

# Journal of Supreme Court History

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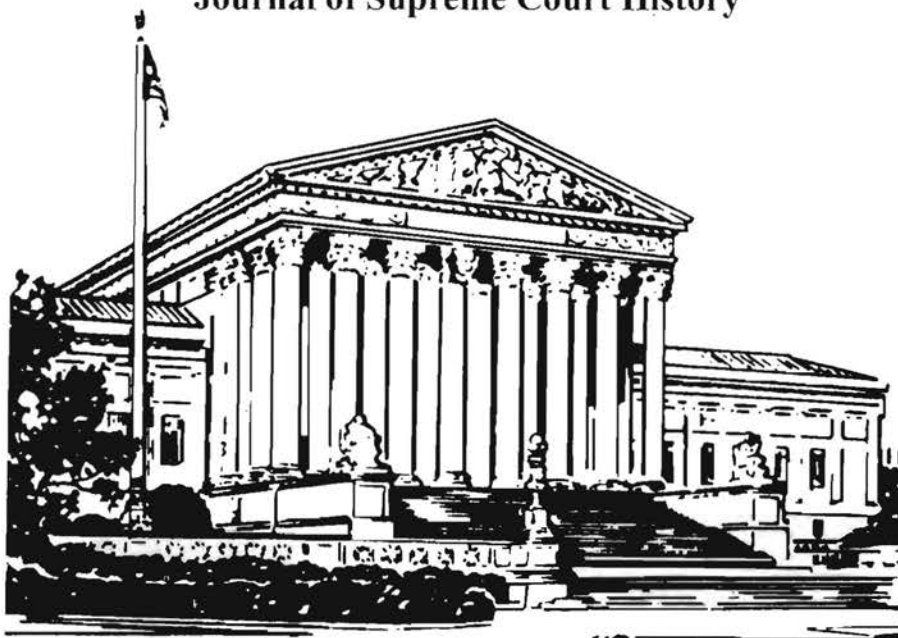
1995 YEARBOOK OF THE SUPREME COURT HISTORICAL SOCIETY

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**WILLIAM JOHNSON**  
Associate Justice (1804-1834)

# Journal of Supreme Court History



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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.

Since 1975, the Society has been publishing a *Quarterly* newsletter, distributed to its membership, which contains short historical pieces on the Court and articles detailing the Society's programs and activities. In 1976, the Society began publishing an annual collection of scholarly articles on the Court's history entitled the *Yearbook*, 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 cosponsor in 1979. Since that time the Project has completed five of its expected eight volumes, with a sixth volume to be published in 1996.

The Society also copublishes **Equal Justice Under Law**, a 165-page illustrated history of the Court, in cooperation with the National Geographic Society. In 1986 the Society cosponsored the 300-page **Illustrated History of the Supreme Court of the United States**. It sponsored the publication of the **United States Supreme Court Index to Opinions** in 1981, and funded a ten-year update of that volume that was published in 1994.

The Society has also developed a collection of illustrated biographies of the Supreme Court Justices which was published in cooperation with Congressional Quarterly, Inc. in 1993. This 588 page book includes biographies of all 108 Supreme Court Justices and features numerous rare photographs and other illustrations. Now in its second edition, it is entitled **The Supreme Court Justices: Illustrated Biographies, 1789-1995**.

In addition to its research/publications projects, the Society is now cooperating with the Federal Judicial Center on 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's history. These materials are incorporated into displays prepared by the Court Curator's Office for the benefit of the Court's one million annual visitors.

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

The Society ends 1995 with approximately 5,200 members whose financial support and volunteer participation in the Society's standing and ad hoc committees enables 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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Roger Goldman and David Gallen, **Justice William J. Brennan, Jr.: Freedom First**

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# Editorial Foreword

**Melvin I. Urofsky**  
**Chair, Board of Editors**

We begin this issue on a note of sorrow, with the passing of retired Chief Justice Warren E. Burger. The members of the Society, as well as other readers of this *Journal*, will remember him for his foresight and encouragement in the establishment of an organization dedicated to the study and the promotion of the history of this nation's highest tribunal.

This particular issue demonstrates that there are many ways of looking at that history. We are pleased to be able to carry a speech by a member of our northern neighbor's constitutional court. We also think that most of our readers, many of whom studied the Court's history more than a few years back, will find the article on teaching that history today to be of interest. Certainly our children, and their children, will be learning, and not just about the Court, in a far different manner than we did.

We are also delighted that one of our members, the Honorable Sheldon S. Cohen, brought to us a document of inestimable worth, the diary that William O. Douglas kept during his first Term on the Bench. The comments found there do much to explain why the Court in the 1940s earned a reputation as one of the most fractious in our history. At the other end of the Court's history, we have a new John Marshall document uncovered by the Documentary History Project of the Supreme Court 1789-1800. It is from scraps like these, both large and small, that historians can attempt to decipher the often complex history of the Supreme Court. Regrettably, the author of the article about the letter, James C. Brandow, passed away on November 11, 1995. He had been an editor at the Project since 1989 and will be much missed.

Two of our members have also contributed

memoirs that we are proud to publish, since they shed light on different aspects of the Court's history. Milton Handler and Robert L. Stern have had long and distinguished careers at the bar and as public servants, and their paths have frequently led them, in one capacity or another, to enter the Court as counsel for both the government and private litigants. Professor Handler recalls his year as a clerk with one of the giants of twentieth-century jurisprudence, Harlan Fiske Stone, while Mr. Stern discusses his service in the Office of the Solicitor General during one of the most tumultuous eras in our history. Handler's article is greatly enhanced by private photographs taken by Louis Lusky, also a Stone clerk and a distinguished Columbia Law School professor, who has generously donated them to the Society.

The establishment of a prize for a student essay has again yielded an article that we would have been happy to carry even if it had not been submitted for the Hughes-Gossett Award. The great outpouring of writing on Oliver Wendell Holmes, Jr., continues, in part at least, because of the way that Holmes has become an icon in our judicial history. I. Scott Messinger explores how that idolization began while Holmes still lived.

Finally, we are adding one new feature this year, a retrospective book review. There are a small number of classic works in American constitutional history, and such is the fashion of scholarship that many of them are no longer known today. Beginning with this issue, we will carry reviews of classic books. John Paul Jones looks at the first modern analysis of the Court's workload; next year his colleague, Michael Wolf, will look at the first modern history of

the Court, that of Charles Warren.

With this issue Clare Cushman takes over as managing editor, replacing Jennifer M. Lowe, who has moved over to be Director of Programs. I want to thank Jennifer for all she has done the last few years, not least of which was to help a new editor over the hurdles of actually getting this periodical into your hands.

Finally, let me thank those of you who have

either directly or indirectly let us know that you like what we are trying to do with the *Journal*. You can help us to make it a better publication by sending us any ideas you may have. This is, after all, the journal of the members of the Supreme Court Historical Society. We are all bound together by our interest in that body's history, and there are many roads left for us to explore.

#### **ACKNOWLEDGMENT**

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*.



# Eulogy for Warren E. Burger

J. Michael Luttig

**Editor's Note:** *We are publishing the eulogy Judge Luttig delivered at Chief Justice Burger's funeral as a tribute to the man who helped found the Supreme Court Historical Society in 1974 and who did so much to make it grow and flourish.*

If ever there was a life to be celebrated, then his.

He looked like the Chief Justice of the United States. But any who think this his foremost qualification misunderstand the office he occupied and misunderstand the man that he was.

In a society often preoccupied with politics and convinced by sound bites, not even the nature of law itself is easily understood, much less that which defines greatness in those who hold our highest judicial office.

But history will record, as it already has begun to do, that Warren Burger was one of our great Chief Justices. It will reflect that he was exactly what the nation wanted and needed from the one in whom it reposed this ultimate trust.

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Those of us who had the privilege to serve this extraordinary man as his law clerks were well aware that we were in the service of one who rightfully held this highest of office. Albeit from a different vantage point, we saw in him the same that his colleagues on the Court and others in private life saw.

We saw a man whose oath was virtually

his faith, a man who committed his entire life to the law. We saw a man who took his duties to heart, working literally eighteen to twenty hours a day, seven days a week, year after year, in their performance.

We saw a man singularly devoted to the Constitution — his life's passion. We knew it was high allegory that this man literally handed the Constitution to hundreds of thousands of Americans during the several year celebration of its bicentennial, just as it was fitting that he shared his birthday with that document.

We saw in this man a boundless respect — indeed, a love — for the Supreme Court. And we saw a man whose every action was calculated to bring to it respect and who jealously protected that institution with every ounce of his considerable energy.

We saw a man who, in an almost uncanny way, seemed guided by history, a man with enormous admiration for the Founding Fathers, who spoke of them in such a way that you believed that, somehow, some way, he really did know each and every one of them.

Perhaps most importantly, we saw a man who believed with all his heart that his high office belonged not to him, but to the people, and that he but held it in sacred trust. We saw a man who, because of this belief, in reality was quite humbled by his great office.

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In him, we saw a man of judgment, one who had that rare gift that lies at the core of what was his life's undertaking, and for which the highest intelligence quotient is no substitute. A man who understood the difference between intellectualism for intellectualism's sake, on the one hand, and wisdom on the other. We saw a man of uncommon common sense — an intensely practical man, who took pride in his practicality. One who demanded of himself opinions that could be read and understood by the people. One who never hesitated to ask, when it made no sense at all, "Can this really be the law?"

We saw a man with a fierce sense of justice, a man who, one summer night in London, would not be restrained from entering and breaking up a street brawl when he saw five young thugs beating a lone other with fists and sticks. It was the

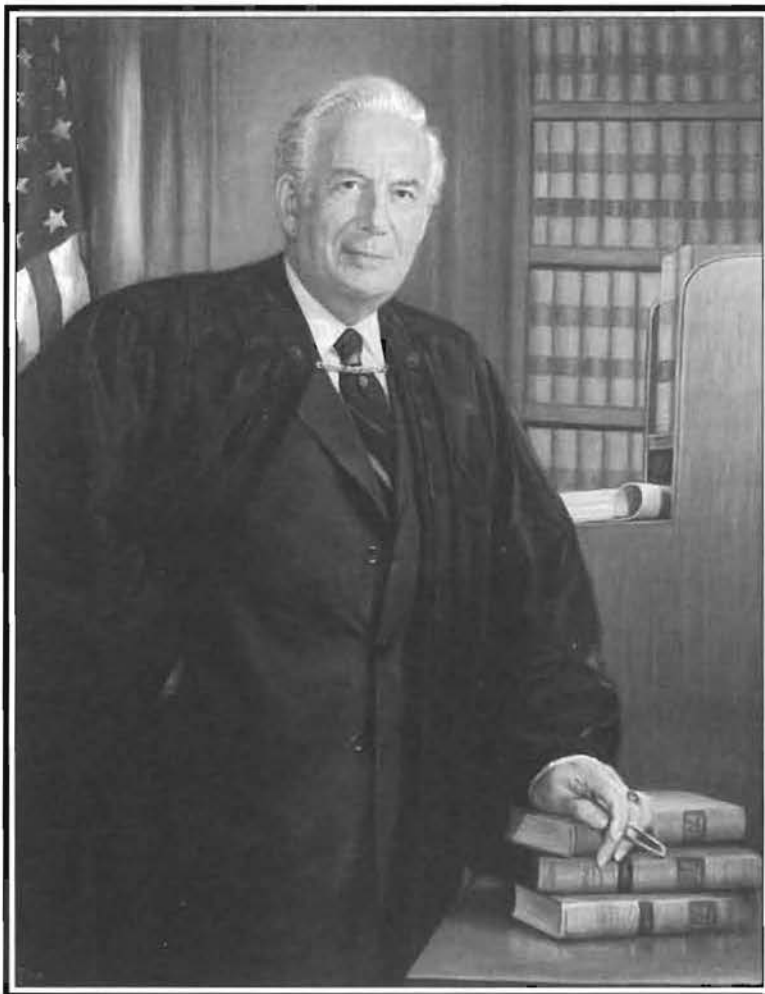
Chief Justice. "It just wasn't right," he said.

In him, we saw a man who eschewed labels and defied categorization. There was no mistaking that Warren Burger was independent, that he was his own man in everything he did.

There was never a doubt as to where the Chief Justice stood on an issue, from the need to turn off the lights during the energy crisis (of which we were reminded by hand-scrawled orders taped to the switch-plates), to the loftiest constitutional issue.

And, in keeping, we saw a man who simply declined to mold his own image through the avenues of media.

We, too, saw a "visionary." A traditional, conventional man, but a man who, from his professional days in St. Paul, was never comfortable doing it "that way" just because "it had



Warren E. Burger  
(1907- 1995)



always been done" "that way." A man who, although inspired by history, was never fearful of challenging even the tried and tested, which he frequently did with that familiar twinkle in his eye. He was challenged, and he challenged others, to do better, in the administration of the courts, in prison reform, in effective judicial decision-making. There was nothing as to which he refused to take a "fresh look."

He was a man who saw it as his solemn obligation to tout the virtues of the American system of law, here and abroad, which, because he was convinced of those virtues, was easy to do. If told that he never turned down a request to discuss his favorite subjects — American law and the Constitution — I would believe. There was never a discussion, never a speech, when our reforms, our progress, our achievements were not hailed by him and held up as exemplary.

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And throughout our years with him, we saw a man of deep conviction, and the certain strength that almost always attends such conviction. A man who had the courage and the character to stand up for what he believed was right. A man who, as all here would attest, never failed to speak his mind for fear of criticism.

And in this unmistakable strength, this strength of character, we saw, and we sensed, a steadiness and a balance that reassured us, as it did the country, that our faith in the institutions of government, and particularly the judiciary, was fully justified. And all the while we understood that under his leadership, the course of law, and thereby the course of history, was undergoing a slow but assuredly fundamental change.

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We also had the opportunity to see "the Chief" just as a person, without the mantle of office. (Chief Justices, we forget, are people, too.) We saw what those who knew him only as a public figure never saw. And in many ways, this was the most special aspect of our service.

We saw a man who was easily understood — but only if one cared to understand.

We saw not at all a private man in the sense that was thought, but rather a man who always

loved to be with and around people — visitors in the halls of the Court, acquaintances from the Washington establishment, and old friends — a man who simply treasured the very, very few hours a week that he did allow himself and his family.

We saw a man who was supremely conscious of the magnitude of the responsibilities he had assumed, and the little time that there was to fulfill them in the way he had decided they must be fulfilled, but a man who ultimately was very much at ease with himself and his office.

We saw a man who, though comfortable with formality, much preferred informality. A man whose austere lifestyle never fell prey to official Washington. A man who, though he spent a lifetime in this capital city, in important respects never left the quaintness of his earliest Minnesota home.

We saw evident in everything he did, those wonderful, enduring Midwestern values. A man with a profound sense of right and wrong, he was. In a time when it seemed that all had become relative, it simply was never so for him.

We saw a man whose respite was in tending to what seemed like the tiniest details of internal court management — details he took the time to address so that the public could better understand the Supreme Court and its role in our democracy.

We saw the man who, for hours, could recount story after story from history in such vivid detail that you would swear you were there.

We saw this man of commanding presence, who, for reasons we are only now beginning to understand, seemed never to hold a child or to speak of an old friend without tears coming to his eyes.

We also saw, up close, the quiet but sure love he had for Vera, who was his strength, and we saw the equally intense fatherly love that he had for Wade and for Margaret.

We saw the fiery patriotism of a man who loved his country as much as anyone could.

We saw the wine connoisseur, the chef (whose bean soup and orange marmalade were nationally known, at least among his law clerks), the artist, the sculptor, the naturalist (who delighted that the same birds that nested in his holly tree on Rochester Street found their way to his new home on Wakefield), the antique buff, the humorist, and the political observer.



We saw much more that, because of his office, was regrettably hard for others to see.

And as we watched, we caught his contagious enthusiasm for life.

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In a word, if only briefly, we who had the privilege of serving the Chief Justice were able to see the law — and life — through the eyes

of an elegant, graceful patriot. And what an inspirational perspective it was!

He has now passed this life. But is there any doubt that he lives on through the institutions he shaped and so very much cherished, and through the countless lives he touched? A richer legacy than his none of us could hope for.

If ever there was a life to be celebrated, then his.

# **Canadian Justice: Celebrating Differences and Sharing Problems**

**Claire L'Heureux-Dubé**

**Editor's Note:** *This is adapted from a speech given before the American College of Trial Lawyers at Amelia Island, Florida, on April 8, 1995.*

As I flew in from Ottawa, I thought about how similar our two countries are. In fact, upon first glance, our two countries may even appear virtually indistinguishable. We share the North American continent, with its vast expanses and magnificent and diverse landscapes that stretch from the Atlantic to the Pacific. We are both democracies. We both have responsible government. We both have a federal judiciary, and a state or provincial one. We both inherited the English common law and the French civil law. We both have Bills of Rights (the *Charter* in Canada). And we were both embroiled in a bitter baseball labor dispute.

Yet, as many a Canadian will remind you, and as the president of the Canadian Bar Association told you yesterday, beneath our similarities lie many differences. For example, while we are both democracies, we function differently; while we both have Bills of Rights, we apply them differently; while we both inherited the English common law, we developed it differently; and while we both have a federal judiciary and a state or provincial one, we choose judges differently. In fact, upon a close examination, it becomes clear that our differences are at least as significant as our similarities.

One such difference, which I cannot help but think of today, as I stand before you in the company of Madame Justice Ginsburg, is the fact that while Justice Ginsburg and I are both Supreme Court judges in our respective countries, we both were nominated through extremely different processes.

In the United States, nominees for the Supreme Court undergo extensive public confirmation hearings and are chosen in the course of a fairly partisan political process. Nominations to Canada's Supreme Court, on the other hand, are made through a totally different procedure. Supreme Court judges are nominated by the Prime Minister of Canada after informal consultations with the Canadian Bar, individual lawyers, and judges, as well as with cabinet members. The process is not entirely secretive, but is also not fully public. I must add that after witnessing the rigors of your nomination procedure, I am very happy that I was spared such an ordeal. Perhaps I would not have been "apotheosized by the ermine,"<sup>1</sup> to use the words of Professor Bernard Schwartz, if I had had to go through the same agonizing procedure your Supreme Court nominees must endure.

In my comments this morning, however, I do not intend to discuss the differences between our two Supreme Courts at length. Rather, I want to focus on our two Constitutions, and particularly our two Bills of Rights. These documents are at the heart of our two legal and

political systems. It is with these documents that any discussion of the similarities and differences between our two countries must begin.

I hope you will forgive me if my topic seems somewhat sober and serious. The truth of the matter is that one should stick with one's strong points — and I am much better at speaking about serious issues than I am at doing comedy or lighter fare. In fact, my critics would say that my serious works are considerably funnier than my attempts at comedy.

As I mentioned a moment ago, I wish to compare our two Constitutions, and particularly our two Bills of Rights. My first observation about these two documents is that they grew out of two very different historical contexts. Your nation, your Constitution, and your vision of individual rights and liberties were forged by your War of Independence and further refined in the crucible of yet another war, your Civil War, almost a century later.

Next to the dramatic backdrop against which the building blocks of your nation were forged, the development of the Canadian Constitution and the Canadian vision of nationhood and civil

liberties was a placid affair. In fact, when compared to the United States, I dare say that the constitutional ideals that bind my country grew through *evolution* rather than through *revolution*. Canada's independence and constitutional documents gradually evolved as Canada slowly progressed from a British colony to a fully independent nation.

Another intriguing difference between the American and Canadian traditions relates to our attitude toward government. Sir William Blackstone, the great English legal scholar of the eighteenth century, once remarked,

That the king can do no wrong, is a necessary and fundamental principle of the English Constitution.

This assumption would appear to underlie a certain faith in both the role and the nature of the state, which Canadians have inherited from English tradition and law. At the risk of generalizing, I would note that, historically, Canadians have tended to view their government and parliamentary institutions as, on the whole,



The 1982 Canadian Constitution was signed into law in Ottawa by Canadian dignitaries and the Queen of England. From left to right: Gerald Regan, Minister of Labour; Pierre Elliott Trudeau, Prime Minister; Her Majesty the Queen; Michael Pitfield, Clerk of the Privy Council; and Michael Kirby. The *Charter*, Canada's equivalent to the American Bill of Rights, was not constitutionalized until 1982, more than a century after confederation.



worthy of trust. There has never really developed in Canada the deep-rooted suspicion of government which led Thomas Jefferson once to observe that "Government is best which governs least." In Canada, we tend to regard government as part of the solution for many of our problems, whereas in the United States, it seems to me that the opposite sentiment is often more strongly held — namely, that government is part of the problem, rather than the solution.

These fundamentally different perceptions of government found expression in our two Constitutions. Your Bill of Rights came into force only two years after the drafting of your Constitution. It set out a series of sacred and *absolute* individual rights. The rapid incorporation of these rights into your Constitution demonstrated, I think, a fundamental distrust of governmental power.

In Canada, by contrast, our *Charter* was only constitutionalized in 1982, more than a century after confederation. Furthermore, compared with your Bill of Rights, our *Charter* places less emphasis on individual rights and more emphasis on collective interests. The first and most obvious expression of this difference is the fact that Section 1 of the Canadian *Charter* formally recognizes that individual rights and collective interests may, at times, be in dynamic tension with one another. As such, it makes the individual rights and freedoms guaranteed in the *Charter* "subject . . . to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

Section 1 implicitly recognizes that no one right can be absolute. Moreover, our courts have developed criteria to facilitate the reconciliation of conflicting rights as part of a Section 1 analysis. The American Bill of Rights does not include an equivalent to our Section 1. Instead, the balancing of conflicting rights in the American context has been accomplished by the judiciary through the development of a rich, complex, and sometimes mystifying jurisprudence that seeks out limits within the rights themselves.

Another significant difference between our *Charter* and your Bill of Rights stems from the process through which the *Charter* was added to our Constitution just over a decade ago. At that time, as surprising and anomalous as this might appear, Canada did not have the legal

power to modify its own Constitution without prior ratification by the British Parliament. An interesting and difficult question therefore arose: Given that Canada was a federal state, and given that the *Charter* would affect the exercise of provincial powers, to what extent could the Canadian government seek British leave to amend the constitution without the express agreement of the provinces? This question was referred to the Supreme Court of Canada in 1981,<sup>2</sup> and that Court came up with what I think you will agree was a uniquely *Canadian* answer: As a matter of federal *law*, the Canadian government was not obliged to seek provincial consent; as a matter of constitutional *convention*, however, the Canadian government was required to seek a "substantial degree of provincial consent" before proceeding further.

As a result, last-minute negotiations followed during which the Canadian government sought to win over the ten provinces. To this end, a section, which has since been referred to as the "quintessential Canadian compromise," was added to the *Charter*. Known as the "notwithstanding clause," it expressly permits the federal Parliament or a provincial legislature to restrict the applicability of certain sections of the *Charter* to specific legislation. In particular, it applies to sections dealing with freedom of expression, religion, the press, peaceful assembly, and association, and legal rights associated with due process and equality. The catch to this override power, however, is that any legislation passed in such a manner expires, and must be passed again, after five years. On my understanding, there is no similar override available to the Congress of the United States. The existence of this section in the Constitution of Canada is a telling reminder of the tradition of parliamentary supremacy we inherited from the British, and a reminder of how our notion of sovereignty differs from that of the United States, in that sovereignty resides in Parliament rather than in the people. Our Constitution, unlike yours, does not begin with "We the people."

Another of the more fundamental differences between the *Charter* and the Bill of Rights is the absence of any protection of proprietary interests under the *Charter*. In the American Constitution, property is protected by the Fifth and Fourteenth Amendments. In Canada, by contrast, a decision was made to exclude property rights from the

*Charter*. As a result, the *Charter* does not explicitly encompass corporate-commercial economic rights. I must add, however, that the Supreme Court of Canada has not yet fully dealt with the issue of economic rights, particularly in the context of equality rights, poverty rights, social security rights, and other economic rights "fundamental to human life or survival."<sup>3</sup>

What is perhaps most distinctive about the Canadian *Charter* — and most indicative of our willingness to balance individual rights against collective interests — is its emphasis on the rights of minorities and on the rights of members of reasonably definable groups. It reflects a vision of individual dignity that may flow as much from one's own value as a human being as from one's gender or one's membership in a racial, cultural, ethnic, or religious group. I would suggest that this vision differs from that of the American Constitution, where rights are approached from a more libertarian and absolute perspective. The vision flowing from your Constitution is of a nation made up of a collection of individuals, all drawing their rights from their membership in that nation. These two visions find expression in our popular images of ourselves: Canada is often referred to as a "cultural mosaic," whereas the United States is labeled a "melting pot."

Perhaps the best illustration of this vision in Canada's Constitution can be found in Section 27 of the *Charter*, which requires that the *Charter* be interpreted "in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians." Although this section has not yet figured prominently in our jurisprudence, it did play a role in an important decision of the Supreme Court upholding the constitutionality of a criminal law against hate literature.<sup>4</sup> While freedom of expression is as sacrosanct a value to our democracy as it is to yours, we could not go quite so far as your Court in defining the legitimate limits to that speech. The "clear and present danger" doctrine that has evolved in the United States, which essentially precludes regulation of any type of expression unless it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action,"<sup>5</sup> was too high a threshold for us, given the explicit recognition in our *Charter* of the values of multiculturalism and substantive equality of individuals. For Canada, willful promotion of

hatred that denigrates others and offends human dignity is as much worthy of criminal sanction as is physical violence or any other lawless action.

On that note, I would now like to address more directly the profound differences in our constitutional approaches to equality rights, for it is through this prism that our countries' differing visions become more apparent. In the United States, equality is guaranteed under the Fifth and Fourteenth Amendments. The relevant portion of the Fourteenth Amendment reads, as you very well know, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The equality provisions in our *Charter* are somewhat more expansive. Section 15 reads:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The first interesting difference between the treatment of equality in our two Constitutions is that, unlike the United States, in Canada that right is only available to physical persons, not corporations.

With respect to individuals, however, the right to equality in Canada is broader than in the United States. To begin with, the American Equal Protection Clause promises only "equal protection" of the law, whereas the Canadian *Charter* guarantees both equal protection and equal *benefit* of the law. Thus, in Canada, equality is both a negative and a *positive* right. In other words, individuals are not only equally entitled to be protected against discriminatory restrictions, but are also equally entitled not to be denied benefits in a discriminatory manner.

In the United States, distinctions based on race are very strictly scrutinized, whereas distinctions made on the basis of sex are evaluated against a less stringent standard. In Canada, by contrast, this is not the case. Discrimination is discrimination, regardless of the basis upon which it is done.

At the heart of our differences, however, is the means by which we define equality itself. In



the United States, equality is regarded as "sameness of treatment," whereas in Canada, equality is evaluated more from the standpoint of "sameness of result." The difference between our two approaches is particularly pronounced with respect to affirmative action programs. The constitutional validity of affirmative action programs has been the subject of considerable debate in your country. Some Justices of your Supreme Court have expressed general opposition to such programs on the basis that they violate the "sameness of treatment" principle.<sup>6</sup> Other members of your Supreme Court have rejected this approach, arguing that a ban on class-based remedies for the disadvantaged ignores hundreds of years of class-based discrimination and permits the Equal Protection Clause to indirectly perpetuate racial inequality rather than alleviate it.<sup>7</sup> In Canada, however, this debate was resolved within the *Charter* itself, which provides in Section 15(2) that the guarantee of equality

***"In Canada, by contrast, discriminatory effects are scrutinized just as carefully as discriminatory purposes. We have concluded that discrimination based on pregnancy is sex discrimination and, going one step further, that sexual harassment is sex discrimination."***

women does not discriminate against women.<sup>8</sup> In Canada, by contrast, discriminatory effects are scrutinized just as carefully as discriminatory purposes. We have concluded that discrimination based upon pregnancy is sex discrimination and, going one step further, that sexual harassment is sex discrimination.

Through this brief survey, I hope I have demonstrated some of the many differences in tradition, approach, and interpretation that underlie our two constitutional documents, and in fact, our two societies. While Canada and the United States do indeed have much in common, we also differ in many ways. However, I see the differences between us as our strength rather than our weakness, for they give us both the opportunity to learn from one another, and thus help our two friendly countries along the path of continued self-improvement.

I cannot end this address without mentioning a serious problem of particular interest to us, as lawyers, namely the tar-

... does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups, including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

It is revealing of the differences between our respective countries that this issue, so hotly debated in America, was not one of the more controversial sections of our *Charter*.

Another very fundamental difference in our approach to equality is that, as I understand it, in the United States, the Equal Protection Clause is violated only by statutes which discriminate on their face, or where an intention to discriminate can be demonstrated. Thus, your Supreme Court has held that an enactment that happens to discriminate against pregnant

nished state of the legal profession's image. In a recent article in *Canadian Lawyer*, it was noted that "lawyers are probably the most unloved of all professionals and are commonly characterized as smooth-talking, greedy, immoral bloodsuckers."<sup>9</sup>

To fully appreciate the low esteem in which lawyers are held by the general public, one need only look to the movies, as my colleague Justice Rosalie Abella of the Ontario Court of Appeal pointed out in a recent speech to the Canadian Bar Association.<sup>10</sup> For instance, in the hugely successful movie *Jurassic Park*, the first person to be killed by the rampaging dinosaurs is the movie's only lawyer. He is killed when a giant *Tyrannosaurus Rex* breaks through the roof of a bathroom and devours him, head first. The audience's response — laughter, cheering, and applause.

