was rewarded for his labors on behalf of the Constitution, when the President named him an Associate Justice.¹⁸ South Carolina's John Rutledge, another who had harbored hopes of becoming Chief Justice, also had to rest content with an Associate Justiceship. They were joined by William Cushing of Massachusetts, Robert Harrison of Maryland, and John Blair of Virginia. Of the original six nominees, all but Wilson had prior judicial experience. More important, all had supported the adoption of the Constitution, with Wilson, Rutledge, and Blair serving in the Constitutional Convention. All but Cushing had participated in national politics or had served in the military. Washington knew each



Equal geographical representation between the Northern and Southern states concerned President Washington. James Iredell of North Carolina was appointed after Robert Harrison of Maryland refused an Associate Justice seat.

of them personally and had seen them at work. Moreover, in making his selections the President had respected the necessity of distributing his nominees across the geographical spectrum. Each of the four largest states—Virginia, Massachusetts, Pennsylvania, and New York—was represented, and of the six Justices, three hailed from states north of the Mason-Dixon line, while three resided south of it.

Popular reaction to the slate was overwhelmingly positive. "I do not believe that any Judiciary in the world is better filled," concluded South Carolina's Ralph Izard. One of Washington's former staff officers assured his chief "the selection of Characters to fill the great Departments has afforded entire satisfaction: particularly in the Judiciary." Perhaps the highest compliment paid to Washington's wisdom came from Senator William Maclay of Pennsylvania. Maclay, who freely criticized the president in the pages of his private journal, remained silent on the appointments.¹⁹

Washington's slate for the Supreme Court remained incomplete, however, for Robert Harrison, citing his poor health, declined the position of Associate Justice. Both Washington and Alexander Hamilton, who had worked with Harrison on Washington's staff, urged the Marylander to reconsider, but Harrison's declining condition thwarted his efforts to visit New York. In his place Washington nominated North Carolina's James Iredell, who had played a leading role in securing his state's ratification of the Constitution the previous November. In making the appointment, Washington, revealing his concern over making an equal distribution of offices across the different states, remarked that "in addition to the reputation he sustains for abilities, legal knowledge and respectability of character he is of a State of some importance in the Union that has given No character to a federal Office."²⁰ The appointment was both a reward for service well done in the ratification debates and a way to



Thomas Johnson nominated Washington to command the Continental Army and served on the Board of Commissioners of the Federal City at his behest. However, he served less than a year on the Court, citing the rigors of Circuit riding.

increase North Carolinians' loyalty to the Constitution by naming one of their own to high office.

During the first years of the Supreme Court's existence the Justices found much cause for complaint in the arduous duties assigned them in the Judiciary Act of 1789. Under that law the Supreme Court was to meet twice a year, in February and August; in addition, the Justices were expected to hold circuit court twice annually. With the vast expanse of territory covered by the Justices on circuit, it soon became apparent the rigors of travel would prove a deterrent to service on the bench. Iredell, whose southern circuit included Georgia and the Carolinas, characterized his occupation as that of a "travelling postboy" after covering 1,900 miles. John Jay spent seven months out of the year on circuit duty, an exertion which caused him to consider resigning the office several times. It had been fear of the consequences of riding circuit which had caused Harrison to decline his appointment. The Justices protested this

arrangement several times. In a joint letter to Washington, they announced they found "the burdens laid upon us so excessive" that a change had to be made. But Congress was slow to grant relief, and while adjustments were made in the requirements of circuit riding the system remained intact during Washington's terms.²¹

In 1791, John Rutledge, still smarting over Washington's decision to name Jay and not himself to head the Court, decided to resign his seat in order to accept the position of Chief Justice of South Carolina, enabling him to return home and avoid the demands of circuit courts. Southern jurists believed Rutledge's successor should be selected from their region; as Georgia's Nathaniel Pendleton put it, "I presume the President will be governed as heretofore by the propriety of Chusing the Judges nearly in an equal proportion from among the United States." South Carolina's Jacob Read and Pendleton immediately applied for the vacancy, Pendleton citing Georgia's absence from the Court.²² Charles Pinckney countered Pendleton's plea when he urged Washington to fill Rutledge's vacancy with another South Carolinian.²³ At first, the President sought to gratify Pinckney's request. But he did so in a peculiar way, writing a letter to Charles Cotesworth Pinckney and Edward Rutledge to ask them to consider which one of them would accept the post. The brothers-in-law declined the offer in a joint response.²⁴ The President, unmoved or perhaps even dissuaded by the impressive lobbying campaign which Pendleton had launched upon his own behalf, selected Maryland's Thomas Johnson, a distinguished jurist and former governor. In making the nomination, Washington must have been mindful of Johnson's contribution to his own career, for it had been Johnson who had nominated Washington to command the Continental Army in 1775.²⁵

But Johnson did not remain long on the Court. Soon tired of the demands of attending circuit court, he resigned his seat in January 1793.²⁶ This time Washington sought the assistance of Attorney General Edmund Randolph to screen possible candidates. Discarding various nominees on the grounds of insufficient legal learning or reputation, Randolph urged the appointment of William Paterson of New Jersey, most famous for sponsoring the New Jersey Plan at the Constitutional Convention of 1787. In so doing, Randolph upset



Charles Cotesworth Pinckney joined Edward Rutledge in lobbying the President to fill John Rutledge's seat with a South Carolinian. Instead Washington appointed Thomas Johnson of Maryland.

the sectional applecart, for he chose Paterson, a Northerner, over three Marylanders and a Georgian.²⁷ Nevertheless, Washington concurred with his attorney general, and Paterson joined the Court in March 1793. In the process, he had tinkered with the sectional balance on the Court, suggesting it was no longer an overriding concern.

As before with Washington's other nominations, the Senate confirmed Paterson without dissent. Such compliant behavior appeared to confirm Oliver Ellsworth's prediction, made at the Constitutional Convention, that nomination "will be equivalent to an appointment."²⁸ In part this might have been due to the still inchoate nature of political rivalry between Federalists and Republicans; in part, it may have been due to a continuing sense of deference to Washington. But by the time Washington had to make another nomination to the Court, partisan conflict had intensified, and even Washington was coming under fire for his policies. The confrontation came during the controversy surrounding the Jay Treaty in 1795. Even John Jay's acceptance of the

position of envoy extraordinary to negotiate a treaty with Great Britain had aroused opposition, as critics wondered whether the Chief Justice should also serve in a diplomatic capacity. Nor was Jay's handiwork popular with Republicans, who denounced it as a surrender to British interests. Meanwhile, Jay had tired of the Chief Justiceship. New York Federalists named him as their candidate for governor, and Jay, exhausted by the traveling and other demands placed upon him as Chief Justice, as well as by his just-concluded diplomatic endeavors, decided to accept the office should he win election. Washington first considered Alexander Hamilton to succeed Jay, letting the New Yorker know through his attorney general of the immense importance of confiding that large trust to one who was not to be "scared by popular clamour or warped by feeble-minded prejudice." Others pushed for the nomination of Edmund Randolph, the former attorney general, who had replaced Thomas Jefferson as secretary of state in 1794.²⁹

But neither Hamilton nor Randolph secured



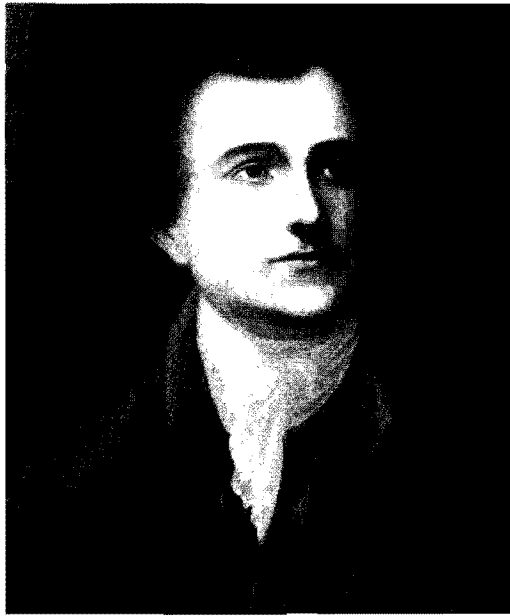
ALEXANDER HAMILTON



After the resignation of Chief Justice Jay, Alexander Hamilton, left, was President Washington's first choice to fill the vacancy. However, John Rutledge, right, saw a chance to return to the Court in the center chair he had long desired. He immediately let Washington know he was available and willing to serve. The President quickly accepted his offer.

the nomination, for John Rutledge saw an opportunity to seize what he thought should have been rightly his. Asserting his claims to the position were equal to those of Jay when the latter was appointed in 1789, Rutledge made clear his availability to be Jay's successor in a letter to Washington. The President enthusiastically accepted Rutledge's offer "without a moment's hesitation." He had always held the South Carolinian in high regard, going so far as to call him the man who "wrote the Constitution."³⁰

At first, Rutledge's appointment was well-received, but he was soon entangled in controversy as a result of the public debate over the Jay Treaty. The revelation of the treaty's terms incited protests and public meetings throughout the United States. South Carolina was no exception to the rule. On July 16, 1795, Charlestonians convened at St. Michael's Church to denounce the treaty. Among those assembled on the speaker's plat-



Edmund Randolph, who succeeded Thomas Jefferson as Secretary of State, harbored his own ambitions to be Chief Justice. His financial difficulties forced him to resign from the Cabinet and abandon his Court goals.



St. Michael's Church, Charleston, South Carolina as it appeared in 1910. It was here that John Rutledge condemned the Jay Treaty and angered Federalists into opposing his nomination as Chief Justice.

form was John Rutledge, who may not have known of Washington's intention to appoint him to succeed Jay. Rutledge denounced the treaty as "a surrender of our rights and privileges" to England, "prostituting the dearest rights of freemen and laying them prostrate at the feet of royalty." He ridiculed the document's language and declared several clauses were little better than "tricks." In words which must have startled many of his listeners, Rutledge closed by commenting it would be better for Washington to die than to approve of Jay's botched handiwork.³¹

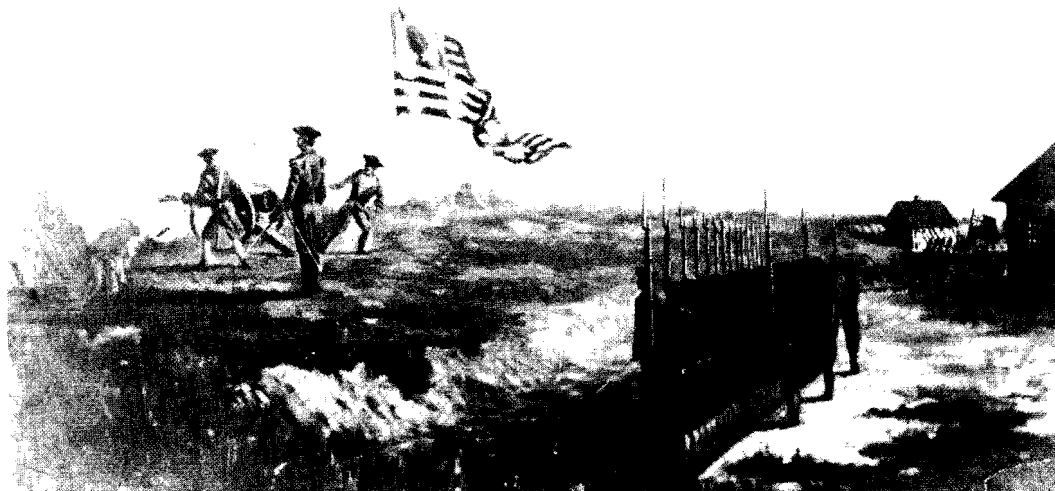
When news of Rutledge's remarks reached Philadelphia, Federalists reacted as if in shock. One termed it that "crazy speech." Oliver Wolcott concluded Rutledge was "a driveller & fool."³² Immediately, Federalists began to call for the withdrawal of the nomination. Stories circulated that Rutledge, "mounted upon the head of a hog's-head, haranguing a mob," had insulted Washington and insinuated that "Mr. Jay and the Senate were fools or knaves, duped by British sophistry or bribed by British gold."³³ Soon the charges went beyond political issues. Rumors circulated that Rutledge was mentally unbalanced—charges which had first surfaced even before news of his

comments on Jay's Treaty were circulated.³⁴ Even Alexander Hamilton took note of these statements in his *Camillus* letters defending the Jay Treaty, suggesting the South Carolinian's remarks were delivered in "a delirium of rage."³⁵

Most curious was the behavior of Secretary of State Edmund Randolph. Upon receiving notice of Washington's intention to name Rutledge Chief Justice, he had written the President to deny his own interest in the Chief Justiceship, but at the same time, citing financial difficulties and a desire to reside in the nation's capital, he made it clear he would not mind replacing Associate Justice Blair, should Blair make good on his hints of a pending resignation. It seemed rather odd for Randolph to deny his ambition for a post already offered to someone else. But the uproar over Rutledge's remarks presented a new opportunity for Randolph to plead for the Chief Justiceship. In his role as the conduit of news to a vacationing Washington, he made sure the President was kept informed of the stories circulating about Rutledge's mental health and "reports of his attachment to his bottle, his puerility, and extravagances, together with a variety of indecorums and imprudencies."³⁶ Randolph's campaign of innuendo and rumor was

cut short, however, when he was forced to resign from the cabinet in the face of allegations he had sought money from French emissaries in exchange for his efforts to delay Washington's signing of the Jay Treaty.

Randolph was not the only one in trouble for his financial dealings, however. Soon reports surfaced that Rutledge was deep in debt. It was charged he had fled England to escape his creditors, only to fall in debt once more. One of the South Carolinian's defenders weakly replied that "pecuniary independence is not prescribed by the Constitution, as a qualification necessary" for the office, and the nominee's "private moral character has nothing to do with his official uprightness." Others, taking heart at Rutledge's opposition to the treaty, continued to support the nomination. Not coincidentally, most of this praise came from the pens and presses of Jeffersonian Republicans. Boston's *Independent Chronicle* praised the nominee as "that illustrious patriot," proclaiming that "our Rights and Liberties will be safe in such hands." His opponents were dismissed as "friends to Monarchy and enemies to Republicanism," and the tone of their attack "is more licentious than any thing which the pen of faction has yet produced."³⁷



The Jay Treaty between the United States and Great Britain, which engendered such passionate denunciation from John Rutledge, provided for the British to withdraw from the Northwest Territory, depicted here in the evacuation of Fort Ontario by the British.

Nor was the growing controversy limited to Rutledge's character. Republican partisans realized the Federalist attack on Rutledge's nomination was implicitly a criticism of President Washington's judgment. By lauding Washington, Republicans sought to force Federalists to make such criticisms explicit. One Republican, responding to a Federalist characterization of Rutledge as insane, reminded readers that as Washington had just nominated Rutledge to the Court, "you must be guilty of a vile calumny, or the President is more crazy than the Judge." Federalists responded that Washington had been deceived. "It is to be lamented . . . that the President had not known better your real character before the appointment," announced one public letter to Rutledge. "His motives in making it, cannot however, be questioned, [for] every one knows and confesses his integrity and zeal to do right." But privately several Federalists wondered why Washington refused to withdraw the nomination.³⁸

On December 15, 1795, the Senate rejected Rutledge's nomination by a vote of fourteen to ten. It was the first time a presidential nominee to the Court had been turned down. Federalist Jeremiah Smith, characterizing Rutledge's July remarks as "a speech which would have disgraced the lips of an idiot," celebrated the news. John Adams, while expressing himself in less colorful terms, concluded Rutledge "deserved it," and that "[C]hief Justices must not go to illegal Meetings and become popular orators in favour of sedition, nor inflame the popular discontents . . . nor propagate Disunion, Division, Contention and delusion among the People."³⁹

Partisanship was evident in the outcome. None of the charges made against Rutledge in 1795 had been raised when he was confirmed in 1789, and four senators who had assented in 1789 dissented six years later. The Philadelphia *Aurora*, noting the senators' refusal to confirm Rutledge was "the first instance in which they have differed with [Washington] in any nomination of importance," thought it "remarkable" that "the minority of the members on the Treaty were the minority on this nomination." Thomas Jefferson concluded the Federalist majority "cannot pretend any objection to him but his disapprobation of the treaty." He continued, "they will receive none but Tories hereafter into any department of the government."⁴⁰ These comments are borne out by an examination

of the vote. Of the ten senators who supported Rutledge, only one, fellow South Carolinian Jacob Read, was a Federalist, while all fourteen who opposed the nomination were Federalists. All nine Republicans had opposed the Jay Treaty; all the senators who rejected Rutledge had approved the treaty.⁴¹ This "unparalleled instance of party spirit," as one paper put it, suggested speaking out on the issues of the day could affect one's chances for political advancement. Another journal remarked that it seemed to be the intent of the Federalists "to keep out of office every one who has spoken disrespectfully" of either Jay or his treaty.⁴²

The news of the Senate's action took several weeks to reach Charleston, where Rutledge resided. Perhaps anticipating the result, he tendered his resignation to Washington on December 28, citing poor health.⁴³ But other events suggested that if he did not know of the result for certain, he had certainly anticipated it, for two days before he resigned, he had attempted to commit suicide by drowning, only to be thwarted by some nearby rescuers.⁴⁴ This seemed to confirm rumors he was mentally ill, providing a rather sad coda to the controversy.

With Rutledge defeated, Washington searched for another nominee. He seriously considered naming Patrick Henry to the post, employing Henry Lee to feel out the old patriot's wishes.⁴⁵ But Henry refused to respond to Lee's inquiries, and Washington, running out of patience, finally nominated Associate Justice William Cushing. The Senate confirmed the choice, but Cushing declined on grounds of ailing health.⁴⁶ Washington then turned to Connecticut's Oliver Ellsworth, a veteran of the Continental and Confederation Congresses, the Constitutional Convention, and the Senate, where he had proved himself a firm Federalist—so firm he had voted against Rutledge's confirmation. Ellsworth accepted the offer, and he was immediately confirmed by the Senate. Most commentators testified to his abilities; a lone dissenting vote, cast by Republican senator Stevens Mason of Virginia, was attributed to his being "a very ill natured & sour man as well as politician."⁴⁷

Almost overlooked in the quest to replace Jay was the resignation of John Blair and the nomination of Samuel Chase of Maryland. Chase was a somewhat controversial choice, for his financial dealings and his combative personality, added to his initial opposition to the Constitution, made

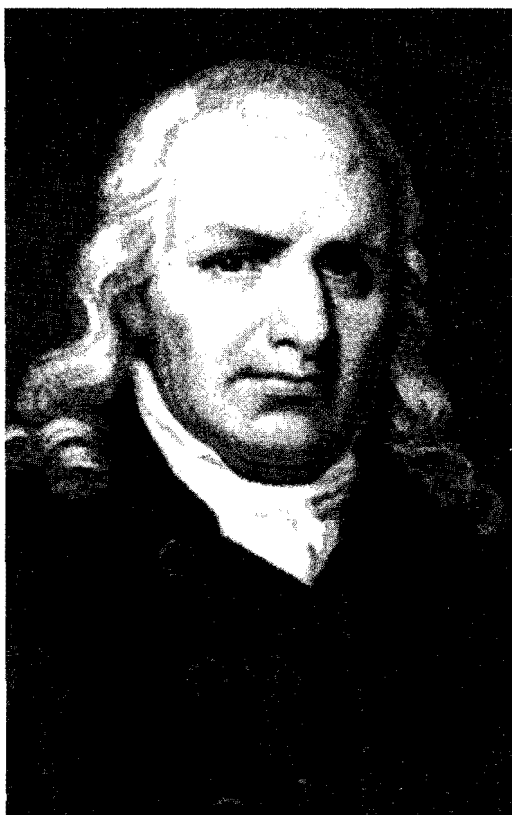
him less than an ideal candidate. These charges played a large part in Washington's previous refusal to consider Chase seriously when the Marylander's name had been brought up by, among others, Chase himself. In 1795 Washington revealed to Hamilton that he remained troubled about these concerns.⁴⁸ But in the 1790s Chase had become a staunch Federalist. At a time when political allegiance was becoming a matter of importance, this was no small matter: Federalists James McHenry and William Vans Murray testified to his qualifications.⁴⁹ Chase's Maryland roots also proved valuable, enabling Washington to keep a rough sectional balance on the Court at a time when only one Southerner (Iredell of North Carolina) could be counted among the five sitting Justices. Even so, not everyone was satisfied: one Virginian complained "that every officer So[uth] of the Potowmack has been succeeded by men

north of that line."⁵⁰

Others grumbled about Chase's nomination, raising questions about his integrity and ability. "It seems to me," observed New Hampshire's William Plumer, "that many of the officers who were first appointed under the authority of the federal government were men of superior talents to those of their successors." Even John Adams commented that Chase's "Character has a Mist about it of suspicion and Impurity." Republican papers argued Chase secured his nomination by supporting the Jay Treaty, claiming "this will wash an antifederalist whiter than snow."⁵¹

For George Washington the controversy over Rutledge was just another disappointment during his second term. He had found it difficult to secure replacements for several positions, including the portfolios of the state and war departments, over the past year. When one disappointed applicant for a Justiceship imprudently inquired as to why he had failed of selection, the President lashed back that while it was "highly probable" that he had made "injudicious nominations," he defied anyone "to ascribe partiality, or interested motives to any of my nominations; ___ or omissions, to prejudice or dislike."⁵²

Yet it was obvious the President's recent choices, as James Madison noted, "are to a man of the treaty party."⁵³ Indeed, Washington's selections had always been shaped in part by political considerations. What changed was what qualified as a political consideration. Residence and support of the new republic had been sufficient in 1789. By 1795, with the emergence of the Federalist/Republican split, partisan affiliation had been added as an important factor in assessing the qualifications of potential nominees. Indeed, as the Rutledge defeat suggested, it could override other considerations and lead to the rejection of a presidential nominee. Nor did Washington maintain his initial adherence to certain standards. He did not consider Samuel Chase for the Court in 1789; by 1795, finding it difficult to make appointments, he overlooked his previous reservations, assured by Chase's new-found Federalism. In short, while merit has always played an important role in the nominations to the high bench it has not been the sole factor in choosing Supreme Court Justices. However the Framers may have intended to distance politics from the selection process, its influence can not be denied.



Samuel Chase, the only Justice to stand for an impeachment trial, was nominated to replace John Blair on the Court. Considered unreliable before, his staunch Federalist stand enabled Washington to place him on the Court.

Endnotes

¹ The best study of the nomination and confirmation process is Henry J. Abraham, *Justices and Presidents: A Political History of Appointments to the Supreme Court*, 3rd edition (New York: Oxford University Press, 1992). A previous examination of Washington's Supreme Court appointments is to be found in James R. Perry, "Supreme Court Appointments, 1789-1801: Criteria, Presidential Style, and the Press of Events," *Journal of the Early Republic* 6 (Winter, 1986), 371-410.

² Washington to Jay, October 5, 1789, in Maeva Marcus and James R. Perry, eds., *The Documentary History of the Supreme Court of the United States, 1789-1800*, (New York: Columbia University Press, 1985), I: 11 (hereafter *DHSC*); Washington to Rutledge, September 30, 1789, *ibid.*, I: 21.

³ Washington to John Rutledge, September 29 and 30, 1789, *ibid.*, I: 20, 21.

⁴ Lincoln to Washington, July 18, 1789, in William W. Abbot, et al., eds., *The Papers of George Washington: Presidential Series*, (Charlottesville: The University of Virginia Press, 1987-1990), III: 235-36.

⁵ Adams to Stephen Higginson, September 21, 1789, *DHSC*, I: 663.

⁶ Philadelphia *Federal Gazette*, February 21, March 9, 1789, *ibid.*, I: 606, 609; Dana to Adams, June 26, 1789, *ibid.*, I: 627-28.

⁷ Edmund Randolph to James Madison, July 19, 1789, *ibid.*, I: 635.

⁸ Charles Warren, *The Supreme Court in United States History*, 3 vols. (Boston: Little, Brown, 1924), I: 39.

⁹ See Francis Dana to John Adams, July 31, 1789, *DHSC* I: 641; James Bowdoin to John Adams, August 10, 1789, *ibid.*, I: 647; Stephen Higginson to John Adams, August 10, 1789, *ibid.*, 647-48; John Adams to William Tudor, September 18, 1789, *ibid.*, I: 662; Perry, "Supreme Court Appointments," 375-79, surveys local political conditions.

¹⁰ Ames to Lowell, July 28, 1789, *DHSC*, I: 640-41.

¹¹ Washington to Madison, August 9, 1789, *ibid.*, I: 647.

¹² Adams to William Tudor, September 18, 1789, *ibid.*, I: 662.

¹³ Washington to Edmund Pendleton, March 17, 1794, *ibid.*, I: 746.

¹⁴ Lincoln to Knox, July 18, 1789, and to Washington, July 18, 1789, *ibid.*, I: 633-34; Rush to Tench Coxe, February 26, 1789, and to John Adams, April 22, 1789, *ibid.*, I: 606-7, 613-14.

¹⁵ Lowell to John Adams, August 7, 1789, *ibid.*, I: 642-43.

¹⁶ Griffin to Washington, July 10, 1789, and Chase to Washington, September 3, 1789, in Abbot, *Papers of Washington: Presidential Series*, III: 167-68, 597.

¹⁷ Wilson to Washington, April 21, 1789, *DHSC* I: 612-13. See also Thomas McKean to Washington, April 27, 1789, and Arthur Lee to Washington, May 21, 1789, *ibid.*, 614-16, 620.

¹⁸ *Ibid.*, I: 48. Later historians have wondered whether Wilson's unstable finances contributed to Washington's decision not to name Wilson Chief Justice. If so, the decision was wise, for Wilson's investments in land speculation proved disastrous, and Wilson did not always stay one step ahead of his creditors, landing twice in jail.

¹⁹ Izard to Edward Rutledge, September 26, 1789, *ibid.*, I: 668; Humphreys to Washington, October 28, 1789, *ibid.*, I: 673; see Kenneth R. Bowling and Helen E. Veit, eds., *The Diary of William Maclay and Other Notes on Senate Debates* V. IX *Documentary History of the First Federal Congress of the United States of America* (Baltimore: The Johns Hopkins University Press, 1988), 161-68 (September 24-26, 1789).

²⁰ Donald Jackson and Dorothy Twohig, eds., *The Diaries of George Washington*, 6 vols. (Charlottesville: The University of Virginia Press, 1976-1979), VI: 28-29.

²¹ William L. Smith to Edward Rutledge, February 13, 1792, and Benjamin Bourne to [William Channing], February 21, 1792, *DHSC*, I: 732-33; see Warren, *The Supreme Court in United States History*, I: 85-90, and Julius Goebel, Jr., *History of the Supreme Court of the United States, I: Antecedents and Beginnings to 1801* (New York: Macmillan, 1971), 554-69.

²² Read to Washington, February 10, 1791; Nathaniel Pendleton to James Iredell, March 5, 1791; Nathaniel Pendleton to [Henry Knox?], March 5, 1791, all in *DHSC*, I: 717-21.

²³ Charles Pinckney to George Washington, March 8, 1791, *ibid.*, I: 724.

²⁴ Washington to C. C. Pinckney and Edward Rutledge, May 24, 1791, and Pinckney and Rutledge to Washington, June 12, 1791, *ibid.*, I: 725-29.

²⁵ Douglas Southall Freeman, *George Washington: A Biography*, 7 vols. (New York: Scribners, 1948-1957), III: 436-37.

²⁶ Johnson to Washington, January 16, 1793, *DHSC* I: 80; see also Johnson to James Wilson, March 1, 1792, *ibid.*, I: 733-34.

²⁷ Randolph to Washington, February 18, 1793, *ibid.*, I: 738-39.

²⁸ James Madison, *Notes of Debates in the Federal Convention of 1787* (New York: Norton, 1966), 345 (July 21, 1787).

²⁹ William Bradford to Alexander Hamilton, July 2, 1795, and Edmund Randolph to Washington, July 7, 1795, *DHSC*, I: 760-62.

³⁰ Rutledge to Washington, June 12, 1795, *ibid.*, I: 94-95; Washington to Rutledge, July 1, 1795, *ibid.*, I: 96-97; Abraham, *Justices and Presidents*, 73.

³¹ See *DHSC*, I: 17; Rutledge's speech as reported in the *South-Carolina State Gazette*, July 17, 1795, *ibid.*, I: 765-67.

³² William Bradford, Jr., to Alexander Hamilton, August 4, 1795, and Oliver Wolcott to Hamilton, July 30, 1795, *ibid.*, I: 774-75.

³³ Quoted in Warren, *The Supreme Court in United States History*, I: 130.

³⁴ Edmund Randolph to Washington, July 25,

1795, *DHSC*, I: 772.

³⁵ [Alexander Hamilton], "Camillus," No. 5, August 5, 1795, *ibid.*, I: 776-77.

³⁶ Randolph to Washington, July 7, 1795, and August 5, 1795, *ibid.*, I: 761-62, 776. Perry, "Supreme Court Appointments," 388, draws a different connection between Randolph and Rutledge, asserting that Washington extended the commission to Rutledge to avoid adding to the expected fallout over Randolph's removal. But Perry adduces no evidence to support his argument.

³⁷ Boston *Columbian Centinel*, August 26, 1795, and Philadelphia *Aurora*, October 20, 1795, *DHSC*, I: 784-86, 804-5; Boston *Columbian Centinel*, August 28, 1795, *ibid.*, I: 789-92; Boston *Independent Chronicle*, August 10, 1795, *ibid.*, I: 778. Boston *Independent Chronicle*, August 27, 1795, and Philadelphia *Aurora*, September 1, 1795, *ibid.*, I: 787-88, 794.