Clearly, when the general public views us as bloodsuckers who deserve to be eaten by dinosaurs, it is time to acknowledge that our



profession faces a serious image crisis. Couple this with a judicial system that is seen by many litigants as slow, inefficient, and expensive, and it becomes clear that we must act quickly and decisively to improve both our justice system and our profession's image. That your college is very aware of these problems is illustrated by the fact that previous speakers, such as Ambassador Sol Linowitz and the president of the Canadian Bar Association, Tom Heintzman, have spoken about them, as well as by the fact that a workshop was devoted to the subject.

I have no magical solutions for these problems. I merely want to note that the image of lawyers and the quality and accessibility of the justice system are problems being faced in both our countries. They are problems on which we can and should work together to develop new and innovative solutions to our mutual benefit. While, as I noted previously, our two countries are different in many ways, we nonetheless share common problems and can learn from each other in our attempts to solve them. In this respect, I am confident that with organizations such as the

American College of Trial Lawyers involved in the struggle, we will be able to overcome, both in Canada and the United States, the problems facing our noble profession.

### Endnotes

<sup>1</sup> Bernard Schwartz, "Shooting the Piano Player"? Justice Scalia and Administrative Law" 47 *Admin L.R.* 1 at 16 (1995).

<sup>2</sup> *Reference re: Resolution to Amend the Constitution*, (1981) 1 S.C.R. 753.

<sup>3</sup> See, for example, *Attorney General of Quebec v. Irwin Toy Limited*, (1989) 1 S.C.R. 927 at 1003-1004.

<sup>4</sup> *R. v. Keegstra*, [1990] 3 S.C.R. 697.

<sup>5</sup> *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

<sup>6</sup> See, e.g., Justice Scalia's reasons in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

<sup>7</sup> See, e.g., *California Regents v. Bakke*, 438 U.S. 265 (1978), at 400, per Marshall J., and at 407, per Blackmun J.

<sup>8</sup> *Geduldig v. Aiello*, 417 U.S. 484 (1974).

<sup>9</sup> Bruce Livesey, "The Tarnished Image," *Canadian Lawyer* (February 1995) p.16 at 17.

<sup>10</sup> Rosalie Silberman Abella, "Ethical Issues for Lawyers in the 1990s" (Luncheon Address, Canadian Bar Association National Sections/Department of Justice Meeting, Ottawa, Ontario, October 28, 1994) [unpublished].

# **Gladly Wolde He Teche: Students, Canon, and Supreme Court History**

**William M. Wiecek**

From senior high school through graduate and professional school, anyone who would teach the history of the Supreme Court faces a cascade of challenges. All teaching is a mediation between three things: teacher, subject matter, and student. Assuming that the teacher is capable and well prepared, difficulties arise with the students and the subject matter. Where the subject is the history of the Supreme Court, problems abound in both areas.

Let's begin with the students, who, in today's college classroom, are mostly young adults, native English-speakers who have spent their entire lives immersed in the American culture of the past two decades. Already, we have identified part of the problem.

College history teachers voice a universal lament today: their students are ahistorical. They know little about history, and care less. Sam Cooke spoke for them in his much-recorded hit "Wonderful World":

Don't know much about history,  
Don't know much biology,  
Don't know much about science books,  
Don't know much about the French I took  
Don't know much about the middle ages  
I looked at the pictures and I turned the  
pages  
Don't know nothin' bout no rise and fall  
Don't know nothin' bout nothin' at all.<sup>1</sup>

This characteristic historical ignorance is irrespective of gender, race, ethnicity, geographic origin, and socioeconomic class. Our colleagues in other fields nag us: "Why don't my students know any history?"

There are actually several sensible answers to that question. One is that "History," as a discrete subject, has disappeared from the secondary-school curriculum. Our students don't know any history because they aren't taught any before they come to college. Instead, they are "exposed" to history in courses labeled "Social Studies," where the history content has to compete for the students' attention and time with everything else in that intellectual goulash. History is not taught systematically.

A second problem is that it is often not taught well, either. Every college history teacher faces the frustration of having students who have been "turned off" by history because their original introduction to the subject consisted of memorizing dates. When we encounter them, these undergraduates are history averse. No one comes away from the subject with any positive attitudes toward it after such an experience, so we first have to repair damage done in the past by inept teaching before we can hope to open their minds to history. Our students are also notoriously deficient in languages other than English, ancient or modern, which further shrinks their cultural horizons.

A third problem with the students, which is

really an opportunity in disguise, is that their learning skills differ from ours. By the time they arrive at college, students have already spent twenty hours a week watching TV, perhaps 15,000 hours of their life (!), plus some unknown additional number of hours playing video games such as Nintendo. Even the high school library has mutated into the "media center." So teachers complain that their students are illiterate. That charge is unfair to the educational attainments of today's students. The illiteracy complaint is especially pernicious when it serves as the launchpad for a tirade about the disintegration of the canon. (More on that later.)

Many people assume that today's students have not spent as much time reading, relative to other learning activities, compared to previous generations. I do not know of any empirical studies that support this assumption. Grant it for sake of argument, though. The comparison itself is almost meaningless. All it tells us is that the earlier generations did not have multimedia learning opportunities.

Today's students compensate for whatever deficiencies they may have in reading by other abilities, not recognized or valued by those of us of earlier generations simply because we don't possess those abilities ourselves. In place of the relatively slow and totally linear process of acquiring information by reading, our students acquire information and sensations visually, graphically, fast, and hot. Their media include MTV, with its dazzling, colorful, suggestive imagery reinforced by sound, and now, multimedia home computers running interactive software or CD-ROMs.

I do not claim that an hour of couch-potato time in front of the boob tube is the equivalent of an hour spent reading *Moby Dick*. I merely make two points: 1) the technology of acquiring information and of learning has changed greatly in the last thirty years; and 2) that change is not as apparent to older persons, and thus not appreciated by them or exploited by them when they are teachers.

Teaching is partly science, (educational psychology) but mostly art. The art of teaching consists of an intuitive, almost-magical ability to engage students' minds where *they*, not we, are. The goal of our teaching is to enable them to teach themselves when they have left us. A good teacher approaches the challenge of teaching

history by reimagining the subject as it would be viewed from the cultural position of the student. One of the most difficult accomplishments in teaching is to imagine yourself back into the state of ignorance of your students. Only from there can you figure out how best to reach them. The ancient Greek figure of the pedagogue, the slave who accompanied schoolboys, carrying their books for them, is a useful trope here. The teacher walks alongside the students, at their pace, striving to understand where they are, and then to lead them along the path of learning.

So much for the challenge presented by the students. Next, the subject matter. The history of the Supreme Court poses a double difficulty. The first derives from the institution itself, the second from its sources.

The Court itself is a forbidding institution to a layperson, swathed in secular ritual. Its dramaturgy has been designed to be literally awe-inspiring (as it should be). The Court does its work in a temple, which Washington tourists enter by ascending long marble steps flanked by outsized mythological figures, while craning their necks up at a classical frieze that proclaims "Equal Justice Under Law."

When the Justices do their public work, they appear dramatically from behind parted draperies, wearing black robes, reminiscent of a processional of Benedictine monks going to vespers. Recently the Chief Justice and Justice O'Connor have taken to wearing black skull caps as well, confusing the religious comparison (monks in yarmulkes?). The Chief has added a little color to his robes with gold slashes on the sleeves, inspired by the costume of the Lord Chancellor in a local production of *Iolanthe*. This innovation was greeted with friendly, if not rave, fashion reviews. It provides a welcome light touch not seen before in that office, somewhat offsetting the ponderous *gravitas* of the scene. The Justices are seated in armchairs large enough to be thrones, arrayed on a well-appointed dais that looks like a cross between an altar and a stage set.

The primary sources for the Court's history, its opinions, are even more forbidding to the young reader. They are among the most difficult of documentary sources for a nonhistorian to read, understand, and interpret. The opinions are filled with jargon, some of it in one or the other of two dead languages. Their conventions of citation are recondite to the point of



obscurity. Opinions are often long, and sometimes poorly written. Judicial prose, especially in pre-World War I opinions, seems antique to the modern reader. To historians, the opinions of Marshall and Story may be lucid, Holmes' epigrammatic, Brandeis' inspiring, Cardozo's poetic, but that is only because we spend our lives reading historical documents. The nineteenth-century prose conventions, the long, elegant sentences of Story, the obscure, prolix writing of Chief Justice Edward D. White are all daunting barriers between the student and the subject matter.

Assuming, though, that students can be induced to read the opinions in excerpted form, the teacher then confronts the major substantive challenge: which topics and primary sources should be taught? In other words: is there a canon in the teaching of the Court's history? If there is, what is its content? Turning the basic question around, it would be unthinkable to assume that there is no canon at all, that our students need not know anything about the history of the Court, or that there are no criteria to determine what is to be selected out of the great mass of the Court's history to convey to college students.

I believe that all of us have ideas about the canon and what it includes. We assume that young people coming along ought to know something about some essential core of the

history of the Supreme Court, and we are disturbed when they don't. Further, we assume, reasonably enough, that it is the responsibility of teachers in undergraduate courses in constitutional history or public law (as taught in political science departments) to inculcate, or at least introduce, that canon. We may have different expectations for students who will simply take their places as citizens, as opposed to those who will go on to become lawyers or political leaders, with higher expectations for the latter.

That question of the canon as an aspect of pedagogy must be posed in terms of the time available to cover the subject. For purposes of this discussion, assume a two-semester course for a total of six hours' credit, each semester having approximately forty-five classroom hours. At the threshold of curriculum planning, the teacher faces a preliminary and dichotomous choice. Do you strive for comprehensive coverage of the subject, at the risk of superficiality? Or do you pursue in-depth analysis of selected issues, sacrificing complete coverage? Neither option is "right" or better than the other. They serve different values and different intellectual/emotional aptitudes.

Teachers do not agree on the contents of the canon, or whether the attempt to define one is useful, damaging, a diversion from more



Professor Wiecek employs the latest technology in his classes on law and government at Syracuse University. Here he uses a projected computer screen to teach a course called Race and Law. Onto the screen he projects an "electronic casebook," which consists mainly of excerpts of Supreme Court decisions he has downloaded for the benefit of his students. Professor Wiecek believes that interactive technology makes learning a less passive experience.

worthwhile intellectual pursuits, or something else. Nevertheless, I offer here my own view of what the canon should contain. I believe that educated Americans ought to know something about it, partly to fulfill the responsibilities of citizenship (or what I think of as "constitutional literacy"<sup>2</sup>), and partly simply as part of their liberal education.<sup>3</sup>

The canon should include more than Supreme Court opinions. Today's legal and constitutional historians believe that a vice of earlier legal history was its acontextuality. Those who went before us, especially those who were lawyers with little historical training, presented legal developments doctrinally and in a conceptual vacuum, having no relationship to the economic, social, political, and cultural circumstances from which they emerged. Lawyers' legal and constitutional history continues to replicate this fault today.<sup>4</sup> The current cohort of legal historians is working to restore context to legal history, retaining a primary focus on purely legal materials but adding to it the nonlegal background out of which legal doctrine emerged and back into which its influence has flowed.

Some of us may overdo this emphasis on nonlegal context, but time enough to correct the pendulum swing when it becomes excessive, which it scarcely has done so far.

Students should know something of the English foundation of our constitutional order and its interplay with our indigenous constitutional development before the American Revolution. The first segment of the course should begin with Magna Carta and later implementing legislation, but should emphasize the constitutional struggles of the seventeenth century, which were the most important matrix of English experience for American constitutional thought. The absolutist, Whig, and radical positions deserve equal attention, particularly since the primary sources are readily

accessible. Americans have a natural tendency to regard Whig/parliamentary/Lockean beliefs as the "right" or correct vision, which is all the more reason to present competing positions fully and fairly. The dangers of Whig historiography in this context are magnified by the gap that would exist in students' historical understanding if they knew nothing about the beliefs of the absolutists and the radicals. In the colonial era, the workings of the imperial constitution deserve attention, while institutional developments in the colonies provide a valuable introduction to the American Revolution. The origins of slavery and racism constitute one of the most important subjects of the era.

The large corpus of John P. Reid's studies<sup>5</sup>

on the Revolution demonstrate the importance and richness of constitutional issues for the Court's history. His work reinforces the tradition revived by Bernard Bailyn and Gordon Wood a generation ago.<sup>6</sup> It corrects the old Progressive indifference to legal and ideological issues, but without rendering their interpretive insights obsolete. The Revolution was legalistic, conservative, and yet intensely radical, in

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both its theory and its practice. There is no more radical idea in political theory than that the people are capable of ruling themselves, and that those who wield political power are their servants. The Declaration of Independence demands heavy emphasis, but the teacher should give some attention to its bill-of-indictment provisions as well as its opening paragraphs.

In the constitutional era, we should pay more attention than is usually allotted to the state constitutions, which were our original constitutive documents and the matrix of our national Constitution. Virginia's of 1776 and Massachusetts' of 1780 are the richest in concepts, while Pennsylvania's of 1780 provides a radical comparison. The Articles of Confederation are useful



principally as an introduction and foil to the Constitution of 1787, but time spent on the expressly clause of Article II is a good investment, particularly in light of today's Tenth Amendment revival.

For the Constitution itself, some attention to the politics and dynamics of the Philadelphia Convention is necessary, but the principal focus ought to be the Federalist papers. Antifederalist writings are much in vogue now, apparently not so much for their contemporary role as a negative alternative to the Federalist position as for what many consider their relevance to enduring problems of federalism and personal liberty. This interpretation has been greatly influenced by Herbert Storing's essay and collection,<sup>7</sup> and seems to have a deep ideological spin, appealing to conservatives today who find affinities in Antifederalists' anxieties.

Once into the Federalist era, a constitutional history course ought to pay some attention to the policy initiatives of Alexander Hamilton and the competing ideologies of Thomas Jefferson and James Madison. For example, the Farewell Address is a compendium of conservative republican ideology, while Jefferson's First Inaugural offers an enduring, alternative vision for American society.

After 1790, the question of canon refocuses itself into what cases are essential for the educated American to know about, understand, and have thought about. I propose the following list. I assume that the relevance of each case and the rationale for its inclusion will be obvious to any reader of this *Journal*. The significant question to be addressed is therefore the packaging of the lot. Hence, I will keep comments on the individual cases to a minimum.

#### The early Court

*Calder v. Bull* (Corwin's "The Basic Doctrine of American Constitutional Law")

#### The Marshall Court

*Marbury v. Madison*

*Fletcher v. Peck*

*McCulloch v. Maryland*

*Gibbons v. Ogden*

*Barron v. Baltimore*

A rough parallelism simplifies the teaching of antebellum constitutional history. Just as a teacher might first explore Federalist/Jeffersonian political theory and then Marshall Court cases, so he or she might then do Jacksonian/Whig ideological conflict, followed by attention to the cases of the Taney Court. But ideological and policy differences that separated Democrats and Whigs are less significant than a deeper underlying divergence of constitutional vision that was sectional rather than partisan, which became intensified when entangled in the complications of the fatal struggle over slavery. The antinomy was between a Jeffersonian states-power vision of the American constitutional order, grounded in the Tenth Amendment, and the nationalist vision of Hamilton, Marshall, and Daniel Webster, grounded in the Supremacy Clause of Article VI. The Jeffersonian view, articulated definitively in the Virginia and Kentucky Resolutions and Madison's Report of 1800, was the authentic original exposition of the Constitution, embraced by a majority of Americans into the 1830s. Marshall's nationalist vision, so natural to us in the late twentieth century, was an innovative challenge. The climax of confrontation between the two views occurred in the Webster-Hayne debates of 1830. Compared with this conflict, Jacksonian-Whig disagreements over political economy, as well as most of the Taney Court cases, recede into lesser significance.

#### The Taney Court

*Charles River Bridge Case*

*Swift v. Tyson*

*Luther v. Borden*

*Genesee Chief v. Fitzhugh*

*Prigg v. Pennsylvania*

*Dred Scott v. Sandford*

*Ableman v. Booth*

Secession and the war present both challenges and opportunities for the teacher. It has always surprised me that most teachers and scholars dismiss the theories that underlie secession with contempt. That doubtless reflects the constitutional experience of the last generation, which saw those ideas exhumed in the 1950s for dishonorable ends, resistance to desegregation. Yet if Antifederalist thought has enduring significance for us, surely



interposition, nullification, and the state-centered constitutionalism of the Virginia and Kentucky Resolutions remain equally relevant.

### Reconstruction

*Texas v. White*  
*Slaughterhouse* (majority only)  
*Civil Rights Cases*  
*Plessy v. Ferguson*

Reconstruction re-created the Constitution, providing the postbellum nation with a new constitutional order, resembling in broad outline the old one in such things as separation of powers, but creating a new configuration of liberty and power in matters of federalism and individual rights. The Reconstruction Amendments were, functionally, a new Constitution, and the reactionary efforts of those like Raoul Berger to repress the genie back into the bottle have evolved from fatuity to pathos.<sup>8</sup> Reconstruction is a difficult constitutional challenge because the teacher must convey the equal importance of two great and inseparable themes, each of which needs exclusive attention in its own right if it is to be done adequately: federalism on the one hand, and on the other, individual freedom, rights, and immunities, with particular reference to the status of the freedpeople. *Slaughterhouse* is central here, but it is difficult to do justice to both great themes simultaneously — and, to complicate the challenge even more, to use the dissents in the case as the segue into the next major topic, substantive due process.

### The Laissez-Faire and Progressive Eras

*Slaughterhouse* (again)  
*Munn v. Illinois*  
*U.S. v. E. C. Knight*  
*In re Debs*  
*The Income Tax Cases*  
*Allgeyer v. Louisiana*  
*Oleo and Lottery Cases*  
*Lochner v. New York*  
*Adair v. U.S.*  
*Muller v. Oregon*  
*Loewe v. Lawlor*  
*Standard Oil v. U.S.*  
*Coppage v. Kansas*

### The Child Labor Cases

(*Hammer and Bailey*)

*Adkins v. Childrens Hospital*  
*Home Building and Loan Assn. v. Blaisdell*  
*U.S. v. Butler*  
*Ashwander v. TVA* (Brandeis concurrence)  
*Carter v. Carter Coal Co.*  
*Morehead v. New York ex rel. Tipaldo*  
*Carolene Products* footnote

Historiographically, a conflict has emerged between a Progressive/neo-Progressive/liberal interpretation of these cases and revisionist views that have emerged in the past twenty years. While this interpretive controversy is interesting to historians, especially those of us who have participated on one side or the other of the debate, our time is not well spent in belaboring it with undergraduates, who couldn't care less, even if we succeed in making the issues of the debate clear.

### First Amendment

*Schenck v. U.S.*  
*Abrams v. U.S.*  
*Gitlow v. New York*  
*Whitney v. California*  
 (Brandeis concurrence)  
*Chaplinsky v. New Hampshire*  
*Brandenburg v. Ohio*  
*Miller v. California*  
*Lemon v. Kurtzman*

The First World War era introduced the First Amendment into the constitutional arena. Here the issue becomes not so much which cases to include as how to package them: do you introduce the First Amendment with *Schenck* and carry it forward to *Whitney* or all the way up to *Brandenburg*? These questions illustrate the overweening problem with teaching twentieth-century constitutional history: the integrity of chronology can be respected only by chopping the subject up into eras, unless the teacher organizes the entire semester topically, so as to do three or four separate minicourses, such as economic regulation and federalism, First Amendment, civil rights, and presidential power. That might be an approach favored by political scientists teaching public law, while historians prefer to follow a more disciplined chronological approach.

### The Modern Era

*Brown v. Board of Education*

*Griswold v. Connecticut*

— including Harlan's dissent in *Poe v. Ullman*

*Roe v. Wade* and *Planned Parenthood of*

*Southeastern Pennsylvania v. Casey*

The constitutional revolution of 1937 and *Carolene Products* ushered in the modern era, which for most teachers falls about halfway through the second semester. Then the great challenge becomes what to include of the post-World War II issues. Here, in my experience, the possibility of a canon breaks down altogether. The recent past is too rich, too dense, too important to be surveyed even at a high level of generality.

The foregoing thumbnail sketch doubtless reflects the perspective of an historian of the early period. It must seem radically incomplete, if not distorted, to historians with a more recent orientation. After 1938, the canon degenerates for me into identifying topics, not cases. I have found myself frustrated by the ever-present, nagging sense of "If today is Tuesday, this must be Belgium" approach to surveying the modern era. This results in two weeks for civil rights, another two for modern civil liberties, including the rights of persons accused of crimes, some time for presidential power, modern federalism issues, and so on. To the students, it must seem a blur. Since most of them come into class with strongly held assumptions that relevance increases as we approach the present, this must be doubly frustrating to them. I simply do not know how to deal with this problem — I usually avoid it by ending the course around 1960 — and I would be interested in learning about how others deal with it.

In addition to the cases, I believe that students should be introduced to the problems of constitutional interpretation, including the problem of the Framers' intent. This necessarily requires reliance on secondary sources, such as Robert Bork's *The Tempting of America*.

Knowledge of the canonical cases, whichever they might be, is insufficient for a liberal, humane education. When I taught constitutional history courses to undergraduates, I hoped to leave them with two additional intellectual changes. First, they should have become more self-aware of their own values. I do not believe that post-secondary teachers can inculcate substantive values. Years of teaching religious education courses to grade-school children, followed by a year of running the program, left me convinced that children's value systems are substantially in place by the time they reach the age of six. After that, only a life-altering personal crisis of some sort can modify their values. At most, formal education can only reinforce values already in place. So I think it is futile for a college teacher to hope to instill values, or change those already there.

What we can hope for, however, is to make our students conscious of their values, more adept at articulating them, and more willing to consider challenges to them. We might also hope to instill in them an attitude of respect for the differing values and opinions of others.

My second substantive goal is to leave in the students a desire to know more about our constitutional past, together with the knowledge of resources to which they can turn to teach themselves when they have left the classroom.

Permit me to conclude on a personal note. I have been teaching about the history of the Supreme Court in one way or another for thirty years. The subject is so rich, so fascinating, that you can spend a professional lifetime in it and never exhaust it. Even without recent technological innovations, a life spent in the history of the Court is constantly self-renewing. There is a lot of truth to the sentimental adage, "A teacher is but a student grown old." Like Chaucer's clerke, it can be said of us blessed with the opportunity of teaching about the Supreme Court, "gladly wolde he lerne, and gladly teche."

## Endnotes

<sup>1</sup> Sam Cooke, "Wonderful World," © 1978 Abkco Music, Inc.

<sup>2</sup> After composing this piece, I discovered that Walter F. Murphy, James E. Fleming, and Sotirios A. Barber use the phrase "constitutional literacy" in *American Constitutional Interpretation*, (Westbury, N.Y.: Foundation Press) 2nd ed. (1995), 23.

<sup>3</sup> I am uncomfortable affirming the existence of a canon of any sort, fearing that it places me alongside Allan Bloom and E. D. Hirsch, whose thoughts and selections I do not endorse: Allan Bloom, *The Closing of the American Mind: How Higher Education Has Failed Democracy and Impoverished the Souls of Today's Students* (Simon and Schuster, 1987); E. D. Hirsch, Jr., *Cultural Literacy: What Every American Needs to Know* (Boston: Houghton Mifflin, 1987).

<sup>4</sup> E.g.: David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789-1888* (1985); Currie, *The Constitution in the Supreme Court: The Second Century, 1888-1986* (Chicago: University of Chicago Press, 1990).

<sup>5</sup> *In a Defiant Stance: The Conditions of Law in Massachusetts Bay, the Irish Comparison, and the Coming of the American Revolution* (University Park, PA: Pennsylvania State University Press, 1977); *In a Rebellious Spirit: The Argument of Facts, the Liberty Riot, and the Coming of the American Revolution* (University Park, PA: Pennsylvania State University Press, 1979); *The Briefs of the American Revolution: Constitutional Arguments between Thomas Hutchinson, Governor of Massachusetts*

*Bay, and James Bowdoin for the Council and John Adams for the House of Representatives* (New York: New York University Press, 1981); *In Defiance of the Law: The Standing-Army Controversy, the Two Constitutions, and the Coming of the American Revolution* (Chapel Hill: University of North Carolina Press, 1981); *Constitutional History of the American Revolution: The Authority of Rights* (Madison: University of Wisconsin Press, 1986); *Constitutional History of the American Revolution: The Authority to Tax* (Madison: University of Wisconsin Press, 1987); *The Concept of Liberty in the Age of the American Revolution* (Chicago: University of Chicago Press, 1988); *The Concept of Representation in the Age of the American Revolution* (Chicago: University of Chicago Press, 1989); *Constitutional History of the American Revolution: The Authority to Legislate* (Madison: University of Wisconsin Press, 1991); *Constitutional History of the American Revolution: The Authority of Law* (Madison: University of Wisconsin Press, 1993).

<sup>6</sup> Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, MA: Belknap Press, 1967); Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill: University of North Carolina Press, 1969).

<sup>7</sup> Storing, *The Complete Anti-Federalist* (Chicago: University of Chicago Press, 1981); *What the Anti-Federalists Were For*, vol. I of *The Complete Anti-Federalist* (1981).

<sup>8</sup> Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Cambridge MA: Harvard University Press, 1977).



# **Divided Loyalties: Justice William Johnson and the Rise of Disunion in South Carolina, 1822-1834**

**Timothy S. Huebner**

*My reputation is the property of the United States.  
It is in safe hands and defies scrutiny.  
But I wish to live in harmony with those around me.  
The smiles of my fellow citizens are dear to me.*

**William Johnson, 1822**

In 1822, Justice William Johnson of the Supreme Court of the United States became embroiled in a heated controversy with many of the residents of his hometown of Charleston, South Carolina. Stung by the fear of a slave conspiracy, political leaders in the city and throughout the lowcountry region had acted swiftly to apprehend the alleged rebels and their leader, a mulatto named Denmark Vesey. In the midst of the crisis, Johnson urged caution in a letter to a Charleston newspaper and warned against allowing "popular demand for a victim" to undermine the lawful administration of justice. Local leaders defensively reacted to Johnson's admonitions, and a war of words resulted that severely damaged the Justice's relationship with many of the residents of both Charleston and the state as a whole.<sup>1</sup>

The strife surrounding Johnson's comments about the Vesey conspiracy was merely the first of a series of disputes between the Justice and South Carolina's extremist political leadership. Over the course of the next decade, until his death in 1834, Johnson repeatedly antagonized South Carolinians with his relatively moderate views

on slavery, his unswerving devotion to nationalistic principles, and his firm opposition to the doctrine of nullification. Johnson's myriad troubles sprang from tensions inherent in service on the nationalistic Marshall Court and citizenship in the progressively disunionist state of South Carolina. The experience of Johnson demonstrates that the constitutional component of sectionalism was not confined to abstract doctrinal debates over the Marshall Court's decisions, but that it also shaped the daily experiences of antebellum federal judges who often grappled with competing allegiances to state and nation.<sup>2</sup>

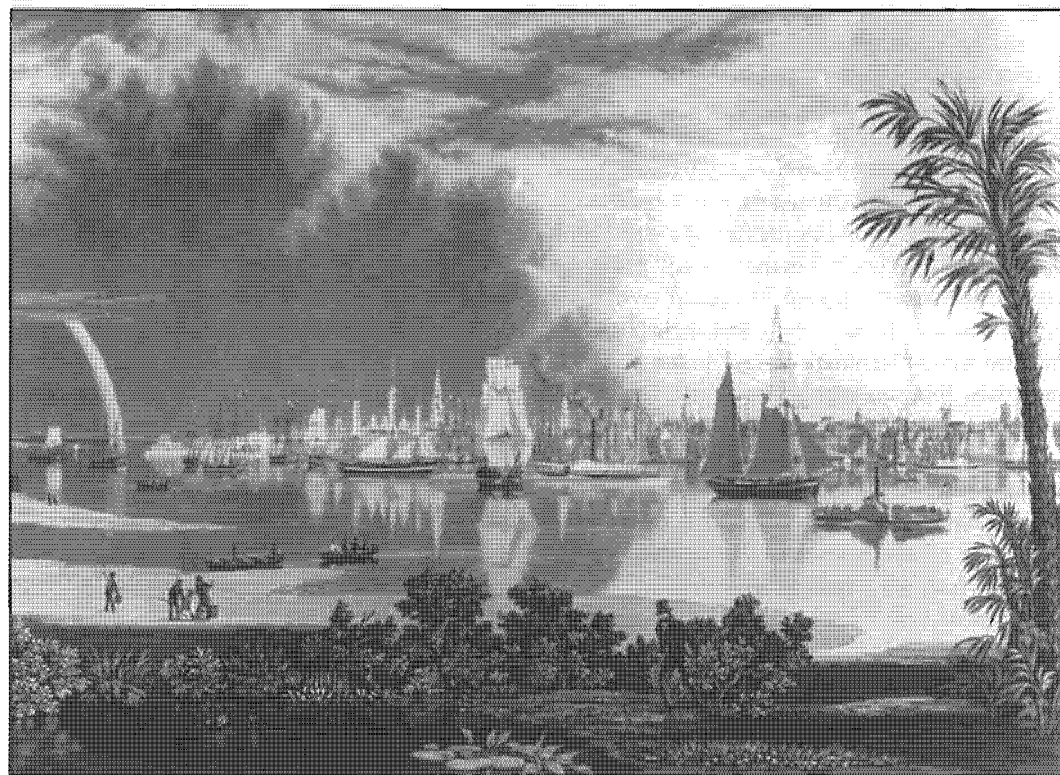
Born in Charleston in 1771, the son of blacksmith William Johnson, Sr., and Sarah Nightingale, Johnson had strong ties to his place of birth. After graduating in 1790 with highest honors from Princeton, Johnson returned to his hometown, where he entered the law office of Charles Cotesworth Pinckney, a leading figure in Charleston society.<sup>3</sup> After establishing a law practice in Charleston, Johnson quickly made a name for himself. In 1794, the South Carolina Society, an organization of elite Charlestonians who supported philanthropic causes, admitted

him to membership; later that year he married Sarah Bennett, the daughter of a prominent architect. In October 1794, Johnson entered the state house of representatives, rising to the position of house speaker, and his fellow lawmakers appointed him judge of the state court of common pleas in December 1799.<sup>4</sup> During his early career, Johnson had thus risen rapidly within the ranks of Charleston society and had established lasting social and political connections in his home state.

At the same time that Johnson developed these ties to South Carolina, he grew in his devotion to the nation. His father, along with Christopher Gadsden, had led a group of artisans and mechanics who figured prominently in the American Revolution in Charleston, and the elder Johnson's political activities made a lasting impression on his son.<sup>5</sup> As a young man, Johnson developed a deep reverence for the cause of national independence and an intense respect for the heroes of the war. Later in his career, he frequently referred to the struggle for independence in his speeches, writings, and judicial opin-

ions, and, like so many of the revolutionary generation, often used the war against Great Britain as a reference point in articulating his political and constitutional views.<sup>6</sup> Johnson also showed an unusually keen interest in the war by devoting years to writing a biography of General Nathanael Greene, one of the heroes of the southern theater. Johnson greatly admired the men of action in the Revolution — leaders like his father, Gadsden, and Greene — and cherished the revolutionary ideal of national unity.<sup>7</sup> In Johnson's view, more than just an example of historical heroism, the struggle for independence was a crucial historical event to which future generations of Americans could look for guidance and inspiration. The young South Carolina judge, in other words, became an ardent nationalist.

Throughout most of his career, Johnson's loyalties to both his state and the nation were completely compatible. In the nationalistic environment of the post-revolutionary period and the Era of Good Feelings that followed, the spirited debates about the proper role of the national



Ships docking in the port of Charleston were supposed to comply with the Negro Seaman Act, a law passed by South Carolina in 1822 to discourage the spread of slave rebellions. It required free blacks to be imprisoned during their vessel's stay in port; if a captain failed to pay for a black's incarceration or to redeem him on departure, the seaman would be sold by the state as a slave. Charleston harbor is depicted above in the 1830s in a highly romanticized view.



government did not manifest themselves in stark, sectional terms. As many historians have shown, the Jeffersonian Republicans, suspicious of national power, were by no means a sectional political party, and Southern slaveholders desirous of protecting the peculiar institution did not begin to articulate the constitutional theory of state rights in defense of slavery until the Missouri Crisis of 1820. In other words, Southerners had not yet formulated the potent mix of pro-slavery ideology and states' rights constitutional theory that combined in 1861 to bring about disunion.<sup>8</sup> When Thomas Jefferson appointed Johnson to replace the retiring Justice Alfred Moore on the Supreme Court in 1804, the President recruited the young South Carolina judge because contemporaries described him as "an excellent lawyer, prompt, eloquent, of irreproachable character," with "republican connections" and "good nerves in his political principles."<sup>9</sup> Over the next several years, even though Johnson's concurrences with Marshall's nationalistic rulings in cases like *Martin v. Hunter's Lessee* (1816) and *McCulloch v. Maryland* (1819) proved a source of irritation to Jefferson, they did not affect the Justice's relationship with South Carolina.<sup>10</sup>

Johnson's harmonious association with his home state, however, was forever altered by the controversy surrounding the Vesey plot. On June 16, 1822, the Charleston public first learned of the slave plot. Armed guards surrounded the city, and the police who appeared along Charleston's streets arrested ten slaves for taking part in the cabal. The following day, with emotions running high and details of the conspiracy not yet clear, Johnson penned a letter to the *Charleston Courier* in which he described a similar incident that had occurred in the area around Augusta, Georgia. In an equally frightening climate created by rumors of a slave uprising, Johnson related, a freeholders' court there had hastily hanged a slave for allegedly blowing a horn. "Although no evidence was given whatever as to a motive for sounding the horn, and the horn was actually found covered and even filled with cobwebs," Johnson wrote, "they condemned that man to die the next day!" "Popular demand for a victim" was so great, according to Johnson, "that it is not certain a pardon could have saved him." Johnson's implied warning against rushing to judge the current

conspirators appeared in print on June 21, 1822, as an unsigned letter to the editor. From that day forward, Johnson's relationship with his home state would never again be the same.<sup>11</sup>

By the time the anecdote was published, a five-member court of freeholders had already begun to examine evidence surrounding the conspiracy, and on the day the letter appeared, authorities arrested Vesey. Thus coinciding with the first stages of the investigation, Johnson's message provoked a firestorm of controversy. On the day of its publication, two members of the freeholders court marched to the *Courier* to demand the name of the letter's author, and Johnson, when informed of the request and while still unaware of the magnitude of the controversy that was brewing, admitted that he was the writer.<sup>12</sup> Meanwhile, on June 22, the day after the letter appeared, the Intendant of Charleston, James Hamilton, issued a quick rebuttal in the *Charleston Southern Patriot* to what he described as the "unjust libel . . . insinuated against his fellow citizens," although Hamilton, when he learned the identity of the letter's author, immediately apologized to his friend Johnson.<sup>13</sup>

While Johnson had little difficulty easing the concerns of Hamilton, placating the members of the freeholders court proved nearly impossible. On June 24, Johnson sent a letter in reply to Hamilton's to the *Patriot*, but the newspaper's editor promptly returned the letter and advised against its publication. "The agitation of the public mind is likely to be prolonged, not quieted by a controversy in the public prints," the editor informed Johnson. Satisfied, Johnson withdrew the letter and hoped for an end to the controversy. Later that day, however, he received a message from the members of the court, who assailed his original letter to the *Courier*. They described Johnson's story as "calculated to produce, not only a distrust of our proceedings, but contained an insinuation, that, under the influence of popular excitement, we were capable of committing perjury and murder." Furthermore, they demanded that an explanation and apology from Johnson appear in the following day's *Courier*.

The charges of the freeholders court severely tarnished the Justice's reputation. Over the course of the next several days, rumors concerning Johnson's attitudes toward slavery and the alleged conspirators spread throughout the city.



Some even accused him of attempting to undermine the court's proceedings by using "fraudulent means" to free a group of condemned conspirators. Johnson's daughter, writing to her cousin, later remarked that her father's conduct had "been most unmercifully handled and [had] given rise to many tales."<sup>14</sup>

Ultimately Johnson believed that his reputation in Charleston had been so damaged by the barrage of criticism and innuendo that he issued a pamphlet explaining the entire course of events from the publication of his letter of June 21 to the publication of the court's response on June 29. The pamphlet, entitled "To the Public of Charleston," revealed how Johnson's service as a Supreme Court Justice affected his relationship to his home state and community — how the dual loyalties to state and nation were beginning to conflict. Johnson had hoped to hold the confidence of his fellow Charlestonians and was deeply disappointed when they accepted the attacks leveled against him. "My misfortune is," he explained in the pamphlet,

that I have presumed too much upon the hope, that the censures cast upon me would be repelled, by a community with whom I was born and raised, among whom I have spent a life now looking downward in its course, whose confidence and kindness I have many reasons to be grateful for, and whom I can confidently say, I have faithfully served, and never dishonoured.

Johnson clearly valued the opinion of his community, and he made great efforts both to distance himself from the charges made by the freeholders court and to demonstrate his loyalty to the city of his birth. "What interests have I that are not yours?" he asked. "What feelings, what opinions, but in common with you? The bones of my forefathers rest among you; all my connexions are in the bosom of this city."<sup>15</sup>

Despite Johnson's desire that his native city think well of him, he let it be known that, as a Justice of the Supreme Court of the United States, his standing ultimately did not depend upon the approval of the public of Charleston. "My reputation," Johnson asserted in the pamphlet,

is the property of the United States. It is in safe hands and defies scrutiny. But I wish to live in harmony with those around me. The smiles of my fellow citizens are dear to me. They will read and consider my defence; and though for a time a cloud may intercept the beams of their favour, I fear nothing.<sup>16</sup>

Johnson's service on the Marshall Court helped him to develop a nationalistic perspective that had begun to clash with his local loyalties. At the same time, the Justice still expressed faith in his fellow Charlestonians. He insisted that, in the final analysis, he was the one who had been wronged — he was the one who had been falsely accused and held up to public ridicule.<sup>17</sup> Despite the unexpected sequence of events, Johnson remained confident that his explanation and defense of his actions would restore his reputation. In short, despite the numerous charges leveled against him, in 1822 Johnson still affirmed his allegiance both to South Carolina and to the United States.

A subsequent episode, however, would stretch to the limit Johnson's ability to maintain these dual loyalties. In December 1822, in an effort to keep free blacks from inciting rebellion among slaves, the South Carolina legislature enacted legislation requiring that free black seamen on any vessel that came into a state port be imprisoned for the duration of the ship's stay. The Negro Seaman Act, as it was called, also mandated that the captain of the vessel pay for the sailors' temporary "detention" and ultimately take responsibility for removing them from the state. If the captain failed to do so, the state would deem the free black seamen "absolute slaves" and sell them.<sup>18</sup> Although several black seamen were jailed under the Act during the first several weeks that it was in effect, protests by the British government led to assurances from American officials that the state would not enforce the law. In August 1823, however, as a result of the efforts of the South Carolina Association, an extremist organization intent on enforcing the state's black codes, the sheriff of Charleston took Henry Elkison, a Jamaica-born British citizen, from his ship in Charleston harbor and put him behind bars. The British Minister to the United States, who had earlier received a written pledge from Secretary of State

John Quincy Adams that the law would not be enforced, appealed to Justice Johnson, who at the time was sitting as a judge of the Circuit Court in Charleston.<sup>19</sup>

The attempt to free Elkison came before Johnson in the form of a petition for a writ of habeas corpus in the case of *Elkison v. Deliesseline* (1823). Attorneys for the South Carolina Association, rather than the state's attorney general, argued in defense of the South Carolina law. They contended that it was the right of any state to restrict the entry of foreigners; therefore, states possessed the power to prescribe the terms on which foreigners might remain. The association also defended the law as "a mere police regulation," like any other measure in the interest of public health or safety. Finally, using an argument that later became the hallmark of Southern constitutional theory, attorneys claimed that South Carolina possessed the authority to enact such laws because it had not surrendered its sovereignty to the national government upon entering into the federal compact.<sup>20</sup>

Johnson's decision offered no relief to Elkison, but the Justice's *obiter dictum* on the constitutionality of the Negro Seaman Act infuriated South Carolinians. Because Elkison was being held prisoner under the authority of the state, Johnson admitted that he possessed no power — as a federal judge — to grant a writ of habeas corpus. Elkison, therefore, remained in prison. At the same time, Johnson boldly declared the Negro Seaman Act unconstitutional on three grounds.

First, he held, the law usurped Congress' exclusive power to regulate commerce. By passing a law that detained free black seamen who arrived in its ports, Johnson reasoned, South Carolina had attempted to regulate commerce between itself and foreign nations — a power he believed was reserved to the national government. Johnson argued,

The right of the general government to regulate commerce with the sister states and foreign nations is a paramount and exclusive right, . . . and this conclusion we arrive at, whether we examine it with reference to the words of the constitution, or the nature of the grant.

Second, in his view, the Negro Seaman Act interfered with the treaty-making power of the United States. Elkison's seizure on board a British ship, Johnson explained, violated the 1815 commercial convention with Great Britain. "A reciprocal liberty of commerce is expressly stipulated for and conceded by that treaty," he wrote. "To this the rights of navigating their ships in their own way, and particularly by their own subjects, is necessarily incident." The state of South Carolina, in his view, certainly did not possess the power to interfere with an agreement between two nations.<sup>21</sup>

Finally, and more important than either its implications for commerce or treaty-making, the Negro Seaman Act, Johnson argued, was an ominous example of how states' rights principles might be translated into law. Such actions especially troubled the Justice, because they threatened both to undermine the heroic achievements of the revolutionary generation and to divide the Union. The South Carolina law, Johnson wrote, "tends to embroil us with, if not separate us from our sister states; in short that it leads to a dissolution of the Union, and implies a direct attack upon the sovereignty of the United States."<sup>22</sup> Out of reverence for the Revolution, as well as for the Constitution that his father had helped to ratify, Johnson feared the ultimate result of such expressions of state power. "Where is this to land us? Is it not asserting the right in each state to throw off the federal constitution at its will and pleasure?" he asked. "If it can be done as to any particular article it may be done as to all; and, like the old confederation, the Union becomes a mere rope of sand."<sup>23</sup> Thus, in Johnson's mind, the Negro Seaman Act not only interfered with the national government's constitutional authority to regulate commerce and make treaties, it also represented an audacious assertion of state power.

Johnson's opinion set off a fiery debate in South Carolina, and the Justice from Charleston again found himself under attack. The local press deemed the opinion so inflammatory that all three of the city's major newspapers refused to print it, and Johnson was forced to publish the decision in pamphlet form for distribution. Critics feared the implications of Johnson's opinion — that South Carolina, which already had a majority black population, would be deprived of the power to regulate the movement of free blacks



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*The Opinion of the Hon. William Johnson, delivered on the 7th August, 1823, in the case of the arrest of the British Seaman under the 3d section of the State Act, entitled, "An Act for the better Regulation of Free Negroes and Persons of Colour, and for other purposes," passed in December last.*

Ex parte HENRY ELKISON,

*A Subject of his Britannic Majesty,*

VS.

FRANCIS G. DELIESSSELINÉ,

*Sheriff of Charleston District.*

While sitting as a circuit court judge, Justice William Johnson found the Negro Seaman Act unconstitutional in the case of *Elkison v. Deliesseline* (1823). He ruled that in barring a Jamaican-born British citizen from coming ashore, South Carolina had illegally usurped the federal government's exclusive right to regulate commerce between itself and a foreign power, had interfered with the federal treaty-making function, and had audaciously put states' rights ahead of the national interest. Deemed too inflammatory, the opinion was refused by local papers and Justice Johnson was forced to pay to have it printed as a pamphlet (left).

into the state and would be unable to shield its shores from an inevitable invasion of black seamen. "[H]ow great is the present danger to our people!" charged a writer in the *Charleston Courier*. "[H]ow much will that danger be increased! if the hordes of negroes at the North, and the West-Indies, are permitted to invade us at their pleasure in their merchant ships."<sup>24</sup> The fears of Thomas Cooper, president of South Carolina College and Johnson's most vitriolic antagonist, were even more fantastic. Cooper described the opinion as "so strange, containing matter so irrelevant, and so verging towards the confines of sedition, that whatever credit we may allow to his motives, we cannot help looking aghast at his doctrines." The cantankerous college president imagined a dramatic expansion of the rights of the state's free black population and, ultimately, legal marriages between the state's white

and free black citizens.<sup>25</sup>

Aside from racial fears, the fact that the author of the opinion was a Charleston native further angered his opponents. Since he offered no judicial relief to Elkison, many of Johnson's critics wondered why the Justice had apparently gone out of his way to declare the act unconstitutional, given the degree of opposition such a pronouncement was bound to produce. One writer in the *Charleston Mercury*, for example, lambasted Johnson for ignoring "the sympathies and feelings of his fellow citizens" in rendering an "extrajudicial" opinion on the constitutionality of the law. Moreover, Johnson seemed to care more about trade with the North and with foreign nations than he did the interests of South Carolina. "He knows the unfavorable feeling which the Act was calculated to excite abroad," the same writer noted in the *Mercury*, "then, why



not at the same time, give some thought to the situation and feelings of the people at home, amongst whom he lived?"<sup>26</sup> Although Johnson no doubt believed he had the nation's best interests at heart, his hometown critics interpreted his perspective as a repudiation of his native city.

Never one to shy away from criticism, Johnson stoutly defended the *Elkison* decision in a series of newspaper essays, but there actually was very little that he could do either to silence the chorus of opposition or halt enforcement of the act. The apparent determination of Charlestonians to imprison black seamen, to defy his ruling in the *Elkison* case, and subsequently to vilify him in the local press, all caused Johnson to grow bitter toward his hometown. "I have received a Warning to quit this City," he wrote to Thomas Jefferson in the midst of the controversy. "I fear nothing so much as the Effects of the persecuting Spirit that is abroad in this Place." The following summer, after further reflection upon the events of the past two years, Johnson revealed in a letter to Secretary of State Adams the bitterness and resentment that he had come to feel toward his enemies in South Carolina. He described the state's political leadership as "a set of men who . . . are as much influenced by the pleasure of bringing its functionaries into contempt, by exposing their impotence, as by any other consideration whatever."<sup>27</sup> Fearful for the future of the Union, Johnson nevertheless remained powerless to prevent South Carolina from enforcing the Negro Seaman Act or from advancing its states' rights agenda. In December 1824, after ignoring the *Elkison* ruling for almost a year and a half, the South Carolina legislature passed a series of resolutions attacking any "unconstitutional interference with her colored population" and affirming the state's power to guard against further "insubordination and insurrection."<sup>28</sup> South Carolina had won the day, and Johnson had become increasingly unable to maintain his dual loyalties to state and nation.

Nevertheless, Johnson refused to absent himself from the Charleston political scene. Instead of avoiding further confrontation with his opponents, he ensured for himself a continuing role in city politics. In 1826, while still a sitting Justice of the Supreme Court of the United States, Johnson succeeded in winning local political office. Always popular in his home borough of

Canonsborough in Charleston Neck, an unincorporated section outside the city limits, Johnson was elected to serve as one of five commissioners of the poor for the area. Because of the absence of any other governing body in Charleston Neck, commissioners of the poor wielded considerable local power. They supervised the collection of public revenue to assist the indigent and appointed local superintendents to administer this work. As a public official, Johnson thus possessed some of the power that issued from the ability to levy taxes, dispense resources, and control patronage. By seeking this office, Johnson maintained strong ties with the city of Charleston, despite the repeated injuries he had suffered at the hands of its citizens.<sup>29</sup>

Firmly entrenched in local politics, Johnson again outraged the state's political leadership by supporting the Union when the Nullification Crisis arose. Growing out of South Carolina's open defiance of the federal tariff of 1828, the famous showdown between the state and the national government replayed the themes that had arisen out of the furor over the Vesey conspiracy and the *Elkison* decision. South Carolinians' concerns about race and a black majority, the constitutional question of federal regulatory power over commerce, and the threat of disunion all converged in South Carolina's opposition to the tariff. The "Tariff of Abominations," as the locally unpopular law of 1828 was called, increased import duties from approximately one third to one half, and in a state already in deep economic distress, the higher duty was devastating.<sup>30</sup> In 1827, Robert J. Turnbull, a low country planter and author of the Negro Seaman Act, fired one of the opening salvos in the war of words over nullification. Writing under a pseudonym in the *Charleston Mercury*, Turnbull denounced the growing tendency of the national government toward "consolidation" and described the federal tariff policy as an attack on the South.<sup>31</sup>

Over the next several months, Johnson denounced the arguments of Turnbull, John C. Calhoun, and others favoring nullification of the tariff. In a series of newspaper essays published as a pamphlet in 1828, Johnson charged that the nullifiers falsely characterized the national government as tyrannical and oppressive.<sup>32</sup> "The idea of encroachment, systematic encroachment on the part of the General Government," he



wrote, "is a bug-bear raised by the designing, to frighten the weak and credulous."<sup>33</sup> Not only did the nullifiers misrepresent the threat of national power, in Johnson's view, they also exaggerated the power that states could exercise. Turnbull, Calhoun, and others contended that sovereignty ultimately resided in the several states — that the national government held only those powers which were granted to it by the compact created by the states.<sup>34</sup>

In response, Johnson reiterated the doctrine he had first stated in *Elkison* — that power to regulate interstate commerce had passed from the states to the national government with the adoption of the Constitution — and, once and for all, emphatically rejected the notion of "state sovereignty." "It is a solecism to talk of sovereign and independent States," he argued,

that cannot levy a single battalion of armed men, except in case of actual invasion; that cannot coin a copper farthing; that cannot negotiate a treaty, nor adopt the minutest regulation with regard to commerce; . . . that are precluded from holding any other language towards the National Government, than that of memorial or remonstrance, such as may equally be held by the humblest citizen; and all whose most solemn enactments are liable to be set aside, and declared utterly void, when not in accordance with those of the National Legislature.

In exasperation, Johnson added, "If all this does not imply inferiority and subordination, then nothing can."<sup>35</sup>

To the logic of his constitutional arguments, Johnson added an emotional appeal to patriotism. "Everything that makes this country worth a wise man's love," he wrote, "is bound up in the Union of these States." Nullification of the tariff, in Johnson's view, meant disunion, a policy that true heirs of the Revolution should reject. "Let it be the duty of every citizen, who values the blessed work of our fathers," he pleaded, "to make a vigorous defence against this disturber of our prosperity; and to convince all who endeavour to shake our attachment to the Union, that we have not forgotten the lessons they have left, of patriotic devotion to the Nation."<sup>36</sup> Like

the Negro Seaman Act, the cause of nullification, in Johnson's mind, raised the specter of disunion and threatened to undo the work of the nation's Founders.

Over the next few years, Johnson continued his crusade against the nullification movement. In 1830, as the campaign gained momentum, South Carolinians debated whether to hold a convention later that year for the purpose of officially nullifying the tariff. In a published letter to a group of proconventionists, Johnson outlined his opposition to such a meeting, but many of his claims were so extreme that they harmed the cause of the Unionists. Johnson, for example, contended that the state had "not only not been injured, but really benefitted to many thousands by the Tariff" and that "no state in the Union is more deeply interested in maintaining the principles of the Tariff." Moreover, he described nullification as "folly" and a convention as a "grand end and aim and agent of conspiracy" to divide the Union.<sup>37</sup> The pronullification States Rights party seized on Johnson's statements and publicized them widely in the state's newspapers. When the Justice's unionist allies refused to endorse the tariff — which Johnson equated with the cause of the Union — Johnson disappeared from the political scene. Unionists could no longer tolerate his reckless statements, while Johnson could not ally himself with those who seemed half-hearted in their devotion to the Union. Johnson's loyalty to South Carolina reached a breaking point. "Men's minds there [South Carolina] are diseased," he wrote the following year to Mathew Carey, "and you must have noticed that the Union party has not ventured to advocate the tariff or even vindicate it against the attacks of Mr. Calhoun's disciples."<sup>38</sup> Unable to get along even with those South Carolinians who shared his devotion to the Union, Johnson bowed out of state politics.

As a Justice, however, Johnson had not heard the last of nullification. In 1831, the States Rights party planned to orchestrate a test case in which, they hoped, a local jury would decide the validity of the tariff. Pronullification lawyers imported a bale of woolen cloth from England, but refused to honor the bonds given as security for payment of the tariff. Later that year, the District Attorney brought the case into United States District Court Judge Thomas Lee's courtroom, where lawyers on both sides of the issue



debated the propriety of allowing the jury to decide on the tariff question. Judge Lee, however, in a blow to the nullifiers, instructed the jury that they only had authority to decide whether to execute the bond. The jury could not, according to the judge, render an opinion on the constitutionality of the tariff. Given their limited instructions, the jurors decided that the lawyers needed to honor the bond and pay the tariff.<sup>39</sup>

After denouncing Judge Lee's instructions to the jury, the States' Rights party planned an alternative strategy — to make an appeal to Johnson's Circuit Court and hope that the Justice would issue another one of his grandiose opinions affirming his protariff stand. Such a decision, the nullifiers undoubtedly hoped, would breathe new life into their cause. Yet,

this time the Justice disappointed his opponents. When Johnson finally heard the case in 1832, he simply affirmed Judge Lee's ruling and insisted that questions of law belonged to the judge, while questions of fact belonged to the jury. He thus upheld the notion that the jury in the case did not have the authority to decide the constitutionality of the tariff. Apart from these affirmations, however, Johnson avoided issuing *obiter dictum* about the validity of the tariff. Perhaps having learned from his excessive declarations in the *Elkison* decision, Johnson declined to play into the hands of his antagonists.<sup>40</sup> The following year, Congress approved a compromise that gradually lowered tariff rates over the next decade, and the furor over nullification subsided. Johnson's troubles with his home state thus came to an end.



This cartoon shows England's delight as "The union Pie" begins to crumble when South Carolina threatens secession if the federal government forces it to collect the hated 1828 "tariff of abominations." William Johnson urged his fellow South Carolinians to reject nullification of the tariff and to strengthen national ties in deference to the spirit in which their fathers had fought in the Revolution.



Traveling north to receive medical treatment for his worsening health, Johnson died in 1834 in Brooklyn, New York, far away from the city and state that had so plagued him throughout his career.<sup>41</sup> Over the years, Johnson incurred the wrath of the South Carolina political leadership for his cautious advice during the Vesey conspiracy, his nationalistic ruling against the Negro Seaman Act, and his staunch unionism during the Nullification Crisis. Each episode altered Johnson's sentiments toward his home state and increased the difficulty of remaining loyal to both South Carolina and the Union. Nullification brought this tension into sharp relief, as Johnson's protariff sentiments alienated even his fellow unionists. Throughout these years of crisis in South Carolina, Johnson exhibited a vigorous nationalism. Pride in his father's accomplishments during the American Revolution and his judicial service alongside John Marshall helped Johnson to view local political issues

through a nationalistic lens.

While subsequent southern Supreme Court Justices — John Catron, John A. Campbell, and James M. Wayne — later faced a similar dilemma of dual loyalties during the outbreak of the Civil War, Johnson encountered this tension in the earliest days of the sectional conflict and remained loyal to the Union through more than a decade of continuous controversy. He displayed, in the words of South Carolina Judge John Belton O'Neill, an "inflexible, almost haughty independence of political authority on the one hand, and popular opinion on the other." In the end, Justice William Johnson's devotion to nationalistic principles proved more dear to him than "the smiles of [his] fellow citizens."<sup>42</sup>

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## Endnotes

<sup>1</sup> [Johnson], "Communication: Melancholy Effect of Popular Excitement," *Charleston Courier*, June 21, 1822. There is some debate as to whether such a conspiracy actually existed. See John Lofton, *Denmark Vesey's Revolt: The Slave Plot that Lit a Fuse to Fort Sumter* (Kent, OH: Kent State University Press, 1983), esp. v-xvi; William W. Freehling, *Prelude to Civil War: The Nullification Controversy in South Carolina, 1816-1836* (New York: Harper & Row, 1965), 49-86; Richard C. Wade, "The Vesey Plot: A Reconsideration," *Journal of Southern History*, 30 (1964), 143-161.

<sup>2</sup> On the Marshall Court, see R. Kent Newmyer, *The Supreme Court under Marshall and Taney* (Arlington Heights, IL: Harlan Davidson, Inc., 1968); G. Edward White, *The Marshall Court and Cultural Change, 1815-1835* (New York: Macmillan Publishing Company, 1988). On sectionalism and the Supreme Court, see John R. Schmidhauser, "Judicial Behavior and the Sectional Crisis of 1837-1860," *Journal of Politics*, 23 (1961), 615-640.

<sup>3</sup> For general biographical information on Johnson's early life, see Donald G. Morgan, *Justice William Johnson, The First Dissenter: The Career and Constitutional Philosophy of a Jeffersonian Judge* (Columbia, SC: University of South Carolina Press, 1954), 3-40; John Belton O'Neill, *Biographical Sketches of the Bench and Bar of South Carolina*, vol. 1, (Charleston: S.G. Courtenay & Co., 1859), 72-79; A.J. Levin, "Mr. Justice William Johnson, Creative Dissenter," *Michigan Law Review*, 43 (1944), 503-511; Oliver Schroeder, Jr., "The Life and Judicial Work of Justice William Johnson, Jr.," *University of Pennsylvania Law Review*, 95 (1946), 164-172.