³⁸ Boston *Independent Chronicle*, August 17, 1795, *ibid.*, I: 783; Boston *Columbian Centinel*, August 26, 1795, *ibid.*, I: 784-86; Oliver Wolcott, Sr., to Oliver Wolcott, Jr., November 23, 1795, and Henry Sherburne to Benjamin Bourne, January 5, 1796, *ibid.*, I: 808, 823.

³⁹ Jeremiah Smith to William Plumer, December 26, 1795, *ibid.*, I: 812; John Adams to Abigail Adams, December 17, 1795, *ibid.*, I: 813-14.

⁴⁰ Philadelphia *Aurora*, January 2, 1796, *ibid.*, I: 823; Jefferson to William Branch Giles, December 31, 1795, *ibid.*, I: 821.

⁴¹ A record of the vote is in *ibid.*, I: 99; party identifications have been derived from an examination of the lists provided in John F. Hoadley, *Origins of American Political Parties, 1789-1803* (Lexington: The University Press of Kentucky, 1986), 216-17.

⁴² Boston *Independent Chronicle*, December 31, 1795, *DHSC*, I: 822-23; Philadelphia *City Gazette*, January 9, 1796, *ibid.*, I: 826-27. Perry, "Supreme Court Appointments," 391, offers a different view, claiming that "the Senate's rejection of Rutledge was influenced by concern about his fitness for office more than by political considerations." If so, it seems quite remarkable that all but one Federalist displayed concern for Rutledge's fitness while all Republicans evinced no such concerns.

⁴³ Rutledge to Washington, December 28, 1795, *ibid.*, I: 100. Whether Rutledge had learned of the Senate's action at the time he resigned is unknown.

⁴⁴ William Read to Jacob Read, December 29, 1795, *ibid.*, I: 820-21.

⁴⁵ Henry Lee to Patrick Henry, December 26, 1795; Henry Lee to Washington, December 26, 1795, *ibid.*, I: 818-19.

⁴⁶ Cushing to Washington, February 2, 1796, *ibid.*, I: 103.

⁴⁷ Jeremiah Smith to William Plumer, March 5, 1796, *ibid.*, I: 843.

⁴⁸ Washington to Hamilton, October 29, 1795, *ibid.*, I: 805.

⁴⁹ McHenry to Washington, June 14, 1795; Murray to McHenry, December 24, 1795; Murray to Washington, January 24, 1796, *ibid.*, I: 757, 817, 111.

⁵⁰ Henry Tazewell to James Monroe, May 19,

1796, *ibid.*, I: 848.

⁵¹ Plumer to Jeremiah Smith, February 19, 1796, *ibid.*, I: 838-39; John Adams to Abigail Adams, February 6, 1796, *ibid.*, I: 835; Philadelphia *Aurora*, February 2, 1796, *ibid.*, I: 835. Perry, "Supreme Court Nominations," 395-96, suggests that Chase's physical proximity to Philadelphia may have influenced Washington's decision, since the President desired a full Court; also, Chase's earlier Antifederalist ties might shield Washington from charges of partisanship. He offers no proof for the former statement, and Chase, regardless of his position in 1789, had by the mid-1790s become a renowned Federalist, as Republican newspaper commentary makes clear.

⁵² Washington to Cyrus Griffin, June 8, 1796, *DHSC*, I: 852-53.

⁵³ James Madison to James Monroe, February 26, 1796, *ibid.*, I: 840.

Robert H. Jackson: “Solicitor General for Life”

E. Barrett Prettyman, Jr.

Almost ten years ago I set about to write an article about the Solicitor Generalship of Robert H. Jackson, spurred on in part by the fact that some of those who had known and worked with him were elderly or in ill health. I conducted a number of interviews on tape and wrote a rough first draft, and then the exigencies of the practice drew me from the task. I recently had occasion to complete what was begun so long ago.

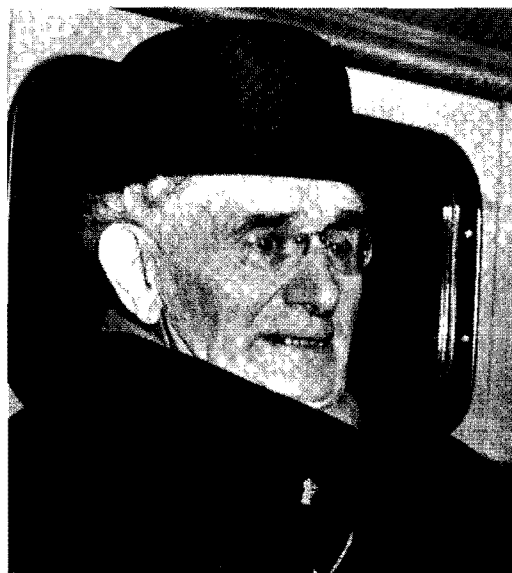
On one Tuesday in 1939, then Solicitor General Robert H. Jackson reargued two difficult cases in the United States Supreme Court that had been argued the previous Term; two days later, he reargued a third case; the following Monday and Tuesday he argued a fourth case; that same Tuesday and on Wednesday, a fifth case; Friday a sixth case, and the following Monday a seventh case!

Thus, at a time when each side was blessed with one hour or longer, he argued seven cases in our highest court within ten working days. For those who practice regularly before the Supreme Court and are familiar with the preparation and emotional input required for even one argument, Jackson's feat was, to say the least, impressive.

Nor were back-to-back arguments a novelty for him. On eight other occasions — as either Assistant Attorney General, Solicitor General, or Attorney General — he argued two or three cases within a single week, and on three separate occa-

sions he argued two or three cases in one day. During the 1938 Term of Court alone, he presented a total of eighteen arguments or rearguments.

But it was skill and not energy alone that led Justice Louis Brandeis to express his view that Jackson should have been “Solicitor General for life.”² This was not a back-handed way of slight-



Justice Louis Brandeis riding in a car to the Court shortly before his retirement. Brandeis did not live long enough to see the man he believed should be “Solicitor General for life” take his seat on the Court.



Robert Jackson as Assistant Attorney General in 1938, shortly before being appointed Solicitor General.

ing Jackson's subsequent achievements at Nuremberg and on the Supreme Court itself, because Brandeis died in 1941 before they had taken place. The comment, rather, was simply a complimentary way of saying that if ever a job sought out the man and the man found his proper niche, it was so with the Solicitor Generalship and Robert Jackson.

He was nominated for the post by President Franklin Roosevelt on January 27, 1938 and took his oath on March 5, 1938. He had previously served as General Counsel of the Internal Revenue Service, as Assistant Attorney General in charge of the Tax Division, and in a similar position at the Antitrust Division. When he became Solicitor General, Jackson had already argued fourteen cases in the Supreme Court, all of them for the federal government. Ten of these were tax cases, two involved securities, one dealt with federal trade, and one was an antitrust case. He had won ten of the fourteen. One argument had been split with Solicitor General, and later Justice, Stanley Reed, two with Charles E. Wyzanski,

Jr.— later a United States District Court judge — and one with Benjamin V. Cohen. His most important cases had been those upholding the constitutionality of Social Security taxes³ and of the Public Utility Holding Company Act of 1935.⁴

His first case as Solicitor General was the famous *Morgan v. United States*, 304 U.S. 1 (1938), which was heard only weeks after he took office and which he lost (but won in later stages) because the Secretary of Agriculture had failed to afford an applicant in a rate proceeding a full and fair hearing. Thereafter, Jackson made twenty-four additional arguments in twenty-one cases as Solicitor General (three were rearguments) between April 1938 and January 1940. He won sixteen of the twenty-two. Ten of his arguments appear in 307 U.S. alone. None of his cases involved criminal law; the subject matter, instead, ranged from antitrust, federal procedure, immigration and tax to bankruptcy and communications. He argued the constitutionality of the Tobacco Inspection Act of 1935,⁵ the Agricultural Adjustment Act of 1938,⁶ and the Revenue Act of 1936,⁷ and in each instance the Act was upheld. In one case he split the argument with Wendell Berge, in another with Philip E. Buck, and in two others with Robert K. McConaughy.

Two cases were argued after his name was sent to the Senate as Attorney General on January 4, 1940, and before he took the oath on January 18, 1940. Finally, unlike his predecessor, Frank Murphy, who never appeared before the Supreme Court, Jackson argued three cases as Attorney General — one involving the constitutionality of the Bituminous Coal Conservation Act of 1937⁸ — and he won all three.

What kind of a Solicitor General was he to work for? On this score, all of those with whom I spoke were in agreement. Largely because he trusted his assistants and left them alone unless they sought help, he was extremely well liked. Edward J. Ennis, who first met Jackson in an antitrust case when Ennis was an Assistant United States Attorney in New York and who later worked in the Solicitor General's office, remembered Jackson's great courtesy and informality.⁹ He recalled that Jackson was very free and democratic with his staff, often walking across the hall and sitting on the corner of some assistant's desk to chat about a change he wanted in a brief. But once the briefs were completed, Jackson did not

discuss how he was going to present oral argument. He felt that with his experience, he did not need "a pre-presentation ... to an audience to get the effect." He was, after all, "as agile mentally as any member of the Court."¹⁰

That he never lacked confidence is illustrated by the fact that few, if any, Solicitors General were more willing to confess error in criminal matters and readier to turn down agencies seeking Supreme Court review of weak cases.¹¹ And when a Justice Department staffer attempted to file an *amicus curiae* brief in *Currin v. Wallace*, *supra*, claiming he had an interest as a farmer separate from his role as a Justice employee, Jackson turned him down in a two-page letter, explaining that the staffer's dual role would have to be revealed to the Court but that, in any event, Jackson's own voice would be the only one speaking for the Department. His confidence is remarkable when one recalls he lacked formal education, never having gone to college and having attended only one year of law school.

Warner W. Gardner, who was First Assistant during Jackson's entire term as Solicitor General and who believed he had heard all of his arguments, thought Jackson's relative disdain for the routine of the Solicitor General's office reflected not so much an indifference to the job as it did the

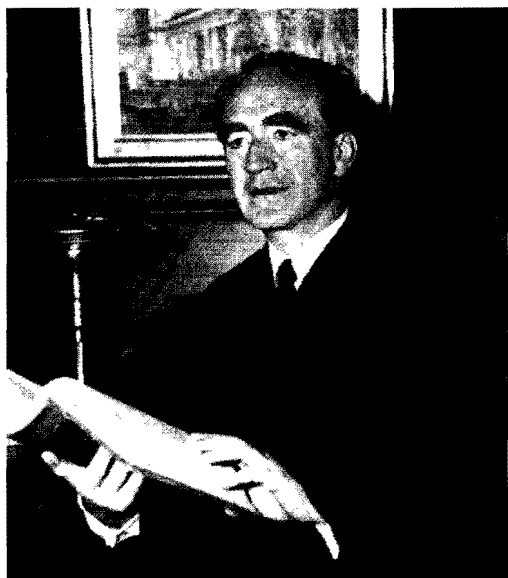
demands being put upon him increasingly by the White House.¹² This in turn was due to the fact that Frank Murphy as Attorney General was "not well liked, either in the White House or in the Department of Justice, and ... they would turn to Jackson rather than Murphy."¹³ Jackson himself said in his oral history that "Sometimes the President would refer directly to me matters that in good administration ought to have been referred to the Attorney General."¹⁴ Part of his disdain for routine, as became clear when he was elevated to Attorney General, was probably due to the fact that Jackson was more of a lawyer than an administrator.¹⁵

In any event, Jackson's self-observation that he was "by temperament an individualist"¹⁶ was borne out by his operation of the Solicitor General's office. He worked independently and largely allowed his assistants to go their own way. A result, said one of them, Paul A. Freund, was that Jackson let his assistants into his confidence much less than Solicitors General Reed or Charles Fahy, but this was part of the attraction. "Of course, if you were going to split the argument, it was a problem."¹⁷

Gardner confirmed that Jackson never held a moot court and seldom consulted others about an argument. No digest was ever prepared for him; he read all relevant cases himself, and with one exception, he also read the record. The one exception occurred when he was walking with Gardner in the hallway beside the courtroom, waiting for his case to be called, and he commented that it was certainly a comfort to know Gardner was familiar with the record in the case because for once he had been unable to get into it. Gardner replied that it should be no comfort at all because he had assumed Jackson had done his usual thorough job and he, Gardner, had not even looked at the record. The case was called, and, fortunately for both, not a single question was asked about the record.¹⁸

Wyzanski pointed out that Jackson never really had a staff. "It may be that a secretary or two moved with him from place to place, but no first-class assistant. He never had a team nor did he ever evoke that kind of team loyalty in spite of the admiration of everybody who played with him had for him as a player."¹⁹

Nevertheless, Gardner wrote that "we are not often in this life blessed with a superior who interferes only upon request, and who has available a prompt and completely satisfactory solu-



Frank Murphy was Attorney General while Robert Jackson served as Solicitor General. They later served together for eight years on the Supreme Court.



Robert Jackson gardening outside his Washington area home. He continued his busy schedule after joining the Court but managed to steal time to relax around his home.

tion when he is requested to advise."²⁰ Joseph A. Fanelli, another assistant, summed up the feelings of those in the Solicitor General's office when he said that Jackson "was a wonderful boss and one hell of a nice guy and a good lawyer."²¹ Charles Horsky, who also worked with him, added he never had a better time in his life than when working under Jackson in the Solicitor General's office.²²

Jackson's style once he got to his feet was "slightly more than conversational," but not dramatic, according to Gardner. He carried a black notebook containing both key phrases or sentences, as well as citations. Jackson's method of presentation, while not easy to characterize, amounted to a "fairly ruthless pruning of the redundant, accumulated arguments and points, going to some pains to present it in a form, though not in substance, different from the brief." This

was based on a view that the Justices would have read the brief, and to avoid tedium he would have to go at it in a different way. Gardner was of the impression that, with the periodic exception of Justice Harlan F. Stone, the Justices had in fact read the briefs.²³

Jackson himself stated that with the possible exception of Chief Justice Hughes in the *Public Utility Holding Company Act* case, he never directed his argument to any particular member of the Court; if he had, he would have been concerned about losing others.²⁴ In addition, he seldom dealt with precedent. He said that he preferred to rely on the Constitution and the good sense of the Justices,²⁵ but part of the reason had to be that so many cases in the constitutional area were against him when he took over the job.

Horsky described Jackson on his feet as quiet, secure, confident, and disarmingly straightforward. He thoroughly understood his cases. He was never rattled, but, on the other hand, he did not have a lot of flair. Nor was he as eloquent as during his opening and closing arguments at Nuremberg. The reason, of course, was that at Nuremberg Jackson had a world-wide audience and was arguing for the benefit of history, whereas before the Supreme Court his task as an advocate was narrower, more directed, and he had to use logic to persuade only five persons. That was why, before the Court, he went straight to the point with a minimum of irrelevant or extraneous things to say. He was both trusted and appreciated by the Court — a large plus.²⁶

Ennis agreed that the Solicitor General was enormously effective and persuasive. While Jackson "came on much stronger" than Fahy, who was "laid-back and softspoken and careful" as Solicitor General, Jackson was still very relaxed, always "in great command." He was dramatic "only in spots." Jackson "had the feeling that with an experienced audience such as the Supreme Court bench, drama should be reserved for high points of the argument, and he would not attempt to carry the whole argument at that level."²⁷

Wyzanski pointed out that Jackson "could pick up anything, of course, in a minute and could give it a turn or twist that maybe the originator did not have in mind but nonetheless the originator recognized was the heart and secret of the idea he had. That I think Bob had to perfection. If you ask me whether Bob was a profound thinker about law

or anything else, I think that you can't mention him with Holmes...."²⁸

Wyzanski added that "... Jackson had that most precious quality of being very fast on his feet and in his tongue and able to answer something at least superficially soundly in a way that accounted for a great deal. His, if you like, 'jauntiness,' to use Felix Frankfurter's word about him, was a very useful thing in a lawyer."²⁹

Jackson, he said, knew "the way you beat Goliath.... You pick out what is really simple and direct and with a little shine and humor to it and hit the guy and that will be remembered.... Striking for the jugular is done with a little stone, not with a battering ram.... He might not have put it that way. He would have put it a wittier way. He really had a genius I think for seeing the point and sharpening it in such a way that its inside was never forgotten.... You couldn't have left an argument which Bob Jackson made without remembering at least one thing he said."³⁰

This is particularly interesting because President Roosevelt is supposed to have told Secretary of the Interior Harold Ickes that while Jackson could make a magnificent speech, he was "too much of a gentleman" and lacked "some fundamental fighting quality."³¹ Another writer described Jackson this way: "Among his personal virtues were sociability, candor, eloquence, and wit; his vices were pride, jealousy, and — although it is not usually so considered today — ambition."³²

Jackson was justly famous for his quick wit — as exemplified by his famous Alfalfa Club speech. "He was a master of the paradox; he had a great love of alliteration and his antithetical statements were gems."³³ But as Horsky and others recalled, Jackson only on rare occasions used this wit in his Supreme Court arguments. He undoubtedly knew, as others have learned to their dismay, that wit can be a very chancy gambit in the highest court.

As Benjamin Cohen put it, Jackson "talked clearly and concisely and didn't seem to hunt for the word or the answer.... He had a pleasant way about him — dignified but not high-hat." Cohen added as an aside that on a personal level outside the courtroom, Jackson "could be rather difficult if he didn't like you — particularly if he had reason not to."³⁴

Freund recalled that Jackson wore the standard attire and "cut a handsome figure.... He had an easy style.... I don't remember that he was lavish in his gestures. I think he did use his hands occasionally for emphasis — perhaps coming down on the podium.... His voice was mellifluous; it was an easy voice to listen to. [George Wharton] Pepper in his elder years was for my tastes too melodramatic — that famous close in the *AAA* case which apparently gripped [Justice] Roberts seemed to me a bit hamish."³⁵

Jackson was deferential but avoided either extreme of obsequiousness or treating a question as if stupidity prompted it. He himself said that the advocate should "[b]e respectful, of course, but also be self-respectful, and neither disparage yourself nor flatter the Justices."³⁶

Freund felt that Jackson "seemed to me to have such rapport with the Court that he was talking to them really almost as a colleague."

In this regard, "he was like [John Lord] O'Brien in one case, who, when asked a question that went to the heart of the matter and was

obviously a sensitive one, replied something like this: 'Mr. Justice, I have given that question a great deal of thought. I have been troubled by it, and I finally reached a conclusion that satisfies me, and I wonder if it will satisfy you, and it is this....'" The Court, said Freund, was "just eating it up."³⁷

Freund thought that Hughes as well as Brandeis admired Jackson greatly, and that Roberts thought well of him. Butler, on the other hand, could be a very tough cross examiner, particularly about some of the New Deal measures, which "made him purple in the face."³⁸

This observation is borne out by two of Jackson's early arguments, made when he was Assistant Attorney General in charge of the Anti-trust Division, which were transcribed and appear *in toto* in Senate Documents.³⁹ While they do not directly relate to his performance as Solicitor General, they do, in the absence of transcripts while he held that post, give some measure of his style and shed light on the kinds of questions asked of him. In the *Steward* case, he and Wyzanski argued for respondent in favor of the constitutionality of key provisions of the Social Security Act, and in *Davis*, he gave the opening argument for

*Robert Jackson was
"too much of a
gentleman."*

petitioner and Wyzanski presented the rebuttal, arguing for the constitutionality of the old age provisions of the same Act. Both cases confirm Freund's recollection that Justice Butler was Jackson's nemesis on the Court. Butler interrupted Jackson in the two cases seventy-nine times — fifteen more than the rest of the Court combined.⁴⁰

In *Steward*, Butler repeatedly attempted to get Jackson to draw lines — to state what limits there were on Congress' power to impose conditions on state action.⁴¹ Jackson demurred each time. As he said at one juncture: "I am directing my point to the fact that the conditions laid down in this law are good, and that is quite as far as I want to undertake to go in the time that is left to me."⁴² At another point, when asked by Butler to spell out any limit on Congress' power to tax employers in a State, Jackson replied, "I would not want to suggest any. I would not want to suggest that there is not any."⁴³ He explained his reasoning as follows: "It seems to me the Court is always very careful to avoid trying to lay down just where the limitations are, and I do not think that I would want to undertake

to do what the Court refrains from doing."⁴⁴ He also did not hesitate to disagree with Butler.⁴⁵

At the same time, he displayed a disarming candor about the implications of what he was arguing. Thus:

When I first read these conditions I was impressed, as you may well be, that they did not leave much for the State to do. I was impressed, as I think you have been, that these conditions prescribed pretty nearly the field of action; and it is only when you contemplate what the field of action in these situations really is that you will find that these conditions are the minimum requirements of [a] good, safe, operating, workable unemployment compensation act, without which no taxpayer ought to be entitled to a credit.⁴⁶

In both cases he made eloquent presentations relating to the plight of the unemployed and those under old-age disabilities.⁴⁷ In light of contempo-



In both *Steward* and *Davis*, Robert Jackson argued the constitutionality of the old age provision of the Social Security Act. The plight of the unemployed and elderly during the Depression moved him and he worked to see that others, like the women pictured above, would not have to suffer in the future.

rary developments, it is particularly interesting to note that both Wyzanski and Jackson went out of their way in *Steward* to make clear that the Act was geared to stop the so-called "cracker-barrel loafer" from collecting money.⁴⁸ Also interesting in light of more recent Supreme Court case law was Jackson's position, when a serious question about the plaintiff's standing was raised in *Davis*, that the Government could and did waive any objection it might have on standing grounds.⁴⁹

The closest he came to humor in either case was when he said, in *Davis*, that old-age benefits could have been financed by a number of methods, including Congress' simply "printing the money," if Congress were "so disposed,"⁵⁰ and when he said in the same case: If the practice of employers moving employees from one locality to another "be exempt from taxation under the Federal Constitution, then there is an unsuspected and a metaphysical limitation on the taxing clause that has taken 150 years to discover."⁵¹ By and large, however, there

was little byplay or humor in these cases; the arguments were complex, detailed, and even grim.

Wyzanski himself had interesting recollections of the two arguments. Solicitor General Reed had assigned Jackson and Wyzanski joint responsibility for all litigation, in whatever court, involving the Social Security Act. The *Davis* case began in Boston before United States District Court Judge George C. Sweeney, who insisted that the two men meet with him prior to trial without any one else present — a development that Wyzanski regarded as "shocking."⁵² The judge pointed out that the case had been brought by a former partner of Justice Brandeis who might have been retained for the purpose of disqualifying the Justice. Did Jackson really want the hearing to be expedited? Jackson — who apparently resented the suggestion as much as Wyzanski did — replied that he did indeed want a prompt hearing and the factor mentioned by the judge would play no part in the case.⁵³

The matter soon reached the Supreme Court, and the brief was worked on by Wyzanski, Horsky

and Abe Fortas. Although Jackson had suggested that they consult with Thurman W. Arnold, a former "Yale professor," and Reed had wanted input from Edward S. Corwin, a "Princeton professor," Wyzanski thought they did not have "any time for a Princeton professor any more than we had for a Yale professor." The three proceeded on their own. They were stunned when they tried to talk to Jackson about the case, and he replied, "Well, I think it would be better if the Court had two different views. I'm going to go about it my way and you go about it your way."⁵⁴

Right up until the time of the argument, Wyzanski had not the slightest idea what Jackson

was going to say. Jackson was "quick as a whip, faster than any of us, but he could not have had the background or precise knowledge of the case. Nonetheless, when he made the argument, I would say the Court listened with great attention and surely with none of the disapproval that I got from my os-

tentatious parade of statistics which so irritated [Justices] McReynolds and Butler."⁵⁵

Wyzanski thought that, "taken as a whole, Bob Jackson's argument while good was not a great argument compared with what he was capable of doing later and what he did later. I don't think that at that stage Cardozo would have said what Brandeis later said, that Jackson should be Solicitor General for life."⁵⁶

Jackson's independence followed through after his arguments were completed as well as beforehand. Despite his famous remark about the three arguments every advocate gives (the one he prepares, the one he actually makes, and the one he thinks of after going to bed that night⁵⁷), Freund recalls no postmortems with Jackson.⁵⁸ Thus, the Solicitor General consulted others in regard to the argument itself neither before it was given nor after it was over.⁵⁹

How good an advocate was Jackson relative to the other major figures of his day? On this issue, his contemporaries were not in total agreement.

On a scale of one to ten, Horsky rated him an

*Congress could pay
for Social Security
simply by "printing
more money."*



George Wharton Pepper was ranked as one of the top legal advocates of his day. Others rated highly were Robert Jackson and John W. Davis.

eight or nine, with only Pepper or John W. Davis rating a ten.⁶⁰ Insofar as dramatics were concerned, Jackson was, in Gardner's view, "far inferior to that brilliant actor, George Wharton Pepper.... Pepper one day when he was arguing the validity of a patent on a washing machine — a more trivial and unimportant bit of argument than the Supreme Court was likely to hear — held me breathless." Jackson "had an appearance of spontaneity, which was false; he had worked on the argument long and hard. He had worked over his clear, unassuming conversational presentation quite hard."⁶¹

Gardner agreed with Horsky that he had never seen Jackson rattled but disagreed about Pepper. "Pepper was an intellectual and theatrical performer of the first order, but I don't think he had the same mastery of the case as Jackson had." In one case in Maryland with which Gardner was familiar, "Pepper made the mistake of being patronizing...; that is a mistake Jackson would have never made."⁶²

Paul Freund served under four Solicitors General, and while they all had differing virtues,

he most enjoyed listening to Jackson. Freund explained that an assistant does not always appreciate hearing someone else argue from a brief the assistant has worked on — it is easy to think of answers from the safe vantage point of counsel table — "but I was really fascinated by his oral arguments, because they did not slavishly follow the brief. He had reconstructed, reorganized the arguments for his own purposes.... I may say parenthetically that I had the same pleasure when I clerked for Brandeis, listening to him give an oral opinion. He did not read from the written opinion and generally reorganized it. I thought then that he must have been a terribly effective oral advocate. Well, I saw that in Robert Jackson."⁶³ Robert L. Stern, who worked on the briefs in two cases that Jackson argued, agreed. Stern was particularly impressed because Jackson in both instances had had only three or four days to prepare.⁶⁴

Part of the pleasure of listening to Jackson, Freund said, was his "gift of phrase." He had "an Elizabethan delight in the sword playing of wit." Davis, said Freund, had some of Jackson's characteristics: a gift of words and an ability to absorb the Court's attention. The Justices "rarely interrupted Davis; they seemed to enjoy him and knew he would come around to their point if they let him go. You know that Hugo Black for all of his confrontations with Bob Jackson said that the two best advocates he had heard were Jackson and Davis.... I would add John Lord O'Brien, who had the confidence of the Court. He looked like a bishop." Jackson was "inferior to none of them at his best, and he had a sharp analytical mind as well.... In that respect, he certainly compared well with George Wharton Pepper."⁶⁵

Fanelli heard Jackson argue only one case, *Electric Bond and Share Co. v. SEC*, which involved the constitutionality of the Public Utility Holding Company Act of 1935, and the argument was divided between Jackson and Cohen. Jackson's argument, for he was essentially "a very gentle man," was proper and courtly and good," but "the brilliant argument in the case was in my opinion made by his colleague Ben Cohen.... The division of an argument is ordinarily a bad error. But Cohen spoke second and, of course, had the advantage of hearing Jackson's argument and of hearing the questions. He directed himself to a fine knitting and molding process that made a

whole of the argument.... Between the two of them, they won a great victory."⁶⁶

Wyzanski thought that Pepper "really knew law. And, he not only knew it, but he was not burdened by his knowledge. I mean he was graceful.... He was just wonderful to listen to. You didn't know whether you were going to hear *Gilbert & Sullivan* or *Marbury v. Madison*. Whatever moment seemed to be appropriate came out." On the other hand, said Wyzanski, "there never was anybody in whom the Court took more delight" than Jackson. "I doubt very much whether he was ever as good technically as William D. Mitchell, who I think must have been the greatest advocate in our lifetime — or my lifetime. Probably was. I'm sure that Bob Jackson was a better Solicitor General than John W. Davis. Mr. Justice Stone said to me once, ... 'John W. Davis paints a beautiful picture, but George Wharton Pepper wrestles with the problem which disturbs the Court.'"⁶⁷

Erwin Griswold, later Solicitor General, heard Jackson argue several cases. He thought that Davis was "the smoothest and most effective



Dean Erwin Griswold, Chairman of the Supreme Court Historical Society and former Solicitor General, thought John W. Davis was the "smoothest" advocate he saw argue before the Court and ranked Jackson second.

advocate" he ever saw before the Supreme Court, and that competing in second place were Jackson, Newton D. Baker and William D. Mitchell, in no particular order. Parenthetically, Griswold noted that the greatest argument he ever heard was in *United States v. Smith*, 286 U.S. 6 (1932), in which Davis, Pepper and Mitchell all argued.⁶⁸

After only a year and ten months as Solicitor General and one-and-a-half years as Attorney General, Jackson took his seat on the Court he had so often appeared before. He had made forty-two arguments in all,⁶⁹ eleven of which were extended over into two days and one into three days. He had appeared before fourteen Justices, with six of whom — Roberts, Black, Reed, Frankfurter, Douglas and Murphy — he would later serve.

As a Justice, Jackson advanced and consolidated many of the views he had espoused as Solicitor General — particularly as to the federal power under the Commerce Clause to break down interstate barriers.⁷⁰ Writing for the Court, he cited with approval eleven of his argued cases in sixteen different opinions.⁷¹ He also joined sixty-eight majority opinions which cited with approval eighteen of the cases he had argued.⁷² In dissent, he cited his own cases with approval in only five instances and joined in others' dissents relying on his argued cases in only three instances — an indication of how the cases he had argued continued as established law for an appreciable period of time.