<sup>4</sup> Morgan, *Justice William Johnson*, 24-26, 35-36.

<sup>5</sup> *Ibid.*, 3-22; Levine, "Mr. Justice William Johnson, Creative Dissenter," 504-505; E. Stanly Godbold, Jr. and Robert H. Woody, *Christopher Gadsden and the American Revolution* (Knoxville: University of Tennessee Press, 1982), 68-69.

<sup>6</sup> See, for example, Johnson, "An Oration Delivered in St. Philip's Church, Before the Inhabitants of Charleston, South Carolina. On Saturday the Fourth of July, 1812, in Commemoration of American Independence; by the appointment of the '76 Association, and published at the request of that society," (Charleston, S.C.: W.P. Young, 1812).

<sup>7</sup> Johnson, *Sketches of the Life and Correspondence of Nathanael Greene, Major General of the Armies of the United States, In the War of the Revolution* (Charleston, SC: A.E. Miller, 1822). Johnson dedicated the book "to the Venerable Survivors of the Soldiers of the Revolution" of whom he "had formed but a faint idea of their virtues and sufferings, until drawn to the study of their actions." (Quoted in A. J. Levin, "Mr. Justice William Johnson, Jurist in Limine: The Judge as Historian and Maker of History," *Michigan Law Review*, 46 (1947) 131). Levin speculates that Johnson selected Greene as the subject of a biography because he possessed many of the same characteristics as Johnson's father: "Greene had begun as an artisan, a mill-hand; Johnson's father had been a blacksmith. Johnson's father had been one of the sparks which lighted the flame of revolution in South Carolina and had, therefore, been in large measure responsible for her liberation; Greene had conducted his most successful campaigns in the southern theatre." 132.

<sup>8</sup> Morton Borden, *Parties and Politics in the Early Republic, 1789-1815* (New York: Thomas Y. Crowell, 1967); Don E. Fehrenbacher, *Constitutions and Constitutionalism in the*

**Slaveholding South**, (Athens, GA: University of Georgia Press, 1989), 45-52.

<sup>9</sup> Jefferson selected Johnson based on both geographical and political considerations. Because both the Sixth and Second Circuits were not represented on the Court, only candidates from New York, South Carolina, or Georgia received consideration. Johnson's name appeared on a list of potential Justices from South Carolina prepared by lawmakers Wade Hampton and Thomas Sumter to President Thomas Jefferson, February 17, 1804, as published in Gallard Hunt, "Office-Seeking during Jefferson's Administration," *American Historical Review*, 3 (1898), 281-282. See also, Henry J. Abraham, **Justices and Presidents: A Political History of Appointments to the Supreme Court**, (New York: Oxford University Press, 1992), 85.

<sup>10</sup> Jefferson urged Johnson to take up the Republican cause on the Court in dissent, instead of allowing Marshall to dominate the Court's decision-making. See Jefferson to Johnson, October 27, 1822, as published in Paul L. Ford, ed., **The Writings of Thomas Jefferson**, vol. 12, (New York: G.P. Putnam's Sons, 1905), 251. See also, for general discussions of Johnson's judicial record, Henry F. Bedford, "William Johnson and the Marshall Court," *South Carolina Historical Magazine*, 62 (1961), 165-171, and Herbert A. Johnson, "The Constitutional Thought of William Johnson," *South Carolina Historical Magazine*, 89 (1988), 132-145.

<sup>11</sup> Richard C. Wade, "The Vesey Plot: A Reconsideration," *Journal of Southern History*, 30 (1964), 144, 150-151; [Johnson], "Melancholy Effect of Popular Excitement"; Bertram Wyatt-Brown, **Southern Honor: Ethics and Behavior in the Old South**, (New York: Oxford University Press, 1982), 411-412.

<sup>12</sup> Wade, "Vesey Plot," 144; Johnson, "To the Public of Charleston," (Charleston: C.C. Sebring, 1822), 6-7.

<sup>13</sup> James Hamilton, "To the Public," *Charleston Southern Patriot*, June 22, 1822; Johnson, "To the Public of Charleston," 7.

<sup>14</sup> "To the Public of Charleston," 8-9, contains the advice of the editor, as well as the letter Johnson received from the court members. See also, *Charleston Courier*, June 29, 1822. Ana H. Johnson to Elizabeth Haywood, July 24, 1822, Ernest Haywood Papers, Southern Historical Collection, the Library of the University of North Carolina at Chapel Hill.

<sup>15</sup> Johnson, "To the Public of Charleston," 3-4.

<sup>16</sup> Johnson, "To the Public of Charleston," 12, 15-16.

<sup>17</sup> Johnson wrote: "I feel sensible that I am the injured man. You have imputed to me views and motives which I am known to be incapable of; and even when acknowledging my prompt disclaimer of every allusion injurious to you, you require of me, a publication in a prescribed newspaper and in prescribed language, disavowing intentions which it is degrading to admit that I could be thought capable of; and this too, not in the language of my natural political and social equals, but that of dictators." ("To the Public of Charleston," 12.)

<sup>18</sup> Quoted in Philip M. Hamer, "Great Britain, the United States, and the Negro Seamen Acts, 1822-1848," *Journal of Southern History*, 1 (1935), 3-4.

<sup>19</sup> Hamer, "Negro Seamen Acts," 5; Freehling, **Prelude to Civil War**, 113-116; Irwin F. Greenberg, "Justice William Johnson: South Carolina Unionist, 1823-1830," *Pennsylvania History*, 36 (1969), 310-11; Paul Finkelman, "States' Rights North and South in Antebellum America," in Kermit L. Hall and James W. Ely, Jr., eds., **An Uncertain Tradition: Constitutionalism and the History of the South**, (Athens, GA: University of Georgia Press, 1989), 131-32; Morgan, *Justice William Johnson*, 193.

<sup>20</sup> *Elkison v. Delisseline*, 8 Fed. Cas. 493, No. 4,366 (1823);

"The Argument of Benj. Faneuil Hunt, in the case of the Person claiming to be a British Seaman, under the 3d section of the State Act of Dec. 1822, in relation to Negroes, etc. before the Hon. Judge Johnson, Circuit Judge of the United States, for the 6th Circuit," as quoted in Hamer, "Negro Seamen Acts," 6.

<sup>21</sup> 8 Fed. Cas., 493, 495.

<sup>22</sup> 8 Fed. Cas., 493, 494.

<sup>23</sup> 8 Fed. Cas., 493, 496.

<sup>24</sup> *Charleston Courier*, September 25, 1823. Johnson complained bitterly about the newspapers' failure to publish the opinion: see *Charleston Mercury*, August 26, 1823. The pamphlet form is entitled, "The Opinion of the Hon. William Johnson, delivered on the 7th August, 1823, in the case of the arrest of the British Seaman under the 3rd section of the State Act, entitled, 'An Act for the better Regulation of Free Negroes and Persons of Colour, and for other purposes,' passed in December last."

<sup>25</sup> Thomas Cooper, "Coloured Marriages," *Carolina Law Journal*, 1 (1830), 93. For a discussion of Cooper's pro-slavery thought, see Daniel Kilbride, "Slavery and Utilitarianism: Thomas Cooper and the Mind of the Old South," *Journal of Southern History*, 59 (1993), 469-486. Johnson and Cooper were old rivals; they had collided before on the issue of funding for the common schools of South Carolina. See Dumas Malone, **The Public Life of Thomas Cooper, 1783-1839**, (New Haven: Yale University Press, 1926), 268-273.

<sup>26</sup> *Charleston Mercury*, August 15, 1823, August 22, 1823.

<sup>27</sup> William Johnson to Thomas Jefferson, August 11, 1823, as published in *South Carolina Historical Magazine*, 1 (1900), 211-212; Johnson to John Quincy Adams, July 3, 1824, as published in "Free Colored Seamen — Majority and Minority Reports," 27th Congress, 3rd Session, Rep. No. 80, House of Representatives, p. 14.

<sup>28</sup> "Resolutions of the Senate of South Carolina," December 1824, as published in Herman V. Ames, ed., **State Documents on Federal Relations**, (New York: Da Capo Press, 1970), 206-207.

<sup>29</sup> Greenberg, "Justice William Johnson," 323-324.

<sup>30</sup> Freehling, **Prelude to Civil War**, 136-138; Lacy Ford, Jr., **Origins of Southern Radicalism: The South Carolina Upcountry, 1800-1860**, (New York: Oxford University Press, 1988), 120-121.

<sup>31</sup> Greenberg, "Justice William Johnson," 320-321.

<sup>32</sup> Hamilton [pseudonym], "Review of a Late Pamphlet under the Signature of 'Brutus,'" (Charleston: James S. Burges, 1828). Although nowhere in the pamphlet is the authorship stated, biographers Donald Morgan and Irwin Greenberg both attribute it to the South Carolina Justice because of its style and content. Their assessment appears accurate.

<sup>33</sup> "Review of a Late Pamphlet," 41.

<sup>34</sup> See especially [Calhoun], "South Carolina Exposition: Committee Report," as published in Robert L. Meriwether, ed., **The Papers of John C. Calhoun, 1825-1829**, (Columbia, SC: University of South Carolina Press, 1959-86), 442-539. Calhoun later developed many of these ideas more fully. See C. Gordon Post, ed., **John C. Calhoun, A Disquisition on Government and Selections from the Discourse**, (New York: Liberal Arts Press, 1953).

<sup>35</sup> "Review of a Late Pamphlet," 38.

<sup>36</sup> "Review of a Late Pamphlet," 5, 11.

<sup>37</sup> Johnson to John Taylor, *Charleston Mercury*, September 21, 1830, as quoted in Greenberg, "Justice William Johnson," 327.

<sup>38</sup> Johnson to Mathew Carey, December 10, 1831, as quoted in

Greenberg, "Justice William Johnson," 329.

<sup>39</sup> Morgan, **Justice William Johnson**, 268-270; Greenberg, "Justice William Johnson," 331.

<sup>40</sup> Morgan, **Justice William Johnson**, 270-272; Greenberg,

"Justice William Johnson," 331-332.

<sup>41</sup> Morgan, **Justice William Johnson**, 280-281.

<sup>42</sup> O'Neill, **Biographical Sketches**, vol. 1, 74; Johnson, "To the Public of Charleston," 16.



# ***Lochner v. New York:* Rehabilitated and Revised, but Still Reviled**

**Paul Kens<sup>1</sup>**

*The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution. Under that provision no State can deprive any person of life, liberty or property without due process of law. The right to purchase or sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right.*

## ***Justice Rufus Peckham in *Lochner v. New York* (1905)***

As he delivered the majority opinion in *Lochner v. New York* on April 17, 1905, Justice Rufus Peckham probably had no idea this would be the case for which he would be remembered.<sup>2</sup> As Supreme Court cases go, this one seemed inconsequential. In a five to four vote the Court struck down a New York law that limited the hours a baker could work to ten hours a day and sixty hours a week. Yet, *Lochner v. New York* became in the Progressive and New Deal eras what *Roe v. Wade* has become in ours. For people who are unhappy with the Court's direction it is the ultimate symbol of judicial overreaching. Few cases in American history continue to attract more attention than *Lochner*, and few have been more clearly identified with a distinct legal doctrine or a distinct era in constitutional history.

Perhaps the five to four vote should have provided some hint of the case's importance. The majority's decision reflected a controversial constitutional theory that had been gaining ground in the 1880s and 1890s but had not yet been fully sanctioned by the Supreme Court. This theory was based upon the Fourteenth Amendment guarantee that no state shall deny any person life, liberty, or property without due process of law,

and it depended upon three interrelated concepts.

First was substantive due process. In contrast to the traditional view that "due process" was a guarantee of correct judicial procedure, this idea held that the substance of a law could deny a person life, liberty, or property. The second concept was liberty of contract, an idea that the Fourteenth Amendment guarantee of liberty includes the freedom of two or more people to make any agreement they might desire. Of course this liberty could not be absolute. Consequently the third concept, a narrow view of the police powers of the states, provided a counterweight for determining whether laws that limited the right of contract were legitimate. Although this theory of limited government was vague, it was captured by the notion that a state's power was limited to making law that effected health, safety, morals, and peace and good order. According to the conventional accounts of Supreme Court history, the *Lochner*-era Court molded these three ideas to fuse its own view of the neutral state into constitutional doctrine.

In one of his most famous dissents, Justice Oliver Wendell Holmes, Jr., complained that the majority's decision in *Lochner* was based "upon an economic theory which a large part of the

country does not entertain."<sup>3</sup> Holmes also argued that, "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statistics." The theories to which he was referring were laissez-faire economics and Spencer's version of Social Darwinism. Both reflected a brand of individualism that ran afoul of Progressive and New Deal era reformers' efforts to employ the state as an agent of social change. Holmes' terse comments thus captured the larger implications of the decision. He had recognized that *Lochner v. New York* touched a raw nerve connected to some deep-seated ideas about the American political system. It raised questions about the extent to which people could look to government to solve the economic and social problems brought on by the Industrial Revolution, or to redress hardships created by the operation of the free market.

In addition, the *Lochner* decision intensified an ongoing debate over the extent to which the judiciary should be involved in answering those questions. In the period between 1905 and 1937, which became known as an era of "laissez-faire constitutionalism," the Court came to be viewed as a backward-thinking institution that had overstepped its authority and imposed its will over that of the majority of American voters. Theodore Roosevelt, for example, complained that the Supreme Court had "created an insurmountable barrier to reform."<sup>4</sup>

This was an exaggeration, of course. Justices of the laissez-faire Court probably upheld as many reform statutes as they overturned. But Roosevelt accurately captured the frustration that reformers of the Progressive Era and the New Deal felt toward the Court. Nowhere in the Constitution could they find "liberty of contract," nowhere could they find laissez-faire economics. The Court, they believed, was fabricating constitutional doctrine out of thin air. For them, *Lochner* came to represent the worst of raw judicial activism.

*Lochner* has continued to be one of constitutional history's most prominent examples of judicial activism. In this respect the case has served constitutional debate as what William M. Wiecek calls "a negative touchstone." Along with *Dred Scott*, he says, "*Lochner* is our foremost reference case for describing the Court's malfunctioning."<sup>5</sup> Aviam Soifer calls *Lochner* "shorthand in [the language of] constitutional

law for the worst sins of subjective judicial activism."<sup>6</sup> Bernard Schwartz also ranks *Lochner* right along with the most discredited decision in Supreme Court history.<sup>7</sup>

Although the case has its defenders, constitutional scholars from all sides of the political and ideological spectrum routinely, perhaps even ritualistically, call up the ghost of *Lochner* to condemn decisions that they think are ill advised. As conservative jurist Robert Bork put it: "To this day, when a judge simply makes up the constitution he is said to '*Lochnerize*,' usually by someone who does not like the result."<sup>8</sup> Even the Supreme Court itself seems haunted by the ghost of *Lochner*. Debating Justices are sometimes prone to argue over whose decision has come closer to reaching the depths of *Lochnerizing*.<sup>9</sup>

Despite its reputation, however, *Lochner* does not appear to have been exiled entirely from current constitutional doctrine. Recent decades have witnessed a number of serious efforts to rehabilitate the case or to revise the historical view of it. One group of scholars, counting the number of state laws actually overturned in the years following *Lochner*, concluded that there was no laissez-faire era. The Supreme Court, they maintain, was about as progressive as reformers could have hoped. A second group argues that laissez-faire constitutionalism was right, or at least on the right track. Inspired by the renewed interest in property rights, they claim that an emphasis on economic liberty is consistent with our constitutional tradition. A third group maintains that the legal doctrine expressed in *Lochner* and similar cases was not based upon laissez-faire economic theory. Even if the decision was wrong, they say, it was consistent with long-standing American traditions inspired by Jacksonian democracy and free labor ideals. Part of the purpose of this article is to discuss these new theories. Before turning to them, however, it may be best to review the background of *Lochner* and the case itself.

## I.

Justice Peckham's majority decision hinged on a presumption of fact. He assumed that the New York Bakeshop Act could only be a legitimate exercise of the state's police power if it related to public health and safety.<sup>10</sup> And he justi-



fied the Court's decision to overrule the statute in part on his belief that the number of hours a baker worked bore no relationship to public health and safety. Perhaps he was right. On its face, baking does not seem to be an unhealthy business. Unlike miners, bakers did not routinely face the danger of sudden death. Their life expectancy was not particularly low. Judge Bartlett of the New York Court of Appeals ridiculed the shorter hours law saying that, "the claim that . . . the business of a baker, is an unhealthy occupation, will surprise the bakers and good housewives of this state."<sup>11</sup> Yet there was ample statistical support for the contention that baking was an unhealthy occupation. The turn-of-the-century bread baking industry did not resemble your great-grandmother's kitchen. It was an urban industry that grew with the Industrial Revolution. In 1850 there were fewer than 7,000 bakery workers in the United States. By 1900 that number had increased to 60,000.<sup>12</sup>

The business of baking was actually made

up of two distinct industries. The cracker baking companies tended to be larger and mechanized. The shops that baked bread tended to be small. They usually employed fewer than four workers and the work was done by hand. In the cities, the bread baking industry was a creature of urban slums. Slums created the market. People living in crowded tenement dwellings, some of which had no ovens, created a demand for store bought bread. There were fewer homemakers in cities where women were employed in sweatshop industries. The industry was a creature of urban slums in another way as well. That is where most bakeshops were located. All it took to open a bakeshop was a little ambition and enough capital to purchase an oven. The weight of that oven, along with low rent, led most bakeshop owners to set up shop in the cellar of a tenement building. These tenement cellars were mainly designed to hold up the building and house the building's sewer. Most of the cellars had dirt floors, and all were roach and rat



Bakeries proliferated on New York's Lower East Side at the turn of the century with the rise of women working outside the home in garment sweatshops and having less time to bake bread. Although the stores may have been clean and the bread wholesome, conditions in the tenement cellars below where the loaves were prepared and baked were usually dangerous and filthy.



infested.

That was the environment in which bakeshop employees worked: and their work was hard. Bakers did not measure in cups and teaspoons, they used shovels and sacks. They were exposed to flour dust, gas fumes, dampness, and extremes of hot and cold. It was true that they were not exposed to sudden death as were miners, for example. But they appeared to have a tendency to suffer more than most from a disease that was then called "consumption." The term was used to describe a lung disease, like tuberculosis, characterized by coughing, night sweats, and "wasting away." And journeyman bakers tended to "waste away." Typically, by the age of forty-five they were weakened to the point that they were forced to leave the trade.

Viewed from the perspective of modern science, there was nothing peculiar about the industry that would cause bakers, more than anyone else, to contract tuberculosis. But the point is that they believed they were more likely than the rest of the population to suffer from lung disease and they may have been right. Some statistics of the industry indicated that there was at least a viable argument that working conditions in bakeshops were unsafe and unhealthy. And these statistics were part of the record of the case when it came to the Supreme Court.<sup>13</sup>

When it came to state interference with liberty of contract, however, a viable argument was not enough to satisfy Peckham. In the clash between the state's power to legislate and what he viewed as a fundamental right of the individual to freedom of contract, Peckham would place a heavy burden on the state to prove the legitimacy of its legislation. "The mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid," he wrote. "The Act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate. . . ."<sup>14</sup>

"This is not a question of substituting the judgment of the court for that of the legislature," Peckham maintained.<sup>15</sup> But, of course, that is exactly what he did. The New York legislature had passed the Bakeshop Act not once, but twice. Both times the vote had been unanimous and amendments to the ten-hour workday provision were specifically at issue in the second vote. At the very least it could be said that 119 legisla-

tors had voted in favor of the ten-hour ceiling. Taking into account the decisions in two levels of New York appellate courts, twelve out of the twenty-one judges who had considered the case favored the law as well. Among them were Justices John Marshall Harlan and Oliver Wendell Holmes, Jr., who each dissented from the opinion of the Supreme Court.

Both Harlan and Holmes argued that the Court should start from the presumption that the legislature's act was valid. In Harlan's opinion, ". . . when the validity of a statute is questioned, the burden of proof, so to speak, is upon those who assert it to be unconstitutional."<sup>16</sup> He went further to provide a measure of that burden. "[T]he state is not amendable to the judiciary, in respect to legislative enactments, unless such enactments are plainly, palpably, beyond all question, inconsistent with the Constitution of the United States."<sup>17</sup>

Harlan was willing to agree with the majority that it was the Court's duty to define fundamental principles of law, or determine what is inconsistent with the Constitution. But if the judiciary was to perform its function efficiently, Harlan believed it must be generous in allowing the legislatures to apply those principles. Where questions of detail existed, the legislature should be given the benefit of the doubt.

Holmes would have taken this deference to the legislative branch a step further. The meaning of liberty under the Fourteenth Amendment would be perverted, he wrote, "unless it can be said that a rational and fair man would necessarily admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law."<sup>18</sup> Holmes' test created a greater burden and had a slightly different implication than Harlan's. The idea that a statute should not be declared unconstitutional unless a rational person would necessarily admit that it violated fundamental principles implies that the legislature has as much right to make determinations of principle as does the Court. Holmes had made this point more explicitly in an earlier case. "Great constitutional provisions must be administered with caution. Some play must be allowed for the points of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."<sup>19</sup>



Lochner's Progressive Era critics agreed with Harlan and Holmes that the Court had chosen to ignore facts weighing in favor of the statute's validity and had simply been too quick to violate the legislative prerogative. Sir Frederick Pollock, a British legal scholar, captured their frustration when he asked how the Court sitting in Washington, D.C., could know anything about the conditions affecting bakeries in New York City.<sup>20</sup> Labor leader Samuel Gompers speculated that the outcome of *Lochner* would have been different if the majority of the court had visited the bakeries and seen the conditions that prevailed.<sup>21</sup> As the country moved into the New Deal era, the glaring subjectivity of Peckham's decision reinforced charges that judges had anointed themselves as censors of the legislative power, or had created an "imperial judiciary."<sup>22</sup>

If the Court's subjectivity had been the only cause for criticism of the majority opinion, however, *Lochner* would have seemed little more than an isolated mistake. Reformers' complaints

about the Court's reading of the facts actually had much deeper roots. Perhaps this is best explained by asking why the outcome of this case turned on whether baking was an unsafe or unhealthy trade. Work in the bread baking industry was certainly unpleasant. It may have been unhealthy. But the major complaint of journey-men bakers was that they were usually required to work too many hours. There were reports of men working as much as fifteen hours, six days each week, and twenty-four hours on Thursdays, for a total of 114 hours each week. While this represented the extreme, a work week of seventy-four hours was typical. In addition, most bakers were required to take room and board in the shop. If lucky, they slept on a cot. But most men slept on the boards they used for kneading the bread.<sup>23</sup>

It is important to understand that bakers, and wage workers in general, were not building up a small fortune in overtime pay. They were not paid by the hour but rather by the day. That is why the movement for shorter hours became the



Fumes, heat, and dust made bakers prone to bouts of "consumption," resulting in a widespread belief that the baking trade caused workers to die of tuberculosis at unusually high rates. Most bakers suffered so badly from the difficult conditions that they were forced to "retire" at age forty-five or risk wasting away. This picture of *Lochner's* bakery (with *Lochner* standing second from right) was probably taken years after the trial because it looks much neater and less hazardous than most bakeries circa 1905.



first major issue for organized labor in America. The earliest goal of this movement was simply to define what constituted a legal day's work. Workers offered a variety of theories to justify their demands for shorter hours. Some were based on duty. Long hours, they reasoned, did not allow them to satisfy their responsibility to family. It did not allow the free time necessary to keep informed about politics and perform their duties as citizens in a democracy. Workers based other arguments on efficiency. Rested workers performed better on the job, they argued. Mistakes caused by fatigue could be costly and dangerous. Besides, they continued, rested workers would miss fewer days. Their main justification for seeking shorter hours, however, was based on simple fairness and their view of liberty. Leisure as well as wealth was understood to be one of the benefits of industrial progress and workers were dissatisfied with their share. Supporters of shorter hours legislation operated upon the belief that the economic system was rigged in such a way that they did not have real freedom to contract. They were looking to government to throw some weight onto their side of the bargaining table.<sup>24</sup>

Opponents of shorter hours legislation responded with arguments based upon what they believed to be traditional ideas about liberty. Government, they said, should not be involved in regulating the terms and conditions under which people could dispose of their own labor. That was properly the function of the marketplace. It did not matter to them that workers felt they had little chance to bargain in the environment with which they were presented.<sup>25</sup> There is little question that their arguments contained the touch of Adam Smith's invisible hand, reinforced by survival of the fittest from Social Darwinian thinking.

The important point is that public debate on this issue was not a matter of health and safety. It was a matter of philosophy of government and political economics. Peckham knew this. "It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting public health or welfare, are, in reality, passed from other motives." What these other motives were he did not say, other than to refer to the Bakeshop Act as "purely a labor law. . . ."<sup>26</sup>

Peckham was correct there were other motives for passing the law, but calling it a purely labor law was overly simplistic. Similarly simplistic are the temptations to think of the *Lochner* case as a struggle between organized labor and big business or as a conspiracy between large bakeries and unions to put small bakeries out of business.<sup>27</sup> The political conditions in turn-of-the-century New York do not support the belief that organized labor had the power to push a shorter hours statute through the legislative process. In 1895, the year the Bakeshop Act passed, a Republican political machine dominated the state. The machine, it was said, conducted the state's business in a place called "the amen corner," where Boss Thomas Collier Platt and his cronies met every Sunday morning to make policy. They were not interested in labor reform. Nor were the Democrats, who gave only lip service to labor legislation. Both parties relied on contributions from major business interests.<sup>28</sup>

The atmosphere in which the business lobby dominated politics certainly weighed against the success of labor legislation. There would be nothing unusual about that. A more telling characteristic of the era's politics, however, was the political weakness of labor. The labor movement was in its infancy in 1895. Furthermore, in New York organized labor was split into three often competing factions: The American Federation of Labor, The Knights of Labor, and The Workingmen's Assembly. If these rivals could have worked enthusiastically together on any issue of general interest to labor, it certainly would not have been a shorter hours law. A large element of labor, including some of its most influential leaders, opposed the idea of obtaining shorter hours through legislation. Having been fooled by ineffective laws in the past, they had come to believe that the only way to achieve a shorter workday was through collective bargaining.<sup>29</sup>

Enactment of the New York Bakeshop Act resulted primarily from the efforts of two men, aided by extraordinary luck and timing. Henry Weismann was a hustling officer of the Journeymen Bakers' and Confectioners' International Union. The young labor leader, who had come to New York to serve as editor of the union's newspaper, quickly recognized that passage of a shorter hours law could supply an



opportunity to further his career. Weismann was charismatic and ambitious. He worked effectively within the labor movement to gather support for the Bakeshop law. But, aside from his small union, he had no effective base of political power.

A journalist, Edward Marshall, supplied the needed political muscle. In 1894 Marshall served on a select state committee to study "the tenement-house problem." The tenement-house committee had little interest in the baking industry other than to study the incidence of fire in cellar bakeries. But Marshall took a further interest in urban bakeshops and he set out to examine the industry in depth. On September, 30, 1894, the Sunday morning *Press* carried the result of his investigation. "Bread and Filth Cooked Together," read the headline. But the series of articles that followed was more than an account of filthy conditions in the city's bakeries. It also exposed the oppressive working conditions and "dreadful hours of labor" that were common in the industry. For Marshall, the tenement problem went beyond atrocious living conditions in the slums. The sweatshop system, he argued, was itself an evil inherent in slum life, and atrocious living conditions and labor conditions were both present in cellar bakeries.<sup>30</sup>

Marshall created the publicity that would make legislation of shorter hours in the baking industry politically viable. He also took up the cause. As a member of the tenement house committee of 1894, he had made connections among the state's most influential reformers, and he got them involved in the project as well. Some were active in the "good government" movement for civic reform. But many took up issues involving conditions of the poor. On matters of political economy, they tended to reject laissez-faire and the idea of the neutral state. Rather, they believed that government has a duty to use its power to alleviate the hardships of poverty. They encouraged fair distributions of wealth and improved working and living conditions. While their arguments were peppered with considerations of morality, justice, and fairness, their motives were not altogether altruistic. Many of these mainstream reformers believed that failure to improve the conditions among the poor and working class would eventually lead to a more drastic change in American society.

Edmond Kelly, a member of the prestigious City Reform Club, cautioned that the power of the workingman could not be overlooked. If their needs were not addressed, he warned, labor might "run riot . . . in its war upon capital" and "destroy the very foundations upon which our civilisation is built."<sup>31</sup> These people were not by any stretch of the imagination radicals. They did not oppose private property. They simply saw an urgent need for reform as a means to preserve the existing social order.<sup>32</sup> Most of New York's civic reformers were independent Republicans. They wielded significant political power because Boss Platt's machine depended upon them to reduce the Democrat's hold in urban areas. With their support, and an election pending, the proposal to clean up urban bakeries and limit the number of hours bakers could work unanimously passed through the New York legislature. When the governor's legal advisor raised a question about the wording of the limitation of hours, supporters agreed to amend the bill and send it back to the legislature. Passed once again by a unanimous vote, the final version was signed into law on May 2, 1895.

Five years later Joseph Lochner, a Utica, New York, bakeshop owner, was charged with criminal misdemeanor for requiring or allowing one of his employees to work more than sixty hours a week. The state trial court convicted Lochner and assessed a fifty dollar fine. Lochner appealed to the state intermediate appeals court, which voted three to two to uphold the conviction.<sup>33</sup> He then appealed to the state's highest court, which upheld the law again, this time by a vote of four to three.<sup>34</sup> That might have been the end of the matter, but someone convinced Lochner to appeal his case to the Supreme Court of the United States. That someone was none other than Henry Weismann: the same Henry Weismann who, just ten years earlier, had worked as a labor leader to get the bakeshop law passed. Now he would go to the nation's highest court to try to have it declared invalid.

Soon after the Bakeshop Act became law, Weismann satisfied his ambition to become the head of the bakers' union. He led the union for two years when, caught with his hand in the till, he was forced to resign. Weismann then opened a bakeshop of his own. Now an employer, he became a leader of a bakeshop owners' organization called the Retail Bakers' Association.



Weismann claimed to have studied law in his spare time. In 1901, however, he was accused of unauthorized practice of law. Nothing came of that charge but no record exists showing that he was at that time, or at any time thereafter, admitted to the New York bar. It seems that when he argued Joseph Lochner's case before the nation's highest tribunal, Henry Weismann was not licensed to practice law.<sup>35</sup>

Weismann's inexperience showed. He filed a document in the state court entitled "Undertaking on Appeal to the United States Supreme Court." But he did not file a petition for writ of error — the order that would direct the county clerk to send the records of Lochner's case to the Supreme Court of the United States.<sup>36</sup> After this false start, he enlisted the help of an experienced attorney, Frank Harvey Field. But Weismann, now in the status "of counsel," probably remained the driving force behind the case. Licensed or not, with the help of Field, he won. In 1905 the Supreme Court of the United States declared that the shorter hours provision of New York's Bakeshop Act violated Joseph Lochner's constitutional rights and was therefore invalid.

Peckham and the majority reasoned that liberty of contract was among the freedoms guaranteed by the Due Process Clause of the Fourteenth Amendment. The state's limitation on the number of hours a baker may work necessarily infringed on that liberty. But, like everyone else, Peckham realized that liberty of contract could not be absolute. Virtually every law interferes in some way with the freedom of people to make contracts.

To determine which laws were valid and which were not, Peckham would follow the practice of measuring liberty of contract against the loosely defined concept referred to as "the legitimate police power of the states." This practice, which amounted to a balancing of two vague standards, supplied critics with another complaint about the Court's activism. Not only was the Court's assumed power extreme and manufactured, it was also arbitrary. Liberty of contract doctrine, they complained, gave the Court an arbitrary veto over any state attempts to deal with the problems of an industrial society. The fate of any given statute would depend on how the Court defined and applied the state's "police power." If the Court had defined the term to include any law passed in the interest of the "gen-



Henry Weismann metamorphosed from a union leader agitating for better working conditions for bakers, to a bakeshop owner trying to make his employees work long hours. In the latter incarnation, he successfully argued the *Lochner* case before the Supreme Court, although he was not licensed to practice law.

eral welfare," a great deal of room would be left for economic legislation. But the *Lochner* decision applied a narrow definition of police power. The majority adopted the view that the only legitimate state laws were those passed to protect public health, safety, morals, and peace and good order.<sup>37</sup>

The public morals component of the police power meant puritan morality and little more. Gambling, supervision of sexual morality, limits on the sale of alcohol, and sabbatarian laws were the proper subject of state legislation.<sup>38</sup> Less conventional attempts to control avarice, gouging and advantage taking were not.<sup>39</sup>

The peace and good order component of police power simply recognized the law's age-old role of protecting property and providing rules to smooth out the flow of commercial intercourse or settle disputes between property owners. Although this undoubtedly gave legislatures some latitude, in the years between 1905 and 1937 the Court did not hesitate to invalidate legislation when it decided the state had gone too far. A statute requiring railroads to deliver livestock to connecting carriers, an order that railroads install switches to certain



grain elevators, and a requirement that streetcars be heated were among the laws invalidated during the period.<sup>40</sup> State attempts to regulate the mining, trucking, banking, railroad, and insurance industries also fell under the judicial ax.<sup>41</sup> Even laws that governed the process of litigation were invalidated. A Kansas statute that provided liquidated damages for overcharging on shipments of oil was invalidated, as were rules providing double damages for a railroad's failure to settle claims for killing livestock.<sup>42</sup>

The Court looked to the health and safety component in many of the cases involving labor regulations. In the years following *Lochner* it upheld a shorter hours law for women in *Muller v. Oregon*, but not without first being convinced that long hours posed a significant health threat to the "weaker sex."<sup>43</sup> Reformers had cause for optimism when, in *Bunting v. Oregon*, the Court upheld a law that set the workday at ten hours for women, children, and men working in manufacturing, and required that employers pay time and one-half for overtime.<sup>44</sup> That very Term, however, the Court extended liberty of contract thinking to federal legislation when it overruled a law that prohibited anti-union yellow dog contracts.<sup>45</sup> One year later *Hammer v. Dagenhart* invalidated a federal child labor law, and six years later *Adkins v. Children's Hospital* would overrule a federal statute that set maximum hours for women and children working in Washington, D.C.<sup>46</sup> "[F]reedom of contract is . . . the general rule and restraint the exception," declared Justice Sutherland, "and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances."<sup>47</sup>

## II.

Taking Justice Sutherland to task, modern studies by Melvin Urofsky and John E. Semonche make a valid point that the laissez-faire Court upheld more statutes than it overruled.<sup>48</sup> Their detailed review of the cases tell us a great deal about the impact of judicial decisions and the limits of the Court's power. But it does not warrant the conclusion that "the Supreme Court was as progressive as most reformers could desire," or that "the Court was hesitant to exercise the broad new powers to oversee legislation." It

does not take away from the fact that legislation had to pass through the judicial gauntlet. The wonder is that some cases — like a law setting a standard weight for a loaf of bread or a rule that the sale of seed, hay, and coal be made on the basis of actual weight — even made it to the Supreme Court.<sup>49</sup>

It may be that, when the cases are counted, the laissez-faire era Court does not prove to be as hostile to regulatory legislation as is commonly portrayed. By emphasizing results over reasoning, however, these empirical studies tend to misrepresent the tenor of early twentieth-century decisions. Furthermore, they fail to explain why reformers of the era were so upset with the judiciary. For reformers, *Lochner* was more than a myth. Their political arguments were based, not on health and safety, but on ideals of fairness and liberty. When the Court adopted liberty of contract theory and the narrow definition of police power, it rejected those ideals. Regulatory legislation was adopted and judicially approved in the era. But it had to fit into the Court's formula. And, because the Supreme Court is accepted in our society as the final interpreter of fundamental law, the ultimate impact of *Lochner* was that the judiciary had skewed public debate by adding legitimacy to one side and placing a heavy and undeserved weight on the other.

Holmes captured this point in his dissent:

But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.<sup>50</sup>

Law professor Roscoe Pound later joined this line of criticism. Not only had the Court usurped a power properly abiding in the people, he wrote, but it had strained the Constitution to the utmost "in order to sustain a do-nothing philosophy which had everywhere completely broken



down when applied to the actual conditions of modern life."<sup>51</sup>

What made matters worse to Pound was that the Court's value choice was disguised as neutrality. The villain, for him, was the legal method which portrayed judges as "passive oracles" who divine rules from an already existing body of legal principles.<sup>52</sup> Among reformers within the legal profession the reaction to this "mechanical jurisprudence" spawned the schools of sociological jurisprudence and legal realism. These theories rejected precepts of late nineteenth-century Classical Legal Thought that attempted "to create a sharp distinction between law and politics and to portray law as neutral, natural, and apolitical."<sup>53</sup>

In 1937, thirty-two years after the *Lochner* decision, the Court reversed itself. *West Coast Hotel v. Parrish*, which upheld a state minimum wage law, marked the end of liberty of contract. Charles Evans Hughes' opinion for the majority drew a new boundary for the police power that more closely reflects reformers' views. Adapting the language of the laissez-faire Court he declared that, "Peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression."<sup>54</sup>

The Court's rejection of liberty of contract may have signaled the end of laissez-faire constitutionalism but it did not signal the end of judicial activism. *Lochner* was dead, but its ghost remained. Guided by Justice Stone's now famous footnote four in the *Carolene Products* case, the Court soon began to follow a "double standard" for testing the constitutionality of state legislation.<sup>55</sup> Under this doctrine a presumption favoring the validity of state legislation existed when economic regulation was at issue, but a stricter standard would be applied when other "preferred freedoms" or personal liberties were at stake. Inspired by this preferred freedoms doctrine, a new strain of judicial activism from the Warren Court years up to fairly recent times turned *Lochner* into a dilemma for some critics. On one hand, modern liberals use the case as a reminder of the dangers that lie in judicial dabbling in political economics. But liberals want the Court to take the lead on matters of social welfare policy, thus raising the specter of another style of judicial activism. On the other hand, some conservatives, especially those who are

advocates of judicial restraint or original purpose, use *Lochner* as a symbol of the dangers inherent in unrestrained judicial power.<sup>56</sup> In attacking the activism of *Lochner*, however, they risk acquiescing to the idea that property rights could expect only minimal protection from the Constitution.

That is not a problem for some modern property rights advocates. The laissez-faire Court might have skewed public debate, they would argue, but it skewed debate in a way consistent with the Constitution. According to some, the function of the law ought to be to encourage economic efficiency or neutrality.<sup>57</sup> Like laissez-faire economists, today's adherents to neoclassical economics or "the Chicago school" believe that those objectives are best accomplished through the workings of the market.

It is not enough to show that *Lochner* was decided on the basis of correct economic theory, however. Reasonable as the economic arguments may be, in order to legitimize the *Lochner* decision and the legal doctrine it represents, proponents must also show that it was good constitutional law. To do this they emphasize that property was among the most important concerns of the Framers of the Constitution and the authors of the Fourteenth Amendment.<sup>58</sup>

There is widespread support for the proposition that property was supremely important to the framers.<sup>59</sup> Reminding us of this raises serious questions about the legitimacy of giving property second class status among rights. It does not, however, mean that the Constitution embraces any particular theory of competitive capitalism or radical individualism. There is no doubt that our constitutional traditions include a link between the sanctity of property and notions of liberty. The link is strong but it is also complex. It takes an unsubstantiated leap of logic to conclude that "the [F]ramers of the Constitution were generally concerned not solely with protecting property rights but also with market freedom."<sup>60</sup> For one thing, economic regulation has been a common part of American life throughout most of our history, and generally accepted in politics and law.<sup>61</sup> What is more, the Framers wrote only two protections of property into the Constitution. Article I, section 10 provides that no state shall pass any law . . . impairing the obligation of contract. The Fifth Amendment guarantees that private property



shall not be taken for public use without just compensation and that property shall not be taken without due process. Although both provisions have been applied to overrule government regulations, until recently, neither has been interpreted as a broad and open-ended limitation on government involvement in economic matters. That task fell to the Fourteenth Amendment's Due Process Clause and the liberty of contract doctrine.

Today's most influential theory for tying economic individualism to the Constitution is based upon the Fifth Amendment guarantee that private property shall not be taken for public use without just compensation. Although a taking is generally thought of as meaning government acquisition or appropriation of private property, Richard Epstein would apply the term to any government action that adversely affects all or part of the value of property.<sup>62</sup> Taxation, regulation, intrusions on buying and selling property would all be subject to the takings clause. Like liberty of contract, the takings theory recognizes that some governmental regulation is legitimate. Also like liberty of contract, it envisions a very limited role for government. According to Epstein, the police power extends only to laws protecting individual liberty and private property against wrongs involving force and misrepresentation perpetrated by one individual against another.<sup>63</sup> In the spirit of *Lochner*, Epstein would place the burden on government to prove that its legislation is a rational means to accomplish a legitimate end.<sup>64</sup> Although grounded in a different provision of the Constitution, Epstein's "takings" theory shares most of the fundamental assumptions of laissez-faire constitutionalism.

At the same time that one group of scholars tries to rehabilitate *Lochner* and once again attach economic individualism to the Constitution, another group has been reassessing the roots of *Lochner* era jurisprudence. Modern historians have taken *Lochner*'s Progressive Era critics to task. Holmes was wrong, they say. *Lochner* and its genre were not the result of judges simply attaching an economic theory to the Constitution. They were, in the words of Charles McCurdy, the product of habits of thought that were deeply imbedded in the American consciousness well before the liberty of contract doctrine entered American law.<sup>65</sup>

What were these "habits of thought" to which

McCurdy refers? Some writers, including McCurdy himself, find them in antebellum free labor thinking. They begin with the observation that liberty of contract doctrine grew out of Justice Stephen Field's idea of the right to choose a lawful profession. Put in this light it is easy to see the connection. A laborer's right to agree to the terms of employment appears linked to free labor thinking in its rawest form — as a contrast to indentured servitude. *Lochner v. New York* thus appears not as a reflection of laissez-faire thinking but rather as an instance of Justices steeped in free labor ideology resisting the very idea of unfree labor contracts.<sup>66</sup>

As the century progressed and the legal theory of a right to choose a lawful profession evolved into freedom of contract, so did the goals and ideals of free labor become more complex. Free labor was initially a response to traditions that gave employers legal control over an employee's labor, even where the laborer had entered into the employment agreement voluntarily. Under early Anglo-American law, once an employment contract was entered the employer had direct legal control over the employee's labor. During the entire term of the contract, employers controlled the conditions of work and the hours employees would work. Some laws allowed them to prohibit the employee from leaving, and even administer corporal punishment.

By the middle of the nineteenth century most of these forms of legal compulsion had disappeared. But there were deeper reasons for free labor's opposition to indentured servitude and legal compulsions. The free labor ideology was driven by a desire for economic independence and what some referred to as "the dignity of labor." To most proponents, free labor meant labor with economic choices and with the opportunity to quit the wage-earning class.<sup>67</sup> Later nineteenth-century wage earners found that the repeal of legal compulsions did not assure that their hopes for independence, choice, and opportunity would be achieved. In a world where concentrated corporate power was becoming more predominant, economic compulsion could just as effectively threaten their liberty. Placed in this world, wage earners and reformers began to turn to government for help, and they did so in the name of free labor.<sup>68</sup>

Freedom to choose a profession and liberty

of contract may have been appropriate accomplishments for wage earner in a system where labor was made unfree because of legal compulsion. Clearly, Justice Peckham's decision in *Lochner* reflected free labor ideals in this sense. But, given the goals of free labor and changes in social and economic conditions, it is just as clear that Peckham did not capture the essence of the free labor tradition as it had developed by the turn of the century. His decision to ignore the disparities of bargaining power between workers and employers ignored the realities of the labor market. His concern for "the right of an individual to labor for such time as he may choose" did little to foster the independence and dignity of common bakeshop workers to provide them with economic choices.<sup>69</sup> Whether rooted in laissez-faire economics or free labor ideology, Peckham's ideas seemed to many to be out of date.

Other scholars, Michael Les Benedict, Howard Gillman, David M. Gold, and Alan Jones among them, find the roots of *Lochner* era constitutional doctrine in another "deeply imbedded habit of thought"—the ideals of Jacksonian democracy.<sup>70</sup> Gillman observes that while judges of the laissez-faire era frequently extolled the virtues of private property and market liberty, the cases of the era "demonstrated a superior judicial commitment to the familiar Jacksonian preoccupation with political equality or government neutrality, the belief that government power could not be used by particular groups to gain special privileges or to impose burdens on competing groups."<sup>71</sup> As Gold put it, the force driving the judicial doctrine of the laissez-faire era was not a wish to protect business from government but rather an animus against "special" or "class" legislation.<sup>72</sup>

Gold's comment, which intermingles the concepts of "special privilege" and "class legislation," illustrates both the strength and weakness of this school of thought. "Class legislation," did not have the same meaning to opponents of

government regulation as "special privilege" had for Jacksonians. When late nineteenth-century judges and lawyers attacked economic regulation as "class legislation" they meant laws that benefited one segment of society at the expense of another.<sup>73</sup> Most often they were exposing a theory of government that denied the state the power to affect distribution of wealth by placing heavier burdens on one economic group—the wealthy.<sup>74</sup> Certainly Justice Peckham thought of the term in this manner. While still on the New York Court of Appeals he denounced a warehouse rate regulation saying, "to uphold legislation of this character is to provide the most frequent opportunity for arraying class against class; . . ."<sup>75</sup> The Jacksonian idea of "special

privilege" was not so broad. It referred to the practice of granting government favors that resulted in profit for a particular individual or group of individuals.

Although laissez-faire constitutionalism no doubt shared with the ideals of Jacksonian democracy a commitment to liberty, equality under the law, and government neutrality, the meaning of liberty and the reason for neutrality were not the same.

Where the late nineteenth

***"Implicit in [the Jacksonians'] charges of class legislation was the idea that wage earners, farmers, artisans, and laborers represented the entrenched forces of political privilege while corporations and powerful business interests were the oppressed."***

century's opponents of class legislation were motivated by fear of democracy, Jacksonians were motivated by a desire for democracy. They opposed special privilege because it resulted in artificial inequalities of wealth. They feared it because it tended to concentrate power. To Jacksonians, government's doling of special privilege created a vicious cycle that threatened both liberty and democracy. Artificial inequalities of wealth gave those with the most money the means with which to influence government which, in turn, resulted in these same people receiving more special privilege. Jacksonians worried that this cycle of privilege allowed the rich and powerful to bend government to their own purposes. Their response was to favor limiting the power of government.<sup>76</sup>



It is important to emphasize that the Jacksonians' distrust of government stemmed primarily from their fear of special privilege and artificial inequalities of wealth. Corporations and special privilege put too much power in the hands of too few individuals. In the Jacksonian mind, the source of that power was government. Later in the century, Jacksonian slogans about limited government were used to denounce business regulation. But the link is misleading. Jacksonians were not thinking of government as a regulator. They wanted to limit government in order to limit the power of moneyed interests. Although later opponents of regulation may have been true to some aspects of the Jacksonian tradition, their opposition to class legislation turned the tradition on its head. Implicit in their charges of class legislation was the idea that wage earners, farmers, artisans, and laborers represented the entrenched forces of political privilege while corporations and powerful business interests were the oppressed.

Although the revisionist view tends to legitimize *Lochner* era jurisprudence, not all of these revisionist historians are interested in justifying economic individualism. To the contrary, Gillman's purpose in re-evaluating *Lochner* seems to be to justify modern judicial activism. *Lochner* reflected a long tradition, he says. But that tradition which reflects the Founders' ideal of a faction-free America, the concept of the neutral state and distrust of special legislation, gradually came into conflict with "the onslaught of corporate capitalism." Gillman concludes that, by de-emphasizing economic rights and emphasizing personal liberties, the "constitutional revolution of 1937" brought legal doctrine into line with the realities of American society. Recognizing that "Conservatives have used the lore of *Lochner* as a weapon in their struggle against the modern Court's use of fundamental rights as a trump on governmental power," Gillman wants to remove that weapon from their hands.

Revisionist historians have successfully demonstrated that judges of the *Lochner* era did not simply pull *Wealth of Nations* off of their bookshelves and attach it as an addendum to the Constitution. But the implications of their discovery can be exaggerated. It is tempting to either ignore or disregard that, as the century passed, both the Jacksonian and free labor tradi-

tions splintered, sending shoots off in very different directions.<sup>77</sup> Each shoot professed an interest in liberty, each claimed to foster equality. But they had different views about what liberty and equality meant, and different ideas about the role of government and the value of democracy. If the judiciary was influenced by these traditions, it also was faced with competing theories of government that reflected a schism in the traditions.

It is a mistake to think that the traditions of free labor and Jacksonian democracy run in a single straight line to the constitutional doctrine of the laissez-faire era. Proof that late nineteenth-century constitutional doctrine has roots in Jacksonian democracy and free labor theory does not mean that the matured doctrine embodies these ideals in anything like their antebellum form. It does not rule out the possibility that laissez-faire economics had a significant impact on *Lochner* era constitutional doctrine.<sup>78</sup> Furthermore, the tendency to depict laissez-faire constitutionalism as sole heir to the free labor and Jacksonian traditions has an unfortunate side effect. Intended or not, it gives to the *Lochner* era constitutional doctrine a sense of democracy and egalitarianism that is not justified.

Regardless of whether it was based upon laissez-faire economics, free labor theory, or Jacksonian democracy, the lessons of *Lochner* are the same. The Progressive historians' complaint that the Court had used an open-ended doctrine to choose between competing visions of liberty and the role of government remains valid. So does their argument that the Court had attached to the constitution a brand of individualism that was not explicitly mandated. Modern reformers, who favor judicial activism in cases regarding privacy, discrimination, voting rights, religious freedom, and criminal justice, continue to face the unenviable task of trying to distinguish their versions of judicial lawmaking from that embodied in *Lochner v. New York*. Modern conservatives who would like to see a rebirth of classical economics cannot shake *Lochner's* legacy. A full evaluation of the case, the events and theories that made it important, and the controversy that it stirred demonstrates why fusing neoclassical economics into the Constitution would not make good law. Above all the experience of the *Lochner* era demonstrates that, rather than assuring that

important social issues are fully and fairly debated, the misuse of judicial review can skew the tenor of these debates. When it threw the weight of the Constitution onto the side of

laissez-faire style individualism the Court abated the force of other reasonable theories about how to solve the economic and social problems of its day.

### Endnotes

<sup>1</sup> Parts of this article are adapted from the author's previous work, **Judicial Power and Reform Politics: The Anatomy of *Lochner v. New York*** (Lawrence, KS: The University Press of Kansas, 1990).

<sup>2</sup> *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>3</sup> *Lochner*, p. 75, Holmes dissenting.

<sup>4</sup> Theodore Roosevelt, "Judges and Progress," *Outlook*, January 6, 1912, p. 42.

<sup>5</sup> William M. Wiecek, **Liberty Under Law: The Supreme Court in American Life** (Baltimore: The John Hopkins University Press, 1988), p. 123.

<sup>6</sup> Aviam Soifer, "The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1888-1921," *5 Law & Hist Rev.* 249, 250 (1987).

<sup>7</sup> Bernard Schwartz, **A History of the Supreme Court** (New York: Oxford University Press, 1993) p. 190.

<sup>8</sup> Robert Bork, **The Tempting of America: The Political Seduction of the Law** (New York: The Free Press, 1990), p. 44.

<sup>9</sup> Mary Cornelia Porter, "Lochner and Company: Revisionism Revisited," in Ellen Frankel Paul and Howard Dickman, eds. **Liberty, Property, and Government: Constitutional Interpretation Before the New Deal**. (Albany, NY: State University of New York Press, 1989), pp. 12-17.

<sup>10</sup> *Lochner*, p. 57.

<sup>11</sup> *People v. Lochner*, 177 N.Y. 145, 187 (1904) Bartlett dissenting.

<sup>12</sup> For the following discussion of the baking industry I have relied upon: Hazel Kyrk and Joseph Stanciliffe Davis, **The American Baking Industry, 1849-1923** (Stanford, CA: Stanford University Press, 1925); William G. Panschar, **Baking in America**, 2 vols. (Evanston, IL: Northwestern University Press, 1956); New York, **Preliminary Report of the Factory Investigating Commission - 1912** (Albany, NY: Argus Company, 1912).

<sup>13</sup> Judge Vann of the New York Court of Appeals had provided some of these data in his concurring opinion. *People v. Lochner*, 177 N.Y. 145, 169-74 (1904). There was also evidence to the contrary. Peter Karsten has been kind enough to send me a copy of a 1892 California Bureau of Labor Statistics survey of twenty-seven occupations which shows bakers having the fewest days of work lost due to ill health.

<sup>14</sup> *Lochner*, pp. 57-58.

<sup>15</sup> *Lochner*, pp. 56-57.

<sup>16</sup> *Lochner*, pp. 68, Harlan dissenting.

<sup>17</sup> *Lochner*, pp. 72-73, Harlan dissenting.

<sup>18</sup> *Lochner*, p. 76, Holmes dissenting.

<sup>19</sup> *Missouri, Kansas, & Texas Rwy. Co. v. May*, 194 U.S. 267, 270 (1904).

<sup>20</sup> Frederick Pollock, "The New York Labour Law and the Fourteenth Amendment," *Law Quarterly Review* (July

1905) 212.

<sup>21</sup> *New York Tribune*, April 19, 1905, p. 1.

<sup>22</sup> See, Ernst Freund, "Limitation of Hours of Labor and the Federal Supreme Court," *Green Bag* 17 (June 1905) 411, 413.

<sup>23</sup> See New York, **Preliminary Report of the Factory Investigating Committee - 1912**, vol. 1 (Albany: Argus Company, 1912); "The Remedy for Filthy Bakeshops," *New York Press*, October 28, 1894, part 3, p. 6; Hazel Kyrk and Joseph Stanciliffe Davis, **The American Baking Industry, 1849-1923** (Stanford, CA: Stanford University Press, 1925); William G. Panschar, **Baking in America**, 2 vols. (Evanston, IL: Northwestern University Press, 1956).

<sup>24</sup> See, Marion Cotter Cahill, **Shorter Hours: A Study of the Movement Since the Civil War** (New York: Columbia University Press, 1932); David Montgomery, **Beyond Equality: Labor and Radical Republicans, 1862-1872** (New York: Alfred A. Knopf, 1967); Lemuel Danryid, **History and Philosophy of the Eight-Hour Movement** (Washington, DC: American Federation of Labor, 1889).

<sup>25</sup> See, Rowland Hazard, *North American Review*, January 1866, p. 198; Edward Atkinson, "Personal Liberty," *Popular Science Monthly*, February 1892, pp. 437-38.

<sup>26</sup> *Lochner*, p. 64.

<sup>27</sup> This is the position taken in Bernard H. Siegan, **Economic Liberties and the Constitution** (Chicago: University of Chicago Press, 1980) pp. 116-17.

<sup>28</sup> See, Thomas Collier Platt, **The Autobiography of Thomas Collier Platt**, ed. Louis J. Lang (New York: B.W. Dodge & Company, 1910); Harold F. Gosnell, **Boss Platt and His New York Machine** (Chicago: University of Chicago Press, 1924).

<sup>29</sup> See, Samuel Gompers, **The Workers and the Eight-Hour Day: Its Philosophy** (Washington, DC: American Federation of Labor, n.d.), pp. 34-35; Cahill, p. 55.

<sup>30</sup> *New York Press*, September 30, 1894, part 2, p. 1; May 5, 1894, part 2, p. 1; Roy Lubove, **The Progressives and the Slums: Tenement House Reform in New York City, 1890-1917** (Pittsburgh: University of Pittsburgh Press, 1962) p. 97.

<sup>31</sup> Edmond Kelly, **Evolution and Effort** (New York: D. Appleton and Company, 1895) pp. 283-84.

<sup>32</sup> See, Gerald Kurland, **Seth Low** (New York: Twayne Publishers, 1971); David C. Hammack, **Power and Society: Greater New York at the Turn of the Century** (New York: Russell Sage Foundation, 1982).

<sup>33</sup> *People v. Lochner*, 73 App. Div. 120 (1902).

<sup>34</sup> *People v. Lochner*, 177 N.Y. 145 (1904).

<sup>35</sup> See, Paul Kens **Judicial Power and Reform Politics**, pp. 98-103.

<sup>36</sup> Records, Oneida County Court, *People v. Lochner*; *Records of the Supreme Court of the United States*, *Lochner v. New York*, Petition and Order for Writ of Error, Assignment of Error, Writ of Error. Weismann is listed as "of counsel" on all of these



documents. Before oral argument took place he was granted leave to appear *pro hoc voc.* **Journal, Supreme Court of the United States**, October Term, 1904, February 23-24, 1904, pp. 113-114.

<sup>37</sup> Peckham's opinion refers only to public health, safety, and morals. Peace and good order was the fourth cog in this narrow definition; e.g., *Crowley v. Christensen*, 137 U.S. 86 (1890). I assume Peckham ignores it because it was not an issue in *Lochner*.

<sup>38</sup> E.g., *Cox v. Texas*, 202 U.S. 446 (1906); *Tracy v. Ginzberg*, 205 U.S. 170 (1907); *Cosmopolitan Club v. Virginia*, 208 U.S. 378 (1908); *Frisbie v. U.S.*, 157 U.S. 160 (1895); *Murphy v. California*, 225 U.S. 623 (1912); *Mutual Film Corp. v. Industrial Commission of Ohio*, 236 U.S. 230 (1915).

<sup>39</sup> See *Adams v. Tanner*, 244 U.S. 590 (1917) (regulation of employment agencies).