Although Jackson himself called his months at Nuremberg "well spent in the most important, enduring, and constructive work of my life,"⁷³ he described the Solicitor General's office as offering "the greatest professional opportunity and intellectual satisfaction of any in all the Government"⁷⁴ and his term as Solicitor General as "the most enjoyable period of my whole official life."⁷⁵ This insight is reflected in every aspect of his work in that most influential post. He not only carried out his heavy duties as Solicitor General but fended off Congressional charges of Communist sympathies⁷⁶, dabbled in foreign policy decisions,⁷⁷ made recommendations for Supreme Court appointments,⁷⁸ and wrote a book, published after he became Attorney General, dealing with the Administration's efforts to change the course of Supreme Court rulings in the 1930s.⁷⁹

He also gave speeches — many of them. His papers at the Library of Congress include forty-six



Robert Jackson gave numerous speeches and public addresses while Solicitor General and after. Here he is delivering a radio address after he joined the Court.

different speeches he gave during his less than two years as Solicitor General. Over one six-day period, he spoke on five occasions. Nor were all of these speeches strictly professional. Despite his expressed view that the Solicitor General's Office "was removed from political activity by tradition,"⁸⁰ he gave numerous purely political speeches as Solicitor General.

Robert H. Jackson was a unique, independent, proud, urbane, hard-working, personable, well-respected and ambitious Solicitor General. Whether the best or not, he was an advocate of the first rank.

Endnotes

¹ *Coleman v. Miller*, 307 U.S. 433 (1939); *Chandler v. Wise*, 307 U.S. 474 (1939); *United States v. Morgan*, 307 U.S. 183 (1939); *United States v. Rock Royal Co-operative, Inc.*, 307 U.S. 533 (1939); *H.P. Hood & Sons, Inc. v. United States*, 307 U.S. 588 (1939); *O'Malley v. Woodrough*, 307 U.S. 277 (1939); *William Jameson & Co. v. Morgenthau*, 307 U.S. 171

(1939).

² According to one account, Justice Brandeis made the remark directly to the President. Philip B. Kurland, "Robert H. Jackson," in IV *The Justices of the United States Supreme Court 1789-1969* 2543-71, 2559 (Leon Friedman and Fred L. Israel eds., 1969). According to another, Brandeis made the comment to Justice Felix Frankfurter, who confirmed it in writing to Justice Jackson's biographer. Eugene C. Gerhart, *America's Advocate: Robert H. Jackson* (1958) at 191, 486 n. 35. In all probability, Brandeis made the point on several occasions to several people. As Frankfurter pointed out, "I need hardly tell you it was the appreciation of a great master of the art of advocacy for another." *Id.*

³ *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937); *Helvering v. Davis*, 301 U.S. 619 (1937).

⁴ *Electric Bond & Share Co. v. SEC*, 303 U.S. 419 (1938).

⁵ *Currin v. Wallace*, 306 U.S. 1 (1939).

⁶ *Mulford v. Smith*, 307 U.S. 38 (1939); *United States v. Rock Royal Co-operative, Inc.*, *supra*.

⁷ *O'Malley v. Woodrough*, *supra*.

⁸ *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940).

⁹ Telephone Interview with Edward J. Ennis, in Washington, D.C. (July 13, 1983).

¹⁰ *Id.*

¹¹ See Gardner, "Robert H. Jackson: Government Attorney," 55 *Colum. L. Rev.* 438, 443 (1955).

¹² Interview with Warner W. Gardner, in Washington, D.C. (July 1, 1983).

¹³ *Id.* See also Gerhart at 174.

¹⁴ H.B. Phillips, Oral Hist. Res. Office, Columbia Univ., 1952-53, Folder 4, at 601.

¹⁵ See Gardner, 55 *Colum. L. Rev.* at 443.

¹⁶ 1 *Unpublished Speeches* 12. The Robert Jackson Papers, Library of Congress, Manuscript Division, Washington, D.C. Frankfurter noted that he had "a preference for truculent independence over prudent deference and conformity...." Frankfurter, "Foreword," 55 *Colum. L. Rev.* 435, 436 (1955). See also Justice William H. Rehnquist, "Robert H. Jackson: A Perspective Twenty-Five Years Later," 44 *Alb. L. Rev.* 533, 536 (1980) (He "maintain[ed] throughout his life a sturdy independence of view which took nothing on someone else's say-so."); D.J. Hutchinson, "The Black-Jackson Feud," *The Supreme Court Review* 203, 239 (1988).

¹⁷ Interview with Paul A. Freund, in Cambridge, MA (July 6, 1983).

¹⁸ Interview with W. Gardner.

¹⁹ Interview with Charles E. Wyzanski, Jr., in New York, N.Y. (July 7, 1983).

²⁰ Gardner, 55 *Colum. L. Rev.* at 441 (emphasis in original).

²¹ Telephone Interview with Joseph A. Fanelli, in Washington, D.C. (July 13, 1983).

²² Interview with Charles A. Horsky, in Washington, D.C. (July 1, 1983).

²³ Interview with W. Gardner.

²⁴ Gerhart at 191-92.

²⁵ *Id.* at 192.

- ²⁶ Interview with C. Horsky.
- ²⁷ Interview with E. Ennis.
- ²⁸ Interview with C. Wyzanski.
- ²⁹ Telephone Interview with C. Wyzanski, in New York, N.Y. (July 15, 1983).
- ³⁰ Interview with C. Wyzanski (July 7, 1983).
- ³¹ Harold L. Ickes, III *The Secret Diary of Harold L. Ickes* 378 (1974).
- ³² Glendon Schubert, *Dispassionate Justice* 5 (1969).
- ³³ Philip Halpern, "Robert H. Jackson, 1892-1954," 8 *Stan. L. Rev.* 3, 4 (1955-56).
- ³⁴ Interview with Benjamin V. Cohen, in Washington, D.C. (July 7, 1983). Cohen passed away five weeks after this interview.
- ³⁵ Interview with P. Freund.
- ³⁶ Justice Robert H. Jackson, "Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations," 37 *A.B.A. J.* 801, 802 (1951).
- ³⁷ Interview with P. Freund.
- ³⁸ *Id.*
- ³⁹ *Steward Machine Co. v. Davis*, *supra*, appears at S. Doc. No. 53, 75th Cong., 1st Sess. at 99 (1937) (the argument is synopsized at 301 U.S. at 562-68); *Helvering v. Davis*, *supra*, at S. Rep. No. 71, 75th Cong., 1st Sess. at 1 (1937).
- ⁴⁰ The next most frequent interruptions were by Sutherland, Stone, Brandeis, Hughes and Cardozo, in that order.
- ⁴¹ *E.g.*, S. Doc. No. 53 at 105-07.
- ⁴² *Id.* at 108.
- ⁴³ *Id.* at 106. *See also id.* at 114 ("... my burden is to show that this act does not infringe, rather than to show that none could have been passed that would").
- ⁴⁴ *Id.* at 116.
- ⁴⁵ *E.g.*, "I could not agree with you about that, Your Honor." *Id.* at 116.
- ⁴⁶ *Id.* at 109. *See also id.* at 111.
- ⁴⁷ *E.g.*, S. Doc. No. 53 at 100, 104, 119-20, 122; S. Doc. No. 71 at 15, 17, 19-20.
- ⁴⁸ S. Doc. No. 53 at 109.
- ⁴⁹ S. Doc. No. 71 at 3-5.
- ⁵⁰ *Id.* at 12.
- ⁵¹ *Id.* at 15.
- ⁵² Interview with C. Wyzanski (July 7, 1983). Jackson's biographer has recounted several instances in which Jackson, either as Assistant Attorney General or Solicitor General, called on Chief Justice Hughes to discuss *ex parte* the length or scheduling of approaching arguments — a practice that presumably would be unthinkable today. Gerhart at 143-45.
- ⁵³ Interview with C. Wyzanski (July 7, 1983).
- ⁵⁴ *Id.*
- ⁵⁵ *Id.*
- ⁵⁶ *Id.*
- ⁵⁷ Jackson, "Advocacy Before the Supreme Court" at 803.
- ⁵⁸ Interview with P. Freund.
- ⁵⁹ Compare Richard M. Nixon's postmortem after his argument of *Time, Inc. v. Hill*, 385 U.S. 374 (1967). L. Garment, *The New Yorker*, Apr. 17, 1989, at 90.
- ⁶⁰ Interview with C. Horsky.
- ⁶¹ Interview with W. Gardner.
- ⁶² *Id.*
- ⁶³ Interview with P. Freund.
- ⁶⁴ Telephone Interviews with Robert L. Stern, in Chicago, IL (Aug. 11, 12, 1992).
- ⁶⁵ *Id.*
- ⁶⁶ Interview with J. Fanelli.
- ⁶⁷ Interview with C. Wyzanski (July 7, 1983).
- ⁶⁸ Telephone interview with Erwin Griswold, in Washington, D.C. (July 22, 1992).
- ⁶⁹ There has been some confusion about the number of cases he argued and won, brought on in part by his rearguments. *See, e.g.*, "Justice Jackson Dead at 62 of Heart Attack in Capital," *N.Y. Times*, Oct. 10, 1954, at 1 (lost six of forty-four cases as Solicitor General); *Time*, June 12, 1939, pp. 16-17 (lost two of twenty-four cases argued in one Term); Marquis W. Childs, "Robert H. Jackson: The Man Who Has Always Been a New Dealer," 103 *Forum* 148, 149 (1940) (lost one of twenty-four cases in a Term); *Current Biography* 428 (1940) (lost three of twenty-four cases); Gardner, 55 *Colum. L. Rev.* at 442 (won twenty-seven arguments in all); Halpern, 8 *Stan. L. Rev.* at 7 (lost six of forty-four cases as Solicitor General)
- ⁷⁰ *See* Arthur E. Sutherland, "The Nation's Economy and State Frontiers," 8 *Stan. L. Rev.* 26, 27, 30-32, 35, 52 (1955).
- ⁷¹ In addition, eight of his opinions cited seven of his argued cases with a "see" or "compare."
- ⁷² In addition, he joined in twenty-nine majority opinions which cited twenty of his argued cases with a "see" or "compare."
- ⁷³ Robert H. Jackson, *Forward* to W. Harris, *Tyranny on Trial* at xxxvii (1954).
- ⁷⁴ Jackson, "Government Counsel and Their Opportunity," 26 *A.B.A. J.* 411 (1940).
- ⁷⁵ *See* Kurland at 2557 (excerpt from Columbia University oral history tapes).
- ⁷⁶ Gerhart at 150-52.
- ⁷⁷ Gerhart at 158-60, 179-82; Ickes at 391-93.
- ⁷⁸ Gerhart at 165-67, 183.
- ⁷⁹ Robert H. Jackson, *The Struggle for Judicial Supremacy* (1941).
- ⁸⁰ Gerhart at 191.

The Supreme Court Fleet

James B. O'Hara

Mere service in office guarantees a conspicuous place in the national memory to every President. American history textbooks customarily are subdivided in terms of elections and the succession of administrations, and every chief executive has a "shrine" somewhere, a library perhaps, a birthplace or museum home, a tomb.¹ Honors for Justices of the Supreme Court are far more haphazardly bestowed. Indeed, the names of Justices--except for a few--are unlikely even to appear in the index of history textbooks. The author for a number of years has asked graduate students to identify a list of five former presidents and five former members of the Court. Inevitably, the obscure William Henry Harrison, who was president for only a month, is identified by the students. In contrast, Justices Samuel F. Miller and Stephen J. Field, whose jurisprudence massively influenced national industrial policy and constitutional law for half a century, are always unrecognized. By and large, Justices are forgotten, their service to the nation uncommemorated, their final resting places neglected.²

There was, however, a period during World War II when the Justices were systematically honored in a singular yet highly appropriate fashion. The United States Maritime Commission named a large number of its emergency cargo vessels, popularly called "Liberty Ships," in honor of Supreme Court Justices. Almost all of these ships were involved in wartime combat. Although some were lost at sea, all rendered superb service during the war, and many remained in merchant service long after the end of hostilities.

The story of this "Supreme Court Fleet" is forgotten now, but deserves to be remembered.

The Maritime Commission

Following the end of World War I, military readiness was a low national priority. The voters



President Franklin Delano Roosevelt delivering a speech in 1937, a year after signing the Merchant Marine Act. Roosevelt had served as Assistant Secretary of the Navy during World War I and was fascinated by ships and the sea throughout his life.

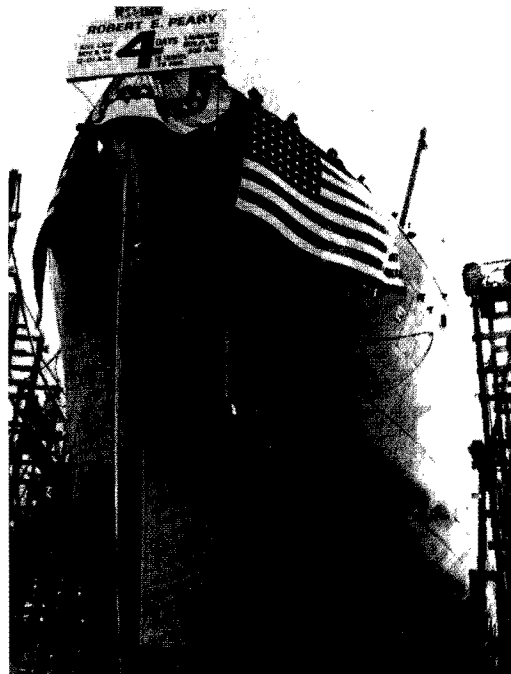
and their elected leaders seemed to believe victory in the Great War had indeed guaranteed a lasting peace, that the world had become "safe for democracy." Manpower levels in the military began to dip precipitously, training was neglected, morale was low, and arms and equipment obsolete. Then the Great Depression contributed more to this already alarming vulnerability as heavy industry grew moribund and millions lost their jobs.

The American shipbuilding industry was particularly weak. Hundreds of naval and merchant ships constructed before and during World War I were, by the mid '30s, rusty and unreliable. Financial constraints prevented construction of replacements. An earlier pool of skilled workers was lost as shipyards closed. Labor-management strife was commonplace and desperate management sometimes would turn to unethical and illegal practices to maintain profits or cut losses. A special Senate investigating committee chaired by Hugo L. Black of Alabama exposed many of the ills of the industry and triggered the demand for greater government intervention and regulation.

In 1936, President Franklin D. Roosevelt signed

the Merchant Marine Act³, designed not only to solve industry problems, but also to stimulate employment and general economic recovery. A key provision of the new legislation was the creation of the United States Maritime Commission, with broad powers to set maritime policy and to rebuild the merchant fleet. The President's choice as first chairman was a recognized problem-solver, Joseph P. Kennedy, the Boston banker, former chairman of the Securities and Exchange Commission, and father of the future president. Kennedy began the work with characteristic energy. By 1938, when he resigned to become ambassador to Great Britain, settlements of old contract disputes between the companies and the government had been negotiated. Labor problems also abated somewhat as the unions saw jobs being created. The administration recognized, even if the companies did not, that labor unions were to be an integral part of future industrial growth.⁴

Kennedy was replaced by Rear Admiral Emory Scott Land, an old friend of Roosevelt's from the President's earlier service as Assistant Secretary of the Navy. Admiral Land turned out to be an



Rear Admiral Emory S. Land, left, served as the second chairman of the Maritime Commission. The Admiral and President Roosevelt were longtime friends, going back to World War I. Right, The World Record Liberty Ship, *Robert E. Peary*, built in only four days, fifteen and a half hours. Time was a highly valued commodity in liberty ship building and speed was always emphasized.



The construction of the *Booker T. Washington*, the first liberty ship named for an African-American. *Booker T. Washington* was built at the California Shipyards Corporation in Los Angeles, although liberty ships were being built around the country.

ideal choice for the challenges ahead. He was experienced, wise, had the requisite technical knowledge, but most of all, possessed superb management skills.⁵

The commission's initial work, after tackling the industry's financial and labor problems, was to plan an entirely new merchant fleet -- modern in design, efficient in operation, and the fastest afloat. Old shipyards had to be rebuilt, new yards begun, and a labor force of skilled workers trained. But world events rapidly intruded on these early plans. Even before war broke out in Europe in 1939, Americans anxiously eyed the ominous happenings in Germany. When Hitler's armies actually began to move, both the President and large segments of popular opinion realized the United States could not watch helplessly. American sympathies were undisguised, shipments of sup-

plies were openly made to Great Britain, and the Lend-Lease Act, passed early in 1941,⁶ stretched neutrality virtually to the breaking point. By December of that year and Pearl Harbor, the United States was a full, albeit unprepared, participant in both an Atlantic and a Pacific War.

Under the pressure of these rapidly changing circumstances, the commission's original plans for American shipping were unceremoniously scrapped. The building and expansion of shipyards became the highest priority. Ships for the Navy had to be constructed along with a merchant fleet, and the design of the merchant carrier now had to be driven by speed of construction rather than speed afloat. The commission, after initial reluctance, was compelled to rely on an adapted British design for a slow-moving but relatively easy-to-build freighter as the master plan for a

standardized "emergency" cargo ship. This design was to become the centerpiece of maritime war policy and strategy. Parts were completely interchangeable; the ships could be put together as if on a production line. "They were all built from the same plans in nineteen shipyards on both coasts, and, to a large extent, built by unskilled labor -- former salesmen, transplanted farmers, part-time students, ex-millworkers, and liberated housewives."⁷ The basic design used for the American ships differed from the earlier British model. The silhouette of the American ship showed a single deck house rather than the split house of the British original. This pattern not only simplified construction in the running of electrical and plumbing connections, it also rearranged the configuration of the cargo holds, an arrangement which made the American ships easier to load.⁸

The stress was always on building the ships as fast as they could be built; indeed they had to be built faster than the enemy could sink them.

Germany's submarines were devastating. "[B]etween the beginning of the war in September 1939 and the entry of the United States in December 1941, German U-Boats sank 882 ships in the North Atlantic, and in 1942, the United States' first full year at war, they sank 1006."⁹

The first of the new emergency cargo ships, the *Patrick Henry*, was launched in September 1941, in Baltimore. In a message to shipyard workers that day, President Roosevelt referred to the "Liberty Fleet" and to the ships as "Liberty Ships." The name stuck. So did another name. These ships were hardly handsome and sleek; their squat, heavy look earned a nickname also attributed to Roosevelt: "Ugly Ducklings."

From January 1942, when the first Liberty ship set sail, until May 1945, when the last was delivered, an astonishing total numbering more than 2700 ships were built, in excess of two ships a day! The early ships took eight months to build, but construction time gradually was reduced to



The first liberty ship, named after Revolutionary War patriot Patrick Henry, was launched by President Roosevelt in September 1941 in Baltimore. It did not set sail until January 1942, after the United States entered World War II.

only a month. One ship was actually built in four days. The industrial miracle which brought all this about was, without question, one of the turning points of the war.

Liberty ships were not part of the Navy except for a relative few which were converted to Navy use soon after or even before launching. They were almost exclusively merchant ships, manned by merchant marines, built to handle cargoes of tanks, ammunition, fuel and military supplies. Later, a few were outfitted as troop carriers; however, most were employed to deliver war supplies quickly and often to overcome the enemy's proximity to sources of supply.

Naming the Ships

Names for the vessels were chosen by a "Ship Naming Committee" of the Maritime Commission. Names were selected from lists of "patriots, scientists, journalists, educators, artists, and industrialists."¹⁰ Recommendations were accepted from all sources, including shipyard management and workers' unions. In later stages of the war, a number of ships were named after merchant marine heroes and war correspondents killed in action. Ships were named only after deceased

persons. That way, pressure could be avoided from publicity-hungry political figures and celebrities.

Early in the process, the committee decided the Supreme Court could be a fertile source of names. The *Roger B. Taney* was launched in December 1941, the first of sixty-six Liberty ships to be named for Justices. Indeed, of the sixty-nine deceased Justices who had sat on the court since 1789, only three were not honored. The three were William Paterson, William Howard Taft and Edward T. Sanford. It appears their names were not used because other ships with similar names were still in service.

In a nice historical touch, ships honoring Justices were often built in the states where the Justices had lived and worked. The *James M. Wayne* was built in Georgia; the *Roger B. Taney* and the *Samuel Chase* in Maryland; the *Stephen Johnson Field* and the *Joseph McKenna* in California; the *James Iredell* and the *Alfred Moore* in North Carolina. In a few cases, families were honored. There was not only a ship named for Justice Field, ships were also named for his brothers Cyrus Field and David Dudley Field. Edward Rutledge, brother of the second Chief Justice, had his ship also. There was a ship named for Alexander J. Dallas, the Court's first reporter, and for Robert H. Harrison and Edwin M. Stanton, who were both appointed to the Court but did not serve. There was also a ship named *Oliver Wendell Holmes*, and existing records do not indicate whether the namesake is Holmes *pere*, the distinguished physician and author, or Holmes *filis*, the distinguished jurist. Knowledgeable sources indicate that naming a ship after two persons of the same name, while rare, was not unknown.¹¹

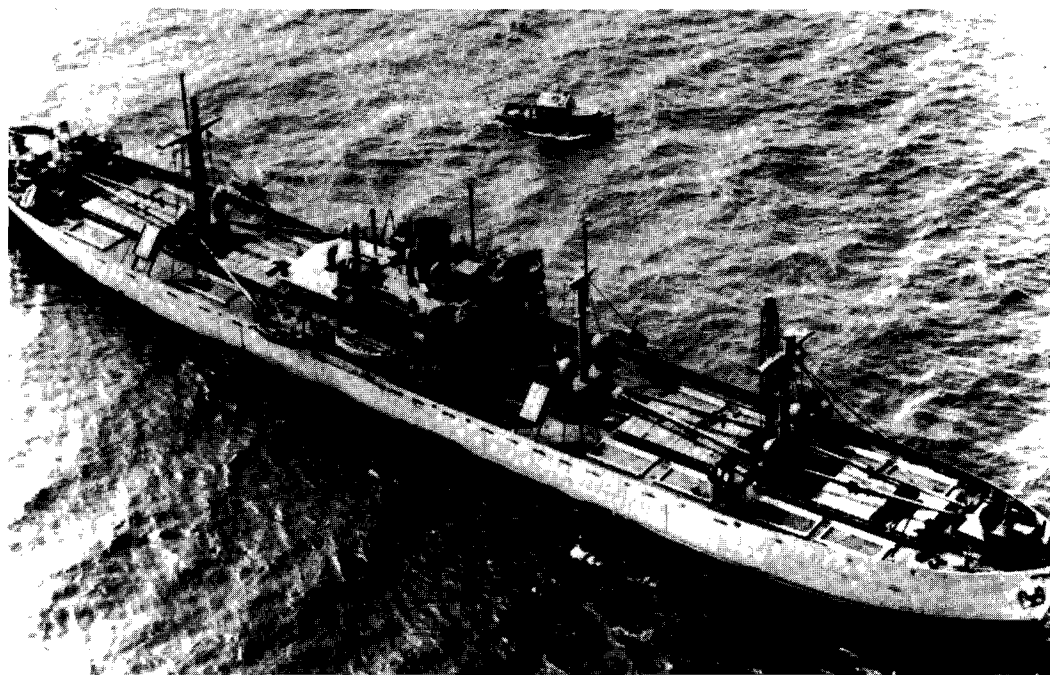
For a few Justices, the Liberty ship was not the first vessel named in their honor. Smith Thompson, Levi Woodbury and Roger B. Taney had earlier ships designated for them. The Coast Guard cutter *Taney*, now decommissioned, is permanently berthed in the Baltimore harbor.¹²

Service During the War

The perils facing the merchant fleet were grave.¹³ In the Atlantic, German U-Boats were particularly deadly, and accounted for heavy losses to merchant shipping especially in 1942 and 1943. Aircraft were a grim threat everywhere, but the suicide Kamikaze attacks in the Pacific brought a



It is not known if *Oliver Wendell Holmes* was named for the author, shown here in his Massachusetts study, or for his son, the Supreme Court Justice.



The Gabriel Duvall at sea during the war. Because the liberty ships carried large loads and traveled in slow moving convoys, they were often easy targets for the enemy.

terror of their own. Mines were a problem, because the ships often were carrying a highly flammable or explosive freight. During the winter or storm seasons, the weather might be as dangerous as the enemy.

Cargo vessels were armed for defensive action, but their guns were hardly a match for a destroyer or a submarine or incendiary attacks from the air. Liberty ships had gun crews, the Armed Guard, whose cool heroism in combat could be counted on to help repel attacks, sometimes with surprisingly successful results.

Various ploys were developed to maximize safety. The merchant fleet usually sailed in convoys with Navy protection, but this had its own problem because the speed of the convoy became the speed of the slowest vessel. When loaded to capacity the maximum speed of a Liberty ship was ten knots or less, and the ships were often sailing with cargoes which exceeded capacity. In contrast, the fastest of the full-rigged clipper ships of a century earlier could sail at twenty knots.¹⁴

The ships sailed in convoys because it was determined early that a slow convoy was safer than a fast ship sailing alone. To confuse enemy submarines, the entire convoy would zigzag along its route. While this tactic lengthened the already

long voyages, it rendered it more difficult for U-Boat crews to get a reading for the plotting of torpedo angles. Talented seamanship was required of Liberty ship officers as their slow-moving vessels attempted the zigzag maneuver with faster-moving ships in fog, through storms, or at night when the entire convoy sailed under a complete blackout. The whole process was a blind choreography, with deadly penalties for error.

From the beginning, losses were severe. The first "Supreme Court" Liberty ship was lost on September 13, 1942, when the *Oliver Ellsworth* was sunk by a U-Boat on a run from Scotland to the Russian port of Murmansk as part of a convoy of thirty-nine merchantmen with an escort of destroyers, submarines, minesweepers and anti-aircraft ships. Only twenty ships arrived at Murmansk, but the convoy had itself inflicted heavy damage on the enemy.¹⁵

Later the same year, the *Pierce Butler*, on its maiden voyage, was sunk by a German submarine in the Indian Ocean. Most of the crew were able to escape by lifeboat and ultimately reached Durban, South Africa.¹⁶ The U-Boat responsible for the direct hit surfaced and its officers talked to the surviving crew of the freighter. Such encounters were not rare; occasionally, the German crew

would supply charts to direct the survivors to the nearest land.

Three other ships named after Justices became casualties in 1943. The *Roger B. Taney* was sunk at night by a German submarine in the South Atlantic. Two lifeboats, each with more than twenty men aboard, were able to escape the sinking ship. The boats soon lost each other. One was rescued after twenty-one days at sea; the second sailed over twenty-five hundred miles for forty-two days before rescue by a Brazilian passenger ship. Their only water had been caught in the sails during storms; their only food a thirty-pound fish speared after thirty days and cooked in a bucket fire made with wood from an extra oar.¹⁷

A radio bomb hit the *Bushrod Washington* in the Gulf of Salerno, Italy, on September 14, 1943, igniting a gasoline fire which raged for an entire day before the cargo of ammunition exploded. Fortunately, the full day allowed for escape; almost the entire crew survived.¹⁸

The *James Iredell*, for much of her short life, seemed indestructible. Damaged while in a convoy from the United States to Sicily, she sailed to Naples after repairs in Palermo. In Naples, a German air raid was responsible for several direct hits and it took three days to extinguish the fires aboard. Permanent repairs were made in the United States, but then the *Iredell* suffered weather

damage during storms at sea while sailing to England. Finally it was decided to sink the ship deliberately at Normandy, shortly after D-Day (June 6, 1944) to serve as a breakwater blockship off the beachhead. The ship was finally broken apart by violent storms later that month.¹⁹

In March 1944, the *William B. Woods* was torpedoed and sunk near Sicily while carrying over 400 troops on a short run from Palermo to Naples. Miraculously, more than 300 men were rescued. A cadet midshipman was credited with saving dozens of lives by lashing mattresses together and throwing them to men in the water.²⁰ The *Morrison R. Waite* was damaged by a Kamikaze plane in Leyte Gulf while carrying troops and ammunition. Although there was an explosion, fires were extinguished, and the *Waite* returned to service before finally being scrapped in 1963.²¹

German submarines were active until the very end. Tough, professional, with excellent morale, their crews were still a menace to Allied shipping long after it had become clear Germany had lost the ground war. The *Horace Gray* was torpedoed on the Murmansk Run in February 1945, only a few months before the German surrender.²²

The last wartime era casualty of a Supreme Court merchant ship occurred during the occupation of Japan in November 1945, when the *Brockholst Livingston* was abandoned and de-



The John Rutledge at sea, December 17, 1943. For all the danger the Supreme Court fleet was in during the war, it is surprising that only a tenth were sunk in combat, although the loss of life was high.

clared a total loss after severe damage during a typhoon at Okinawa.²³

A few Liberty ships, including five with the names of Justices, were acquired by the Navy after launching. Following Navy policy for auxiliary vessels, they were given the names of stars and constellations. The *James Wilson* became the *Sterope*; the *David Davis* became the *Carina*; the *Melville W. Fuller* and the *Noah H. Swayne* were called the *Cassiopeia* and the *Aridad*. These four served honorably, earning a total of eight battle stars. A fifth, originally the *Benjamin Cardozo*, was renamed *Serpens* and sailed cargo runs in the Pacific during its short life. In January 1945, while being loaded with depth charges at Guadalcanal, the ship suddenly and spectacularly exploded, killing more than 250 crew members and stevedores. The cause of the explosion was never identified.²⁴

This account can highlight only the more dramatic stories of the Liberty fleet and its brave crews. The majority of the ships named for Justice's did not sink, but every one faced extraordinary danger throughout the war. Every ship was

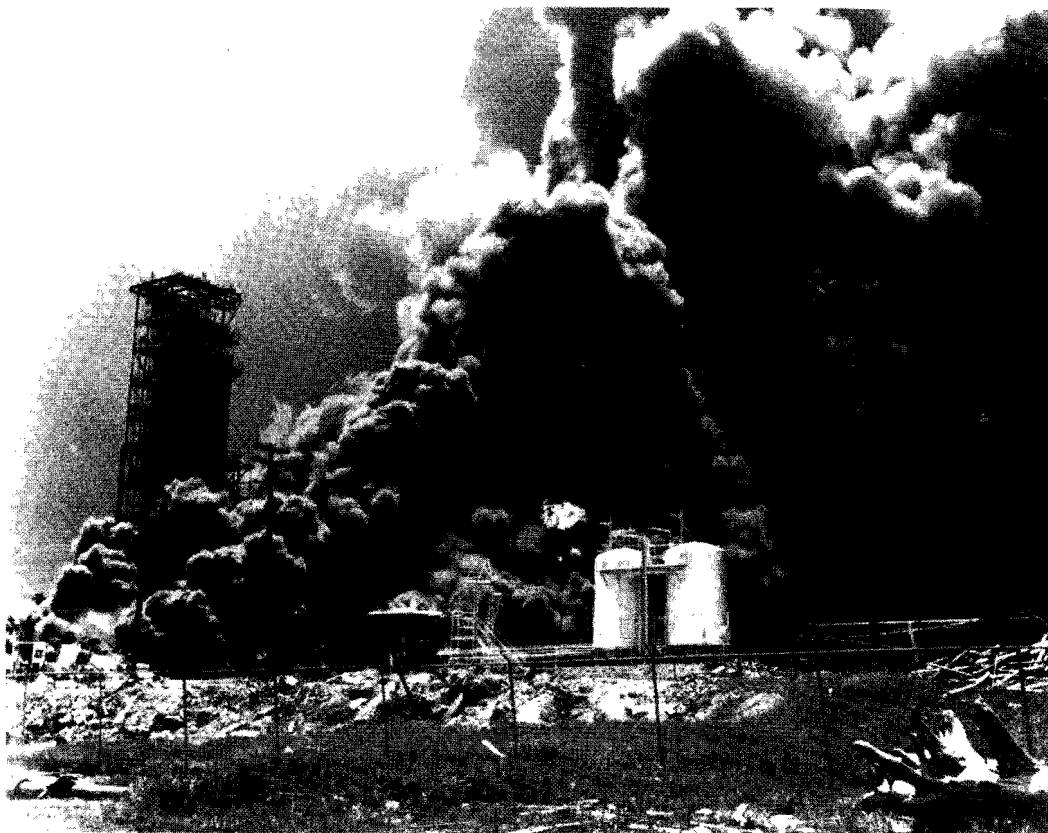
involved in combat situations, most on more than one occasion. Crew members were killed or injured during air attacks, while fighting fires, in accidents, during storms or in extremes of cold and heat. By all accounts, the merchant marines and the armed guards did not regard themselves as heroes, or even as brave. Their country was in peril, there was a war to be won, and they had a job to do. Perhaps the Court and its Justices have never been honored so well.

The Fleet After the War

The last Liberty ship was completed in May 1945. As the end of the war drew near, the Maritime Commission cancelled the contracts for remaining ships. Now there was an excess number of merchant ships, and plans had to be made to adapt to peacetime needs. Large numbers were put in reserve. Many others were sold to private companies throughout the world, and these often received new names. The *Horace Lurton* became the *Roy*; the *Nathan Clifford* became the *American Oriole*; the *Rufus Peckham* was called in turn



The *Rufus W. Peckham* after the war. After being re-fitted for civilian life all that remains is for the new name, *Sea Gale*, to be painted on the side of the ship.



Above, a scene from the 1947 Texas City, Texas disaster which originated in the *Grandcamp*, formerly the *Benjamin R. Curtis*. The explosions killed over five hundred people and caused over one hundred million dollars in damage.

the *Sea Gale*, then it was *Nicholas* and finally, it became the *Valiant Effort*.

One spectacular event involving a Supreme Court ship occurred after the war. The *Benjamin R. Curtis*, built in California in 1942, served honorably during hostilities. It was then sold to a French shipping company and renamed the *Grandcamp*. On April 17, 1947, the ship was berthed at Texas City, Texas, loading a cargo of ammonium nitrate fertilizer when fire broke out in the hold. Efforts to contain the fire were abortive and it was decided to tow the ship away from the docking area. Suddenly, the *Grandcamp* blew up in a "tremendous thunder clap" heard for a hundred miles.²⁵ Two airplanes were knocked out of the sky by the concussion. Flaming debris ignited two other ships which in turn exploded. Then dockside structures of the large Monsanto chemical plant were demolished in a chain of repetitious explosions. When the fire finally burned itself

out, days later, the plant was a shambles. Several other ships were destroyed, but the *Grandcamp*, neé *Benjamin R. Curtis*, had disappeared completely.²⁶ General Jonathan M. Wainwright, the hero of Bataan, visited the city on the day of the original explosion, and said: "I have never seen a greater tragedy in all my experiences."²⁷ Five thousand people were injured; more than five hundred were killed. Some years later, as seems appropriate for a holocaust originating on a ship named for a Supreme Court Justice, litigation on the assignment of tort responsibility for the tragedy reached the Court.²⁸

Time ultimately took its toll for the remaining Liberties. Some of the ships in "mothballs" were reactivated during the Korean War; others were towed out to sea for target and torpedo practice. Large numbers were simply scrapped at ports around the world. A few were sunk off the Atlantic or Gulf coast as artificial reefs.

There were efforts to modernize a few ships in the reserve fleet. After trial conversions of four ships during the 1950s, a number of the Liberties were modified but the conversions were never attempted on a large scale. As the ships reached the age of twenty during the 1960s, a survey was undertaken to test the seaworthiness of the remaining Liberty ships. It was found that corrosion was extensive and the maintenance of the ships was becoming increasingly expensive. Repair was costly even when parts were available. But the underlying problem was the impossibility of verifying the integrity of the old ships for insurance purposes. Only two Liberty Ships--neither from the group named for Justices--are still afloat in their World War II state.

The *Jeremiah O'Brien* is a museum ship, berthed at Pier 3 East, Fort Mason Center, in San Francisco. Completely restored, the O'Brien has been declared a national monument and is on the register of the National Trust for Historic Preservation.²⁹ Its East Coast counterpart, the *John W. Brown*, after many years of service as a maritime high school in New York City, is now being refitted in Baltimore, Maryland. Ultimately, the *John W. Brown* will also be a museum open to the public.³⁰ Both these ships are fully operational and occasionally cruise to nearby ports.

The saga of the Liberty Ship is now over. For the five years of World War II, these ships were the crucial link from the factories of the United States to the battlefields of Europe and to the islands of the Mediterranean and the Pacific. Thousands of crew members perished in a war which Americans believed was fought to preserve a system of fundamental justice, fairness and freedom. The nameplates on the ships gave only a name, not a descriptive identification; the vast majority of the crew probably did not know that they sailed on vessels named after Justices of the United States Supreme Court. They might well have agreed, and we with them, that the names were very suitable.

When the war was over, Admiral Land was sometimes defensive when critics carped about the hastily-built ships. "We did the best we could with the tools we had," he said. "We built the ships. The war was won, and if you don't like that, you can go to Hell."³¹

Endnotes

¹ See Robert G. Ferris, ed., *The Presidents from the Inauguration of George Washington to the Inauguration of Gerald R. Ford: Historic Places Commemorating the Chief Executives of the United States* (1976).

² See George A. Christensen, "Here Lies the Supreme Court: Gravesites of the Justices", 1983 *Y.B. Sup. Ct. Hist. Soc'y* 17.

³ Merchant Marine Act, ch. 858, 49 Stat. 1985 (1936).

⁴ SEE Richard J. Whalen, *The Founding Father: The Story of Joseph P. Kennedy* 189-196 (1984).

⁵ For the complete story of the Commission during the war, See Frederic C. Lane, *Ships for Victory: A History of the U.S. Maritime Commission in World War II* (1951).

⁶ Lend-Lease Act, ch. 11, 55 Stat. 31 (1941).

⁷ Eloise Engle and Arnold S. Lott, *America's Maritime Heritage* 272 (1975).

⁸ John Gorley Bunker, *Liberty Ships: The Ugly Ducklings of World War II* 8 (1972). The ships were 441 feet long, and constructed of riveted steel plates, run by a triple-expansion steam reciprocation engine. There were five holds. Cargo handling, gear winches and steering were steam and electrically operated. Herbert R. Shultz, *The Ugly Ducklings* 13 (1986).

⁹ Sherod Cooper, *S.S. John W. Brown: Baltimore's Living Liberty* 1 (1991).

¹⁰ Lane, *supra* note 5, at 70.

¹¹ Interview with A.L. Wadsworth of Project Liberty Ship (June 12, 1992).

¹² In 1960, a nuclear submarine was given the name *John Marshall*.

¹³ Any recounting of the wartime service of the Liberty fleet must rely on three essential sources: L.A. Sawyer and W.H. Mitchell, *The Liberty Ships* (2d. ed. 1985); Justin F. Gleichauf, *Unsung Sailors: The Naval Armed Guard in World War II* (1990); John Gorley Bunker, *Liberty Ships: The Ugly Ducklings of World War II* (1972). The meticulously researched work by Sawyer and Mitchell is the standard reference work.

¹⁴ Engle and Lott, *supra* note 7, at 265.

¹⁵ Bunker, *supra* note 13, at 67-69.

¹⁶ *Id.*, at 131.

¹⁷ Gleichauf, *supra* note 13, at 329-30; Bunker, *supra* note 13, at 103-5.

¹⁸ Bunker, *supra* note 13, at 115.

¹⁹ Sawyer and Mitchell, *supra* note 13, at 112.

²⁰ Bunker, *supra* note 13, at 117.

²¹ Sawyer and Mitchell, *supra* note 13, at 134.

²² Gleichauf, *supra* note 13, at 182.

²³ Sawyer and Mitchell, *supra* note 13, at 66.

²⁴ *Id.*, at 70.

²⁵ Bunker, *supra* note 13, at 201.

²⁶ Sawyer and Mitchell, *supra* note 13, at 66.

²⁷ *New York Times*, April 17, 1947, at 1.

²⁸ *Dalehite v. United States*, 346 U.S. 15 (1953).

²⁹ Harry A. Butowksy, *Warships Associated with World War II in the Pacific* 25 (1985).

³⁰ Restoration of the *John W. Brown* is under the

direction of Project Liberty Ship, P.O. Box 25846, Highlandtown Station, Baltimore, Maryland 21224-0846. The author is grateful to the volunteers of Project Liberty Ship for valuable assistance in the completion of this article. Special thanks are owed to A.L. Wadsworth, Brian Hope, David Aldworth and Sherod Cooper.

³¹ Shultz, *supra* note 8, at 22.

Justice Potter Stewart: The *Unpredictable* Vote

Gayle Binion

At the time of his appointment to the United States Supreme Court in 1958,¹ Potter Stewart was asked to describe his judicial philosophy. He responded, "I like to be thought of as a lawyer."² In a personal interview, eighteen years later, he reiterated this preference.³ When he announced his retirement in 1981, he told reporters he hoped he would be remembered "as a good lawyer who did his best." Stewart was especially concerned he not be labeled as either a liberal or a conservative, labels readily attached to the Justices with whom he served.⁴ To Stewart, those labels suggested a Justice who acted upon his own eco-

nomic, political, social, or religious values. In contrast, his Justice-as-lawyer role model suggested for him a jurist capable of applying objective legal reasoning to questions before the Court, uninfluenced by his own values. Although Stewart was fully aware of the enormous social, economic and political consequences which Court decisions may have, he continued to believe one could, nevertheless, set aside one's own philosophical values as bases for decision making.⁵ It appears, even at the close of his career on the Court, Stewart had succeeded in eluding the pigeon-holers.⁶

The most commonly used terms to describe Stewart: "moderate,"⁷ "neutral,"⁸ and "swing voter,"⁹ reflect his tendency to vote "liberal" in some cases and "conservative" in others, and his propensity to defy prediction in specific cases. Constitutional scholars, often frustrated in their attempt to pinpoint Stewart's ideology, have tended to ignore his role on the Court, have assumed his positions were the result of inconsistent or random decision making, or have attempted to assess his votes along an ideological continuum as defined by alliances with brethren.¹⁰ Careful analysis of Stewart's decisions, however, reveals there were significant predictors of his positions on the controversial issues of his day, but they were not necessarily inherent in the *substance* of the legal questions before the Court. Primary among his values, and explanatory of many of his allegedly unpredictable votes, were his fervent commitment to states' rights and an equally strong commitment to narrow, non-anticipatory decision making. It is this latter orientation which contributes to his lawyerly self-image, but it is the former which rationalizes

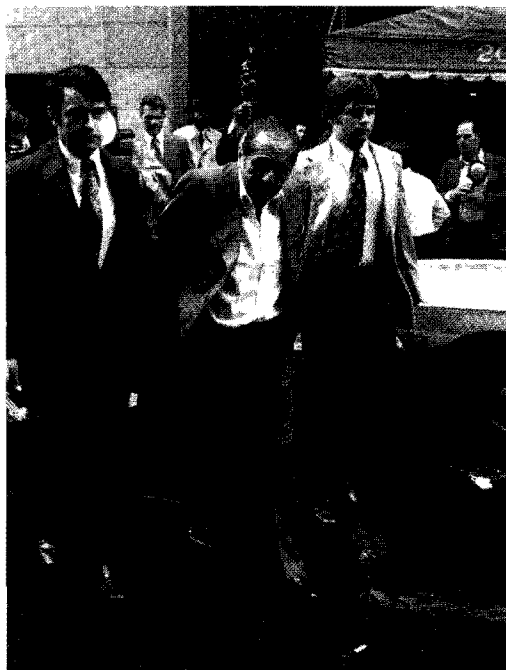


Potter Stewart relaxing at home. Stewart served as an Associate Justice from 1958-1981. He strived to be remembered "as a good lawyer who did his best" throughout his career.

many of his otherwise incomprehensible decisions.

States' Rights Federalism

The most significant element in Stewart's jurisprudence was his commitment to states' rights. To most students of constitutional law, states' rights is a relic of our darkest past, a constitutionalism that supported slavery, corporate oligopoly, and the inability of the federal government to deal with twentieth-century problems. The ideology of dual federalism, under which the Tenth Amendment stood as a positive restriction on national authority, was laid to rest in *U.S. v. Darby Lumber*¹¹ in 1941, when Justice Harlan Stone proclaimed "the [Tenth] Amendment states but a truism that all is retained [by the states] which has not been surrendered." But Stewart, in contrast with the predominant legal thought of our age, and with the Supreme Court on which he served, maintained a commitment to dual federalism, to the belief that states continued to retain substantial constitutional autonomy. Dissenting alone in *Perez v. U.S.*¹² in 1971, he concluded



Justice Stewart dissented in *Perez v. United States* (1971), arguing that loan-sharking was only a local practice. Frank Tieri, above, is shown after his arrest by the FBI in New York on federal loan-sharking charges.

that loan-sharking was only a local business practice, and, therefore, despite its occurrence nationwide, not subject to congressional regulation. His Tenth Amendment reasoning was reminiscent of ideas largely abandoned by the Court during the era of Franklin D. Roosevelt.

Stewart also dissented against guaranteeing to defendants in state criminal proceedings the protections contained in the Bill of Rights.¹³ He viewed the imposition of these restrictions on the states as an interference with their conduct of their criminal justice systems. Because the operation of a criminal justice system was, for Stewart, an essential function of government, largely definitional of a sovereign state, he was extremely unlikely to favor abridging the autonomy of the states in this area. His votes in *Malloy v. Hogan*,¹⁴ *Benton v. Maryland*,¹⁵ and *Duncan v. Louisiana*¹⁶ against the "incorporation" of, respectively, the privilege against self-incrimination, the ban on double jeopardy, and the right to a trial by jury, as well as his votes in *Escobedo v. Illinois*,¹⁷ *Miranda v. Arizona*,¹⁸ and *Gilbert v. California*,¹⁹ against restrictions on police practices in the states, all spoke to his commitment to the autonomy of state government.²⁰

His reluctance to interfere with states' criminal justice systems extended to even those cases in which First Amendment rights were in jeopardy. Despite his usual support for the free speech rights of demonstrators²¹ and alleged pornographers,²² he refused to enjoin states from enforcing their criminal laws against these people. In *Cameron v. Johnson*,²³ *Gunn v. Committee to End the War in Vietnam*,²⁴ and *Ellis v. Dyson*,²⁵ Stewart voted against the prayed-for injunctions, not because he was unsympathetic to the claims for substantive constitutional rights under the First Amendment, but rather, because he did not believe the federal courts ought to enjoin the routine processes of criminal law enforcement in the states. He believed any resulting infringements on First Amendment rights from the challenged prosecutions could be rectified on appeal, a view not generally shared by civil libertarians. To the relatively untrained eye, however, Stewart's voting behavior in First Amendment cases may appear to "swing" from alliance with the liberals in cases which raise only issues of free expression to alliance with the conservatives when injunctions against state government are involved in the protection of speech rights.

His commitment to states' rights also explains



Justice Stewart saw a state's electoral system as an integral part of its sovereignty. He voted to uphold the 1965 Voting Rights Act but severely restricted the Attorney General's authority to reject state's electoral systems. African-American voters, like those shown above voting in Fairmont Heights, Maryland in 1962, were likely to get Stewart's vote only in cases of flagrant abuse of their voting rights.

his very limited support for voting rights claims which challenged poll taxes, literacy tests, malapportionment, and other state governmental practices which diluted the political strength of African-American voters.²⁶ Although he upheld the jurisdiction of the federal courts over such cases and sustained the authority of the Attorney General under the 1965 Voting Rights Act, he severely restricted the power of either to reject the state systems they scrutinized.²⁷ A state's electoral system, like the enforcement of its criminal law, was to Stewart an inherent feature of its sovereignty. He was, therefore, apt to sustain all but the most flagrant abuses and irrational policies.²⁸

Stewart was largely alone in his views on federalism through the Warren Court and the early years of the Burger Court. With the appointment of four Justices by President Richard Nixon, however, federalism was again in vogue. Stewart had given a speech in 1957, recommending that most civil litigation be "returned" to the state courts.²⁹ In the mid-nineteen-seventies, a majority of the Court took significant steps in that direction in several important decisions.³⁰ In

1976, Stewart and the four Nixon appointees formed a bare majority favoring the autonomy of state and local governments in *National League of Cities v. Usery*.³¹ That decision, which immunized state and local government from federal wage and hours legislation applicable to other employers, was the first of its type in nearly forty years.³² Similar coalitions then proceeded to "return" to the states a modicum of autonomy over their electoral and criminal justice processes.

Only a full appreciation of Stewart's commitment to the principles of states' rights will help one understand his decisions. While other Justices were concerned with defining the privilege against self-incrimination or the constitutional principle of one person, one vote, Stewart was more concerned with deciding whether states should be required to respect either.

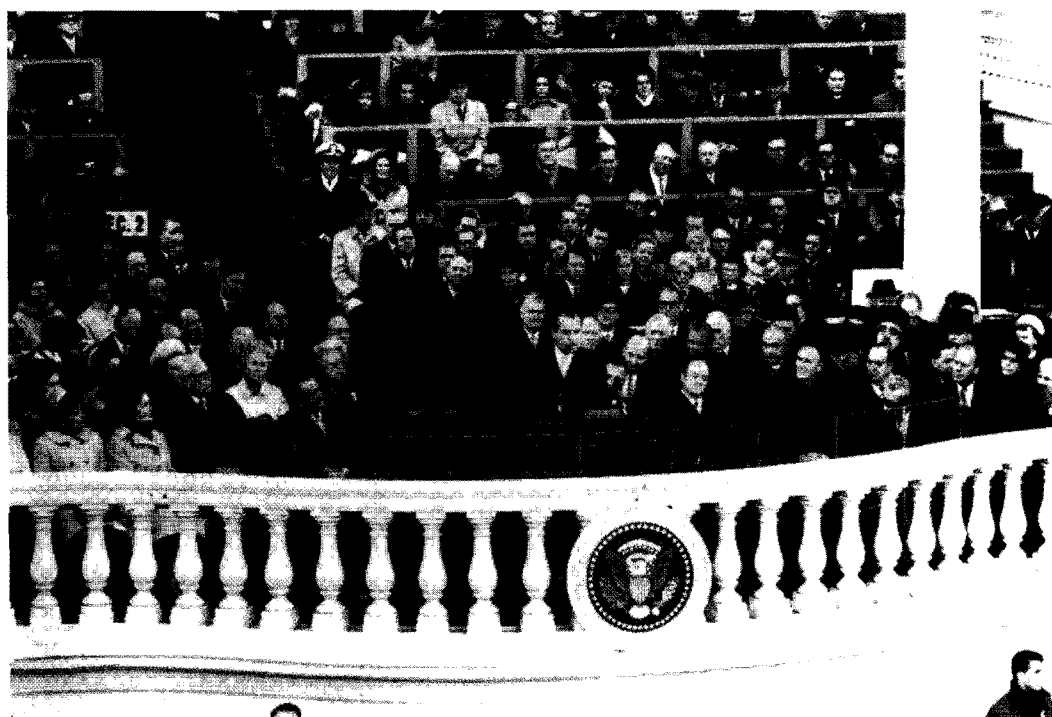
The Narrow Opinion

Perhaps most striking in Stewart's jurisprudence was his commitment to narrow, non-anticipatory opinions. His constitutional decision making

was characterized by his narrowing of the issue, the decision, and the remedy. It was this very deliberate, step-by-step process that best defined his concept of "lawyering." "The law," he told me in our interview, "is a careful profession."³³ During the same interview Stewart commented on the virtue of this approach. "No one," he said, "is wise enough to see around the next corner." By committing himself no further than was necessary to resolve the case before the Court, he retained considerable freedom in subsequent cases. His voting patterns may, therefore, have been unique and apparently "unpredictable," but they were not markedly inconsistent.

The hallmark of a Stewart opinion is that as much attention was paid to clarifying what was not being decided as what was. This was especially true of his behavior, and perhaps his role on the Court, when facing the most controversial issues of his day. His concurrence in *Baker v. Carr*,³⁴ which opened the federal courts to cases on legislative malapportionment, very carefully detailed that only the issues of jurisdiction, justiciability and standing had been resolved. In classic Stewart fashion, he took issue with the left and the right of the Court, criticizing

both the majority and dissenting perspectives for the substantive conclusions he believed they had mistakenly suggested had been reached. The socially divisive issue of capital punishment elicited a similar "go slow" response from Stewart. In *Furman v. Georgia*,³⁵ he rejected the death penalty, as applied, because of its "freakish" imposition. Unlike Justices William Brennan and Thurgood Marshall, however, he thought it "unnecessary to reach the ultimate question" of the unconstitutionality of capital punishment *per se*. Similarly, although Stewart was seen as a supporter of the media when he voted against enjoining the publication of excerpts from the *Pentagon Papers*, which detailed governmental activity during the Vietnam war, it was because little attention was paid to what he actually said in his opinion. In *New York Times v. U.S.*,³⁶ Stewart decided only the question of the constitutionality of prior restraint in the case at bar, under then existing law. He specifically left open the possibility of post publication criminal charges against *The New York Times* and *The Washington Post*. He further allowed for legislation which would permit such injunctions in the future. Finally, in *Flast v.*



The inauguration of Richard Nixon as President January 20, 1969, led to changes in the Supreme Court as Nixon appointed four new Justices during his first term. The states' rights Potter Stewart advocated in dissent during the Warren Court was in vogue during the Burger Court years.



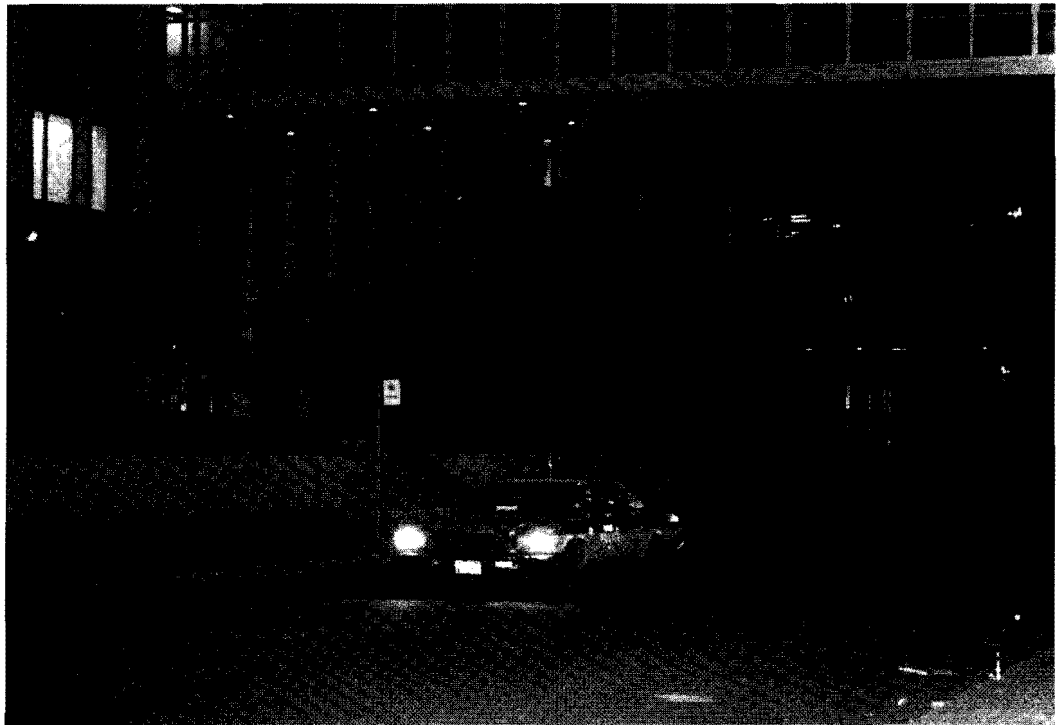
Marian Reynolds, on the floor of the Kansas House of Representatives in 1975. Mrs. Reynolds was eight months pregnant when this photo was taken and planned to remain at work as long as possible. Justice Stewart wrote two decisions on pregnancy in the workplace in 1974. In the first, he rejected a mandatory maternity leave. In the second, he upheld discrimination against pregnancy in a state disability plan.

Cohen,³⁷ Stewart concurred with the finding of the Court that plaintiffs had standing "as taxpayers," to challenge a federal statute which, *inter alia*, provided funds for sectarian educational institutions. In his concurrence, he stressed the merits of the case had not been reached. "Only" the question of taxpayer standing had been resolved, and only with respect to expenditures allegedly in violation of the Establishment Clause of the First Amendment. Stewart was careful to point out that *Frothingham v. Mellon*³⁸ had not been overruled and the Court had not opened the doors of the federal courts to all of the grievances of taxpayers.³⁹

Stewart's unique ability to narrow decisions and subsequently to distinguish seemingly similar cases made him a critical figure on the Court. His was often the pivotal, tie-breaking fifth vote in controversial decisions. Stewart was able to distinguish pretrial hearings from criminal trials with respect to the access of the press. In *Gannett v. DePasquale*⁴⁰ he wrote for a majority of five that judges may close hearings, but in *Richmond Newspapers v. Virginia*,⁴¹ he concurred with the Court holding that

trials must ordinarily be open. In *Cleveland Board of Education v. LaFleur*⁴² in 1974, he wrote the Court opinion rejecting a mandatory fifth-month maternity leave policy for elementary school teachers, but shortly thereafter he wrote the *Geduldig v. Aiello*⁴³ decision, upholding discrimination against pregnancy in a state disability plan. On other occasions, Stewart wrote both the *Brewer v. Williams*⁴⁴ and *Rhode Island v. Innis*⁴⁵ decisions, distinguishing squad-car conversations by police designed to elicit information from the suspect-passenger from those which only result in allegedly voluntary and unforeseeable cooperation with the police. Finally, Stewart was the only Justice to reject affirmative action programs sponsored by government in *Regents of the University of California v. Bakke*⁴⁶ and *Fullilove v. Klutznick*,⁴⁷ but to uphold a private plan fostered by Kaiser Aluminum Corporation in *Weber*.⁴⁸

His tendency to distinguish related issues, and to render exceptionally narrow and tentative decisions, also helps to explain Stewart's jurisprudence in racial equality cases where he was far



A police cruiser patrolling the empty streets of Detroit. In two cases, Stewart distinguished between squad-car conversations designed by the police to elicit information and those that result in voluntary cooperation.

more likely to support racial equality in the application of statutory law than in constitutional decisions. Because this is an area of decision making in which both constitutional jurisprudence and statutory interpretation have each been a significant part of the Court's agenda, it is possible to compare Stewart's voting behavior in constitutional cases with those decided under federal statutes and to analyze the pattern which emerges. In cases on constitutional law, Stewart was distinctly more conservative than were the other Justices with whom he served on the Supreme Court. In contrast, in cases applying federal civil rights statutes, such as the 1964 Civil Rights Act, the 1965 Voting Rights Act, the 1968 Open Housing Act, as well as the post civil war statutes, Stewart's support for the claims of the African-American plaintiffs is nearly identical to the Court as a whole.⁴⁹ A very persuasive explanation for this phenomenon reflects back on Stewart's concern about our lack of wisdom "to see around the next corner." Statutory interpretations by the Court may easily be changed by Congress if they are seen as either faulty or inadvisable. Constitu-

tional decisions have a certain permanence. Not only is it rare for the Supreme Court to overrule itself, the political process of constitutional amendment is arduous and, consequently, rarely used. A judicial concern about flexibility for change, a strong motivating principle underlying Stewart's preference for narrowness, may as well lead directly to a greater sense of interpretative freedom when applying statutory rather than constitutional law.