<sup>40</sup> E.g., *Louisville and Nashville R.R. v. Central Stock Yards*, 212 U.S. 132 (1909); *Missouri Pacific R.R. v. Nebraska*, 217 U.S. 196 (1910); *South Covington R.R. v. Covington*, 235 U.S. 537 (1915); *Chicago, Milwaukee & St. Paul R.R. v. Wisconsin*, 238 U.S. 491 (1915).

<sup>41</sup> E.g., *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393 (1922); *Frost & Frost Trucking v. Railroad Commission*, 271 U.S. 589 (1926); *Fidelity and Deposit Company v. Tufoya*, 270 U.S. 426 (1926); *New State Ice Company v. Liebmann*, 285 U.S. 262 (1932).

<sup>42</sup> *Missouri Pacific R.R. v. Tucker*, 230 U.S. 340 (1913); *St. Louis Iron Mountain & Southern R.R. v. Wynne*, 224 U.S. 354 (1912); *Chicago, Milwaukee & St. Paul R.R. v. Polt*, 232 U.S. 165 (1914); *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930).

<sup>43</sup> *Muller v. Oregon*, 208 U.S. 412 (1908).

<sup>44</sup> *Bunting v. Oregon*, 243 U.S. 426 (1917).

<sup>45</sup> *Adair v. United States*, 208 U.S. 161 (1908); *Coppage v. Kansas*, 236 U.S. 1 (1915) overruled a state prohibition of yellow dog contracts.

<sup>46</sup> *Hanmer v. Dagenhart*, 247 U.S. 251 (1918); *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

<sup>47</sup> *Adkins v. Children's Hospital*, p. 546.

<sup>48</sup> Melvin I. Urofsky, "Myth and Reality: The Supreme Court and Protective Legislation in the Progressive Era," 1983 *Yearbook of the Supreme Court Historical Society* 53-72; John E. Semonche, *Charting the Future: The Supreme Court Responds to a Changing Society, 1890-1920* (Westport, CT: Greenwood Press, 1978).

<sup>49</sup> *Schmindinger v. Chicago*, 226 U.S. 578 (1913); *Burns Baking Co. v. Bryan*, 264 U.S. 504 (1924); *House v. Mayes*, 219 U.S. 270 (1911).

<sup>50</sup> *Lochner*, pp. 75-76.

<sup>51</sup> Roscoe Pound, "The Need of a Sociological Jurisprudence," 19 *Green Bag* 607, (1907); Pound, "Liberty of Contract," 18 *Yale Law Journal* 454 (1909).

<sup>52</sup> Pound, "Sociological Jurisprudence," p. 612.

<sup>53</sup> Morton J. Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992) p. 170, for a discussion of legal realism, see Horwitz, 169-213.

<sup>54</sup> *West Coast Hotel v. Parrish*, 300 U.S. 379, 393 (1937).

<sup>55</sup> *United States v. Carolene Products Company*, 304 U.S. 144, 152-53, note 4 (1938).

<sup>56</sup> Bork, *The Tempting of America*, p. 44.

<sup>57</sup> See, Bernard Siegan, "Rehabilitating *Lochner*," 22 *San Diego Law Review* 453 (1985); Richard Posner, *Economic Analysis of Law* 3rd ed. (Boston: Little, Brown and Company, 1986) pp. 581-614; Cass R. Sunstein, "Lochner's Legacy," 87 *Columbia Law Review* 873 (1987) emphasizes neutrality;

Bernard Schwartz, *A History of the Supreme Court* (New York: Oxford University Press, 1993) provides a concise criticism of Siegan and Posner.

<sup>58</sup> See, Stuart Bruchey, "The Impact of Concern for the Security of Property Rights on the Legal System of the Early American Republic," 1980 *Wisconsin Law Review* p. 1135.

<sup>59</sup> See, Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and its Legacy* (Chicago: University of Chicago Press, 1990).

<sup>60</sup> Stephen Macedo, "Resurrecting Economic Rights: The Doctrine of Economic Due Process Reconsidered," 103 *Harvard Law Review* 1363 (1990); see also Bernard Siegan, "The Constitution and the Protection of Capitalism," in Robert A. Goldwin and William A. Schambra, eds., *How Capitalistic is the Constitution?* (Washington, DC: American Enterprise Institute for Public Research, 1982).

<sup>61</sup> See, William J. Novak, "Public Economy and the Well-ordered Market: Law and Economic Regulation in 19th-Century America," *Law and Social Inquiry* 18 (Winter 1993), 1-32. I have also addressed the constitutional aspects of early and mid-nineteenth century regulation in an earlier work. Paul Kens, "Liberty and the Public Ingredient of Private Property," *The Review of Politics*, (Winter 1993) 85-116.

<sup>62</sup> Richard Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge, MA: Harvard University Press, 1985). The takings theory has been addressed in a number of recent cases. *Hodel v. Irving*, 481 U.S. 704 (1987); *First Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886 (1992); *Dolan v. City of Tigard*, — U.S. —, 114 S. Ct. 2309 (1994).

<sup>63</sup> Epstein, *Takings*, pp. 112-13.

<sup>64</sup> Epstein, *Takings*, p. 128.

<sup>65</sup> Charles W. McCurdy, "The Roots of 'Liberty of Contract' Reconsidered: Major Premises in the Law of Employment, 1867-1937," 1984 *Yearbook Supreme Court Historical Society* 20-33, p. 24.

<sup>66</sup> McCurdy, p. 33.

<sup>67</sup> See, Robert J. Steinfield, *The Invention of Free Labor: The Employment Relation in English and American Law and Culture, 1350-1870* (Chapel Hill: The University of North Carolina Press, 1991); Jonathan A. Glickstein, *Concepts of Free Labor in Antebellum America* (New Haven: Yale University Press, 1991); Eric Foner, *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party Before the Civil War* (New York: Oxford University Press, 1970).

<sup>68</sup> Robert J. Steinfield, p. 187, describes this evolution: "As the nineteenth century wore on, wage workers complained more and more bitterly that the power of property was making them slaves to their employers. And they could appeal to deeply entrenched American attitudes for support for their claims. But their argument was now more difficult and more contradictory."

<sup>69</sup> *Lochner*, p. 54.

<sup>70</sup> Michael Les Benedict, "Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism," 3 *Law and History Review* 293 (Fall 1985); Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* (Durham, NC: Duke University Press, 1993); David M. Gold, *The Shaping of Nineteenth-Century Law: John Appleton and Responsible Individualism* (Westport, CT: Greenwood Press, 1990).

<sup>71</sup> Gillman, p. 12.

<sup>72</sup> Gold, p. 139.

<sup>73</sup> James W. Ely, Jr., **The Chief Justiceship of Melville W. Fuller, 1888-1910** (Columbia, SC: University of South Carolina Press, 1995), p. 63.

<sup>74</sup> Owen M. Fiss, **The Oliver Wendell Holmes Devise History of the Supreme Court of the United States: Volume VIII, The Troubled Beginnings of the Modern State, 1888-1910** (New York: Macmillan Publishing company, 1993) p. 81, discussing the Income Tax Case.

<sup>75</sup> *People v. Budd*, 117 N.Y. 1, 68-69 (1889), Peckham dissenting.

<sup>76</sup> For treatment of Jacksonian Democracy, I have relied heavily on: Harry L. Watson, **Liberty and Power: The Politics of Jacksonian America** (New York: Noonday Press, 1992) pp. 149-50; Lawrence Frederick Kohl, **The Politics of Individualism: Parties and the American Character in the Jacksonian Era** (New York: Oxford University Press, 1989); Arthur M. Schlesinger, Jr., **The Age of Jackson** (Boston: Little,

Brown and Company, 1945); Marvin Meyers, **The Jacksonian Persuasion: Politics and Belief** (Stanford, CA.: Stanford University Press, 1957) and, Donald B. Cole, **The Presidency of Andrew Jackson** (Lawrence, KS: University Press of Kansas, 1993).

<sup>77</sup> Michael Les Benedict's careful observation illustrates the point:

"Laissez-faire constitutionalism received wide support in late nineteenth-century America not because it was based on widely-adhered-to economic principles, and certainly not because it protected entrenched economic privilege, but rather because it was congruent with a *well established and accepted principle* of American liberty." Benedict is careful not to claim that laissez-faire constitutionalism was congruent with *the established and accepted* principle of American liberty." Benedict, p. 298, emphasis added.

<sup>78</sup> Benedict, p. 331, observes a symbiotic relationship between these traditions and laissez-faire theory.



# Judge Learned Hand: The Man, the Myth, the Biography\*

Gerald Gunther

**Editor's Note:** Professor Gunther delivered this paper as the Society's 1995 Annual Lecture. His biography of Hand won the Society's Erwin N. Griswold Prize, a triannual award given to the best work pertaining to Supreme Court history.

Perhaps I should begin as Learned Hand started one of his last addresses, in December 1958, shortly before he turned eighty-seven. The members of his audience, he said, were "of various degrees of distinction, all very great, apparently."<sup>1</sup> Hand no doubt uttered those words with tongue in cheek; but I cannot think of a more apt occasion and a more appropriate audience than to convey them here most seriously.

I spent more than two decades working on the first biography of Judge Learned Hand. The biography was published just about a year ago,<sup>2</sup> and I would like to speak about the book, about some things I learned while writing it, and about the man who is its subject.

Learned Hand's name is well known to many Americans, not only to lawyers and judges, for a number of reasons I won't enumerate exhaustively. Justice Benjamin Cardozo was once asked who among his Supreme Court colleagues was the greatest. Cardozo replied: "The greatest living American jurist isn't on the Supreme Court."<sup>3</sup> He was speaking of course about Learned Hand, who served as a federal judge for fifty-two years, from 1909 to 1961, who participated in thousands of cases, who handed down thousands of opinions — opinions that are still cited today (almost always with the distinctive parenthetical remark

"Learned Hand, J."), opinions familiar to every lawyer and law student.

The law normally changes far too rapidly to assure vitality to decades-old opinions. But many of Hand's continue to be influential today, in part for his remarkable gift in lucid literary expression, in part because of his sheer analytical abilities. Moreover, Hand, especially in the last two decades of his life, wrote glittering prose in a large body of essays, eulogies, and lectures,<sup>4</sup> so that in his final years Hand's distinctive craggy face, his bushy eyebrows and his penetrating eyes, represented for many Americans the personification of the ideal judge. But above all, his major impact stems from his devotion to craftsmanlike work, his ability to analyze with care every single case that came before him, large or small, and from the model he provided of the creativity that is within the powers of even his kind of restrained, modest judging.

In speaking today about the judge and my work on his biography, I will not say much about his rulings. I want instead to focus primarily on three related themes that emerge from my work, and to intersperse some stories about the man and the judge, to bring him to life as best I can, much as I tried to do in the biography. First, I want to identify some aspects of Hand's life that seem especially pertinent to contemporary problems regarding the exercise of the judicial function. Then, I want to discuss some choices and adventures I faced in writing the Hand story, especially to explain why the book is not an intellectual biography but is rather a personal

one that tries to unearth what made Hand tick, and how his personal traits related to his manner of judging. Finally, I want to address a broader theme, the theme regarding the task of the biographer generally.

## I.

Hand's major legacy, beyond the example he set of the judge as craftsman, lies in his model of restrained, modest judging, in constitutional as well as other areas. To some, it will seem odd to view Hand's restrained, modest judging as a *continuing* legacy, because, during recent decades, there has been much skepticism that human beings possessing the power of a judge can indeed restrain themselves, question themselves, doubt themselves; in recent years, there has been far greater enthusiasm for more activist, interventionist, even ideological judges. Hand viewed his judicial role as quite limited, but it was hardly a paralyzing one. He did not think it judges' business to infuse personal notions into the vague phrases of the Constitution, but he opposed that kind of activism in part because he thought it would get courts into political trouble, and he wanted to preserve the reputation (and independence) of the courts in performing their very important function of interstitial lawmaking, the task of filling the gaps that judges confront when they interpret statutes or encounter uncertainties in the common law.

From the days of the legal realists of the 1930s to those of the deconstructionists and other critical legal studies theorists today, many have voiced doubts that judging can ever be truly modest and restrained. Typically, these doubts rest on the premise of what everyone supposedly knows — that human beings *have* emotions and ideological preferences, and that it is thus mere myth and facade that a judge can be modest, detached, impersonal, and fair minded, can listen to and seriously think through both sides of an argument.

Hand was not the only well-known judge to preach that much-criticized kind of restraint model. Oliver Wendell Holmes, Jr., too, stands in that tradition, and Felix Frankfurter advocated restraint far more often than Hand, and at much greater length. But in my view, no one has bet-

ter demonstrated by example, by performance, that this supposedly unattainable model *is* humanly achievable than Learned Hand. Holmes was so detached from real world disputes that he was truly Olympian; he hardly cared about the outcome of the conflicts in which the mass of mankind engaged. And Frankfurter was so passionate personally that, again and again, his emotions made adherence to the principles he preached well nigh impossible. Among these three principal advocates of modesty and restraint, Hand, though hardly perfect, came closest to realizing in his work the ideal that so many dismiss as myth.

## II.

Hand's failure to gain appointment to the Supreme Court of the United States, despite his towering reputation, may shed light on some aspects of the appointment process, surely another issue of considerable contemporary relevance. In the early 1920s, Hand, though still a district judge (until his promotion to the Second Circuit in 1924), was already talked about for the Supreme Court. His name was on some pretty well-known lips, but — as one of Cole Porter's lyrics has it — they were the wrong lips. The Court was of course a predominantly conservative Court at that time, the kind of Court that would soon be described as that of the Four Horsemen or of the Nine Old Men. But the people who wanted Hand on the Court then were people such as Oliver Wendell Holmes, Jr., and Louis Brandeis, the great dissenters of the day. Unfortunately for them (and for Hand), the Presidents in power were Warren Harding and Calvin Coolidge, and the politically active Chief Justice was William Howard Taft. Harding and Coolidge had little use for Hand, no more than Hand had for them: Hand voted in seventeen presidential elections in all, eight times for a Democrat, eight times for a Republican, and once for an Independent — hardly the record of a loyal follower of any one party. And Taft knew all about that, better than most people. And so Taft insisted, in repeated letters to the White House and to the Attorney General when Supreme Court vacancies arose, that so unreliable a maverick as Hand could not be trusted on the Supreme Court.



As Taft once wrote to the President, Hand "would most certainly herd with Brandeis and be a dissenter. I think it would be risking too much to appoint him."<sup>5</sup>

Taft was of course correct in his fears: Hand's first major law review article,<sup>6</sup> published a year before he became a judge, was a vehement attack on the *Lochner* decision<sup>7</sup> striking down a maximum hours law for bakers, a decision that gave its name to an entire era — the first three and a half decades of this century, when the Court repeatedly struck down economic reform laws on the ground that they interfered with liberty of contract and the free market. At least as important to Taft, Hand had been an enthusiastic supporter of ex-President Teddy Roosevelt's Progressive Bull Moose Campaign in 1912 (mainly because Roosevelt and Hand both detested the *Lochner* philosophy); Hand advised Roosevelt regularly, even participating in the drafting of the Progressive Party's platform and, in the interest of helping the new third party, running, *while sitting as a federal judge*, for the chief judgeship of New York State's highest court. And Taft had a good memory: Taft remembered that he had come in a poor third in the 1912 presidential election, well behind Woodrow Wilson's plurality and Teddy Roosevelt's strong showing, largely because of the Progressives' defection from the G.O.P.

Hand's chances of gaining appointment to the Court grew considerably when Taft's tenure as Chief Justice ended in 1930. The President then was Herbert Hoover, whom Hand knew, admired, and indeed voted for in 1928. To fill the Chief Justiceship vacated by Taft, Hoover contemplated promoting his close friend, Associate Justice Harlan Fiske Stone. That move would leave a vacancy for a new Associate Justice, and Hoover, according to the most credible story, was persuaded to choose Hand. At the last minute, however, someone suggested that Hoover should avoid insensitivity to the G.O.P.'s elder statesman, Charles Evans Hughes. Hughes had after all given up his seat on the Court in 1916, in a sacrifice to his party, in

order to run (unsuccessfully) for the presidency against Wilson; Hughes, it was argued, should therefore receive the first offer in 1930. Hand's supporters thought that this would merely be a formal gesture, for Hughes surely would not accept the Chief Justiceship just months after his son, Charles Evans Hughes, Jr., had become Solicitor General, for it would of course be intolerable to have a son-father relationship between the Solicitor General, who was responsible for all the government's cases in the Supreme Court, and the Chief Justice. In any event, the White House sent an emissary to Hughes in New York, to explore his interest in the vacancy. When the emissary returned to the Oval Office the next morning, Hoover asked what Hughes' response had been, and the emissary (Hand's close friend, New York lawyer

Joseph Cotton, at the time Deputy Secretary of State) reported that Hughes had accepted on the spot: "The son-of-a-bitch never even thought of his son!"<sup>8</sup> And thus ended Hand's second opportunity.

Hand had one more chance for a Supreme Court appointment. It arose in 1942, during the early part of World War II, when Justice James F. Byrnes resigned to become the Director of War Mobilization. President Franklin D. Roosevelt was bombarded with pleas

that he name Hand, pleas particularly from Justice Felix Frankfurter and Gus (Augustus) Hand, Learned Hand's cousin and colleague on the Second Circuit. There is some evidence that F.D.R. almost selected Hand, but changed his mind at the last minute. In part, the President feared the political heat that a Hand nomination might stir: 1942, after all, was just five years after F.D.R.'s Court-packing plan, which rested on the proposition that people over seventy were too old to serve on the Court, and would have allowed the President to appoint additional Justices if those over seventy did not retire. Since Hand had turned seventy at the beginning of 1942, the prospect of naming Hand at the end of that year simply proved too embarrassing to F.D.R. (Indeed, F.D.R. had written to Gus Hand in a



A young Learned Hand  
photographed off the bench.

bantering letter that he wished that Gus, as Senior Warden of an Episcopal Church, "might alter in the records the date of [Learned's] birth."<sup>9</sup>) Instead, Roosevelt decided to name a younger man, Wiley B. Rutledge, then a judge of the D.C. Circuit. Ironically, Rutledge died seven years later, in 1949; Learned Hand continued to sit actively for twelve more years after Rutledge's death.

Hand's experience reminds that appointments to the Supreme Court are not solely based on a merit system. The President's personal feelings, political allegiances, and a variety of factors play a role, then as now — and rightly so, in my view. In 1959, at a Second Circuit ceremony celebrating Hand's fifty years on the bench, Chief Justice Warren and Justices Harlan and Frankfurter all took part, with Justice Frankfurter delivering an especially affectionate speech — a speech whose major theme was that Hand was "lucky" never to have made it to the Supreme Court!<sup>10</sup> That remark tells us a great deal more about Justice Frankfurter, who was quite unhappy with the Court's majority by the late 1950s, than it does about Hand. In fact, Hand privately (and poignantly) confessed to his old friend Frankfurter his quite understandable desire over the years to sit on the Supreme Court: "I can say it now without the shame that I suppose I should feel — I longed as a thing beyond all else that I craved to get a place on it. . . . It was the importance, the power, the trappings of the God damn thing that really drew me on, and I have no excuse beyond my belief that I am not by a jugful alone in being subject to such cheap and nasty aspirations."<sup>11</sup> Not until his late seventies could Hand put aside his regrets.

### III.

Hand's engagement with public policy and political issues for most of his life, even while

he was committed to apolitical, dispassionate judging, raises another question pertinent to contemporary concerns. Although Hand was a skeptic (and indeed an agnostic) most of his life, pre-World War I Progressivism sparked remarkable enthusiasm in him. Moreover, Hand took a public role (in 1914) in the founding of *The New Republic* magazine, of which his friend Herbert Croly was the first and long-time editor. Indeed, Croly pressed Hand to leave the bench and become an editor of the magazine instead! Hand declined, but frequently contributed essays — occasionally under his own name, most often pseudonymous ones — essays usually criticizing the abuses of the Supreme Court. And whether publicly or not, Hand, unlike Holmes, never ceased to follow public affairs closely — one of the co-founders of *The New Republic* and then

his close friend, newspaper editor and columnist Walter Lippmann, was after all following them professionally. (Holmes by contrast took pride in *not* reading newspapers!)

Soon after the end of World War I, Hand decided to confine expression of his views on public issues solely to his private correspondence. He was prompted most importantly by Holmes, who advised him to "avoid heated issues" while a judge. And so Hand ceased the active political life he had led, a

*"I can say it now without the shame that I suppose I should feel — I longed as a thing beyond all else that I craved to get a position on [the Supreme Court]. . . . It was the importance, the power, the trappings of the God damn thing that really drew me on, and I have no excuse beyond my belief that I am not by a jugful alone in being subject to such cheap and nasty aspirations."*

life that would be quite unthinkable for a modern federal judge. But by the 1950s, when McCarthyism became a national phenomenon, Hand spoke out against it early and courageously on several occasions — first in an address to the American Law Institute,<sup>12</sup> then in an even more widely publicized speech to the New York Regents upon receiving an honorary degree,<sup>13</sup> and then in additional speeches, mainly between 1951 and 1955. Privately, Hand had for years loathed the fear-mongering, intolerant remarks of witch-hunters such as Senator Joseph P. McCarthy. That he spoke out publicly —



forcefully and eloquently — earlier than almost any other establishment figure, helped a great deal to move the nation beyond that dark era.

Hand publicly expressed his feelings on these issues only after he stepped down from “regular active service,” in 1951. But this did not really solve the problem of judicial propriety entirely, for he continued to sit actively on the Second Circuit for the final ten years of his life, until 1961. And during those years, he heard several McCarthyism-related cases, such as Judith Coplon’s espionage conviction and William Remington’s alleged perjury regarding his youthful Communist associations. Hand’s policy views produced some real tensions in his judicial work. The *Remington* case especially engaged his emotions.<sup>14</sup> The defendant, one of those accused by Elizabeth Bentley (then a very prominent ex-Communist witness), was convicted of perjury after a grand jury proceeding in which Remington’s wife was browbeaten by the foreman (who had a contract to do a book with Bentley) and the prosecutor. Hand was clearly disturbed by the prosecutorial tactics, and his sympathies were no doubt also aroused by the labeling of a defendant as subversive largely on the basis of events more than a decade earlier, when Remington had been a student at Dartmouth. But there was no legal argument readily available to reverse Remington’s conviction, no way to do so without extending prior doctrine. Yet Hand dissented, and spent weeks trying to write a persuasive, legally sustainable dissent, in the hope that the Supreme Court would grant review of the case.

I was Hand’s clerk then, and as always, my sole job was simply to discuss the case with the judge — never to write a word! (No law clerk for Hand among all the clerks over his decades on the bench ever wrote a word, in a memo or a draft opinion — it was the ideal law clerk position!) Hand’s expectation of a law clerk was startling to a twenty-six-year old just out of law school, who was told on first meeting this legendary judge, already over eighty, that he was supposed to argue with the judge, to find holes in his drafts. I, like other new law clerks, thought this was simply a nice way to make me feel better, at least useful. Within weeks, I understood that *was* in fact precisely what Hand wanted from his clerks — and *all* that he wanted! Hand was the most open-minded person I have ever met;

he was not only ready but eager for criticism. Often, donning the judicial robe not only raises self-esteem but also stirs a tendency to be too cocksure about too many things. Hand, by contrast, once wrote to Holmes that he found the cocksureness of so many deeply unnerving, for he was never “damned cock-sure about anything.”<sup>15</sup>

In the *Remington* case, Hand prepared draft opinion after draft opinion, showed each draft to me, and asked me to identify the holes in it — which I did my best to do. That was his regular opinion-producing process. By the time he got to his thirteenth — yes, thirteenth — draft, he handed it to me and asked, rather plaintively, “Will that one wash?” After reviewing it at my desk, I went back into his office to return his long yellow sheets of paper to him and said that, while the first two parts of the three-part opinion now seemed airtight, there were still some holes in the third part. He looked at me wearily, even sadly, sighed, and explained: “I can’t sit on the fence forever! I get paid to *decide* cases! *This* one will have to do.” And with some annoyance, he lifted a paperweight and threw it at me — barely missing me. (My first encounter with an angry Judge Hand shook me up. I returned to my office, sat down at my desk, and put my head on my arms to pull myself together. Hand soon came in silently, walking on the carpet in his socks; I didn’t realize that he was there and had lifted himself to sit on my desk until I felt his hand touching the top of my head and heard his voice saying: “Sonny, don’t take it that hard. It’s all part of the job.” An hour or two later, my wife, Barbara, came to the chambers to pick me up for a social engagement. She seemed to me unusually pale and a bit shaken herself. It was a rainy night, and she reported that she had gotten out of the elevator on the twenty-fourth floor and had started walking down the hallway when she encountered a figure in an old beige raincoat with his hat pulled down over his face. Not until the “stranger” grabbed her by the arms and lifted his head to speak to her did she recognize the judge. “What’s wrong with you, young woman?” Hand said to her. “You have been married at least three years now — don’t you ever yell at him? You have to yell at him more!” Unfortunately for me, Barbara Gunther is a reasonably quick study!)

Enormous agony had gone into Hand’s



*Remington* dissent. His arguments, while novel, were very carefully considered, and his reasoning was nearly airtight. Hand's sympathy with the defendant's fate, and his anger at the prosecutorial misconduct, no doubt played a role in moving him to write a strong dissent; but he nevertheless remained open until the end to new arguments and to critical questions, and he was determined to prepare a dissent that was as craftsmanlike as he could produce. The agony of the decision was real, but, as he said, he was paid to decide cases, and, despite all his self-doubt and self-questioning, he decided more than his share.

And Hand, that modest, restrained judge, that man who so closely identified with Caspar Milquetoast, had *real* courage on the bench. His opinion as a district judge in the *Masses* case in 1917 is a good example.<sup>16</sup> Confronting the Espionage Act of 1917 soon after its adoption, two years before the issues reached the Supreme Court in the *Schenck*,<sup>17</sup> *Debs*,<sup>18</sup> *Frohwerk*,<sup>19</sup> and *Abrams*<sup>20</sup> cases, Hand wrote his wife at the outset that at first glance the motion papers seeking an injunction by that radical, antiwar magazine against the Postmaster General seemed to make

a very persuasive case. If he had to decide the case on the basis of this first reading of the papers, he indicated, he would probably have to rule against the government. In an especially poignant letter, he expressed his realization that his chances of promotion to the Second Circuit, at the time very realistic ones, might well be destroyed if he ultimately decided that way. But, he went on to say, "I must do the right as I see it and the thing I am most anxious about is that I shall succeed in giving a decision absolutely devoid of any such consideration [as the prospect of promotion]. There are times when the old bunk about an independent and fearless judiciary means a good deal. This is one of them; and if I have limitations of judgment, I may have to suffer for it, but I want to be sure that these are the only limitations and that I have none of character."<sup>21</sup> Soon after, he issued the injunction, knowing full well that his promotion would be put on hold (as it was — he was not promoted to the Second Circuit for another seven years). His opinion sketched an "incitement" approach to First Amendment decisions which, fifty years later, became the law of the land. At the time and for a few years thereafter, he argued at length



Judge Learned Hand on April 10, 1959, in the robing room before the Special Session marking the fiftieth anniversary of his appointment to the Court of Appeals for the Second Circuit. He is flanked by Justice John Marshall Harlan, Justice Felix Frankfurter, and Chief Justice Earl Warren, who all came to pay tribute to the venerable judge. Frankfurter made a speech insisting that Hand was lucky not to have been elevated to the high court.



with Holmes, one of his few heroes, about Holmes' "clear and present danger" test of the *Schenck* case. But *Schenck* and its progeny enshrined "clear and present danger" into constitutional law for decades. Hand thought, both in the 1920s and the years before his death, that his *Masses* approach was simply a little ship he had launched into the waters that sank, never to be retrieved. Posthumously, Hand was vindicated, in *Brandenburg v. Ohio* in 1969.<sup>22</sup>

#### IV.

There is no time to explore other aspects of Hand's work, on and off the bench, if I am to turn to my second theme — my thoughts as to what *kind* of judicial biography I should write. I faced a major choice when I tried to sketch this biography. Almost all judicial biographies I knew were in large part works of intellectual history, works tracing the subject through the public record, especially the opinions. Studies of character and personality and the relation of these traits to the judicial output are a great deal rarer. At the outset, then, I thought I would write a primarily intellectual biography, the kind of work Mark DeWolfe Howe started to write on Holmes.<sup>23</sup> I thought I would have chapters on Hand on contracts and Hand on torts and Hand on antitrust and Hand on corporate reorganization and Hand on taxation and so forth. I thought, too, that I would intersperse brief sections on his personal life and his nonjudicial work among these doctrinal chapters.

That is *not* the book I have written. I changed my own course from the direction of intellectual history to a study of the human being and his make-up, as well as a depiction of the rich political and social history in which Hand lived, a life that included the first six decades of this century, from the presidency of Theodore Roosevelt to that of John F. Kennedy (Hand voted for both, by the way).

What above all shifted my course toward a personal character study was my reading through the hundred thousand or so manuscripts in the Hand Papers, an extraordinary collection that was made exclusively available to me. Hand did not like the telephone, did not like commuting to meet acquaintances in other states, detested dic-

tating letters — and (largely because of these traits) was one of the truly great correspondents of this century. He *liked* writing letters, often very thoughtful and revealing ones, and he spent several hours each day keeping in touch with a wide range of friends and acquaintances, legal and judicial and, even more important to him, people outside the law's realm. Some of the most extensive correspondence, for example, is not only his more than fifty-year-long exchange with Felix Frankfurter, but also his correspondence over more than a half century with Bernard Berenson, the expatriate art historian and art connoisseur, and the decades of exchanges with Walter Lippmann, the editor and columnist. Hand's devotion to the nearly lost art of letter writing suggests a very nineteenth-century outlook; his correspondence reminded me a good deal of the work I had done in early nineteenth-century papers, of Henry Clay, Daniel Webster, John Marshall, Joseph Story, and John Calhoun. Hand had far more technologically advanced means of communication available to him in the twentieth century, but he chose to write his letters in manuscript.

As I involved myself in those letters, I realized that the far more intriguing task in writing about Hand was to convey a sense of the complex human being that was the judge. The book, still contains, selectively, references to many of his opinions (intellectual property, admiralty, immigration, constitutional law, and so forth), but I do that largely to illustrate the distinctive traits that made the human being I describe such a fine judge, to depict how he went about the job of judging. And so, when asked what my model was in writing this biography, I have never been able to cite *any* judicial biography. Instead, I point to books I consider to be simply *good biographies*, whether literary biography or political biography, whether they deal with Edith Wharton<sup>24</sup> or E.M. Forster<sup>25</sup> or Charles Sumner<sup>26</sup> or Henry James.<sup>27</sup>

What I have written, then, is mainly a story of a human being, a remarkably agonized human being. Most people who know Hand only from his opinions and his portraits think of him as urbane, literate, quite self-assured, and serene. What I depict is strikingly different: an anxiety-ridden, self-doubting human being, a renowned public man beset by private doubts — doubts that were stirred in his childhood by a loving but

often suffocating mother and by his larger-than-life ideal of his father who died when Hand was only a teenager, an ideal that Hand — the only son — was pressed to emulate, a task he always believed (until the end of his life!) that he had not carried out successfully. These doubts were reinforced at Harvard College, where the rigid social structure of the day convinced Hand that he was an uncouth outsider. They were reinforced still more by his frustrating experience in law practice in Albany, to which his family successfully pressed him to return, instead of pursuing graduate study in philosophy at Harvard, under William James, George Santayana, and Josiah Royce.

Hand's legal work in Albany proved to be dull and uninspiring, and he never felt that he was any good at it. But after his marriage to Frances Fincke in 1902, he escaped Albany at last and moved to New York City. His law practice there did not enhance his self-esteem any more than his lawyering in Albany had. But he did become known for his intellectual talents in a circle of lawyers who were interested in ideas and in political reform. That renown bore fruit: it was largely responsible for his appointment to the federal bench in 1909, at the age of thirty-seven.

All of Hand's anxieties and bouts of melancholy, traits that contrast sharply with the common perception of the judge, make for a fascinating story, I think. But what do they have to do with the work for which Hand is best known, his work as a judge? In my view, a great deal. Hand's self-doubts not only permeated all aspects of his adult life — his marriage, his friendships, his surprisingly frequent forays into public affairs — but they also at least paralleled his approach to judging as well: the self-questioning, open-minded human being could not help acting that way as a judge. Hand's personal qualities, in short, were close to the traits for which he was admired as a judge — disinterestedness, non-dogmatic evenhandedness, open-mindedness, and incessant, skeptical, probing.

## V.

Let me finally turn to a theme relevant to any biographer, not just a judicial biographer. One common problem is that of the "authorized," "contracted" biographer. My biography was of

course an "authorized" biography — Hand's literary executor, Norris Darrell, asked me to write it. But I did not encounter the problems often met by "contracted" biographers who must depend on the family's goodwill in providing access to materials and who are pressed to submit to potential family veto power over the manuscript. Janet Malcolm has written extensively, in a series of *New Yorker* articles and in a book,<sup>28</sup> about the obstacles encountered by a series of biographers of the poet Sylvia Plath, who all needed the approval of Ms. Plath's surviving husband and his sister. And another literary biographer, Ian Hamilton, has written a fascinating series of case histories<sup>29</sup> vividly describing biographers' encounters with executors and family members who engage in "posthumous reputation-shaping." But I had no such problems, for Hand's literary executor and family were extraordinarily cooperative throughout, never attempting to impose their views. Indeed, I suspect I would not have undertaken the task if I had not had written authorization from the outset to use solely my own judgment in the evaluation of the materials.

This does not mean that I encountered no problems at all in doing the biography. I repeatedly had to confront the question of how far a biographer should intrude upon his subject's privacy. I faced especially delicate issues in exploring some problems of the Hand marriage, particularly Mrs. Hand's close relationship with Louis Dow, a professor of French at Dartmouth, who was a permanent house guest for over three decades in the Hands' summer home in New Hampshire. In dealing with issues such as this, I relied basically on my own judgment — fortunately for me, *my* judgment, not that of a literary executor. Dealing with such matters requires, I think, a degree of judgment, a fair amount of delicacy to avoid needless intrusions into privacies, and an avoidance of baseless speculations. These are questions a biographer can answer only by wrestling with his own soul and conscience, and doing his best to be fair in presenting a nuanced portrait of his subject.

Another problem that I encountered was the degree to which one is tempted to retell the political and social history of the times, history with which the biographer's subject was closely engaged. I wrote about some eras within my





Professor Gunther signing copies of his biography of Learned Hand after delivering the 1995 Annual Lecture.

own memory: the New Deal, World War II, the Cold War years, and McCarthyism; and many before my time: Teddy Roosevelt's Bull Moose campaign, World War I and the Treaty of Versailles controversy, the political stagnation as well as the civil liberties battles of the nation's "Return to Normalcy" during the 1920s. In each case, on each era, I had to write and rewrite and condense as I tried to convey the flavor and issues of those times without recounting from scratch *all* of America's twentieth-century history.

Perhaps the most difficult problem I faced was a fairly common one: the biographer's capacity to retain sufficient detachment from his subject to present a truly balanced and fair portrait. In my case, this problem arose from the fact that I knew Hand: I was his law clerk from 1953 to 1954 and, after I began teaching at Columbia in 1956, I spent many weekends speaking with him. As I reflected on Hand and his work after my clerkship and practice years, my admiration for Hand's approach to judging continued to grow. This close acquaintance and my admiration for him was one of the reasons why I initially was extremely reluctant to undertake the biography.

I end the preface of the biography with the

following passage: "I began work on this biography despite the fear that my admiration might preclude an absolutely unprejudiced portrayal of the man and the judge; I end hoping that I have pictured him fully, warts and all. He remains my idol still."<sup>30</sup> In reading the many reviews of my book (almost all, happily, favorable), I have sometimes regretted those final words of the preface. One West Coast legal paper, indeed, printed a review of the book, entitled "Blinded by the Light," claiming that my book was "not so much a biography as [a] love letter" and suggesting that I had confessed to the sin of idolatry.<sup>31</sup> I have accepted without difficulty the occasional reviewer's comment that I have been too easy on Hand in certain respects; but I have somewhat resented charges of idolatry seemingly based simply on

that closing phrase in my preface rather than on a full examination of the book itself.

On reflection, however, I do not really regret concluding my preface in that way. After all, it is simply telling the truth to say that my admiration for Hand had a lot to do with my decision to undertake the biography. While I recognize the need for biographies of the world's Adolf Hitlers and Josef Stalins, I myself would not cherish devoting two decades to a person whom I find repellent. I may have given Hand the benefit of the doubt on some questions, but I do not think I have written uncritically, nor that I am guilty of total adulation or of the hagiography that, in Norman Dorsen's phrase in the 1994 issue of your *Journal*, is "an occupational disease of judicial biographies written by former law clerks."<sup>32</sup> And, with the help of a wonderful editor, Elisabeth Sifton, I hope and think I have produced a readable, absorbing book. I certainly do not consider these last twenty years wasted, and I am especially pleased that my readers have not found it a waste of time to plow through all of my 680 pages of text.

\* See Gerald Gunther, *Learned Hand: The Man the Judge* (New York: Alfred Knopf, 1994).

## Endnotes

- <sup>1</sup> Learned Hand, "A Personal Confession," in **The Spirit of Liberty: Papers and Address of Learned Hand** (Irving Dilliard, ed., Third Edition, Enlarged: New York: Alfred A. Knopf, 1960), 302, 303.
- <sup>2</sup> Gerald Gunther, **Learned Hand: The Man the Judge** (New York: Alfred A. Knopf, 1994).
- <sup>3</sup> See Lewis F. Powell's "Foreword" in Gunther, at ix.
- <sup>4</sup> See, e.g., **The Spirit of Liberty**, note 1 above.
- <sup>5</sup> William Howard Taft to Warren G. Harding, 4 December 1922, in Gunther, at 274.
- <sup>6</sup> Learned Hand, "Due Process of Law and the Eight-Hour Day," 21 *Harv.L.Rev.* 495 (1908).
- <sup>7</sup> *Lochner v. New York*, 198 U.S. 45 (1905).
- <sup>8</sup> Gunther, at 421.
- <sup>9</sup> Gunther, at 558.
- <sup>10</sup> See "In Commemoration of Fifty Years of Federal Judicial Service by the Honorable Learned Hand . . .," 10 April 1959, printed as a special insert at the beginning of 264 F.2d.
- <sup>11</sup> Gunther, at 569-570.
- <sup>12</sup> Learned Hand, "The One Condition," in **The Spirit of Liberty**, note 1 above, at 223.
- <sup>13</sup> Learned Hand, "A Plea for the Open Mind and Free Discussion," *id.*, at 274.
- <sup>14</sup> *United States v. Remington*, 208 F. 2d 567 (2d Cir. 1953).
- <sup>15</sup> Gunther, at 167.
- <sup>16</sup> *Masses Publishing Co. v. Patten*, 244 Fed. 535 (S.D.N.Y. 1917), *reversed*, 246 Fed. 24 (2d Cir. 1917).
- <sup>17</sup> *Schenck v. United States*, 249 U.S. 47 (1919).
- <sup>18</sup> *Frohwerk v. United States*, 249 U.S. 204 (1919).
- <sup>19</sup> *Debs v. United States*, 249 U.S. 211 (1919).
- <sup>20</sup> *Abrams v. United States*, 250 U.S. 616 (1919).
- <sup>21</sup> Gunther, at 155.
- <sup>22</sup> 395 U.S. 444 (1969). See Gunther, "Learned Hand and the Origins of Modern First Amendment Doctrine," 27 *Stan.L.Rev.* 719 (1975).
- <sup>23</sup> Mark DeWolfe Howe, **Justice Oliver Wendell Holmes: The Shaping Years, 1841-1870** (Cambridge: Harvard University Press, 1957); **Justice Oliver Wendell Holmes: The Proving Years, 1870-1882** (Cambridge: Harvard University Press, 1963).
- <sup>24</sup> R.W.B. Lewis, **Edith Wharton: A Biography** (New York: Harper & Row, 1975).
- <sup>25</sup> P.N. Furbank, **E.M. Forster: A Life** (New York: Harcourt Brace Jovanovich, 1978).
- <sup>26</sup> David Herbert Donald, **Charles Sumner and the Rights of Man** (New York: Alfred A. Knopf, 1970); **Charles Sumner and the Coming of the Civil War** (New York: Alfred A. Knopf, 1960).
- <sup>27</sup> Leon Edel, **Henry James: A Biography** (London: Hart-Davis, 1953-72).
- <sup>28</sup> Janet Malcolm, **The Silent Woman: Sylvia Plath & Ted Hughes** (New York: Alfred A. Knopf, 1994).
- <sup>29</sup> Ian Hamilton, **Keepers of the Flame: Literary Estates and the Rise of Biography from Shakespeare to Plath** (Boston: Faber & Faber, 1994).
- <sup>30</sup> Gunther, at xviii.
- <sup>31</sup> Lawrence J. Suskind, "Blinded by the Light," *The Recorder*, August 8, 1994, at 6.
- <sup>32</sup> Norman Dorsen, "Justice Lewis F. Powell, Jr.: A Biography: A Review Essay," 1994 *Journal of Supreme Court History* 139, 141.



# Legitimizing Liberalism: The New Deal Image-makers and Oliver Wendell Holmes, Jr.

I. Scott Messinger\*

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## I. Introduction

Had Mount Rushmore been commissioned to honor America's greatest Supreme Court Justices instead of its Presidents, there is little doubt that the likeness of Oliver Wendell Holmes, Jr., would have been chiseled into the stone. To a certain degree, longevity of life and service accounts for Holmes' fame, for he was uniquely fortunate to have met and served two of the four Presidents enshrined in the South Dakota mountainside. Having met Abraham Lincoln during his stint as a Civil War soldier, he was appointed to the High Court in 1902 by Theodore Roosevelt. When one considers that he later counseled Franklin D. Roosevelt during his first term as President, Holmes' career seems to demand immortality.

In a speech delivered to Harvard Law School's Thursday Club in 1941, Mark DeWolfe Howe, one of Holmes' former secretaries, sought to explain the legendary status that his mentor had achieved:

That the servant of the people happened also to be the son of Dr. Holmes, blessed with the appearance and manner of magnificence, and that he happened to sit on the Supreme Court until the end of his ninetieth year, made the birth of legend inevitable.<sup>1</sup>

With due respect for Howe's knowledge and understanding of Holmes, his "inevitability thesis" does not explain how this particular Justice became the first and only one to enjoy celebrity status among the general population as well as the legal and intellectual elite. Holmes' spot in the pantheon of great Americans was not simply predestined by circumstance and pedigree. His reputation was carefully conceived by a combination of his own ambitious design,<sup>2</sup> and by the efforts of a host of intellectuals who brandished the tools of memory in shaping an image of Holmes that suited the needs of their respective milieus.

A great deal has been written about the changing perceptions of Holmes, most effectively by one of his recent biographers, G. Edward White. In a 1971 article entitled "The Rise and Fall of Justice Holmes," White charts the evolution and creation of Holmes' reputation between the 1880s and the 1960s from that of "scientist" to "progressive," to "liberal hero," to "unheroic pragmatist," to "alienated intellectual," to "anti-libertarian."<sup>3</sup> The purpose of this essay is not to challenge or confirm White's categories, but to explore the precise mechanisms by which the dominant image of Holmes — that of a great liberal hero — was constructed.

Since "liberalism"<sup>4</sup> came to dominate American politics during the New Deal, it is not surprising that the public image of Holmes as a great liberal was constructed during this era. While much of the scholarship about Holmes is focused on *why* he proved serviceable to liberals seeking

to use his name to promote their own agenda, and on the question of *whether* Holmes was in fact a "liberal" by the standards of his day or ours,<sup>5</sup> very little has been written about the actual tools employed by the New Deal's image-makers in constructing the house of liberalism in which Holmes' public reputation resides. The blueprint to this house shows how politicians and other interested parties can influence public perceptions without addressing the public directly.

While Holmes was never an obscure Justice, in his later years he began to enjoy a celebrity status generally reserved for members of less cloistered professions. As his birthdays became newsworthy events, and his judicial aphorisms became widely quoted, the legend of Holmes was born. This legend would grow in the decade succeeding his death in 1935, and despite the attempts of revisionists, has yet to be fully discredited. Nourished by the efforts of famous men like Felix Frankfurter, Francis Biddle, and Thomas Corcoran, and lesser-known individuals such as Dean Charles Clark of Yale Law School and the playwright Emmet Lavery, the apotheosis of Oliver Wendell Holmes, Jr., was an informal New Deal project conceived of, and executed by, liberal jurists, politicians, and academics.

While each of these architects had personal as well as ideological reasons for exalting Holmes' reputation, they were all mindful of the role that the "Yankee from Olympus" could play in convincing the American people to associate liberalism with the power of ideas. While it is not necessary for purposes of this essay to expound upon Holmes' philosophy at any length, in brief, his judicial and extrajudicial writings reflect a belief that courts should, where possible, refrain from interfering with the intent of state and federal governments to experiment with various legislative schemes. Rooted in a respect for what he called the "marketplace of ideas,"<sup>6</sup> Holmes' brand of judicial restraint offered a coherent philosophy to New Dealers, the greatest experimenters of all. Thus, by portraying Holmes as a liberal hero, the architects of his legend turned the father of "ideas" into an ancestral New Dealer.

Moreover, as liberalism evolved in the 1940s to emphasize the protection of individual rights and liberties, Holmes was once again exploited by New Dealers committed to the power of ideas.<sup>7</sup>

In the face of threats from totalitarian regimes abroad, and from a political atmosphere at home increasingly intolerant of dissent, liberals in the 1940s created a new image of Holmes as a libertarian, and merged this image with his reputation as a New Dealer. Again, it was Holmes' faith in ideas that made this new emphasis possible. The same liberals who, in the 1930s, had found support for pragmatism and deference to legislative prerogatives in Holmes' marketplace of ideas returned to the same marketplace a decade later and discovered a way to associate Holmes with their heightened dedication to free speech principles. In this sense, the prominence of "ideas" in Holmes' philosophy made it possible for his reputation to evolve according to the needs of liberalism.

In examining the creation of Holmes' reputation, I have found three events which most clearly demonstrate how the individuals mentioned above acted both separately and in concert to mold the public perception of the "great dissenter." In chronological order, these events were: 1) A nationally broadcast radio tribute to Holmes on the occasion of his ninetieth birthday, highlighted by an address from the Justice himself; 2) A widely reported visit from President Roosevelt to the retired, but socially active Holmes shortly after inauguration day in 1933; and 3) the development, after Holmes' death, of "The Magnificent Yankee," a nationally touring theatrical production of the life of Holmes, that was eventually made into a major motion picture and an Emmy-winning television film.

Each of these events has been acknowledged by Holmes' biographers as a major component in the Holmes legend, but this essay attempts to examine the role that various New Dealers played in bringing them to fruition. Since much of the lore surrounding Holmes has been shaped by these events, those who helped to orchestrate them are largely responsible for an image that Holmes may not have been able to produce on his own.

## II. Radio Days

Much of the intellectual energy in the early 1930s that would eventually coalesce in the New Deal came from the campuses of the nation's prominent law schools.<sup>8</sup> While Felix Frankfurter preached the virtues of progressivism and judi-

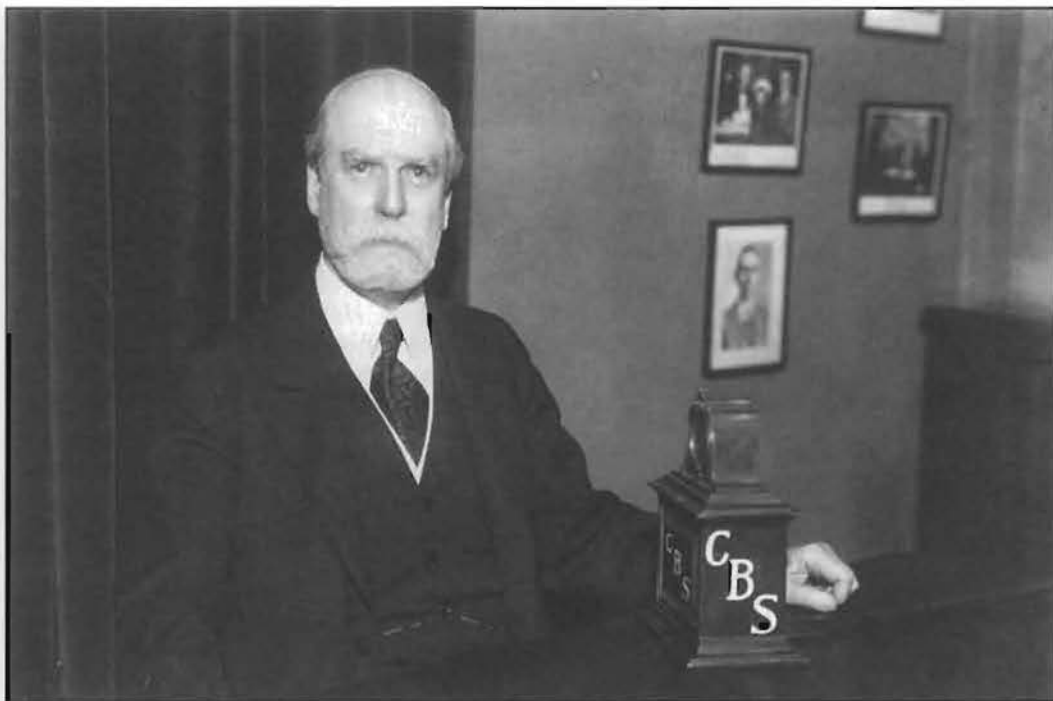


cial restraint as a member of the Harvard Law School faculty, the Dean of Yale Law School, Charles E. Clark, was equally vigilant in promoting a judicial philosophy that would support liberal values. It was one thing, however, to preach judicial restraint to small captive audiences in Cambridge and New Haven, but quite another to justify broad legislation on jurisprudential grounds to the general public. In searching for a way to do just that, Frankfurter and Clark recognized the value of radio as a device for transmitting ideas in general, and the value of Holmes as a spokesman for their ideas in particular.<sup>9</sup>

While Holmes' birthdays had received attention in the national print media since 1926,<sup>10</sup> Frankfurter and Clark seized the occasion of Holmes' ninetieth birthday in 1931 to market the "liberal" Holmes over the air waves. While the plan to honor Holmes in a nationally broadcast radio address was originally conceived by the editors of the *Yale Law Journal*, in collaboration with their counterparts at Harvard and Columbia, Dean Clark was more than a rubber stamp for the plan. While the student editors

secured the promise of Chief Justice Charles Evans Hughes to participate in a radio tribute, Clark suggested that Holmes himself address the national audience, and he personally approached Holmes with the idea. Recounting the sequence of events behind the radio address in a letter to Francis Biddle, Clark wrote: "The boys . . . had not expected to approach Holmes. I suggested the latter and said I would do it myself. So I called upon him . . . and found him very intrigued with the idea."<sup>11</sup>

While Frankfurter's role in this affair was a quiet one, he worked behind the scenes to help organize the broadcast. Most significantly, he arranged for a hookup of the broadcast at Harvard Law School's Langdell Hall, where a crowd of approximately 500 gathered to hear the tributes.<sup>12</sup> In addition, he set the tone for the event by hosting a reception for Holmes on the day of the broadcast, during which he presented the Justice with a bound volume of tributes from exclusively liberal types.<sup>13</sup> Among those represented were Benjamin Cardozo, Supreme Court appointee known for his deference to legislative prerogatives; John Dewey, noted philosopher of



Chief Justice Charles Evans Hughes (above) delivered a radio broadcast in honor of retired Justice Oliver Wendell Holmes, Jr.'s ninetieth birthday on March 8, 1931. From the privacy of his I Street home in Washington, Holmes followed with his own address. The entire broadcast was a carefully orchestrated attempt by Charles E. Clark, Dean of Columbia Law School, and Felix Frankfurter, a professor at Harvard Law School, to market Holmes before a mass audience as a spokesman for liberalism.

pragmatism; the journalist Walter Lippmann, who would emerge as an important New Deal supporter; and Frankfurter himself. Aware that the press would be covering the birthday address, Frankfurter made sure that this volume of liberal praise was reported as well.<sup>14</sup>

In the weeks and days preceding his birthday celebration, Holmes corresponded with Clark, and their letters demonstrate how precisely orchestrated the event was to be. While Clark assured the honoree that the occasion would be a "well-deserved tribute," and that the "public response to it will . . . be gratifying . . .," he also assuaged Holmes' concerns about the "dread plunge into the unknown of radio" by arranging for the old man to broadcast from the comfort of his own Washington study. As he wrote to Holmes on March 3: "[N]ot only will you have in your house the microphone and a receiving set, but also a representative of the Columbia Broadcasting Company will be on hand to tell you what to do." Clark also let Holmes know that in addition to Chief Justice Hughes, both Clark himself and Charles Boston, president of the American Bar Association, would be speaking.<sup>15</sup>

For his part, Holmes was hardly nonchalant about the broadcast. He was careful to inform Clark by letter that he "intend(ed) to say about 150 words, mostly short ones, . . ." As it turned out, Holmes' message contained exactly 143 words, delivered as he had promised "deliberately and distinctly."<sup>16</sup> As evidenced by the carefully crafted length and content of his speech, which contained a melodramatic quotation from one of Virgil's more obscure poems, it is clear that Holmes gave a great deal of thought to what he would say, and that he was not unmindful of the impact that his words would have on molding his public image.

While there is no evidence that Frankfurter or Clark wrote or helped to write the speech that Holmes delivered, both must have smiled when he concluded by quoting Virgil's line, "(d)eath plucks my ear and says, 'Live — I am coming.'" Such language anticipates the youthful New Deal zeitgeist by reflecting Holmes' determination to remain active until the end. If Frankfurter did not write or select this line personally, his role was not insignificant. The source of the quote was a book by Helen Waddell entitled *Medieval Latin Lyrics*, which had been given to Holmes

by Alger Hiss.<sup>17</sup> Hiss, whose liberal bent would one day make him notorious, had served as Holmes' secretary for the 1929-30 Term at Frankfurter's recommendation.

Were Holmes the only speaker on this occasion, it would be hard to portray the event as a liberal campaign project. Largely concerned with outlining the "finishing canter" to his own life, and with exhorting others to work while "the power to work remains,"<sup>18</sup> there is nothing resembling a liberal agenda in Holmes' widely quoted speech. Nevertheless, March 8, 1931, was a significant day in the creation of a public perception of Holmes as a great liberal, because an effort was made by Clark and Frankfurter to portray him as such.

By the time Holmes was given the microphone, Clark had described him as one whose "tolerance and sympathy have led him, often in dissent from his associates, to the expression of the loftiest of liberal opinions." Then, in a move calculated to link Holmes' philosophy to the kind of trailblazing that epitomized proponents of active government in the emerging New Deal era, Clark said that Holmes was so often "ahead of his generation" that "we may well hesitate to differ with him for fear he but expresses the views we will hold tomorrow."<sup>19</sup> The underlying message was clear: Those who oppose legislative experiments today, will one day support them.

It is ironic that Clark used such rhetoric, since he was actually introducing the next speaker, Chief Justice Hughes, from whom Holmes frequently dissented. Hardly a nascent New Dealer, Hughes was an unlikely coconspirator in the plot to "liberalize" Holmes in the public eye. As one would expect from a Chief Justice, Hughes' comments about his colleague were apolitical, but perhaps unwittingly, he helped to exalt Holmes' image as an intellectual giant engaged in purposeful experimentation (precisely how most liberals in the 1930s viewed themselves) by referring to his "authority of experience and wisdom" and his "dauntlessness and unquestionable fire of youth."<sup>20</sup> By associating him with liberal virtues such as youth and courage, the organizers of, and participants in, the radio broadcast made it appear as though Holmes supported the principles soon to be enshrined in the New Deal, despite the fact that his own speech was devoid of politics.

Following the address, the liberal press



rushed to embrace and deify Holmes. If Frankfurter and Clark had attempted to "create" Holmes' liberal image, members of the press sold that image to the public by reporting and following up the radio event with a host of tributes to Holmes couched in liberal praise. *The New Republic*, for example, praised Holmes for his "experimental attitude towards social problems," while *The Nation* echoed this sentiment with its conclusion that "(h)e has stood always for the right of social experiment."<sup>21</sup>

It is important to note that Holmes' ninetyeth birthday was not the first time that his name had been summoned by men like Clark and Frankfurter to argue in favor of legislative experimentation. For example, in a 1927 essay entitled, "Mr. Justice Holmes and the Constitution," Frankfurter lauded Holmes for stemming the tide of *Lochner* era jurisprudence by remaining loyal to his philosophy that "[g]overnment means experimentation" (Frankfurter's words).<sup>22</sup> It is unlikely however, that many people outside of the legal community read such essays. For years prior to 1931, Frankfurter had been selling the idea that Holmes was a great liberal, but the target of his advertising had been the academic community. The radio address was an important event in the creation of a liberal icon, because it marked the first stage in an effort to disseminate this idea to a wider audience.