Assessing Stewart's Jurisprudence

No retrospective on a late Justice would be complete without an assessment of the quality of his constitutional jurisprudence. Stewart rates high on intellect, lucidity, and judicial candor. Opinions written by Stewart are never difficult to decipher; they are short, crisp, and to the point. In this respect, he rivals the craftsmanship of the late Justices John Marshall Harlan, and Robert H. Jackson.⁵⁰

Stewart's Justice-as-lawyer role is, however, a problematic concept. It rests on the assumption that each clause of the Constitution has an unam-

biguous, objective meaning. If this were so, then one might apply the Constitution the way one would apply a commercial code: place the facts of the case alongside the applicable "rules" and automatically reach a "correct" legal conclusion. But this mechanical jurisprudence, so tenaciously embraced by, among others, the late Justice Owen Roberts, is rarely possible. The Constitution's clauses on freedom of speech, due process of law, or equal protection do not admit of lexical definition. Few of its provisions do. The Constitution must be interpreted, and in order to do that a jurist must identify the values underlying the words. Stewart regularly shied away from constitutional theorizing, perhaps out of fear of its being misconstrued as the subversion of the true Constitution in favor of his own image thereof. But a Justice must be at least a bit of a political theorist for his or her judgments to be persuasive.

Stewart's commitment to states'-rights-oriented federalism significantly influenced his jurisprudence. But it was never clear that this commitment flowed from an appreciation of the values in our system of federalism. Our federal division of power can be understood to: (1) promote democracy by allowing decisions to be made by those who would be affected by them; (2) facilitate good governance by permitting problems to be resolved at the lowest level of government equal to the task; (3) encourage the solving of social problems by allowing states to be laboratories for experimentation; and (4) minimize the opportunity for oppressive government through a division of powers. That being so, one would have great difficulty understanding why the restriction of individual rights under the Fourteenth Amendment was dictated by federalism. Except in rare instances, broadly defined individual rights are unlikely to interfere with the values that underlie federalism. Yet Stewart tended to begin every Fourteenth Amendment analysis with a presumption of state sovereignty.

The commitment to the narrow, non-anticipatory decision making process, the element of the Justice-as-lawyer model most characteristic of Stewart, is similarly problematic. A distinction must be drawn between the Court deciding no more than is before it in the case at bar, on the one hand, and choosing to resolve the case with the narrowest possible reasoning, on the other. The virtue of the former is clear. As Stewart said in his

interview, issues not fully litigated in the adversary process should not be disposed of prematurely. When insufficient light is cast on an issue, the Court might well come to the wrong conclusion. But this kind of judicial restraint should not be confused with resolving a constitutional issue with the narrowest possible lawyerly reasoning. To do the latter is to focus on the trees and sometimes miss the forest.

Excessively narrow reasoning breeds unpredictability in the law. One does not know how the Court will resolve the next case. It also provides little guidance for judges faced with similar or related cases in the lower courts; and that, in turn, promotes a lack of uniformity in the decisions made in different jurisdictions. Those are practical problems.

But there is a more serious philosophical problem. Resolving constitutional cases in the narrowest possible manner, like the concept of mechanical jurisprudence, suggests that the Constitution is simply a legal code requiring no theoretical exegesis and/or the development of constitutional theory is to be avoided whenever possible. This deprives both the people and their political leaders of the opportunity to question and to debate the virtue of our constitutional system and legal values. And the failure to place constitutional questions in a broad context results in inequities in the disposition of cases.

The folly of excessive narrowness is particularly apparent in cases involving gender discrimination and discrimination against pregnant women. And it may be here Stewart has left his most permanent mark on constitutional jurisprudence. Because Stewart favored a nondoctrinal course, he would not define gender as a "suspect classification" when four comparatively liberal Justices voted to do so in 1973.⁵¹ As a result, there was not then a uniform,⁵² and there still is not now, a reliable, standard for reviewing such cases.⁵³ Similarly, the two constitutional cases on child-bearing leave (*LaFleur* and *Geduldig*), in which the majority opinions were both written by Stewart, were resolved by entirely different reasoning and reached contrary conclusions. In the broad view, the issue in both was the unconstitutionality of the states' disfavor of pregnancy vis-a-vis other temporary "disabilities." In an alternative and even broader perspective, a perspective eschewed by the Court, the issue was gender discrimination.

Potter Stewart's reluctance to view sex discrimination, like race discrimination, as "suspect," prevented the Court from doing so nearly twenty years ago. It is thus perhaps a great irony of history that his retirement from the Court in 1981 paved the way for the appointment of Justice Sandra Day O'Connor, the first, and to date only, woman to serve on the U.S. Supreme Court.

Endnotes

¹ Stewart was a recess appointment in October 1958, confirmed by the U.S. Senate on May 5, 1959.

² James F. Simon, *In His Own Image: The Supreme Court in Richard Nixon's America* (NY: David McKay, 1973):176.

³ Interview with author April 19, 1976, Washington, D.C.

⁴ The label "liberal" is applied to Justices prone to support individual liberties where there are allegations of governmental intrusion. Claims for Bill of Rights and Thirteenth, Fourteenth and Fifteenth Amendment protection of freedom and equality are generally supported by this group. Liberals, however, are not prone to find violations of individual liberty in governmental regulation of the economy; New Dealism is also part of the liberal perspective. "Conservatives," in contrast, are those who have been unlikely to see governmental actions as violations of individual rights or have been easily persuaded by the government of the advisability of its restrictions on substantive and procedural rights. Conservatives, unlike liberals, are reluctant to read broadly the meaning of constitutional rights or to find implied or penumbral rights. This conception of a liberal-conservative dichotomy with respect to the Court has, with some minor variation, been adopted by contemporary analysts of the Supreme Court. See, e.g. Henry Abraham, *Justices and Presidents*, 3rd ed. (New York: Oxford University Press, 1992), David Rohde and Harold Spaeth, *Supreme Court Decision Making* (San Francisco: W.H. Freeman, 1976), Glendon Schubert, *The Judicial Mind Revisited: Psychometric Analysis of Supreme Court Ideology* (New York: Oxford University Press, 1974), Robert Scigliano, *The Supreme Court and the Presidency* (New York: The Free Press, 1971), and Robert Steamer, *The Supreme Court in Crisis* (Boston: University of Massachusetts Press, 1971).

⁵ Interview with author, *supra* note 3.

⁶ See, e.g., Joseph Bishop, Jr., "The Warren Court is Not Likely to be Overruled", in Leonard W. Levy, ed. *The Supreme Court Under Earl Warren* (New York: Quadrangle, 1972):95, commenting that Stewart and White "are two who cannot even roughly be classified as conservative or liberal." Steamer, *supra* note 4, at p. 262, offered the observation that Stewart was "not easily categorized as conservative or liberal, but for the most part on the side of restraint."

⁷ Glendon Schubert, "Judicial Attitudes and Voting Behavior: The 1961 Term of the United States Supreme Court", 28 *Law and Contemp. Prob.* 126

(1963). In the same article, Schubert referred to Stewart as, "the most typical member of the Court," at p. 137.

⁸ Rohde and Spaeth, *supra* note 4, at p. 144.

⁹ The term "swing" voter implies a fluidity with respect to the Justices with whom he would vote in different cases. Steamer, *supra* note 4, at p. 262, has suggested that, "With notable exceptions, particularly in the areas of desegregation and freedom of speech, Stewart has generally been found in the conservative bloc voting against the Chief Justice (Warren) and the cluster of liberals," Abraham, *supra* note 4, at p. 273, in a similar vein, has commented that despite his "liberalism" on freedom of expression, Stewart has tended to favor the government in criminal cases and hence vote with the conservatives on those issues. But in contrast, with respect to his quality as a "swing" voter, Fred Rodell, "It is the Earl Warren Court", in Levy, *supra* note 6, at p. 148, observed, "Justice Stewart, wetting his toes in the waters of constitutional controversy,... started, a bit cautiously at first, to follow more often than not, the Black-Douglas-Warren-Brennan line." (emphasis added).

¹⁰ Although scholarly attention to Stewart has been relatively minimal, those who have attempted to "place" Stewart within the philosophical spectrum of the Court have disagreed on his exact "location." See, e.g. Steamer, *supra* note 4, arguing that Stewart had been more liberal than Justices Harlan or Whittaker. See, also, Rodell, *supra* note 9, concluding that Stewart was "more likely than not" to be among the liberals. In contrast, Abraham, *supra* note 4, at p. 273 viewed Stewart as a "progressive conservative or moderately liberal."

¹¹ 312 U.S. 100, 124 (1941).

¹² 402 U.S. 146, 157 (1971).

¹³ The one notable exception was Stewart's support for the right to counsel for indigents in state criminal proceedings because he thought it essential for a fair determination of guilt. See, *Gideon v. Wainwright* 372 U.S. 335 (1963) and *Argersinger v. Hamlin* 407 U.S. 25 (1972).

¹⁴ 378 U.S. 1 (1964).

¹⁵ 395 U.S. 784 (1969).

¹⁶ 391 U.S. 145 (1968).

¹⁷ 378 U.S. 478 (1964).

¹⁸ 384 U.S. 436 (1966).

¹⁹ 388 U.S. 263 (1967).

²⁰ For some of the complexities of Stewart's application of Bill of Rights' principles to state criminal cases, see also his positions in *Williams v. Florida* 399 U.S. 78 (1970), *Apodaca v. Oregon* 406 U.S. 404 (1972), and *Johnson v. Louisiana* 406 U.S. 356 (1972). In *Williams* he voted in favor of allowing the states to empanel small juries but dissented against permitting the states to rely on convictions reached by non-unanimous juries in *Apodaca* and *Johnson*. Jury unanimity, in contrast with its size, was, in Stewart's view, an "essential element" of the Sixth Amendment, and, therefore, applicable to the states under *Duncan*, a decision from which he had dissented. Perhaps the most significant apparent departure from Stewart's reluctance to interfere with state criminal procedures was his opinion for the Court in *Crist v. Bretz* 437 U.S.

28 (1978). Under this ruling, the states are required to follow the federal trial rule that jeopardy attaches when the jury is empaneled and sworn. Despite his dissent in *Benton v. Maryland* 395 U.S. 784 (1969) which "incorporated" the Fifth Amendment's prohibition on double jeopardy against the states, Stewart found it necessary under the due process clause to require that the states interpret the guarantee similarly. He stressed in his opinion that the "empaneled and sworn" rule was an "integral part of the constitutional guarantee against double jeopardy" and that the states were, therefore, prohibited from attaching jeopardy at a later point in the trial process (437 U.S. 28, at 38 (1978)). In sum, Stewart's reluctance to apply Bill of Rights provisions to the states under the Fourteenth Amendment is not necessarily accompanied by a narrow reading of the consequences of their incorporation. Federal rules of application of the Bill of Rights, if "integral" or "essential" were, in Stewart's view, applicable to the states.

²¹ See, e.g., *Edwards v. South Carolina* 372 U.S. 229, (1963), *Cohen v. California* 403 U.S. 15 (1971), *Coates v. Cincinnati* 402 U.S. 611 (1971), *Palmer v. Euclid* 402 U.S. 544 (1971), *Schacht v. U.S.* 398 U.S. 58 (1970), and *Spence v. Washington* 418 U.S. 405 (1974).

²² See, e.g., *Jenkins v. Georgia* 418 U.S. 153 (1974), *Hamling v. U.S.* 418 U.S. 87 (1974), *Miller v. California* 413 U.S. 15 (1973), *Paris Adult Theatre v. Slaton* 413 U.S. 49 (1973), *U.S. v. Twelve 200-foot Reels of Super 8 m.m. Film* 413 U.S. 123 (1973), *U.S. v. Orito* 413 U.S. 139 (1973), *Kaplan v. California* 413 U.S. 115 (1973), *Heller v. New York* 413 U.S. 483 (1973), *Alexander v. Virginia* 413 U.S. 836 (1973), *Papish v. Board of Curators of the University of Missouri* 410 U.S. 667 (1973), *Kois v. Wisconsin* 408 U.S. 229 (1972), *Mishkin v. New York* 383 U.S. 502 (1966), *Ginzburg v. U.S.* 383 U.S. 463 (1966), *Jacobellis v. Ohio* 378 U.S. 184 (1964), *A Quantity of Books v. Kansas* 378 U.S. 205 (1964), *Bantam Books, Inc. v. Sullivan* 372 U.S. 58 (1963), *Manual Enterprises v. Day* 370 U.S. 478 (1962), and *Kingsley International Pictures Corp. v. Regents* 360 U.S. 684 (1959).

²³ 381 U.S. 741 (1965).

²⁴ 399 U.S. 383 (1970).

²⁵ 421 U.S. 426 (1975).

²⁶ See, especially, *Harper v. State Board of Elections* 383 U.S. 663 (1966).

²⁷ See, *South Carolina v. Katzenbach* 383 U.S. 301 (1966) and *Katzenbach v. Morgan* 384 U.S. 641 (1966). While it is surprising that Stewart voted to sustain the provisions of the 1965 Voting Rights Act that were challenged in *South Carolina*, despite the extent to which they undermined state autonomy, it appears that the fact that the ultimate decisional authority was in the federal courts and not with Congress (as was the case in *Morgan*) may have influenced his position. But on the question of the authority of the federal government to reject the electoral plans of the states covered by 5 of the Act, see *Richmond v. U.S.* 422 U.S. 358 (1975) and *Beer v. U.S.* 425 U.S. 130 (1976) significantly narrowing such federal authority.

²⁸ In reapportionment cases, Stewart concurred in

Baker v. Carr 369 U.S. 186 (1962) that the subject could be resolved by the courts and in *Reynolds v. Sims* 377 U.S. 533 (1964) on the narrow grounds that failure to reapportion was fundamentally "irrational" and "arbitrary." In subsequent cases, however, Stewart was very unlikely to order states to reapportion and was especially unwilling to expand the class of state and local governments subject to the dictum of *Reynolds*. See, for example, *Wesberry v. Sanders* 376 U.S. 1 (1964), *W.M.C.A. v. Lomenzo* 377 U.S. 633 (1964), *Lucas v. 44th General Assembly of Colorado* 377 U.S. 713 (1964), *Wells v. Edwards* 409 U.S. 1095 (1973), *Hadley v. Junior College District of Kansas City, Mo.* 397 U.S. 50 (1970), and *Avery v. Midland County, Texas* 390 U.S. 474 (1968). On other questions of the constitutional autonomy of state electoral systems, Stewart was similarly deferential to the state and local governments. This was particularly true with respect to state policies limiting access to the ballot for voters and candidates. See, for example, *Rosario v. Rockefeller*, 410 U.S. 752 (1973), *Storer v. Brown* 415 U.S. 724 (1974), *Jenness v. Fortson* 403 U.S. 431 (1971), *Williams v. Rhodes* 393 U.S. 23 (1968), *Lippitt v. Cipollone* 404 U.S. 1032 (1972), *Burns v. Fortson* 410 U.S. 686 (1973), *Kramer v. Union Free School District* 395 U.S. 621 (1969), *Hill v. Stone* 421 U.S. 289 (1975), *Phoenix v. Kolodziejewski* 399 U.S. 204 (1970), *Salyer Land Co. v. Tulare Lake Basin Water Storage District* 410 U.S. 719 (1973), *Richardson v. Ramirez* 418 U.S. 24 (1974), and *U.S. v. Arizona* 400 U.S. 112 (1970).

²⁹ Potter Stewart, "The Role of the Federal Courts in the Administration of Justice", 30 *The Ohio Bar* 480 (June 3, 1957).

³⁰ See, e.g., *Zahn v. International Paper Co.* 414 U.S. 291 (1973) and *Eisen v. Carlisle & Jacquelin* 417 U.S. 156 (1974) which rendered the federal courts inhospitable for class action litigation.

³¹ 426 U.S. 833 (1976).

³² *Garcia v. San Antonio Metropolitan Transit Authority* 469 U.S. 528 (1985) overruled *National League of Cities*.

³³ Interview with author, *supra* note 3.

³⁴ 369 U.S. 186 (1962).

³⁵ 408 U.S. 238 (1972).

³⁶ 403 U.S. 713 (1971).

³⁷ 392 U.S. 83 (1968).

³⁸ 262 U.S. 447 (1923).

³⁹ 392 U.S. 83, at 114 (1968).

⁴⁰ 443 U.S. 368 (1979).

⁴¹ 448 U.S. 555 (1980).

⁴² 414 U.S. 632 (1974).

⁴³ 417 U.S. 484 (1974).

⁴⁴ 430 U.S. 387 (1977).

⁴⁵ 446 U.S. 291 (1980).

⁴⁶ 438 U.S. 265 (1978).

⁴⁷ 448 U.S. 448 (1980).

⁴⁸ *United Steelworkers of America v. Weber* 443 U.S. 193 (1979).

⁴⁹ For a discussion of these data, see, Gayle Binion, "Justice Potter Stewart on Racial Equality: What it Means to be a Moderate", 6 *Hastings Constitutional Law Quarterly* 853, 860-864 (1979).

⁵⁰ Stewart would, no doubt, be pleased by this comparison with Jackson and Harlan. In an interview with the author, *supra* note 3, Stewart noted that his respect for Justice Robert H. Jackson was based on the latter's having been a model of the "justice as lawyer." See, in this regard, a speech given by Stewart at Yale University, Potter Stewart, "Robert H. Jackson's Influence on Federal State Relationships", 23 *Record of the Association of the Bar of the City of New York* 7-32 (1968). From among the Justices with whom he had served on the Court, Stewart cited Harlan as the one to whom he felt intellectually closest. Although he was clearly reluctant to cite the Justice least like himself, he did identify Justice Douglas as having that distinction.

⁵¹ *Frontiero v. Richardson* 411 U.S. 677 (1973).

⁵² See, for example, *Reed v. Reed* 404 U.S. 71 (1971), *Stanley v. Illinois* 405 U.S. 645 (1972), *Kahn v. Shevin* 416 U.S. 351 (1974), *Schlesinger v. Ballard* 419 U.S. 498 (1975), *Taylor v. Louisiana* 419 U.S. 522 (1975), *Weinberg v. Wiesenfeld* 420 U.S. 636 (1975) and *Stanton v. Stanton* 421 U.S. 7 (1975).

⁵³ While *Craig v. Boren* 429 U.S. 190 (1976), decided three years after *Frontiero*, set the standard of an "intermediate" level of review in sex discrimination

cases, a level of review which has also been applied to cases on discrimination against minors in the enjoyment of constitutional rights, (*Carey v. Population Services International* 431 U.S. 678 (1977)), cases such as *Michael M. v. Superior Court* 450 U.S. 464 (1981), and *Rostker v. Goldberg* 453 U.S. 57 (1981), suggest that the standard is a conceptually weak compromise and also, in its application, is able to do little to protect sexual equality. This is especially so because of the failure of an "intermediate" level of review to require that government choose the least restrictive way of accomplishing its "important" objectives. In consequence, any less-than-trivial governmental objective could be viewed by the high Court as thoroughly eclipsing of the importance of sexual equality. The consequences of this approach are especially apparent in cases affecting the rights of minor women who are, in a sense, doubly subject to the vagaries of "intermediate" review. See, for example, *Hodgson v. Minnesota* 497 U.S. — (1990) and *Ohio v. Akron Center for Reproductive Health* 497 U.S. — (1990); see also, Gayle Binion, "Reproductive Freedom and the Constitution: The Limits on Choice", 4 *Berkeley Women's Law Journal* 12, 20-24 (1988-89).

The Judicial Bookshelf

D. Grier Stephenson, Jr.

Perhaps the dominant characteristic of American law is the struggle between constancy and change.¹ The same observation applies to the Supreme Court of the United States. The Court serves as custodian of the values the Constitution embodies but also "feels the touch of public opinion," as James Bryce delicately phrased the

tension. Accordingly, the Court changes "its colour, *i.e.*, its temper and tendencies, from time to time, according to the political proclivities of the men who composed it."² The differences wrought by these varying "proclivities" mean that understanding the Supreme Court has long been aided by studying the individuals who have graced its bench.

One begins with a recognition of the significance of the questions with which the Court deals. While the Court has confronted politically charged issues since Chief Justice John Jay's time, the proportion of such cases has been much higher in the twentieth century than in the nineteenth. For example, constitutional cases, always among the most contentious, occupied only about six percent of the docket in 1875, compared to about half the docket in recent years. Thus, the particular ideological complexion of the bench has come to matter even more in the political struggles besetting the nation.

The length of service of those who become Justices also merits attention. Once named to the bench, the average Justice will serve longer than any President. Through 1992, the forty American Presidents (counting all repeaters and the split presidency of Grover Cleveland only once) have selected only 106 Justices (counting repeaters and those promoted from Associate to Chief Justice only once and omitting the several confirmed nominees who declined to accept). Beginning with President Washington's appointees, but excluding the nine members of the Court sitting in 1992, the average period of service for ninety-



Justice Louis Brandeis as a young man. He once commented that Justices were "almost the only people in Washington who do their own work."

seven Supreme Court Justices has been 15.8 years, and the median has been 15 years, easily besting the longest presidential tenure, Franklin D. Roosevelt's 12.1 years. For Justices appointed since 1900, the average number of years (22.1) exceeds the average (18) for Justices appointed between 1800 and 1899 inclusive. By contrast, the median (17 years) for the latter group exceeds that of the former (16). The short tenures of most Justices appointed prior to 1800 partly account for the slightly lower average for the entire time.³

A third reason which inclines study of the Court toward its Justices is the role of the Justices themselves as decisionmakers. True, recent studies have noted the increased reliance by almost all members of the Court on their clerks (the "junior supreme court," as Justice Douglas once referred to them) both in making recommendations on which cases to accept for review and in drafting opinions.⁴ This development seemingly contradicts the observation made long ago by Justice Brandeis that "the reason the public thinks so much of the Justices ... is that they are almost the only people in Washington who do their own work."⁵ Yet, the two observations may not be that far apart. Individual Justices may continue to do a great deal more of their "own work" than do their counterparts in the other branches of the federal government.⁶ While the role of law clerks and other staff is surely more encompassing than even a half century ago, the Court is unique among Washington's political institutions in the identity between the Justices and the Court's decisions. The same can be said only occasionally today of Presidents, Senators and Representatives. Witness the scarcity of books about even the most prominent legislators since 1960, all the while there has been an outpouring of books about Congress. The proliferation of both personal and committee staff has made it increasingly difficult to separate lawmakers from their assistants and advisers.⁷ Witness the books about Presidents which, perforce, must be books about administrations. Presidents have the leading part, to be sure, but it is a leading part in a cast of dozens (at least). The contrast is revealing. Scholars largely rely on judicial opinions for insights into a Justice's jurisprudential leanings; recent presidential and congressional documents and letters may be suspect as reliable indicators

of a particular President's or a particular legislator's mind, even though they may be helpful in drawing an accurate collective portrait of an office.

At least three kinds of studies aid in grasping the contributions of individual Justices, and through them the work of the institution itself. This article surveys examples of each. (A list of the books reviewed here follows the main text and appears just before the endnotes.)

The first kind includes historical surveys and analytical commentaries which depict the Court and its Justices as actors on the political and legal stage, fashioning public policy alongside players from the executive and legislative branches. The emphasis may be constitutional interpretation, interbranch conflict, or institutional development. With each, the focus is on the individual and collective handiwork of the Justices. Second, and somewhat less obvious, are studies of the judicial process itself—the business and procedure of courts. These may depict one or more elements of the judicial process as manifested in the context of many cases or virtually all elements of the judicial process as illustrated by a single case. (The latter type is commonly referred to as a "case study.") Third, and most obvious, are biographies which attempt to elucidate both policy and process using the life of a single individual. While examples of all three categories have recently appeared in print, biography has been most richly served.

The Biographer's Art

By most accounts, Alpheus Thomas Mason pioneered the development of the modern judicial biography.⁸ Through volumes on Justice Brandeis and particularly on Chief Justices Stone and Taft,⁹ Mason combined traditional analysis of the subject's mind and accomplishments with revelations about the inner workings of the Supreme Court itself. Fortunately, Mason had occasion in his retirement to reflect on what he called the "art of biography." With Thomas Carlyle he agreed that "a well written life is almost as rare as a well spent one."¹⁰ (Mason might not have concurred with Carlyle's further observation that "there are certainly many more men whose history deserves to be recorded than persons willing and able to record it.")¹¹ Success requires "the



Alpheus Thomas Mason pioneered the art of the judicial biography with volumes on Brandeis, Stone and Taft.

technique of the historian as well as that of the artist."

From the vast store house of history the biographer draws material. The exploratory, research stage, though long and laborious, can be infinitely exciting. To turn up a cache of letters long lost or unknown, to discover the factual item or incident that holds the secret to a human being's meaning -- these are among the biographer's rewards.... The slightest shred of available material cannot be overlooked lest it alter shadings in the final portrait.¹²

Yet the same breadth of investigation leads to a second challenge. "From sheer necessity biographers must select, discard, discriminate. ... The process of sifting and eliminating is an art in itself. It is as important to know what to omit as what to include."¹³ The writer must know everything but not use all he knows.

Once materials are at hand, the biographer becomes more artist than historian, adopting "some of the novelist's craft by shifting from the

purely objective point of view of society as a whole to focus on an individual's world and worth. The biographer's task is to blow the breath of life into inert fragments -- mementoes, notes, letters, diaries, dry as dust documents. Only then does the biography emerge...." Because the human spirit, "flame-like and elusive, bears little resemblance to a mass of sundry fragments," Mason knew from his own experience as a writer that "understanding, imagination, sympathy, discrimination, ability to single out the facet that gives meaning to the whole ... are the main causeways to the art." Because a life "is a tangled web," the author must recognize that "widely separated experiences can usually be woven into a meaningful design of continuity. Biographical artistry consists in presenting not only what happened but also the subtle interplay of people and events in the subject's life."¹⁴

However, Mason understood "art" itself had limits. With Brandeis he agreed that one should state the facts and let the characterizations suggest themselves. "Biographers should not sit in judgment." Instead, "guided by their knowledge and insight, the reader should be permitted to render the final verdict."¹⁵

He also appreciated the possibly ephemeral quality of his own work. "Just as each generation is entitled to write its own history, so each generation may be expected to write its own biographies." To aim at finality is to seek "the vain goal of saying the last word" because the word "definitive" applied to biographies "has no proper relation to human affairs. New sources of information and reinterpretation of facts already known have a way of giving the lie to the label 'definitive'." With the reward of "vicarious living," Mason believed biographical writing amply compensated for the risks its challenges entailed. "Fortunate are those who write the biography of anyone whose achievements cannot escape history. By opening a window on one life, biographers may open it on life itself, thus enriching their own and that of others."¹⁶

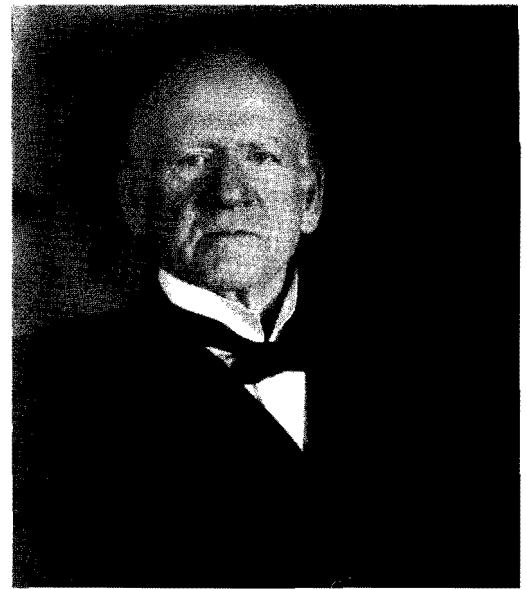
Mason's admonitions apply as accurately to his own scholarship as to the work of others. Recently published judicial biographies fall into two categories: two are among the first to explore the life of a Justice, and four retrace lives already examined by others.

**Biography:
Harlan I
&
Harlan II**

John Marshall Harlan I died in 1911, thirty-four years less two days after President Rutherford B. Hayes nominated him to fill the vacancy on the Supreme Court created when Justice David Davis accepted election to the United States Senate by the Illinois legislature in 1877. It is puzzling that so many decades passed without a thorough book-length study of Harlan's life. Among prominent and long-serving Justices appointed in the nineteenth century, Harlan was for years among the least examined. The subtitle ("A Justice Neglected") of an article in 1955 was accurate too long.¹⁷ A volume in 1915 had focused narrowly on his constitutional views,¹⁸ and a later survey was helpful but brief.¹⁹ Otherwise, Harlan was the subject of a few doctoral dissertations and some articles. Fortunately the wait for something more comprehensive is over. Loren P. Beth's *John Marshall Harlan: The Last Whig Justice*²⁰ satisfies a long-standing need in the literature on the Court and its Justices.

It may not be true, as the author says in his concluding chapter, that Harlan is the preeminent Justice between John Marshall and Oliver Wendell Holmes, Jr.,²¹ but few probably would now contest a claim that he is one of several strong judicial figures during this period. The irony is that perhaps even two decades after his death Harlan would not have been widely regarded by the bar and by constitutional scholars as one of the judicial "greats." They might have recalled a list of dissenting opinions, often solitary ones, seemingly out of step with the legal wisdom of his day. Justice Frankfurter once referred to him as "an eccentric exception."²² His name had "passed into that decent obscurity that is the usual historical resting place for all but the great judges."²³

However, the transformations of constitutional doctrine during the New Deal and Warren Court periods posthumously thrust greatness upon Harlan. The call for expanded national power in the economic realm, the protection of civil rights, and stricter standards for criminal proceedings in state courts found Harlan largely on the politically fashionable side. Since Harlan had addressed these subjects in dissenting opinions, and since the



Justice John Marshall Harlan I served on the Court for nearly thirty-four years. When he died he left a legacy of dissenting opinions in such notable cases as *Plessy v. Ferguson* and the *Civil Rights Cases*.

majority positions against which he argued seemed badly flawed to later generations, Harlan looked prophetic. His strong-minded and enthusiastically partisan manner that survives in the record have lent credibility to one who was right, after all.

With Alpheus Mason's caution about application of the term "definitive" to any biography in mind, the reader finishes Beth's *Harlan* with the impression the author has amply covered the subject. While Harlan occupies a sufficiently important place in Supreme Court history easily to warrant a second biography, one can be thankful that a thoroughly respectable account of Harlan's life does not remain to be done.

While *Harlan* is Beth's first book-length biography, it reflects the hand of a scholar who is very much at home with his subject and in the period about which he has written.²⁴ These are important requirements in a book about Harlan. A writer must understand Kentucky politics and American history before, during, and after the Civil War. It is here the book makes an important contribution to the literature -- placing Harlan in the politics of his time. In no other place do we find the wealth of context, especially prior to his appointment to the Court in 1877. Moreover, one sees Harlan's part in what transpires.

Perhaps the delay in the appearance of a book-length study of Harlan has been fortuitous. Beth has had access to papers and other materials, including the Harlan manuscript collections at the Library of Congress and the University of Louisville, which were not widely accessible as recently as a few years ago. Availability and accessibility of sources about one's subject are all the more crucial when those sources are scanty, at least by the standards of the twentieth century. Some of Harlan's professional life pre-dated the widespread use of the typewriter and carbon paper. Letters ordinarily did not survive unless the recipient, for whatever reason, happened to keep them.

The contrasts between Harlan and his colleagues and between Justice Harlan and his upbringing and early professional years in Kentucky make him a particularly interesting biographical subject. His many dissents highlight the former and state politics highlight the latter. For Beth, the key to understanding Harlan's part in both is his Clay Whig nationalism.

Harlan was born into a slave-owning Whig family in Kentucky, and himself owned slaves until the Thirteenth Amendment of 1865 freed them. (The Emancipation Proclamation of 1863 applied only to Union-occupied areas of the Confederacy.) During the Civil War, Harlan was strongly pro-Union but fiercely anti-Lincoln, supporting McClellan for President in 1864. After the war he opposed ratification of the Reconstruction amendments. Once anti-union Democrats won control of the state government, however, he concluded he had no political future within the state. Harlan then joined the Republicans since they inherited many of the old Whig principles. Although little chance existed of Republican victories in state politics, Republican victories nationally might bring local patronage to the party faithful. His law partnership with Benjamin Bristow (who became U.S. Solicitor General) led eventually to Harlan's role at the Republican Convention of 1876 when he delivered the Kentucky delegation to Hayes at the decisive moment. (Hayes repaid the debt with the offer of a seat on the Supreme Court only months after taking office.) It is this Kentucky part of the story, which consumes slightly less than one-half of the volume, which Beth chronicles especially well.

Harlan seems already to have given serious

thought to a seat on the High Court. "I know of no more desirable position....," he wrote Bristow in 1870, "especially if the salary should be increased to \$10,000.--

It lifts a man high above the atmosphere on which most public men move, and enables him to become in every sense, an independent man, with an opportunity to make a *record* that will be remembered long after he is gone."²⁵

Beth reasons that becoming a Justice freed Harlan from immediate partisan concerns (if not, it turned out, from financial ones).²⁶ Harlan could now espouse "the old Whig doctrines supporting the national government as against the states" to maximize the powers of Congress. "With the support of his 'old Yankee' wife and his three sons²⁷ (who all settled in the North), he was encouraged to maintain the rights of the freed slaves even against eight Northern Court brethren who did no such thing."²⁸

Whatever one concludes about Harlan's constitutional jurisprudence, one thing is undeniable: Harlan's self-confidence and his certainty. He did not suffer from "*Judicial Worms* -- that kind of worms which produce doubt and hesitation, and which do not permit the mind to rest in certainty,



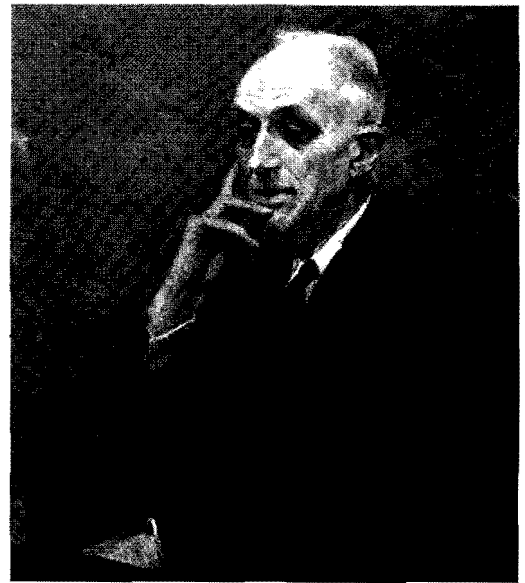
Benjamin Bristow was Justice Harlan's law partner and played an important role in Harlan's ascent to the Court.

until a decision of some Master of the Rolls is found."²⁹ It was probably Justice Brewer who once joked that the Kentuckian retired at night "with one hand on the Constitution and the other on the Bible, safe and happy in a perfect faith in justice and righteousness."³⁰

What does Beth conclude of Harlan as Justice? He reminds the reader of Holmes's remark that Harlan was "the last of the tobacco-spittin' judges," a statement Holmes may have meant literally. There is philosophical and jurisprudential meaning too in the comment. Both proud and stubborn and sometimes intolerant of the views of others, "Harlan was very much a nineteenth-century man and judge." Those opinions so agreeable to "1930s New Dealers and 1950s liberals" derived from "the use of thoroughly nineteenth-century theories and ideals."³¹

Ironically, the other Justice to be the subject of a serious biography for the first time is John Marshall Harlan II, grandson of the first Justice Harlan. This fact makes the second Harlan unique among all 106 Justices: only he is the direct lineal descendant of another Justice. The subtitle of Tinsley E. Yarbrough's *John Marshall Harlan* suggests a second piece of common ground: "Great Dissenter of the Warren Court."³² Like his grandfather, the second Harlan frequently was not of the Court he served. The numbers tell the story: nearly half (296) of the 613 opinions the second Harlan wrote during his sixteen years on the Supreme Court (1955-1971) were dissents. Many of these fell during the 1963-1967 terms which represented the height of the liberal activism of the Warren Court (1953-1969).

(Terms such as "activism" and "liberal" can be confusing when applied to the judiciary. As commonly employed, an activist judge, as opposed to a restraintist judge, is more willing to impose his view of correct policy on officials in other parts of the political system. Restraintist judges tend to defer to the judgments of others; activist judges do not. Liberal decisions uphold the claims of individuals against the government when personal rights are at stake (except claims involving traditional property rights) and the claims of the government against the individual when most forms of social and economy policy are at issue. Activism can therefore be "liberal" or "conservative," depending on the values which are served.)



Like his grandfather, John Marshall Harlan II issued many dissenting opinions throughout his career on the Bench.

The second Harlan understandably held his grandfather in high respect. Just twelve years old when his grandfather died, he had memories which he cherished. As a Justice, he proudly displayed his grandfather's portrait in his chambers. Yet the differences between the two easily outnumber the similarities, for the grandson embraced little of his grandfather's constitutional jurisprudence. While Harlan certainly supported the Warren Court's efforts to eradicate state-mandated racial segregation, he found real limits to Congress's powers to reach private discrimination by way of the Fourteenth Amendment.³³ In the realm of criminal justice he was an eloquent opponent of the application of the particulars of the Bill of Rights to the states through the Fourteenth Amendment, preferring ordinarily to accept state procedures as valid under the due process clause.³⁴ Yet, he was much less deferential than his grandfather in cases involving government regulation of business. While there is little evidence he would have preferred a return to the heyday of the Court's economic policymaking, "he frequently voted to limit the reach of antitrust laws and other federal regulatory legislation."³⁵ Although he joined the judgment of the Court in *Ferguson v. Skrupa*,³⁶ he refused to join Justice Black's opinion of the Court which rejected all judicial attempts to assess the "reasonableness" of economic legislation.

Although not nearly so many years passed between the death of the second Harlan and Yarbrough's book as passed between the death of the first Harlan and Beth's book, several reasons explain the relative inattention in the scholarly literature the second Harlan has received. Indeed, Yarbrough finds the inattention "not ... particularly surprising."³⁷ First, because Harlan usually voted with the restraintist Justices, of whom Felix Frankfurter was the acknowledged leader until his retirement in 1962, some scholars may have viewed Harlan's opinions merely as reflections of Frankfurter's. The second reason was probably Harlan's personality -- described by someone as "Frankfurter without mustard."³⁸ In the eyes of his close friend Justice Potter Stewart, what set Harlan apart was not his scholarship, but his character: "His generous and gallant spirit, his selfless courage, his freedom from all guile, his total decency." For Stewart, Harlan was "a human being of great worth."³⁹ Not being involved in intrigues at the Court, he did not attract the contemporary attention others did. Moreover, his personality meant he "simply lacked the certitude which enabled Hugo Black to paint with a broad brush ... even at the risk of oversimplifying the facts and distorting the language and history of relevant law."⁴⁰ Third, his jurisprudential style led him to choose "a complex judicial and constitutional philosophy" which did "not lend itself readily to extensive generalization or easy analysis."⁴¹ Yarbrough's third point suggests a fourth: Harlan embraced, indeed he was passionate about, subjects such as precedent, federalism, separation of powers, and the so-called "passive virtues" generally.⁴² They were a sharp contrast with the interests of his more liberal colleagues and may partly explain why journalists and even some scholars would find him not as interesting.

The contrasts go further. Harlan's background set him apart from some of his colleagues. For example, consider Justice William O. Douglas, in many respects Harlan's antithesis. Douglas had a poverty-stricken childhood; Harlan's upbringing was comfortable, if not well-to-do. Douglas was a Democrat who at times harbored presidential ambitions; Harlan was a life-long Republican who never sought elective office. Douglas's public employment prior to his Court service consisted of his work at the Securities and

Exchange Commission; Harlan's included appointment as an assistant United States Attorney, special assistant attorney general of New York state, and chief counsel of the New York State Crime Commission, as well as a short tenure on the United States Court of Appeals for the Second Circuit. Douglas practiced law privately for barely two years, while much of Harlan's professional life was spent in private practice, including several leadership positions with bar associations. Douglas prided himself on being "anti-establishment," seemed to relish tweaking the nose of privilege, and appeared to be more at home in hiking clothes than in a judicial gown. Harlan made no apologies when he was called a "patrician." Douglas's tenure on the Supreme Court exceeded thirty-six years, Harlan's only sixteen. Aside from their jurisprudential differences, general theory and the fine points of opinion-writing were not important to Douglas; Harlan by contrast placed high value on legal craftsmanship, being known by many as a "judge's judge."

The contrasts suggest some of the reasons why Harlan's career deserves extensive examination. Particularly as critiques of the jurisprudence of the latter Warren Court (a period which begins roughly with Frankfurter's retirement) Harlan's opinions are important. Second, his opinions are worthy of study because, whether or not one agrees with the outcome, a Harlan opinion is often the best place to begin when trying to understand a case. As William M. Beaney observed, "It was of great importance to Harlan ... that the product of his labors be of maximum utility and longevity."⁴³ Or as Harlan's essence was captured by Paul Freund,

[His] special quality is precisely this gift of conjoining the particular with the general, or rather of finding the general implanted within the particular. Thus one reads his opinions with the secure feeling that they will convey an understanding of the exact controversy to be resolved and will disclose the philosophical wellsprings of the Justice's position.⁴⁴

Someone who has edited Supreme Court opinions for publication may have had this writer's experience that Harlan's are among the most

difficult (and painful) to edit precisely because of that special quality.

Whether because of a particular interest in Harlan or because of a general interest in the Supreme Court during the time he served, one can be pleased Yarbrough has written this book. His examination of the Harlan Papers at Princeton University (Harlan's undergraduate alma mater) is exhaustive. This source richly enhances findings from other collections, including the Brennan Papers at the Library of Congress. Productive of unusual insight as well are the documented interviews with at least eighteen of Harlan's law clerks.⁴⁵ They reveal some gems, including the impressions of one of Harlan's clerks during the mid 1960s that the Justice rarely engaged in "pronouncements."

He was unusual in the amount of listening he did. He struck me as someone so comfortable with himself and so self-confident that he found it easier than most people to listen. ...[T]hat relieved him of any obligation to always [sic] be explaining himself or proselytizing or pronouncing.⁴⁶

"Discovering the why underlying the judge's thinking is...difficult."

Given the breadth, depth, and accessibility of such sources, one can only wonder why Yarbrough found it necessary to rely extensively, in at least one place, on *The Brethren*.⁴⁷

"Surveying a Supreme Court Justice's life and analyzing his jurisprudence," Yarbrough describes with understatement, "are comparatively easy tasks. Discovering the *why* underlying the judge's thinking is decidedly more difficult."⁴⁸ There were, after all, exceptions to the restraintist posture Harlan adopted in most cases. Harlan stood fast against religious exercises in public schools, pushed for the inclusion of the idea of "expectation of privacy" which brought electronic surveillance clearly within the scope of the Fourth Amendment, and adopted a position in *Poe v. Ullman*⁴⁹ and *Griswold v. Connecticut*⁵⁰ that became the theoretical underpinning of *Roe v. Wade*⁵¹ less than two years after his death. Since Harlan was not a textualist like Black, such exceptions presumably did not result from some perceived vagueness in the Constitution itself.

Recognizing that many factors make people what they are, the author isolates five which he believes go far toward accounting for Harlan's judicial record. First was Harlan's prosecutorial experience. It might have strengthened "his regard for the role of the states in the federal system, as well as his support for flexible constitutional standards conditioned by countervailing social imperatives."⁵² It may also have given him an appreciation of the special difficulties law enforcement often encountered. Second, Harlan's secret work as an officer in World War II⁵³ may have contributed to a reluctance while a Justice to second-guess other agencies of government when some aspect of national security was involved. Third, Harlan's years at Oxford as a Rhodes Scholar and his "affinity for the British" seem "certain to have influenced his flexible, essentially common-law approach to legal issues."

That perspective would incline him against absolute rights and toward a standard of reasonableness. A fourth group of influences would take account of his "social background and the corporate focus of his law practice.... There is evidence that Harlan personally sympathized with the interests he was re-

tained to represent."⁵⁴ These experiences not only inclined him to limit government regulation of business where he could but may even have contributed to a mindset which accepted the legitimacy of policies, challenged in many civil liberties cases, designed to eliminate any threat to the nation's political order. For a fifth influence, Yarbrough looks to his "judicial ties" -- judges whom Harlan admired and/or with whom he associated. Besides Frankfurter, the list included Judges Henry Friendly, Harold Medina, Learned Hand, and J. Edward Lumbard. (Justice Holmes had been dead for twenty years when Harlan went on the Court. Still, despite what would appear to be a close jurisprudential connection, Holmes's name oddly does not appear even a single time in the index. Surely Harlan was aware of his opinions.) Yarbrough even considers important Harlan's relationship with Justice Black, although at first glance the connection, given Black's approach to adjudication and frequently opposite votes in cases, would seem implausible. But

Black too wanted to avoid the judicial arrogance of the past, even if his method to contain judicial discretion differed from Harlan's. Sixth on Yarbrough's list was Harlan's general "impatience with provincialism and intolerance,"⁵⁵ an attitude which might help to account for his positions in privacy cases and in some First Amendment ones, such as *NAACP v. Alabama*⁵⁶ and *Cohen v. California*.⁵⁷

Together these influences inclined Harlan to produce a judicial record which has impressed "friends and foes alike."⁵⁸ Students of the Court are in Yarbrough's debt for adroitly capturing so much of Harlan the man and Harlan the judge.

Biography:
Holmes, Frankfurter, Black,
Douglas, & Fortas

Oliver Wendell Holmes, Jr., was born eight years after the first Harlan, and they shared nine years together on the United States Supreme Court before Harlan died in 1911. If there is a sharp contrast between the times and the Courts of the first and second Harlans, the breadth of change in the nation during Holmes's long life is nearly mind-boggling. When he was born, Texas was an independent Republic, William Henry Harrison was President, the Constitution contained twelve amendments, and it took about six months to travel across the continent; when Holmes died the United States was a world power, Franklin Roosevelt was in the White House, there were twenty-one amendments, and Charles Lindbergh had already demonstrated one could traverse the Atlantic Ocean in less than thirty-four hours.

Liva Baker has written the third recent biography of Holmes: *The Justice from Beacon Hill: The Life and Times of Oliver Wendell Holmes*.⁵⁹ Hers joins those written by Gary J. Aichele⁶⁰ and Sheldon M. Novick.⁶¹ Of the three, each has its strengths. Aichele's provides the most concise overview of Holmes's life and jurisprudence; there are elaborate accounts of Holmes's relations with others in Novick's; Baker's attempts to look at all aspects of Holmes the man as well as Holmes the judge. The result in Baker's is the deepest penetration to date of Holmes's private life. However, those interested in the "Beloved Hibernia" episodes should not overlook John S. Monagan's

research.⁶² (One must note, however, a few minor errors. For example, John Jay was not secretary of state while he was Chief Justice, as Baker says;⁶³ while Chief, he did negotiate a treaty with England which bears his name. Also, it is confusing to describe *Buchanan v. Warley*⁶⁴ as involving a racially restrictive covenant ordinance.⁶⁵ It involved a city ordinance which made it unlawful for any "colored person" to occupy a house on a block where the majority of the residents were white-- a plain example of racially based "state action." Racially restrictive covenants appeared in deeds, not ordinances, and presented the more complex question whether the Fourteenth Amendment was implicated when courts enforced those private agreements.)

With the Aichele, Baker, and Novick volumes now available, one would hardly suppose that, among prominent Justices whose service ended before the Burger Court (1969-1986), few comprehensive book-length studies had been written about Holmes before 1989. The explanation for the earlier dearth of biographies⁶⁶ may lie partly in the span of his years; as noted, the nation was



Oliver Wendell Holmes, Jr. saw the world change dramatically during his lifetime. Born during the presidency of William Henry Harrison, he died while Franklin Roosevelt was in the White House.

transformed several times over during his lifetime. A biography requires the author master not only the subject but the subject's times. With Holmes that reality alone is enough to give most writers pause. Holmes is one of a small number of Justices (including at most John Jay, Salmon Chase, William Howard Taft, Louis Brandeis, Charles Evans Hughes, Benjamin Cardozo, and Earl Warren) whose contributions clearly would have demanded biographies even if they had never gone on the High Bench.

Similarly, any scholar undertaking a study of Holmes must surely become weak-kneed when confronting the vast quantity of material both by and about him that must be considered -- more, probably, than for any other American jurist. Baker's volume gives the reader an accurate sense of the challenge Holmes presents. The list of bibliographical sources alone consumes thirty-eight pages, with an average of twenty-five entries per page; even so, the list strangely includes nothing by James Bradley Thayer who, as a professor at Harvard Law School, opposed the growing judicial activism of the 1890s.⁶⁷ (Indeed, one may read Holmes's famous dissent in *Lochner v. New York* as an echo of Thayer.) Holmes wrote more than 2000 judicial opinions, half of those while on the United States Supreme Court. There are his own published books, addresses, and articles, plus eight volumes of letters edited by others. If there are few biographies, there has been no shortage of books and articles about one or more aspects of Holmes's long public life as scholar and judge. There are also approximately 36,000 documents (most unpublished) in the Holmes Papers at Harvard, access to which is closed except with permission, plus references to Holmes in collections such as the William Howard Taft Papers at the Library of Congress. Besides these, Baker consulted at least seventy-one other manuscript collections and conducted a dozen interviews.

Happenstance is also part of the explanation. Frankfurter himself was the first authorized biographer of Holmes. Upon his appointment to the Court, the responsibility fell to Mark DeWolfe

Howe. His two volumes of a projected multi-volume work covered Holmes's life only to 1882.⁶⁸ Howe's death terminated the project. Death also cut short the work of biographer Grant Gilmore.⁶⁹

A fourth part of the explanation may lie in Holmes himself. He has long been regarded as enigmatic. One scholar concluded that "the apotheosis of Holmes defeats understanding."

Primarily interested in the common law, as a judge Holmes greatly influenced only constitutional law. Remarkably dogmatic, Holmes exemplifies 'humility.' Fatalistic, mistrustful of reason, and obsessed with the ubiquity of force, Holmes is nevertheless classified with John Dewey. Generally indifferent to civil liberties interests,

Holmes is regarded as their champion. Unconcerned with contemporary realities, Holmes inspired a school of legal 'realists.' Uninvolved with the life of his society, Holmes affected it profoundly.⁷⁰

"[A]ny scholar undertaking study of Holmes must surely become weak-kneed when confronting the vast quantity of material..."

Perhaps of no other Justice considered "great" by many have assessments varied so much.⁷¹ From the perspective of Felix Frankfurter who probably did as much as anyone to lionize, if not to deify, Holmes, "No judge of the Supreme Court has done more to establish it in the consciousness of the people. Mr. Justice Holmes is built into the structure of our national life and has written himself into the slender volume of the literature of all time."⁷² For others, Holmes was a totalitarian.⁷³ A would-be biographer concluded he was a distasteful, if nonetheless important, figure.

Put out of your mind the picture of the tolerant aristocrat, the great liberal, the eloquent defender of our liberties, the Yankee from Olympus. All that was a myth, concocted principally by Harold Laski and Felix Frankfurter, about the time of World War I. The real Holmes was savage, harsh, and cruel, a bitter and lifelong pessimist who saw in the

course of human life nothing but a continuing struggle in which the rich and powerful impose their will on the poor and weak.⁷⁴

Baker avoids a categorization of Holmes although she gently nudges her subject off the heights of Olympus. Encompassed by Holmes, she chooses to let his life speak for itself. In civil rights cases, for example, she shows his record for what it was: mixed (as was the Court's). One of Holmes's first opinions as a Justice was in *Giles v. Harris*,⁷⁵ a case which demonstrates the vast changes which have occurred in judicial power during this century. In *Giles*, Holmes spoke for a majority which refused to grant relief when the facts showed a blatant plan of state-sponsored voter discrimination based on race. "[W]e are dealing with a new and extraordinary situation ... that the whole registration scheme of the Alabama constitution is a fraud upon the Constitution of the United States."⁷⁶ Fundamental was Holmes's admission that the Court was unable to provide relief. If "the great mass of the white population intends to keep the blacks from voting," he reasoned, "a name on a piece of paper will not defeat them." Instead, relief would have to come from the state or from "the legislative and political department of the government of the United States."⁷⁷ Over three dissents Holmes claimed the Supreme Court was powerless in this situation; he doubted its capacity to have its will obeyed. A decision for *Giles* would have called for a judicially led political revolution and a radically enlarged view of the Court's role. Holmes even threatened to dissent (but did not) in *Buchanan v. Warley*.⁷⁸ In contrast, he wrote the Court's opinion in *Nixon v. Herndon*⁷⁹ (one of the first "white primary" cases which the plaintiffs won) and adamantly condemned legalized lynchings of blacks in state courts.⁸⁰

Baker finds it impossible "to reduce his work to any one system. ... [H]is only absolute was an absolute abhorrence of absolutes."

It is possible to find in Holmes's thought currents consistent with positivism, realism, and pragmatism -- he was realistic but not strictly a realist, pragmatic but not strictly a pragmatist. It is also possible to find ideas consistent with

utilitarianism, sociological jurisprudence, evolutionism, authoritarianism, and totalitarianism. Threads of liberalism and progressivism add more color to the tapestry.... For every lovable quality Felix Frankfurter discovered, an equally disagreeable trait lurked in the shadows. Oliver Wendell Holmes was a complex and often inconsistent man. But he was a man. Not a myth.⁸¹

The relevance of his ideas to the law and to his role as a Justice, Baker concludes, was the realization that all aspects of life -- social, economic, and political -- were in a state of flux. Since law was a reflection of life, law would change as life would change. The Constitution allowed such flexibility.

"Although a new generation of readers may attend to the voice of Holmes as to an echo from another age," Paul A. Freund observed, "they will find ... that it has a disturbingly close resonance."⁸² Gary Aichele has hinted Holmes was no more reflective of his era than of ours. "[T]he figure that emerges [from a study of his life] will be seen from the perspective of the present age, and not in the light of his own. Each reader will find ... his or her own Holmes, and whether that man is a hero or not will depend more upon the reader's judgment than upon historical evidence."⁸³ It is precisely this "judgment" which Baker's prodigious labors facilitate.

In the years after Holmes's retirement, probably no Justice professed greater indebtedness to "the Justice from Beacon Hill" than Felix Frankfurter. Among Justices who have served since World War II, none has left a legacy which offers a clearer example than Frankfurter's of the continuing constitutional tension between change and constancy. Melvin I. Urofsky explores part of this legacy in *Felix Frankfurter: Judicial Restraint and Individual Liberties*.⁸⁴

As the subject of a book, Frankfurter presents a challenge similar to Holmes: a voluminous record. Frankfurter entered public life when Theodore Roosevelt was President; he tendered his letter of retirement from the Supreme Court to President John Kennedy. Alongside the judicial opinions written during his twenty-three years on the Court is the scholarly record of books, articles, and essays spanning the quarter century before his

appointment. In addition, his papers (including letters, memoranda, and draft opinions) from his Court and pre-Court years are vast enough to deter all but the determined scholar. Finally, there is a wealth of secondary literature. One senses the voluminosity in the superb bibliographic essay with which Urofsky concludes his study. Anyone undertaking further study of Frankfurter should begin with it.⁸⁵

Probably no one has gone to the Supreme Court with better preparation than Frankfurter. Even those who did not care for his "politics" were hard-pressed to build a convincing case against Justice Harlan Stone's estimate that he was "eminently qualified."⁸⁶ Moreover, "Frankfurter, too, believed that his entire career had been preparation for the large tasks that now awaited him in the marble temple."⁸⁷ However, he proved to be no leader for the newly forming "Roosevelt Court." Irony and disappointment marked his tenure. "Instead of being the herald of a new jurisprudential age," observes Urofsky, "[he] fought a valiant but ultimately ineffective rearguard action to divert the Court from what he considered a disastrous path. A quarter-century after his death, his opinions are all but ignored by both the courts and academia."⁸⁸ Urofsky's *Frankfurter* is one of several recent attempts -- all excellently written -- to explain why that happened.⁸⁹

In Urofsky's view, the origins of Frankfurter's ineffectiveness were both doctrinal and personal. In contrast to many Justices, his "jurisprudential ideas were well set by the time he took his seat on the Court," and, with one or two minor exceptions, "he did not significantly change them afterwards."⁹⁰ He formed his ideas about the role of the Supreme Court during the 1920s and early 1930s when an activist conservative majority kept the social reform efforts of popular majorities in check. Both to protect the judiciary and to serve worthy legislative objectives, Frankfurter advocated both judicial restraint and institutional deference. In this he followed the examples set by both Justices Holmes and Brandeis, but unlike those mentors he never appreciated the distinction in applying a different level of review when

popular majorities restricted political liberties.

But for one thing -- changing times -- this philosophical outlook might have presented few problems. As of 1928, Frankfurter had defined the Court's political responsibilities in terms of federalism and economic policy.⁹¹ But these issues which had been the mainstay of the Court's docket in the 1920s and 1930s nearly vanished after Frankfurter joined the Court in 1939. In their place appeared concerns which the Court had confronted only infrequently before his arrival: civil liberties and civil rights. As late as the term ending in 1936, only two of the Court's 160 decisions concerned nonproperty issues in civil

liberties and civil rights; a year before Frankfurter's retirement, the number had increased to fifty-four of the 120 cases decided with full opinion.⁹² "It is not that Frankfurter lacked a vision," Urofsky contends, "but rather that time outran his vision; he would have been the perfect judge a generation earlier."⁹³ Consistency turned out not to be a virtue. Because he believed in a Court of exceed-

Frankfurter "would have been the perfect judge a generation earlier."

ingly limited powers and therefore rejected a role that called for the Court to protect rights, he soon lost the initiative in shaping the Court's direction to those who thought differently. One of the earliest majority opinions which he authored was in *Minersville School District v. Gobitis*,⁹⁴ where eight Justices upheld the authority of a local school board to compel salute of the flag against a claim of religious liberty. His last major opinion was a dissent in *Baker v. Carr*,⁹⁵ which asserted the absence of justiciability in cases involving apportionment of state legislatures. In the first case, a new majority soon reversed the position Frankfurter had taken; in the second case, a majority failed to heed Frankfurter's warnings and bravely entered the "political thicket." (There were, of course, some important exceptions to his deferential outlook, as Urofsky acknowledges, particularly concerning religious liberty, the Fourth Amendment, and racial equality.)

Yet the clash of views alone did not diminish Frankfurter's persuasiveness. One would expect some tension on a Court populated by strong-willed individuals. Nor does Urofsky lay all the

blame on Frankfurter for the contentiousness that plagued the Stone and Vinson Courts. Yet the record is clear that Frankfurter's personality and his dealings with his colleagues detracted from the force his judicial arguments otherwise might have had. First, although he could be "charming, solicitous, witty, and outgoing," he was also "duplicious and conniving." Understandably, such characteristics triggered confrontation. Second, Frankfurter "tended to divide the world into disciples and mentors." He could relate well to his mentors and to his students but "not to his peers." Since he did not view any Justice with whom he sat as a mentor and since "the brethren" resented his tendency to treat them as his students, relations were strained. A third and related consideration was the success he had enjoyed as a professor at the Harvard Law School. It "spoiled him for his work as a Justice." He may have known more about the Court than any of the other Justices, but they took exception to his telling them so. The fourth factor was his "intellectual arrogance," which alienated almost all of the Justices at one time or another. Urofsky sees as typical a note Justice Frankfurter scribbled on a draft of one of Justice Wiley Rutledge's opinions after Rutledge had not accepted his advice: "If I had to explain all your fallacies I would have to write a short book on (1) federal jurisdiction (2) constitutional law (3) procedure generally."⁹⁶ Finally, his "high-flown lectures on the purity of the Court often angered those who saw the hypocrisy -- for there is no other word for it -- in his own secretive political activities." Of course, light as well as heat can be generated by friction, but Urofsky on balance finds the effects of Frankfurter's personality mainly negative. "Unfortunately, the Court and its members suffered for more than two decades from the personal animosities generated by this prima donna of the law."⁹⁷

Nonetheless, Urofsky believes Frankfurter's importance as a jurist survives those handicaps. Most notable was Frankfurter's emphasis on "popular democracy" -- "that the will of the people should be the dominant force in a free government." Second, in his advocacy of judicial restraint, Frankfurter served the Court well by stressing the "flexibility" that was one of the "essential attributes of judging." Third, his emphasis on restraint and deference "forced his more activist colleagues to slow down and think about

what they were doing. If he could not get them to adopt his vision of a time past, he did help them to hone their own vision of the times to come."⁹⁸

This writer would add a fourth. Although Frankfurter retired from the bench three decades ago, and although some of the most divisive issues the Court confronts in the 1990s either did not exist as legal questions in 1962 or, if they did exist, existed only barely, his opinions continue to inspire those who are troubled by what appear to be intemperate application of judicial authority. The opinions are of as much value to "conservative" critics of "liberal" decisions as they are to "liberal" critics of "conservative" decisions. Consider a passage from one of his opinions written in 1947:

[T]he Founders knew that Law alone saves a society from being rent by internecine strife or ruled by mere brute power however disguised.... To that end, they set apart a body of men, who were to be the depositories of law, who by their disciplined training and character and by withdrawal from the usual temptations of private interest may reasonably be expected to be 'as free, impartial, and independent as the lot of humanity will admit.'⁹⁹

It would be difficult to probe the constitutional debates of the past decade without stumbling into Justice Frankfurter. Yet, a measure of the distance the nation and the Court have traveled since his retirement is the probability that no person today with a record of having espoused the values Frankfurter taught as a Justice could be confirmed to the United States Supreme Court.

Like Frankfurter, Justices Hugo L. Black and William O. Douglas have been the topics of numerous studies, long and short. What has been absent until now is a volume which subjects them to comparative analysis. This is the goal Howard Ball and Phillip J. Cooper undertake in *Of Power and Right: Hugo Black, William O. Douglas, and America's Constitutional Revolution*.¹⁰⁰ On first consideration, the pairing of Black and Douglas would not seem to be as productive of insight as a pairing of, say, Black and Frankfurter,¹⁰¹ Douglas and Frankfurter, or Brennan and Harlan II. The assumption is that one is likely to learn

more by exposing conflict than by accenting consensus. The assumption may be correct, but it is a miscategorization simply to regard Black and Douglas as two like-minded Justices.

One finds a rough parallel in the overlapping service of Justices Holmes and Brandeis. The words "Holmes and Brandeis dissenting" were to the Supreme Court of the 1920s what the expression "Black and Douglas dissenting" was to a later Court. A shared position, however, does not necessarily mean a common jurisprudential starting point. Matched voting may obscure differences as well as highlight affinities. With Holmes and Brandeis, for instance, the latter was a reformer; the former was not. Holmes was a man of ideas as much as Brandeis was a man of facts and action. "I hate facts," Holmes once wrote to his friend Sir Frederick Pollock (although Holmes admitted it would be good for his "immortal soul to plunge into them, good also for the performance of my duties.")¹⁰² "Brandeis read economics as well as Euripides," Alpheus Mason explained. "Holmes read and reread Plato. The results are clearly reflected in their judicial opinions. Holmes is the enlightened skeptic; Brandeis, the militant crusader."¹⁰³ Ball and Cooper demonstrate that Black and Douglas, like Justices Holmes and Brandeis, sometimes arrived at the same result for different reasons. Their

thinking diverged as often as it moved along the same path.

Ball and Cooper could hardly have chosen a more revealing pair of nouns for their title. For Black, the constitutional populist, the power of the people reposed in the text of the Constitution. Through fundamental law they bestowed authority and imposed limits on judges as well as on themselves and on legislators. Both authority and limits owed their origin to, and derived their legitimacy from, the text of the Constitution. For Douglas, the constitutional individualist, the Constitution safeguarded pre-existing rights. The Declaration of Independence and the Ninth Amendment exemplified Douglas's thinking as much as it did the thinking of the America of the late eighteenth century. Government was the protector but not the source of rights which all possessed by virtue of their humanity. For Black, the judge's duty was to enforce the popular will in both its positive and negative dimensions as manifested in constitutional text. For Douglas, judicial legitimacy rested on solicitous regard for personal liberty, text-based or not. The former's premise was popular sovereignty; the latter's was individual sovereignty. In contrast to Frankfurter's views, which were nearly full-blown when he took his seat on the Court, their philosophies took shape in the process of deciding cases.



Justices Black (left) and Douglas (right) served together on the Court for thirty-two years, longer than any other pair of Justices. Justice Black holds the record for most years as senior Associate Justice with twenty-six years while Justice Douglas served on the Bench longer than any other Justice, thirty-six years.

These are not new insights. Those already well-acquainted with Black and Douglas will find the themes familiar.¹⁰⁴ Instead, the authors' principal contribution flows from the clarity with which they restate those themes.

Ball and Cooper have written three books in one. As they explore contrasting approaches to constitutional interpretation, the authors examine almost every major constitutional question to confront the Court between 1939 and 1971 (the years Black and Douglas served together). The scope of the book is therefore broader than Urofsky's study of Frankfurter, which concentrated on questions of individual rights. Like Urofsky, they tell the story against a backdrop of the Court's internal politics, including the personal and professional relations between Black and Douglas and most of the "brethren." (For Black and Douglas, that collective noun includes more than a quarter of all Justices who have sat since 1789.) Revealed are substantial differences between Black and Douglas in style and temperament, not just in constitutional philosophy. The volume thus contains a wealth of detail of the Court at work, especially with respect to Justices, such as Stanley Reed, who themselves have not yet been the focus of biographies. Scarcely an available source seems to have been overlooked.

Nonetheless, organization of the book is puzzling in spots. Development of themes sometimes seems out of logical as well as chronological order. For example, after an opening reference to *Plessy v. Ferguson*¹⁰⁵ and a summary of the NAACP's litigation strategy in the 1930s¹⁰⁶, the authors jump to the racial sit-in cases of the 1960s¹⁰⁷ before returning to the pre-*Brown* litigation¹⁰⁸ and finally to a comprehensive review of *Brown v. Board of Education*¹⁰⁹ itself. There are also two small factual errors: the Court's vote in *Plessy* was 7-1, not 8-1¹¹⁰ (Brewer did not take part); Black's separate opinion in *Jackson County Board of Commissioners v. United States*,¹¹¹ that so irritated Felix Frankfurter, was a concurrence, not a dissent¹¹².

Along with the strength of their personalities and the force and enthusiasm with which they communicated their convictions, length of service added immensely to the impact Black and Douglas had on constitutional law. Among their colleagues, only Brennan with nearly thirty-four years and White with thirty (so far) have rivaled Black's thirty-four years and Douglas's thirty-



Abe Fortas in his Public Works Division office where he served as General Counsel for the division. He had a long and prominent career in the New Deal and later as a Washington lawyer.

six. Yet, they stand out in another respect. In contrast to the present Court (except for White and Rehnquist), Black and Douglas came to the Court without appellate judicial experience (Douglas had no judicial experience at all, and Black had served only briefly as judge of a police court in Birmingham). Moreover, of current Justices only O'Connor held significant elective office prior to her appointment (Black had twice been elected United States senator). Ironically, the formidable constitutional handiwork of Black and Douglas -- the handiwork which Frankfurter and, to a slightly lesser extent, Harlan resisted -- may have so altered the politics of judicial appointment that those with backgrounds similar to theirs are now likely to be passed over in favor of those whose constitutional values are known or those whose records strongly hint what those values will be.

Douglas's earliest proteges included Abe Fortas, whose professional life linked the New Deal of Franklin Roosevelt and the Great Society of Lyndon Johnson. Laura Kalman's *Abe Fortas: A Biography*¹¹³ offers a close look at one who had a hand in shaping and implementing American liberalism in the middle third of the twentieth century. Hers is the second biography of Fortas to

appear in as many years. The first, Bruce Allen Murphy's *Fortas*, was driven by the question "Who or what killed the public career of Abe Fortas?"¹¹⁴ In contrast, Kalman's allots a subordinate place to Fortas's Court years and probes the elusive private side of her subject's life. Raw page figures suggest the difference. Excluding space in both books devoted to the endnotes, Murphy dedicated sixty-five percent (391) of the pages to the period from appointment as Associate Justice in 1965 through the agony of resignation in 1969; Kalman's account covers the same period in 129 pages (thirty-two percent).

Someone unfamiliar with Fortas's years in Washington might wonder why he has become a biographer's subject, twice over. Of the ninety-seven Justices who have completed their work on the Court, only six served a shorter time than Fortas's three years and nine months.¹¹⁵ While a sketch of his life would reveal he held several administrative posts in the federal government during the 1930s and 1940s, none of these placed him higher than an assistant secretary in the Interior Department. Otherwise, he was an influential attorney and lobbyist in a city with many of both.

Of course Fortas's career on and off the Court was much more than such a brief outline suggests. 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. Confessing disinclination, Fortas accepted the position at the irresistible urging of Johnson. In 1968 Johnson picked him to succeed Earl Warren as Chief Justice. Had Johnson had his way, Fortas would have joined a very small club of Chief Justices who were named from the ranks of Associate Justices -- a club whose membership in 1968 included only Edward D. White and Harlan F. Stone. Johnson hoped 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. (Indeed, 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, he became the first nominee for the center chair in this century to fail to win confirma-

tion. Illustrative of the relationship that was in part the source of his political difficulty, Fortas even drafted the statement for Johnson announcing withdrawal of the nomination. In May 1969 he then became the first (and thus far the only) Supreme Court Justice to resign under fire, giving the new Nixon administration its second (and unexpected) vacancy on the Court to fill. Even when Fortas left public life, reverberations continued from the events in 1968 and 1969, ushering in two decades of some of the most rancorous and vituperative debates ever witnessed over Supreme Court nominees.

This is the record of personal and professional accomplishment and calamity with which any biographer of Fortas must contend. 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 necessarily requires prodigious research. One must have a thorough grounding in the era during which a particular Justice served and must study the judicial opinions, papers, and reflections of colleagues as well. With Fortas, one must do all that, and more. 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 Kalman seems to have left few stones unturned. Documentation in the form of endnotes accounts for roughly one-fifth of the total length of the volume. She appears to have access to one source not available to Murphy: Fortas's personal papers, not yet generally opened to scholars. As did Murphy, Kalman examined Fortas's Supreme Court papers at Yale University.

Her account is both comprehensive and impressive, a valuable example of political analysis and (nearly) contemporary history. The book is no mere chronicling of recent events, but is a good example of the distinction Louis Halle noted between the "close-up view of human society" alone where the "role of accident seems to predominate" and "the larger view" where "a pattern, an order of some sort, becomes apparent."¹¹⁶ Kalman strikes an appropriate balance which views Fortas and others within the enveloping circumstances of the day, some of which they helped to make. "[H]uman detail does not ...

seem to me inconsistent with the large perspective. The essence of history ... is the contrast between the immensity of its movement and the limitations of the individuals who ... put themselves at grips with it."¹¹⁷

One of the most intriguing aspects of Fortas's life was his relationship with Lyndon Johnson, both before and during the Johnson presidency. Asked at his confirmation hearings in 1965 if the relationship might compromise his judicial independence, the nominee answered,

[T]here are two things that have been vastly exaggerated with respect to me. One is the extent to which I am a Presidential adviser, and the other is the extent to which I am a proficient violinist. I am a very poor violinist but very enthusiastic, and my relationship with the President has been exaggerated out of all connection with reality.¹¹⁸

Whatever Fortas's merits as a musician, Kalman's book makes clear his role as the President's adviser did not cease when he went on

the Bench. Indeed, the breadth of his role as adviser on policy questions ranging from strategy in Vietnam to domestic unrest "ran the risk of compromising his judicial integrity. ... He may have reasoned that advice he gave as counselor did not bind him to any decision as a Justice. Yet his behavior was still questionable."¹¹⁹ In fact, drawing on an account by Athan Theoharis and John Cox regarding a certain conviction for tax evasion,¹²⁰ Kalman notes one occasion when "Fortas did talk with Johnson about a case that was pending before the Court."¹²¹

Perhaps the most comprehensive view to date of Fortas as adviser to Johnson appears in neither Kalman's book or Murphy's, but in *The Triumph & Tragedy of Lyndon Johnson* by Joseph A. Califano, Jr., a top assistant in the Johnson White House who later joined Fortas's former law firm.¹²² This memoir documents no fewer than sixteen instances of Justice Fortas as presidential adviser. The most surprising revelation (one mentioned by neither Kalman nor Murphy) was Justice Fortas's role in the Penn-Central merger affair. According to Califano, Fortas, at Johnson's request in November 1966, gave the President



Protesters at the 1967 National Mobilization Direct Action Protest Against the Vietnam War. Justice Fortas advised President Johnson on Vietnam War policy and then sat in the five cases that raised the issue of the constitutionality of the war.

instructions on what the Justice Department should put in its brief.

Johnson called Fortas again. LBJ then told me that Fortas thought the Justice Department had become overbearing on matters within the substantive responsibility of other agencies; [Alan] Boyd should determine what the government says to the court about transportation-policy matters, and the brief should reflect Boyd's view of the merger. He asked me to talk to Fortas about it.¹²³

Califano reports Fortas later telephoned him at home and "repeated what the President indicated he had said."¹²⁴ Later, Fortas not only participated when the Court decided in March 1967 to remand the case to the Interstate Commerce Commission, but his dissent (joined by Justices Harlan, Stewart, and White) even repeated the same point he had urged for the government's brief, indicating he saw nothing wrong with the merits of the merger.¹²⁵ When the Justices finally approved the merger in January 1968, Fortas wrote the opinion of the Court.¹²⁶ Only Justice Douglas dissented. Justice Marshall, who had been Solicitor General, recused himself.¹²⁷

Of course Justice Fortas's connections to the Johnson presidency were widely known. For example, Kalman reprints two sentences from a letter Justice Douglas sent Professor Fred Rodell: "Abe -- architect of our Vietnam policy -- sat in the five cases raising the question of the constitutionality of the war -- absent a declaration of war. I could not tell ... whether he was being hammered on that or not."¹²⁸ But few who knew seem to have grasped the extent of the advising which routinely occurred. By coupling the accounts offered by Kalman and Califano, the reader senses just how frequent were those occasions. Fortas's activities with Johnson seem to have surpassed even those of Frankfurter with Roosevelt. Not only were the circumstances different, but much of Frankfurter's advice, it turns out, was unsolicited.¹²⁹

Why would Fortas continue a pattern of behavior that was not only politically risky and ethically dubious but potentially a threat to the Court itself? Clearly this was a role he was not

compelled to play. Rather, Kalman concludes, "he clearly enjoyed his power."¹³⁰ Fortas "could be reckless in his personal affairs," she explains. "He tolerated behavior in himself that he would not have accepted in a client or friend. As a public servant and officer of the court, he prescribed rules for society. As a private individual, he bent them."¹³¹

Process

Unseen even in most judicial biographies is an important part of the Court's work: the selection of cases for review. Jurisdictional changes, especially in the Judiciary Act of 1925, have given the Supreme Court nearly total discretion over the cases it will decide. This preliminary decision in every case -- the decision to decide -- invites research, particularly so in recent decades as the number of filings has multiplied sharply while the number of decided cases has remained relatively constant. Functionally, the large ratio of total filings to cases decided on the merits means the Court's most frequent decision is to leave in place the decision of the court below. This fact distinguishes the Supreme Court from every other federal court and even from the high courts of many states. Justice William Douglas commented:

Justice Louis D. Brandeis used to say that what the Court did not do was often more important than what it did do. That was his way of emphasizing how important it was for cases to be carefully screened ... to make sure that the question was actually and unmistakably presented, that it was really necessary for the Court to make a pronouncement.¹³²

Understanding case selection is therefore of obvious importance to lawyers who want to press their client's claims in the Supreme Court and to political scientists who properly regard the Court as a political institution -- not "political" in the narrow, partisan sense, but "political" in the broad sense of affecting the distribution of power and influence in a society.

Scholars who have examined case selection begin with two assumptions. The first is that selection is not a matter of drawing docket num-

bers out of a hat, but instead is a purposeful decision. The second is that the Court's own Rule 10 on the granting of certiorari (virtually all cases now reach the Supreme Court by way of this discretionary writ) does not adequately account for those large numbers of cases each Term turned away at the door. The rule can really do no more than suggest some of the characteristics of a case the Justices say they will take into account. Further complicating the task of anyone who wants to probe case selection is the secrecy of the process. Justices typically do not explain publicly why review is or is not granted. While dissents to denials of certiorari are more common now than they were three or four decades ago, such dissents remain relatively uncommon and, when they occur, do not necessarily speak for everyone who might have preferred to grant review.

Until recently, the preponderance of scholarly wisdom has been that the decision to grant certiorari was strategic -- a disguised vote on the merits. Selecting a case for review was therefore based mainly on "political" factors (who or what wins) and not on "legal" considerations (clear jurisdiction, the presence of a conflict among the circuits, ripeness, and so forth).¹³³ Many of these studies were "associational," connecting selection with the characteristics of litigants and the questions they raised. Their conclusions contradicted the Justices' own repeated assertions that a denial "carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review."¹³⁴ In 1980, relying on a close analysis of Justice Harold Burton's papers, Doris Marie Provine was among the first to demonstrate that case selection was more complex than either scholarly articles claimed or the Court acknowledged.¹³⁵ While she agreed with earlier studies "that subjective considerations lie at the heart of case selection," she concluded that the "Justices' perceptions of a judge's role and of the Supreme Court's role in our judicial system significantly limit the range of case-selection behavior that the Justices might otherwise exhibit."¹³⁶

More than a decade after Provine's findings, H. W. Perry, Jr. maintains that "legal" factors do indeed play a sizeable role in case selection. *Deciding to Decide*¹³⁷ moves beyond other case-selection studies in one more important respect. Its principal sources are interviews. Subjects

included five Supreme Court Justices, sixty-four former Supreme Court clerks, seven judges on the United States Court of Appeals for the D.C. Circuit, four U.S. Solicitors General, and four attorneys in the Office of the Solicitor General. The Justices and sixty-one of the clerks were at the Court during the October terms 1976-1980. The contrast in methodology between Perry's study and the earlier ones is sharp. The latter drew conclusions from data in the public domain; Perry attempts to recreate the process from the position of those who grant or deny review. One is reminded of the story attributed to the late humorist Robert Charles Benchley. Asked on an examination at Harvard to write about an Anglo-American fishing treaty from both the British and American perspectives, Benchley said he would instead write about the treaty from the perspective of the fish.¹³⁸

Except where information and its source were already part of the public record, the identities of all interviewees remain confidential. In view of the difficulties caused by publication of *The Brethren* in 1979, where much of the so-called "scoop" was supposed to have come from interviews, it is to Professor Perry's credit, and an indication of the trust placed in him, that he was able to have as many apparently candid exchanges as he did.

Perry explains case selection by devising two "modes" or methods: the "outcome mode" and the "jurisprudential mode."¹³⁹ The former resembles the strategic approach which has been a staple in political science literature. The latter subsumes the various technical considerations which are independent both of the class of the petitioner and of the policy the petitioner challenges. The importance of *Deciding to Decide* is that Perry learned every Justice uses both modes. "What triggers one mode or the other is simply the degree of concern about the outcome on the merits."¹⁴⁰ Justices who care "strongly about the outcome of a case on the merits" enter the outcome mode in deciding whether to take the case. Justices who do not have strong feelings about the outcome enter the jurisprudential mode.

Entering either mode triggers a series of questions. From his interviews, Perry finds that four such questions dominate the outcome mode: "Will I win on the merits? Institutionally irresponsible not to take the case? Good vehicle? Is a better case

likely?" Six questions control the jurisprudential mode: "Conflict in circuits? Important issue? Strong reason to resolve case or issue now? Need/desire more percolation? Good vehicle? Is a better case likely?" Each question is like a gate. Failure of a case to clear a gate in the appropriate way results in a denial of review.¹⁴¹

Case selection is thus complex. Standing alone, the strategic (outcome) and legal (jurisprudential) approaches are only part of the story. If one assumes first, that his interviews yielded a true picture for the 1976-1980 terms, and second, that the description is an accurate portrayal of case selection in other recent terms, Perry's contribution is significant: he demonstrates that both policy and procedure matter.

Just as Perry's book probes the first step in the process by which the Supreme Court decides cases, *The Intelligible Constitution*¹⁴² by Joseph Goldstein directs attention to the last: writing opinions. His concern is not the grammarian's. Nor is he interested in the theories Justices employ in interpreting the Constitution or even in the merits of a doctrine the Court has adopted. Rather, he is preoccupied with the Court's educational mission as communicator and teacher. As they expound the Constitution, Justices have an obligation to publish opinions characterized by clarity, candor, and linguistic integrity. The Constitution enshrines values that define the kind of nation its citizens expect to enjoy. Judicial opinions construing the Constitution provide Justices an opportunity to articulate those values. Indeed, the judiciary is the only part of the government which routinely justifies its decisions through reason and whose ordinary public discourse consists of the fundamental principles of the political system.

Through a series of examples, Goldstein demonstrates how some landmark decisions of the modern Court are flawed exercises in communication. The problem is serious not merely because the author believes the Justices could write better but because flawed opinions run the risk of cutting the Court loose from its own legitimacy. Ironically, judicial review -- itself a limitation on majority rule -- flows from popular sovereignty. As far back as the arguments in Alexander Hamilton's *Federalist* No. 78 and Chief Justice John Marshall's opinion in *Marbury v. Madison*,¹⁴³ judicial review has been grounded on the theory that judges, in refusing to

give force to a duly enacted statute which they find in conflict with the Constitution, embrace the people's will in place of the will of the people's elected agents. Accordingly, the Court's duty in each constitutional case is to explain its decision in a way the sovereign people -- "We the People," Goldstein prefers throughout¹⁴⁴ -- can understand. Otherwise, the point *why* the government may (or may not) take the contested action may well be lost. He might have noted that the Court manifested an awareness of this sovereignty in one of its first constitutional decisions. "To the Constitution of the United States," Justice James Wilson conceded, "the term sovereign is totally unknown."

There is but one place where it could have been used with propriety. But, even in that place it would not, perhaps, have comported with the delicacy of those, who *ordained* and *established* that constitution. They *might* have announced themselves 'sover-



Chief Justice John Marshall's opinion in *Marbury v. Madison* substantiated the idea of judicial review that Alexander Hamilton put forth in the *Federalist* No. 78.

eign' people of the *United States*: But serenely conscious of the *fact*, they avoided the *ostentatious declaration*.¹⁴⁵

Recognizing that opinion writing is a personal as well as collaborative "art,"¹⁴⁶ Goldstein formulates five "canons of comprehensibility" by which the Justices can judge their own handiwork. First, "use simple and precise language level to the understanding of all." This canon recognizes that while a far larger proportion of Americans are literate today than in, say, Chief Justice Marshall's time, the overall level of literacy among the literate taxes any Justice's explanatory powers. It is often remarked that a principal element of the Protestant Reformation was the "priesthood of all believers." Goldstein seems to call for the constitutional investiture of all citizens. Second, "write with candor and clarity." An opinion should reveal the "real and significant reasons underlying" a decision. Third, "acknowledge and explain deliberate ambiguity." If five Justices can agree on an opinion only by the insertion of foggy language, the author of the opinion should be sufficiently forthright to acknowledge its presence. Fourth, "be accurate and scrupulously fair in making attributions to another opinion in the case." Goldstein wishes to avoid the situation Justice Robert Jackson described:

The technique of the dissenter often is to exaggerate the holding of the Court beyond the meaning of the majority and then to blast away at the excess. So the poor lawyer with a similar case does not know whether the majority opinion meant what it seemed to say or what the minority said it meant.¹⁴⁷

Fifth, "incorporate in the text, rather than relegate to footnotes, material that is directly related to the reasons for the decision or to the meaning or breadth of the holding."¹⁴⁸ Goldstein accepts Judge Abner J. Mikva's assessment of footnotes: "If [substantive] footnotes were a rational form of communication, Darwinian selection would have resulted in the eyes being set vertically rather than on an inefficient horizontal plane."¹⁴⁹ (Alas, since Goldstein's book itself contains some substantive endnotes, are readers allowed to wonder whether Darwinian selection

should have located an eyeball at the tip of each index finger?)

To enforce the canons, Goldstein proposes a "final-phase conference" which would bring the Justices together, without clerks or other staff, to review the several opinions in a case before they are released. A free-wheeling discussion might thereby "mitigate the untoward effects on opinion-writing of the bureaucratization of the Court."¹⁵⁰

The proposals clearly merit consideration. Whether they would improve the Court's communication with the public in a age when "sound bites" dominate the electronic media's coverage of public affairs and when contending political forces look less to reason than to results, is another matter.

As Goldstein would be quick to acknowledge, communication alone does not wholly determine the reception a decision receives nor its status decades later. For support, one need look no further than *Lochner v. New York*.¹⁵¹ Paul Kens ably examines the "anatomy" of this case in *Judicial Power and Reform Politics*.¹⁵² His story begins in the Gilded Age and ends in the Progressive Era.

In *Lochner*, five Justices set aside a New York statute of 1895 which restricted bakers to a ten-hour maximum workday. Favorable comment on the ruling was not totally lacking at the time. "It is most gratifying," one newspaper editorialized, "to observe that the Supreme Court does not allow the sanctity of any contracts which may have been made between the demagogues in the Legislature and the ignoramuses among the labor leaders in bringing to naught their combined machinations."¹⁵³ Yet the decision has probably received "more clearly unanimous criticism than any other in the twentieth century."¹⁵⁴ A socialist organ of the day referred to *Lochner* as "a new Dred Scott decision,"¹⁵⁵ and 85,000 bakers threatened a strike and a bread famine, vowing to "fight all along the line" if provisions for the hours restriction were dropped from their labor contracts.¹⁵⁶ Moreover, *Lochner* sparked further interest in reform of the courts among those who felt judicial power was surging unchecked.¹⁵⁷ As President Theodore Roosevelt wrote Justice William Day (one of the dissenters in *Lochner*) nearly three years later, "If the spirit which lies behind [the decision] obtained in all the actions of the Federal and State Courts, we should not only have a revolution, but it would

a revolution, but it would be absolutely necessary to have a revolution, because the condition of the worker would become intolerable."¹⁵⁸

Intervening years have been no kinder to *Lochner*. The decision embraced a laissez-faire policy which subsequent events rendered obsolete, and the ruling has become the twentieth century's archetype of a judicial mistake. Even among those who may still doubt the wisdom of hours legislation, hardly anyone now defends the Court's position as a matter of constitutional law. Posterity may record one of the few benefits of Justice Rufus Peckham's opinion for the Court in that case to have been wholly inadvertent: it was in response to Peckham that Justice Holmes penned one of the most frequently quoted opinions of his long career.¹⁵⁹

Yet the case possesses utility in at least another respect. It demonstrates constitutional change: how the words of the Constitution come to embody new meaning as a way of countering newly perceived threats to old values. *Lochner* was one of the first tests of the federal constitu-

tional limits to the modern regulatory state. Even though commercial legislation, as an example of the police power, had long been commonplace in the states and even though the Fourteenth Amendment and its attendant due process restrictions had been part of the Constitution since 1868, it was the surge in both the number and scope of state regulations in the late nineteenth century which posed the hard question of constitutional limitations. Were popular majorities in the states (Congress had only recently begun to enter the field of commercial regulation under the commerce power) free to impose restrictions unless expressly forbidden by a provision in the Constitution, or might those majorities be restrained by emanations from the "liberty" the due process clause protected? Does "unconstitutional" refer only to an action which conflicts with the words of the document or additionally to a conclusion by judges that the action in question is "unfair"? The *Lochner* majority adopted the latter.

Of course the idea of an enlarged Constitution encompassing more than its text did not originate



Lochner's Home Bakery in New York City was the focus of *Lochner v. New York*. In *Lochner*, the Court overturned a ten-hour workday statute for bakers.

with *Lochner*, as Justice Samuel Chase had demonstrated more than a century before.¹⁶⁰ Nonetheless, while later generations have rejected the *Lochner* result, the *Lochner* view that the Constitution embodies a good deal more than its text seems firmly to have taken hold. Amazingly, however, Kens manages to survey this constitutional landscape without once reviewing either James Bradley Thayer's noteworthy plea from the same era for judicial restraint¹⁶¹ or the seminal New York case of *Wynehamer v. State*.¹⁶²

Besides presenting a fascinating look into New York politics around the turn of the present century, Kens enters the debate over *Lochner's* true status: was it an aberration or did it accurately reflect the mind of the Court at that time? Some scholars have argued the Court's much-discussed opposition to reform legislation is greatly exaggerated, that the Court was reluctant to exercise the power it claimed. Looked at in this way, *Lochner* is an exception to a pattern of widespread judicial tolerance.¹⁶³ Kens disagrees. Although the Court did not impose an insurmountable barrier to reform,

[t]he barrier through which reform legislation had to pass was something more like Ali Baba's cave. Beyond its entrance lay the police power. Many statutes were allowed to pass, but those that did not possess the right words were denied admission. And these words were 'morals, health, safety, peace, and good order.'¹⁶⁴

Moreover, the large number of cases in the state courts challenging various commercial regulations show "how deeply the idea of laissez faire-social Darwinism had been imbedded in the constitutional psyche."¹⁶⁵ In terms of constitutional law, it was an attitude that did not disappear until after 1937, when the Justices no longer held out the police-power hoop through which reformers had to jump.

Commentary

Lochner's attempt to graft a prefabricated right onto the trunk of the Fourteenth Amendment does not fare well in *The Constitution in the Supreme Court: The Second Century 1888-1986*

by David P. Currie.¹⁶⁶ Currie's newest book is the successor to *The Constitution in the Supreme Court: The First Hundred Years 1789-1888*, published in 1985 and won the Supreme Court Historical Society Triennial Book Prize. The first book concluded with Chief Justice Waite's death; the second begins with the Fuller Court. Roughly half of the second book treats the Fuller, White, Taft, and Hughes Courts; the remaining half encompasses the years when Stone, Vinson, Warren, and Burger were Chief Justice. The book thus has eight chronological parts, with each part divided into chapters devoted to the significant constitutional issues of that period. Two constitutional turning points are dominant: "the transformation of the Fourteenth Amendment from an instrument of racial equality into one of laissez-faire,"¹⁶⁷ followed by the dismantling of that constitutional order and the Court's increasing solicitude for non-property aspects of civil rights and liberties.

As was true with the first volume, the key word in the title is the preposition "in." The focus is exclusively on neither the Constitution nor the Supreme Court; instead, the book assesses the impact of the latter upon the former. Currie's method is constitutional analysis from the perspective of a lawyer. References to the broader political and social contexts within which the Court functions usually appear, if at all, only in the footnotes. His chief concerns are interpretation and the style of opinion writing as displayed in major constitutional decisions. The starting point is his conviction

that the Constitution is, as it says, the law of the land, which binds the judges no less than the other officials whose actions they review. It follows that the judges may neither disregard limitations that the Constitution contains nor invent others that it does not. I do not pretend that the Framers answered all questions of constitutional interpretation, or most of them. I do maintain that it is inappropriate for a judge or for any other official to substitute his or her judgment for that of the 'People of the United States' in any case in which the latter can fairly be ascertained.¹⁶⁸

His standard, therefore, is a kind of constitu-

tional objectivism, one that is more impressed by right reason than by right results.

As did the first volume, *The Second Century* includes a wide range of cases. By this writer's count, at least 214 cases receive extended treatment; hundreds of others are mentioned in passing. There is hardly a single noteworthy constitutional case decided during the years 1888-1986 to which Currie does not refer. Since the body of the book barely exceeds 600 pages, Currie accomplishes the task only by dissecting the issues with crisp direct prose. An example is his assessment of the Fuller Court's treatment of economic cases, including *Lochner*: "Substantive due process had finally shown that it had teeth, but two serious bites in twenty years should not obscure the fact that most laws passing through its den during the Fuller period did not get bitten at all."¹⁶⁹

Because the analytical pace is fast, Currie's is not a book most readers will consume in large chunks at a time. Yet because the analysis is so rich and inclusive, it is a book to which most will refer frequently. Especially with respect to topics covered in the latter half of *The Second Century*, many of which remain annual fixtures on the Court's docket, Currie is skilled in keeping his own views well in the background. Unlike some recently published constitutional commentary, there is far more analysis than advocacy. Readers will also appreciate his occasional and instructive references to comparative law.

Looking back over both centuries of judicial power, Currie is satisfied that "on balance judicial review has served us well." Even acknowledging that the Court has not prevented every serious violation of the Constitution, he concludes that, as a nation, Americans have been better off with judicial review than without it. "[T]he harm done by occasionally overzealous judges seems trivial in comparison." After such prodigious research, it is little wonder Currie has his list of preeminent Justices. Joining Marshall, Story, Curtis, and Miller from the first century are Holmes, Brandeis, Cardozo, Hughes, Stone, Jackson, Frankfurter, and Black from the second. They "belong in the pantheon."¹⁷⁰

As well as any of the books surveyed here, *The Second Century* demonstrates how judicial review forms the nexus between change and constancy within the American constitutional system. As cases bring issues old and new to the Court

each term, the Justices play a part in governing the nation. For more than 200 years the Court has conducted a dialogue with the people that reflects the public's historic attraction to, and suspicion of, majority rule. "The people have seemed to feel that the Supreme Court, whatever its defects," reflected Justice Robert Jackson, "is still the most detached, dispassionate, and trustworthy custodian that our system affords for the translation of abstract into concrete constitutional commands."¹⁷¹ In a unique way, the Justices are the keepers of American constitutional morality. The Court has moved into its third century, and that truth remains a source of, and limit on, its power.

The books surveyed in this article are listed alphabetically by author below.

LIVA BAKER, *The Justice from Beacon Hill: The Life and Times of Oliver Wendell Holmes* (New York: HarperCollins, 1991). Pp. xiv, 783.

HOWARD BALL and PHILLIP J. COOPER, *Of Power and Right: Hugo Black, William O. Douglas, and America's Constitutional Revolution* (New York: Oxford University Press, 1992). Pp. viii, 390.

LOREN P. BETH, *John Marshall Harlan: The Last Whig Justice* (Lexington: University Press of Kentucky, 1992). Pp. vi, 313.

DAVID P. CURRIE, *The Constitution in the Supreme Court: The Second Century 1888-1986* (Chicago: University of Chicago Press, 1990). Pp. xiv, 668.

JOSEPH GOLDSTEIN, *The Intelligent Constitution: The Supreme Court's Obligation to Maintain the Constitution as Something We The People Can Understand* (New York: Oxford University Press, 1992). Pp. xx, 201.

LAURA KALMAN, *Abe Fortas: A Biography* (New Haven, Conn.: Yale University Press, 1990). Pp. xiii, 499.

PAUL KENS, *Judicial Power and Reform Politics: The Anatomy of Lochner v. New York* (Lawrence: Uni-

versity Press of Kansas, 1990). Pp., 232.

H. W. PERRY, JR., *Deciding to Decide: Agenda Setting in the United States Supreme Court* (Cambridge, Mass.: Harvard University Press, 1991). Pp. ix, 316.

MELVIN I. UROFSKY, *Felix Frankfurter: Judicial Restraint and Individual Liberties* (Boston: Twayne, 1991). Pp. xiii, 234.

TINSLEY E. YARBROUGH, *John Marshall Harlan: Great Dissenter of the Warren Court* (New York: Oxford University Press, 1992). Pp. xvi, 395.

Endnotes

¹ See, variously, K. Hall, W. Wiecek, and P. Finkelman, *American Legal History* 3-4 (1991); K. Hall, *The Magic Mirror: Law in American History* 309-336 (1989); G. Edward White, *The American Judicial Tradition* 2-4 (1976).

² J. Bryce, 1 *The American Commonwealth* 275 (1914).

³ Data are from the author's calculations.

⁴ B. Schwartz, *The Ascent of Pragmatism* 35 (1990).

⁵ Quoted in C. Wyzanski, Jr., *Whereas -- A Judge's Premises: Essays in Judgment, Ethics, and the Law* 61 (1965).

⁶ W. Rehnquist, *The Supreme Court: How It Was, How It Is* 261 (1987).

⁷ For example, see M. Bisnow, *In the Shadow of the Dome* (1990).

⁸ J. Howard, "Alpheus T. Mason and the Art of Judicial Biography," 8 *Constitutional Commentary* 41 (1991).

⁹ A. Mason, *Brandeis: A Free Man's Life* (1946); *Harlan Fiske Stone: Pillar of the Law* (1956); *William Howard Taft: Chief Justice* (1964).

¹⁰ T. Carlyle, "Jean Paul Friedrich Richter," in 1 *Critical and Miscellaneous Essays* 3 (1897).

¹¹ *Id.*

¹² A. Mason, "Vicarious Living: A Biographer's Reward." Appel Lecture, Franklin and Marshall College, November 8, 1977. The manuscript of this lecture is in the author's possession.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ H. Abraham, "John Marshall Harlan: A Justice Neglected," 41 *Virginia Law Review* 871 (1955).

¹⁸ F. Clark, *The Constitutional Doctrines of Justice Harlan* (1915).

¹⁹ F. Latham, *The Great Dissenter: John Marshall Harlan 1833-1911* (1970).

²⁰ L. Beth, *John Marshall Harlan: The Last Whig*

Justice (1992), cited hereinafter as Beth.

²¹ *Id.*, 271.

²² *Adamson v. California*, 332 U.S. 46, 62 (1947) (concurring opinion).

²³ Beth, 1.

²⁴ See Beth's "Justice Harlan and the Uses of Dissent," 49 *American Political Science Review* 1085 (1955), and his *Development of the American Constitution, 1877-1917* (1971). In the former, Beth observed (at 1085): "The recently published biography of Justice William Johnson [by Donald Morgan] has restored to his place in history the only other Justice who perhaps could compete with Harlan in the lack of attention paid a significant career."

²⁵ Beth, 90 (emphasis in the original).

²⁶ For example, see pp. 134, 143, 188.

²⁷ Richard Davenport (1859-1931); James Shanklin (1861-1927); John Maynard (1863-1934); endnote added.

²⁸ Beth, 3.

²⁹ Harlan to Chief Justice Morrison Waite, June 17, 1885, quoted in *id.*, 142.

³⁰ E. Waite, "How 'Eccentric' Was Mr. Justice Harlan?" 37 *Minnesota Law Review* 173, 180-181 (1953).

³¹ Beth, 268.

³² T. Yarbrough, *John Marshall Harlan: Great Dissenter of the Warren Court* (1992), cited hereinafter as Yarbrough.

³³ *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964).

³⁴ *Mapp v. Ohio*, 367 U.S. 643 (1961); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Duncan v. Louisiana*, 391 U.S. 145 (1968).

³⁵ Yarbrough, ix.

³⁶ 372 U.S. 726 (1963).

³⁷ Yarbrough, xi.

³⁸ *Id.*, xii.

³⁹ *National Observer*, January 8, 1972, quoted in Yarbrough, xi-xii, 344.

⁴⁰ Yarbrough, xiii.

⁴¹ *Id.*

⁴² A. Bickel, *The Least Dangerous Branch* (1962).

⁴³ W. Beaney, "John Marshall Harlan: A Modern Conservative Justice," in D. Grier Stephenson, Jr., ed., *An Essential Safeguard* 126 (1991).

⁴⁴ P. Freund, "Foreword," in D. Shapiro, ed., *The Evolution of a Judicial Philosophy: Selected Opinions and Papers of Justice John Marshall Harlan* xiii (1969).

⁴⁵ Yarbrough, 382.

⁴⁶ *Id.*, 321.

⁴⁷ B. Woodward and S. Armstrong, *The Brethren: Inside the Supreme Court* p.263-264 (1979).

⁴⁸ Yarbrough, 337.

⁴⁹ 367 U.S. 497 (1961).

⁵⁰ 381 U.S. 479 (1965).

⁵¹ 410 U.S. 113 (1973).

⁵² Yarbrough, 338.

⁵³ Yarbrough, 57-61.

⁵⁴ *Id.*, 339-340.

⁵⁵ *Id.*, 343.

⁵⁶ 357 U.S. 449 (1958).

⁵⁷ 403 U.S. 15 (1971).

- ⁵⁸ Yarbrough, 343.
- ⁵⁹ L. Baker, *The Justice from Beacon Hill: The Life and Times of Oliver Wendell Holmes* (1991), cited hereinafter as Baker.
- ⁶⁰ G. Aichele, *Oliver Wendell Holmes, Jr.: Soldier, Scholar, Judge* (1989).
- ⁶¹ S. Novick, *Honorable Justice: The Life of Oliver Wendell Holmes* (1989).
- ⁶² J. Monagan, "The Grand Panjandrum: Mellow Years of Justice Holmes," *Yearbook of the Supreme Court Historical Society* 26 (1988).
- ⁶³ Baker, 573.
- ⁶⁴ 245 U.S. 60 (1917).
- ⁶⁵ Baker, 598.
- ⁶⁶ *Justice Oliver Wendell Holmes* by Silas Bent (1932) was a journalistic account; Catherine Drinker Bowen's *Yankee from Olympus* (1945) was a partly fictionalized account of the Holmes family.
- ⁶⁷ In particular, see J. Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law," 7 *Harvard Law Review* 129 (1893). This essay has been reprinted several times. For example, see R. McCloskey, ed., *Essays in Constitutional Law* 63 (1957).
- ⁶⁸ M. Howe, *Justice Oliver Wendell Holmes: The Shaping Years, 1841-1870* (1957); *Justice Oliver Wendell Holmes: The Proving Years, 1870-1882* (1963).
- ⁶⁹ But see the references to Holmes in his book *The Ages of American Law* (1977).
- ⁷⁰ Y. Rogat, "The Judge as Spectator," 31 *University of Chicago Law Review* 213, 256 (1964).
- ⁷¹ See G. Edward White, "The Rise and Fall of Justice Holmes," 39 *University of Chicago Law Review* 51 (1971).
- ⁷² F. Frankfurter, *Mr. Justice Holmes and the Supreme Court* 112 (Atheneum ed., 1965).
- ⁷³ See F. Biddle, *Justice Holmes, Natural Law, and the Supreme Court* 33-49 (1961) for a discussion of this charge.
- ⁷⁴ Gilmore, *The Ages of American Law* 48-49.
- ⁷⁵ 189 U.S. 475 (1903).
- ⁷⁶ *Id.*, 486.
- ⁷⁷ *Id.*, 488.
- ⁷⁸ See text accompanying endnote 64.
- ⁷⁹ 273 U.S. 536 (1927).
- ⁸⁰ *Moore v. Dempsey*, 261 U.S. 86 (1923).
- ⁸¹ Baker, 11.
- ⁸² P. Freund, "Preface," in Frankfurter, *Mr. Justice Holmes*.
- ⁸³ Aichele, *Oliver Wendell Holmes, Jr.*, xi.
- ⁸⁴ M. Urofsky, *Felix Frankfurter: Judicial Restraint and Individual Liberties* (1991), cited hereinafter as Urofsky.
- ⁸⁵ *Id.*, 219-226.
- ⁸⁶ Mason, *Stone*, 482.
- ⁸⁷ Urofsky, x.
- ⁸⁸ *Id.*, x.
- ⁸⁹ For example, see J. Simon, *The Antagonists: Hugo Black, Felix Frankfurter, and Civil Liberties* (1989), and H. Hirsch, *The Enigma of Felix Frankfurter* (1981).
- ⁹⁰ Urofsky, 220.
- ⁹¹ F. Frankfurter and J. Landis, *The Business of the Supreme Court* 318 (1928).
- ⁹² A. Mason and D. Stephenson, Jr., *American Constitutional Law: Introductory Essays and Selected Cases* 302 (9th ed., 1990).
- ⁹³ Urofsky, 178.
- ⁹⁴ 310 U.S. 586 (1940).
- ⁹⁵ 369 U.S. 186 (1962).
- ⁹⁶ Urofsky, 63.
- ⁹⁷ *Id.*
- ⁹⁸ *Id.*, 179.
- ⁹⁹ *United States v. United Mine Workers*, 330 U.S. 258, 308 (1947) (concurring opinion).
- ¹⁰⁰ H. Ball and P. Cooper, *Of Power and Right: Hugo Black, William O. Douglas, and America's Constitutional Revolution* (1992), cited hereinafter as Ball and Cooper.
- ¹⁰¹ W. Mendelson, *Justices Black and Frankfurter: Conflict in the Court* (1961).
- ¹⁰² O. Holmes, 2 *Holmes-Pollock Letters* 13-14 (M. Howe ed., 1946).
- ¹⁰³ A. Mason, *Brandeis: A Free Man's Life* 577 (1946).
- ¹⁰⁴ For example, see W. Murphy, "The Constitution and the Legacy of Justice William O. Douglas," in D. Stephenson, ed., *An Essential Safeguard* 99 (1991).
- ¹⁰⁵ 163 U.S. 537 (1896).
- ¹⁰⁶ Ball and Cooper, 159-162.
- ¹⁰⁷ *Id.*, 164-169.
- ¹⁰⁸ *Id.*, 169-172.
- ¹⁰⁹ 347 U.S. 483 (1954).
- ¹¹⁰ Ball and Cooper, 159.
- ¹¹¹ 308 U.S. 343 (1939).
- ¹¹² Ball and Cooper, 91.
- ¹¹³ L. Kalman, *Abe Fortas: A Biography* (1990), cited hereinafter as Kalman.
- ¹¹⁴ B. Murphy, *Fortas* 591 (1988).
- ¹¹⁵ John Rutledge, Thomas Johnson, Robert Trimble, Howell Jackson, James Byrnes, and Arthur Goldberg.
- ¹¹⁶ L. Halle, *The Cold War as History* xi-xii (1967).
- ¹¹⁷ *Id.*
- ¹¹⁸ U.S. Senate, *Hearings before the Committee on the Judiciary, Nomination of Abe Fortas*, 89th Cong., 1st sess., p. 50 (1965).
- ¹¹⁹ Kalman, 311.
- ¹²⁰ A. Theoharis and J. Cox, *The Boss: J. Edgar Hoover and the Great American Inquisition* 368-393 (1988).
- ¹²¹ Kalman, 313.
- ¹²² J. Califano, Jr., *The Triumph & Tragedy of Lyndon Johnson: The White House Years* (1991), cited hereinafter as Califano.
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- ¹²⁵ *Baltimore & Ohio R. Co. v. United States*, 386 U.S. 372 (1967).
- ¹²⁶ *Penn-Central Merger and N&W Inclusion Cases*, 389 U.S. 486 (1968).
- ¹²⁷ Califano, 159-164.

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¹³⁰ Kalman, 317.

¹³¹ *Id.*, 2.

¹³² W. Douglas, *We the Judges* 53 (1956).

¹³³ One of the earliest studies was Glendon Schubert's "The Certiorari Game," *Quantitative Analysis of Judicial Behavior* 210 (1959). See also S. Ulmer, "Selecting Cases for Supreme Court Review: An Underdog Model," 72 *American Political Science Review* 902 (1978).

¹³⁴ *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 919 (1950) (Justice Frankfurter's opinion respecting the denial of certiorari). Justice Brennan made the same point in "This Honorable Court," part 2 (Public Broadcasting Service, 1987).

¹³⁵ D. Provine, *Case Selection in the United States Supreme Court* (1980).

¹³⁶ *Id.*, 6.

¹³⁷ H. Perry, Jr., *Deciding to Decide: Agenda Setting in the United States Supreme Court* (1991), cited hereinafter as Perry.

¹³⁸ This writer's source for this story is a colleague, Richard F. Schier. Before he retired from teaching, he sometimes told the Benchley tale before administering examinations.

¹³⁹ Perry, 274.

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¹⁴⁴ For example, see Goldstein, 128.

¹⁴⁵ *Chisholm v. Georgia*, 2 U.S. (2 Dallas) 419, 454 (1793).

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¹⁴⁷ R. Jackson, *The Supreme Court in the American System of Government* 18-19 (1955).

¹⁴⁸ Goldstein, 112-121.

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¹⁵⁰ Goldstein, 125.

¹⁵¹ 198 U.S. 45 (1905).

¹⁵² P. Kens, *Judicial Power and Reform Politics* (1990), cited hereinafter as Kens.

¹⁵³ *New York Times*, April 19, 1905, p. 10. Other favorable reviews appeared at 67 *Albany Law Journal* 129 (1905) and at 60 *Central Law Journal* 401 (1905).

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¹⁵⁵ *The Worker*, May 22, 1905, p. 1.

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¹⁵⁷ For example, see W. Dodd, "The Growth of Judicial Power," 24 *Political Science Quarterly* 193 (1909); L. Boudin, "Government by Judiciary," 26 *Political Science Quarterly* 238 (1911); W. Dodd,

"Social Legislation and the Courts," 28 *Political Science Quarterly* 1 (1913); H. Davis, *The Judicial Veto* (1914).

¹⁵⁸ Roosevelt to Day, January 11, 1908, in 6 *Letters of Theodore Roosevelt* 904 (E. Morison ed. 1951).

¹⁵⁹ See 198 U.S. at 74.

¹⁶⁰ *Calder v. Bull*, 3 U.S. (3 Dallas) 386 (1798). See also the dissenting opinions in the *Slaughterhouse Cases*, 83 U.S. (16 Wallace) 36 (1873), and *Munn v. Illinois*, 94 U.S. 113 (1877).

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¹⁶² 13 N.Y. 378 (1856). See also E. Corwin, "The Doctrine of Due Process of Law before the Civil War," 24 *Harvard Law Review* 366 (1911).

¹⁶³ For example, see J. Semonche, *Charting the Future: The Supreme Court Responds to a Changing Society, 1890-1920* (1978); M. Urofsky, "Myth and Reality: The Supreme Court and Protective Legislation in the Progressive Era," *Yearbook of the Supreme Court Historical Society* 53 (1983).

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¹⁶⁵ *Id.*, 142.

¹⁶⁶ D. Currie, *The Constitution in the Supreme Court: The Second Century 1888-1986* (1990), cited hereinafter as Currie.

¹⁶⁷ *Id.*, xiv.

¹⁶⁸ *Id.*, xiv.

¹⁶⁹ *Id.*, 50.

¹⁷⁰ *Id.*, 604, 605.

¹⁷¹ R. Jackson, *The Supreme Court in the American System of Government* 23 (1955).

The Judicial Bookshelf--Continued

Michael H. Cardozo

Editor's Note: To avoid a conflict of interest, this supplement to "The Judicial Bookshelf" was prepared by Michael H. Cardozo, Chairman of the Board of Editors of this *Journal*, rather than by the usual author, D. Grier Stephenson, Jr..

An Essential Safeguard: Essays on the United States Supreme Court and Its Justices is based on lectures delivered by various scholars at Franklin and Marshall College between 1985 and 1989. Edited by Professor D. Grier Stephenson, Jr., the collection was published in 1991. The lectures that constitute the chapters of the work were part of Chief Justice Burger's "national seminar...to stimulate reexamination of the ideas upon which the Constitution rests," and were designated "The John Marshall Lectures on the Constitution, the Supreme Court, and the Justices." Pursuant to that designation the chapter titles and authors are the following:

1. "Introduction: The Supreme Court in American Government" by D. Grier Stephenson, Jr.
2. "Can Presidents Really Pack the Supreme Court?" by Henry J. Abraham
3. "The Office of Solicitor General: Political Appointee, Advocate, and Officer of the Court" by Rex E. Lee
4. "Conflict and Leadership on the U. S. Supreme Court: From Marshall to Rehnquist" by James F. Simon
5. "Justice Sandra Day O'Connor: An Assessment" by Harold J. Spaeth
6. "The Constitution and the Legacy of

Justice William O. Douglas" by Walter F. Murphy

7. "John Marshall Harlan: A Modern Conservative Justice" by William M. Beaney

8. "Affirmative Action and the Supreme Court" by Jesse H. Choper

9. "Chief Justice Rehnquist and the Future of the Supreme Court" by Martin Shapiro

The introductory chapter conforms faithfully to the style of Professor Stephenson's descriptive reviews of similar works that have been appearing in the *Journal of Supreme Court History* and its predecessor, the *Yearbook of the Supreme Court Historical Society*. Consequently, no better "review" could be prepared than his own eighteen pages. He opens with an essay on the role of the Court in the nation; it "occupies a key place in the American scheme of constitutional democracy in spite of professed weakness."¹ On the next page, under the heading, "Study of the Court," he describes five key elements that are helpful in understanding the Court, the same five elements that, in his introductory essay in "The Judicial Bookshelf" in the 1991 edition of this *Journal*, he called "a useful framework of analysis" for books about the Court:

...the political and intellectual environment, personalities, the past, processes, and product. The first stands for prevailing political theories as well the governmental system and social context in which the Court operates. The second denotes the individual

Justices who decide cases. The third encompasses not only the history of the nation, but more particularly the body of decisions rendered by former Justices. The fourth represents 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.²

Professor Stephenson concluded with the statement that each of his five elements "is reflected in varying degrees in the chapters chosen for this volume." A sentence from his description of each chapter will give the flavor of the chapters. For example, in his opening chapter, the "Introduction," a few selected quotations may reveal some of his perceptions of the Court and its Justices. Examples are some decades-old insights about the judicial process that were prescient for today's debates about qualifications for the bench. He quotes a talk given by Felix Frankfurter, published in the 1954 *Proceedings of the American Philosophical Society*:

Does a man cease to be himself when he becomes a Justice? ...Does he change his character by putting on a gown? No, he does not change his character. He brings his whole experience, his training, his outlook, his social, intellectual, and moral environment with him when he takes a seat on the supreme bench.³

Many years before, in *The Nature of the Judicial Process*, Judge Benjamin N. Cardozo, Frankfurter's predecessor on the Court, expressed similar views:

I have spoken of the forces of which judges avowedly avail to shape the form and content of their judgments....Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and

convictions, which make the man, whether he be litigant or judge.⁴

By including the Frankfurter quotation, was Professor Stephenson suggesting that such passages from great analysts of the judicial process can provide guidance for resolving today's great debate about the propriety and relevance of exploring the background of nominees to the Court in order to learn what positions they are likely to take on particular issues that come before them?

In his discussion of "Process," Stephenson emphasizes the importance of "collegial interaction" in the decision-making process:

Discussion in conference and comment by one Justice on an opinion drafted by another contribute to the form an opinion eventually takes. Such comments can be so persuasive that Justices may change their votes in a case.⁵

Also, possibly revealing his own instincts and convictions near the beginning of Professor Stephenson's introduction, he included the quotation from Alexander Hamilton that "the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution...."⁶

In his comment on Abraham's piece on presidential ability to pack the Court, Stephenson concludes that "by rejecting Washington's choice of John Rutledge to be the second Chief Justice, the Senate assumed a role that has since alerted Presidents that the Senate cannot be regarded as a 'rubber stamp'." The editorial comment on Rex Lee's chapter about the Solicitor General's position is that, although the person in that position is "the third-ranking official in the Department of Justice and is appointed by the President (with the Senate's approval) to represent the government in the Supreme Court [that description] only begins to describe the political and legal significance of the office.... The Solicitor General has an impact that goes beyond that of being an attorney who appears frequently at the Court."⁸

The Stephenson comments on James Simon's chapter on "leadership" in the Court conclude that "No one since Marshall has dominated a court the way he did..." and "Simon draws on Marshall's



Sandra Day O'Connor taking the oath of office September 25, 1981. Justice O'Connor is the 102nd Justice to sit on the Court and the first woman.

experience and that of Charles Evans Hughes, but he looks at the careers of Associate Justices Hugo Black and Felix Frankfurter as well, as indications that leadership is sometimes not confined to the Chief."⁹ A reading of Walter Murphy's chapter on William O. Douglas, however, could not attribute to him such leadership qualities. The chapter opens with these words:

The story is worthy of Horatio Alger: The crippled son of an itinerant minister works day and night to graduate second in his class in law school, becomes a reformer who strikes terror in the hearts of the greedy moguls of Wall Street, then becomes an internationally renowned jurist who spends the rest of his life championing the cause of the underdog. This account also conceals much—a man who was always deeply troubled, never at peace with himself or his world; a judge who was alternately—and sometimes simultaneously—brilliant and careless, eloquent and unpolished, cynical and idealistic.¹⁰

For his commentary on the chapter by William M. Beaney about Justice Harlan, Professor Stephenson quotes a passage that concludes with

a quotation contrasting Harlan and Douglas: "It is easy to be passionate about William O. Douglas. How does one become passionate about John Marshall Harlan?" Harlan was a passionate conservative because he was passionate about federalism."¹¹ In contrast, Harold Spaeth, in his chapter on Justice O'Connor, concludes that she has proved herself to be "a staunch conservative who, upon confirmation, promptly acclimated herself to the Court and its workways. ...Although she is the first woman to hold the position of Associate Justice of the U.S. Supreme Court, nonetheless she clearly appears to be—in Shakespeare's famous phrase--'to the manner born.'"¹²

Jesse Choper's chapter on "Affirmative Action" leads directly to the concluding chapter on the Rehnquist Court. Dean Choper's objective, according to Stephenson, "is to analyze the current Supreme Court and to explore where each member stands on the question [of affirmative action], especially in cases where a Justice has expressed himself or herself in a judicial opinion or in other writings. The result is not a broad-stroke view that labels one or another Justice 'for' or 'against' affirmative action, but a finely tuned presentation that seeks to discover the variables distinguishing one case from another and consequently those characteristics of affirmative action programs a certain Justice will be inclined to

approve or disapprove."¹³ There naturally follows a discussion of "Chief Justice Rehnquist and the Court's Future," written by Martin Shapiro which is a fascinating discussion of the Court and its Justices.

Each of these essays is an excellent guide to understanding the Court and its justices. A reader, however, seeking guidance to the likely course of decisions in the big issues coming to the Court today and tomorrow must beware of predictions from omens described even by these knowledgeable writers. Now, only three years after these essays were completed, decisions, opinions and extrajudicial statements are appearing that bear warning that some conclusions that seemed warranted then are not as firm as they seemed earlier.

Endnotes

¹ D. Grier Stephenson, Ed. *An Essential Safeguard: Essays on the United States Supreme Court and Its Justices*. New York: Greenwood Press, 1991, p. 2.

² *Supra* note 1 at 3-4.

³ *Supra* note 1 at 8.

⁴ Benjamin N. Cardozo, *The Nature of the Judicial Process*, (1921) page 167.

⁵ *Supra* note 1 at 13.

⁶ *Id.* at 2.

⁷ *Id.* at 19.

⁸ *Id.* at 20.

⁹ *Id.* at 29.

¹⁰ *Id.* at 99.

¹¹ *Id.* at 27.

¹² *Id.* at 95.

¹³ *Id.* at 29.

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