### III. FDR Seeks Holmes' Counsel

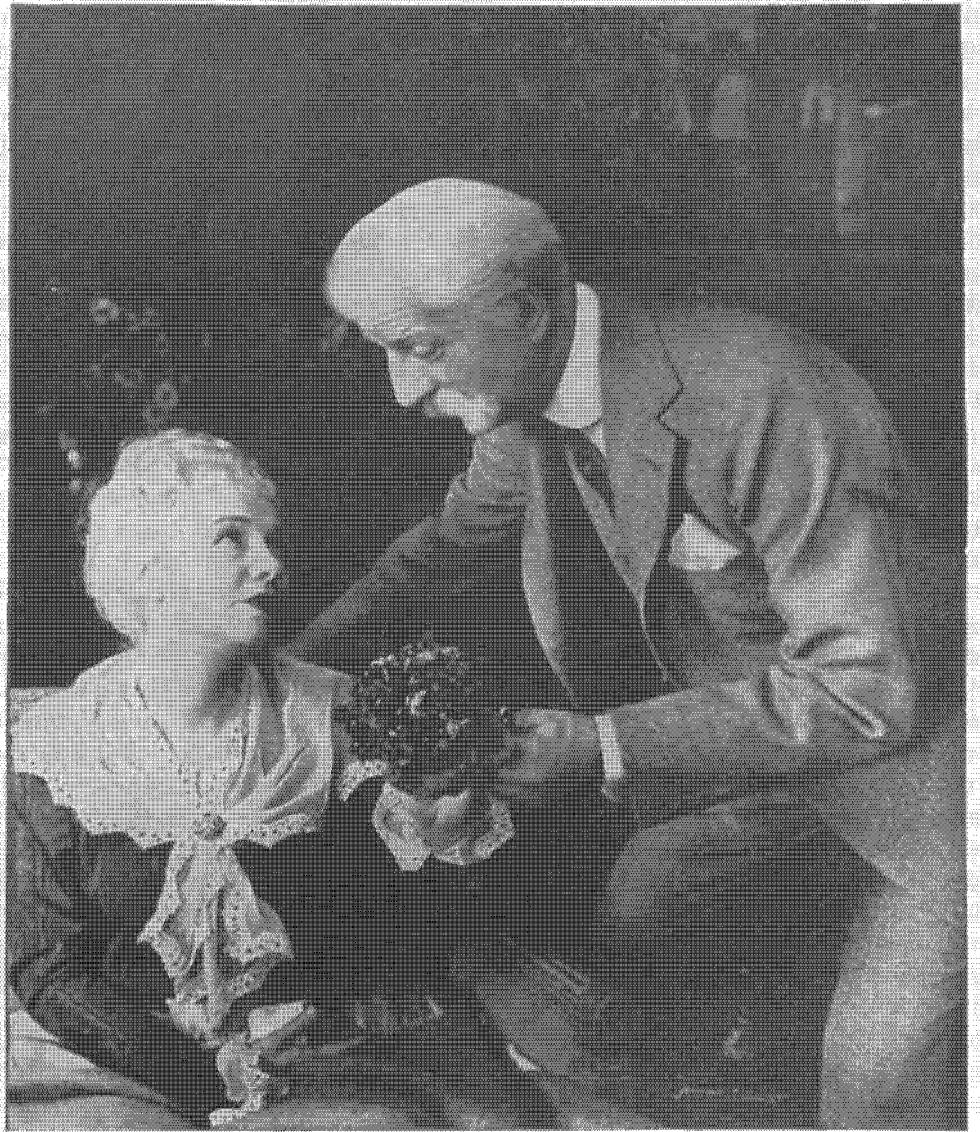
Given that the radio address took place in 1931, it is possible to view the event as a subtle campaign tool for the soon-to-be-elected Franklin D. Roosevelt. Since Roosevelt's victory did not by itself ensure the passage of reform programs, however, the campaign continued to be waged. Again, Frankfurter and other advocates of judicial deference to legislative prerogatives found it useful to parade Holmes in front of the nation as a New Deal fellow traveler. Much has been written about Frankfurter's relationship to FDR and the New Deal, and about how the eminent Harvard Law professor used his influence with the President to fill the government with his cohorts and disciples, (the so-called "hot dogs").<sup>23</sup> However, there has been no treatment in this "conspiracy" literature of Frankfurter's use of Holmes as a more subtle

means of promoting the notion he shared with FDR that the government should be afforded constitutional latitude in its efforts to achieve practical solutions to modern problems.

In searching for a way to portray the President's legislative agenda as jurisprudentially sound, Frankfurter realized the valuable role that the venerable Holmes could play: If the public could be led to associate the progressive ideas of the new President with the legal thinking of the nation's most well-known jurist, then the New Deal would meet with less opposition than its supporters feared. To this end, Frankfurter and others committed to positive government acted quickly after Roosevelt's inauguration in March 1933 to bring the President and the recently retired Justice together in a highly publicized meeting.

The visit of FDR to Holmes' home on the occasion of his ninety-second birthday was widely reported at the time, and has rarely escaped the attention of Holmes' numerous biographers. Yet what has been treated as an amusing piece of "Holmesiana" is more properly characterized as a carefully orchestrated political event in which Frankfurter played the crucial role. Ironically, Frankfurter himself admitted as much during a recorded conversation he had with Dr. Harlan Phillips in 1953, in which he attempted to deny the perception fostered by the media that he and his cronies were involved in "a great plot" to infiltrate the government with left-wing ideologues.<sup>24</sup>

Actually, as his recollections reveal, Frankfurter was involved in a much more subtle plot. Once again seizing upon the occasion of Holmes' birthday to market his views to an attentive public, Frankfurter realized the propaganda value of a well-publicized meeting between a new President and the man he referred to as "this most revered figure in the land, this wise, old wisest of judges . . . ."<sup>25</sup> Thus, before Roosevelt was even inaugurated, Frankfurter sold the idea to the President-elect that a visit to Holmes would "give great pleasure to a very old gentleman whom you admire."<sup>26</sup> Careful to ensure that "everything . . . go off according to Hoyle,"<sup>27</sup> Frankfurter arranged for a lunch to be held at Holmes' house, followed by a "surprise" visit from the President. Alerting the press to the event, Frankfurter looked on contentedly as Roosevelt arrived and slowly negotiated the



# THE PLAYBILL

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## FOR THE ROYALE THEATRE

Louis Calhern and Dorothy Gish played Mr. and Mrs. Oliver Wendell Holmes, Jr., in the original cast of "The Magnificent Yankee" at the Royale Theatre in 1946. The play was based heavily on *Mr. Justice Holmes*, Francis Biddle's biography, and portrayed the childless Holmes as having a father-son relationship with his clerks. Felix Frankfurter had tried unsuccessfully to persuade the playwright, Emmett Lavery, to drop the fatherhood theme, but he did manage to get him to portray Holmes as a liberal hero who was driven by ideas, not ambition. In his secret correspondence with Lavery, he also convinced the young writer to amend his drafts to help dispel notions that Holmes was the father of totalitarian thought by having the Justice express disapproval for Hitler.

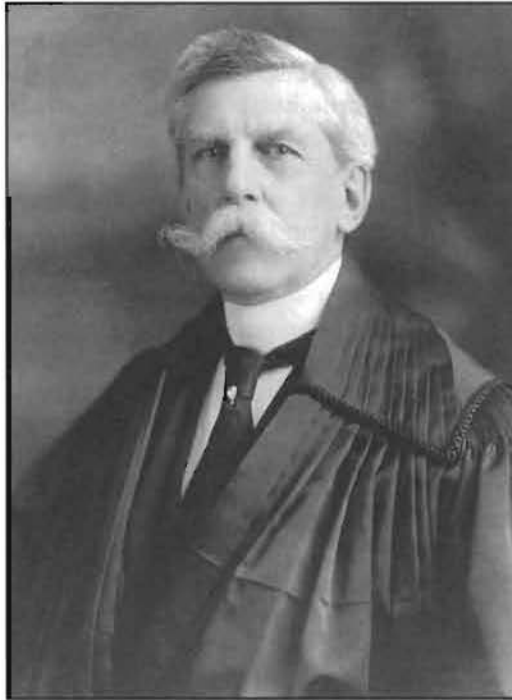


stairs of the famous old brownstone house at 1720 I Street in front of the crowd that had gathered.

Relishing the speculation the event was bound to foster about the nature of the conversation between the President and the Justice, Frankfurter did not for a moment conceive of the visit as an opportunity for Roosevelt to obtain the wise counsel of Holmes on matters of state. Yet, to Frankfurter's satisfaction, this is precisely how the press reported the event.<sup>28</sup> So successful was this effort to portray Holmes as defending FDR's ideas on government, that despite the accounts of those actually present, several recent biographers have claimed that Holmes used the phrase "form your battalions and fight" in encouraging FDR to persevere against the critics of his programs.<sup>29</sup> That this comment is apocryphal is less important than the fact that it has contributed to the perception of Holmes as a militant supporter of positive government's battle against the forces of *laissez-faire*.

It is not the purpose of this essay to dispute or confirm the contention that Holmes was a great liberal jurist, with "liberalism" defined as confidence in the ability of legislative bodies to solve social and economic problems. Mark DeWolfe Howe and other scholars have argued that Holmes was as much a skeptic about the omniscience of legislators as he was about the capacity of judges to discern the wisdom of legislation.<sup>30</sup> What has been argued thus far is that despite the fact that Holmes' philosophy resists categorization along the liberal/conservative axis, he was, and is, perceived by the American public as a "liberal" because of the efforts of *actual* liberals like Frankfurter to portray him as such.

Admittedly, the two examples of this effort discussed above — the radio tribute to Holmes in 1931, and Roosevelt's visit to his home in 1933 — are very subtle forms of propaganda employed to achieve the "liberalization" of Holmes. Such efforts were not futile, however, as revealed by a front page article that appeared in *The New York Times* on the occasion of Holmes' resignation from the Court in 1932. Under a headline declaring "Holmes's Opinions Show 'Liberalism,'" the article hailed the "positiveness of his opinions," and claimed that Holmes and "his close friend Louis D. Brandeis were regarded as



The Magnificent Yankee as he really looked, before he left the Court in 1932. His wife, the former Fanny Dixwell, contracted rheumatic fever shortly after their marriage and never bore children. She did not go out much and despised being photographed. As a result, there are no known photographs of the real Mr. and Mrs. Holmes together.

its most liberal members."<sup>31</sup> It is also important to realize that Holmes was nothing if not careful about his reputation, and that he was not likely to allow himself to be overtly manipulated by New Deal propagandists. As such, any stronger efforts at constructing the liberal Holmes would have to await his passing.

#### IV. Dramatis Personus

The death of Oliver Wendell Holmes, Jr., on March 6, 1935, triggered a flurry of tributes to the great jurist. For those seeking to liberalize Holmes, and thereby legitimate liberalism, the obituary columns and memorial services offered unique opportunities. The apotheosis of the liberal Holmes ranged from a resolution passed by the legislature of the state of Michigan resolving that Holmes "supported the rights of man as paramount to property rights, maintaining an attitude which stamped him as a progressive,"<sup>32</sup> to the ACLU-sponsored radio address in which New Deal cabinet member Harold Ickes called



Holmes a "giant . . . steeped in the ebb and flow of a man-made world,"<sup>33</sup> and in which Harold Laski, the famous British author and New Deal sympathizer, attributed to his departed friend the conviction that "all life is an experiment."<sup>34</sup>

Even President Roosevelt indulged in some postmortem praise of Holmes' jurisprudence in a thinly veiled effort to cast the Supreme Court as an instrument of progress rather than a usurper of legislative prerogatives. In his message to Congress on April 25, 1935, Roosevelt called Holmes' legacy "a faith in the creative possibilities of the law." In the same speech, he declared that "Mr. Justice Holmes sought to make the jurisprudence of the United States fulfill the great ends our nation was established to accomplish."<sup>35</sup> Surely anticipating the struggles he would have securing a Supreme Court sympathetic to his New Deal programs, Roosevelt's panegyric cannot be divorced from its political intent.

Even after the "switch in time," by which the goals, if not the means, of Roosevelt's Court-packing scheme were realized, liberal advocates of legislative experimentation continued to market Holmes to the public as the New Deal "Symbol for an Age."<sup>36</sup> Since the 1940s was a new "age," however, the liberalism's image-makers felt the need to add a new dimension to Holmes' reputation. As the United States found itself embroiled in a war against the forces of totalitarianism, liberalism was evolving to reflect an increased concern for individual rights and liberties. In the repressive political atmosphere that wars tend to foster, liberal exponents of the "power of ideas" embarked upon a vigorous defense of the First Amendment under siege. Once again, Holmes was perceived as a figure whose faith in ideas could be used to uphold and legitimate this new strain of liberalism.

However, the campaign to portray Holmes as an "evolved" liberal representing both New Deal principles and the increased concern for individual rights was complicated by a challenge to his image from a group of Jesuit theologians and law professors who linked Holmes' pragmatism with that of totalitarian regimes. Driven by a fear of the immoral social experiments being tested by Hitler, these scholars turned the liberal's praise of pragmatism on its

head, and maintained that

[i]f totalitarianism ever becomes the form of American government, its leaders, no doubt, will canonize as one of the patron saints Mr. Justice Holmes. For his popularization of the pragmatic philosophy of law has done much to pave the way.<sup>37</sup>

In response to a host of articles published during World War II, in which Holmes' Social Darwinism and secular philosophy of law were attacked as tending towards a dangerous immorality, the liberal custodians of Holmes' public image perceived a threat to their own ideas concerning the role of government in society.<sup>38</sup> As David Hollinger has argued, there was a religious subtext to this battle over Holmes' reputation in the 1940s, as Francis E. Lucey and other members of the Jesuit/Catholic academy reacted against the efforts of Jewish Liberals such as Frankfurter, Morris Cohen, and Harold Laski to secularize American intellectual life, and as these same liberals reacted against the anti-Semitic, "genteel" tradition by embracing "tough minded . . . old WASPS" such as Holmes.<sup>39</sup>

While heated exchanges in bar journal articles and other legal tracts did little, if anything, to influence the dominant public perception of Holmes as a liberal icon, the proponents of this "myth" felt it necessary to reinforce the image they had constructed and thereby to prevent the association of their own ideas with the immorality of totalitarian regimes. Since important New Dealers such as Frankfurter, Francis Biddle, and Thomas Corcoran, all of whom had become associated in the public eye with Holmes (the latter two had been his clerks for the 1911-12 and 1926-27 Terms, respectively), continued to occupy powerful positions in the early 1940s, their interest in continuing the pro-Holmes propaganda campaign was substantial. Yet, owing to the fact that Holmes' personal charm was no longer available as a campaign tool, these men needed a new vehicle by which to address the public. Into the breach stepped an unknown lawyer-turned-playwright whose own agenda and fascination with Holmes made him a willing collaborator in the continuing project to lionize the deceased Justice.

Emmet Lavery met Felix Frankfurter and



Francis Biddle in early 1942 while researching a play he was planning to write about Holmes. The result of their meeting and continued correspondence was the production of "The Magnificent Yankee," a touring theatrical tribute to Holmes authored by Lavery, which opened to a packed house of Washington elites on New Year's Eve, 1945. After graduating from Fordham Law School in 1924 and practicing law in New York City for several years, Lavery became a newspaper editor in Poughkeepsie. Opting to pursue his passion for drama in the mid-1930s, he wrote several plays on Catholic themes and founded the Catholic Theatre Conference in Chicago in 1936.<sup>40</sup> The story of how a Catholic playwright such as Lavery came to collaborate with the secular intellectuals of the late New Deal era is an interesting one that begins in 1937, with his appointment as head of the Play Bureau of the Federal Theatre Project by its director, Hallie Flanagan.

As Joanne Bentley explains in her biography of Flanagan, she was the nation's leading exponent of the Federal Theatre Project, and a woman with close connections to important New Dealers such as Harry Hopkins and Eleanor Roosevelt. Yet, in the growing anti-Communist fervor of the late 1930s, Flanagan's zeal for a national theatre made her subject to "charge[s] of radicalism." Thus, argues Bentley, Flanagan chose to hire Emmet Lavery as her assistant because she was "under pressure from Washington, [and] saw Lavery's moderate views as advantageous."<sup>41</sup> A few years later, New Deal image-makers such as Frankfurter and Biddle would realize as Flanagan had, that Lavery's Catholic background and his association with Jesuit intellectuals would be assets in the campaign to liberalize Holmes.

For two years, Flanagan and Lavery supervised the writing and selection of plays for the Federal Theatre Project with the support of Roosevelt's Works Progress Administration. In November 1939, however, the project was liquidated by an act of Congress under allegations that it was subversive. (In 1947, Lavery would defend himself against such charges before the House Un-American Activities Commission). Fortunately for Lavery, the project was extended by the Rockefeller Foundation and Vassar College, where he spent most of 1940 organizing and filing all of the Federal Theatre records that

had been sent from Washington.<sup>42</sup> Having acquired a taste for the Rockefellers' money and a passion for the Federal Theatre, Lavery conceived of a plan to use the former to promote the latter. This plan revolved around Oliver Wendell Holmes, Jr., a figure who had captured his imagination as a law student.

Recognizing the value of historical drama as a tool by which "great lives would be the delight of the masses as well as the scholars," and convinced that "[t]heatre, even more than the films, might come to mold the thoughts and habits of our time," Lavery saw in Holmes a dramatic subject that would both attract money and disseminate his notion that government should be actively involved in the lives of American citizens (read: playwrights).<sup>43</sup> To this end, Lavery successfully applied to the Rockefeller Foundation for a grant of \$5,000 per year, plus expenses, to become a resident playwright at Smith College, where his task was to "revitalize historical drama" by dramatizing Holmes' life.<sup>44</sup>

Lavery's brief tenure at Smith (which began in July 1942) brought him into contact with (and under the influence of) Frankfurter, Biddle, and Corcoran. It was no coincidence that Lavery undertook his work on Holmes at this small college in the Berkshires. According to the Rockefeller Foundation archives, the details of Lavery's grant were negotiated by Hallie Flanagan, the theatrical liaison to the New Deal, who just happened to be the wife of Smith's president and a dean of the college in her own right.<sup>45</sup> Thus, even before "The Magnificent Yankee" could be shaped by Holmes' former clerks and intellectual disciples, its playwright had been willingly lured into the New Deal's web by the promise of money and support for his aspirations as a dramatist. If the Federal Theatre Project and Hallie Flanagan showed what the New Deal could do for Emmet Lavery, Frankfurter knew that Lavery could do something for the New Deal and for the new strain of liberalism that was evolving in the 1940s.

The prelude to the first face-to-face meeting between Lavery and Frankfurter was the decision by the former to expedite his research on Holmes by sending the latter a series of interrogatories requiring "yes" or "no" answers only. To the playwright's surprise, the Supreme Court Justice "answered every question in some detail and in his own hand."<sup>46</sup> Frankfurter was

so willing, in fact, to assist Lavery in his project, that he agreed to entertain him at his home in Washington on a Sunday morning during the Court's Term in March 1942. In the course of this meeting, Frankfurter not only encouraged the effort to dramatize Holmes' life, but he promised to send a letter of introduction and recommendation on Lavery's behalf to Francis Biddle who was then serving as Attorney General and completing a biography of Holmes.<sup>47</sup>

While Frankfurter's role in shaping the "The Magnificent Yankee" would intensify after Lavery had completed a first draft, Biddle had a greater influence on the content of this initial draft. As reflected in the correspondence between Lavery, Biddle, and Thomas Corcoran (Biddle's attorney), many scenes from the play were taken directly from the pages of Biddle's book entitled **Mr. Justice Holmes**. Much of this correspondence consists of a legal dispute, couched in friendly terms, about whether the scenes appearing both in Biddle's book and Lavery's play constituted the coincidental use of incidents "in the public domain," or a "continuing collaboration" between the two authors entitling Biddle to acknowledgment in the credits, and a percentage of Lavery's profits.<sup>48</sup> Ultimately, it was decided that Biddle would receive fifteen percent of Lavery's royalties from future screen productions of the play.

It is clear that Lavery did use a good deal of Biddle's biography in developing his play, most particularly its portrayal of the childless Holmes as having had a father-son relationship with his clerks.<sup>49</sup> In the play, Lavery extended Biddle's "starved fatherhood" theme to cast a sentimental aura over Holmes that greatly disturbed the "tough-minded" Frankfurter.<sup>50</sup> Nevertheless, Biddle's theme came to dominate the play as well as the screen and television versions that were to follow.

There is also little reason to doubt that Lavery borrowed Biddle's use of Henry Adams as a foil for Holmes, and that he adopted the biographer's technique of posing Adams' "frustrated skepticism" against Holmes' "faith in life."<sup>51</sup> Thus, playgoers listening to Lavery's Adams calling Holmes "inferentially hopeful," were actually receiving a message from Roosevelt's Attorney General, who wanted Americans to identify with Holmes and embrace his alleged "hopefulness" about the New Deal.

Whatever legal obligations Lavery may have had to Biddle for the information culled from his biography, he conceded his debt in several ways. First, he included a note in the playbill and all copies of the play stating "[t]he author is indebted to Mr. Francis Biddle for the use of certain material from Mr. Biddle's biography **Mr. Justice Holmes**."<sup>52</sup> Later, when the play had become a film, Lavery wrote an article for *The New York Herald Tribune* in which he spoke of how he and Biddle had "decided to join forces, with the result that I based a large part of my play on the source materials contained in his biography of Holmes."<sup>53</sup>

Interestingly, whereas Biddle demanded recognition for his contribution to the construction of "The Magnificent Yankee," Frankfurter was concerned with keeping his contributions a secret. As he wrote to Lavery in 1944, "while the Attorney General is eager that you make known his share in your dramatization of the Justice, I am equally eager that no one should even remotely associate me with your interpretation."<sup>54</sup> Yet despite his desire to remain an anonymous campaigner for Holmes' image, Frankfurter was hardly as disinterested as he would like to be remembered. The very fact that the Justice felt it necessary to request anonymity from Lavery reveals how significant a role he actually played.

Not only did Frankfurter encourage the effort to dramatize Holmes' life, but he used his profound powers of persuasion to convince Lavery to alter his portrayal of Holmes so as to enhance his reputation as a liberal hero whose philosophy was rooted in a fundamental concern for the rights of man. As revealed by the extensive correspondence between Frankfurter and Lavery dating from their meeting in 1942, up until the screen production of "The Magnificent Yankee" in 1950, the Justice had two major concerns regarding the portrayal of Holmes. First, he wanted the Justice to be revealed as a man driven by ideas and not ambition; second, he wanted to dispel the emerging image of Holmes as a philosophical father of totalitarianism. Whereas a decade earlier Frankfurter's role in legitimizing liberalism had been to associate Holmes with experimental legislative schemes, his new efforts were aimed at disassociating the Justice from repressive government intrusions. The stage and screen versions of "The





"The Magnificent Yankee" was filmed by Metro-Goldwyn-Mayer in 1950 and then presented by Hallmark on NBC in 1964. Alfred Lunt and Lynn Fontaine (above) played the Holmeses in the televised version, which won five Emmys and brought the image of Holmes as liberal icon to millions of Americans. The tone of Holmes' disapproval of Hitler was sharpened for the film versions: "This fellow Hitler doesn't smell too good to me" became "I don't understand what's going on in Germany . . . I don't understand it and I don't like it."

"The Magnificent Yankee" reflect the success of Frankfurter's effort to reinvent Holmes according to the needs of liberalism.

Fortunately, for purposes of reconstructing the campaign to liberalize Holmes, the Frankfurter-Lavery correspondence has been carefully indexed as part of the Felix Frankfurter Papers.

Yet my research has uncovered an important document that these papers do not contain. Buried in the UCLA Arts Library Special Collections is a copy of the first draft of "The Magnificent Yankee," that Lavery sent to Frankfurter on May 11, 1944, and which the Justice carefully annotated and returned to the playwright

on July 6. That Frankfurter would have taken the time to read the rough draft of a little-known playwright is remarkable, and his comments reveal how strongly he felt about the subject matter. Moreover, the letters that the two men exchanged cannot be properly understood without reference to this document.

In the cover letter that Frankfurter enclosed with the annotated script he sent to Lavery, he summarized his views regarding the importance of downplaying any hint that Holmes possessed any "meretricious motives." Specifically, he felt that Lavery had "falsifie[d] reality" by "mak[ing] the lack of children . . . and failure to become C.J. [Chief Justice] significant influences in the lives of the Holmeses." Frankfurter insisted that "the importance about Holmes for the American heritage is to have him become part of the American tradition, even tho[ugh] he did not hanker for a son and even tho[ugh] he did not have ambition for place but for the passionate pursuit of his ideas."<sup>55</sup>

As discussed above, Frankfurter was unable to convince Lavery to omit the "starved fatherhood" theme from "The Magnificent Yankee" despite such annotational protestations as "Please, *please* drop this silly father theme," and "You must not do this, it's an indecent and a false intrusion. . . . I don't care who gave you this bit of pathetic fallacy."<sup>56</sup> Lavery remained convinced that it was "a good thing for people to believe that Holmes (the complete human being) was just as human with respect to . . . the family or the father and son motif. . . ."<sup>57</sup> While he agreed with Frankfurter that "[w]e do want to show that it was the 'passionate pursuit of his ideas' which was the dominant force" in Holmes' life, he felt that the fatherhood theme would not detract from this presentation.<sup>58</sup>

Yet with regard to his portrayal of Holmes as caring deeply about being passed over for the Chief Justiceship in 1916, and again in 1921, Lavery came to accept Frankfurter's argument that such a portrayal "falsifies the significance of his philosophy, of his thinking, of his life."<sup>59</sup> Responding to Frankfurter's argument that "fundamentally [the Chief Justiceship] did not matter to him" because of his "lack of ambition for place,"<sup>60</sup> Lavery notified the Justice by letter that he was specifically altering the text of his play to make room for a "clear statement of Holmes' lack of ambition for high office." In the same

letter, Lavery indicates that he made this decision after meeting with Francis Biddle and listening to his "excellent suggestions."<sup>61</sup>

The nature of this alteration of the text of "The Magnificent Yankee" is worth mentioning. In the original draft Holmes wistfully tells a gathering of his secretaries not to expect President Warren G. Harding to name him as Chief Justice to replace Edward Douglass White because "[I]f I were you I'd put my money on Taft."<sup>62</sup> In the revised text, Holmes tells his adoring clerks, (and the American public):

Sorry to disappoint you, boys. White is retiring soon . . . but the *President wants a conservative* and I think Taft will be the man . . . I'm too old for that kind of going's on . . . *and besides I never did understand ambition for high office* [emphasis added].<sup>63</sup>

As Frankfurter realized, the addition of this disclaimer was not an insignificant component of the campaign to liberalize Holmes' image and purify his motives. Not only was this incarnation of Holmes distinguished from Taft, the "conservative," but as Frankfurter wrote to Lavery after reviewing the change, "I am glad that you have softened the crude implication that Holmes had ambition for the Chief Justiceship — a suggestion that would deny the central drive of his life." While the Justice continued to berate Lavery for the "unqualified balderdash" represented by the "suggestion that his relation with his law clerks was the sublimated expression of his frustrated longing for a son of his own," he clearly appreciated what he perceived to be the increased focus on Holmes' "purpose to follow the inner call of a thinker."<sup>64</sup>

With "The Magnificent Yankee" set to open less than two months after Lavery's decision to delete "meretricious motives" from his portrayal of Holmes, it is possible to view this decision as another "switch in time" serving to protect the memory of the New Deal by purifying the image of one of its alleged ancestors. With the eminent actor Louis Calhern touring the nation portraying Holmes as a great thinker driven not by ambition but by ideas, Frankfurter, Biddle, and Lavery were in a very real sense responsible for shaping the public perception of Holmes.

As discussed above, however, the rumblings



from Jesuit circles about the relation between Holmes' ideas and totalitarianism continued to offer a competing image of the man. The decision of Metro-Goldwyn-Mayer to undertake production of a cinematic version of "The Magnificent Yankee" in 1950 presented the campaigners for the liberal Holmes with another opportunity to counter such rumblings. Frankfurter was particularly offended by the comparison of Holmes to Hitler coming from the likes of Father Lucey.<sup>65</sup> Thus, in a letter to Lavery prior to the release of the film, Frankfurter described the Jesuit attack on Holmes as a "pack in full hunt," and he claimed that "the view of Holmes as the father of totalitarianism takes the palm as a ludicrous conception."<sup>66</sup>

It is in the context of this battle over the meaning of Holmes' philosophy that Lavery went out of his way to emphasize Holmes' contempt for Hitler. Whereas in the play Holmes' only comment on the subject was, "This fellow Hitler doesn't smell too good to me,"<sup>67</sup> in the cinematic version he calls him a "Son of a bitch" and adds "I don't understand what's going on in Germany . . . I don't understand it and I don't like it."<sup>68</sup> This change reflects the campaign to disassociate liberal "Holmesian" pragmatism from the social experiments that defined Hitler's regime.

Even the press releases concerning the film version of "The Magnificent Yankee" reflect the effort to glorify Holmes by playing upon the fears of Americans in 1950. With Hitler a recent memory and the Russians an emerging threat, the Motion Picture Association wrote of the film:

This picture could not have come at a more opportune moment . . . If we are to achieve international peace, it can only come in the wake of a body of international laws which, inspired by such men as Thomas Jefferson and Oliver Wendell Holmes, Jr., the members of our great American Bar Association will write.<sup>69</sup>

If the Jefferson-Holmes connection wasn't obvious to all filmgoers, no one could have missed the explicit attempt to link Holmes to another great figure claimed by the American left. The friendship between Holmes and Louis Brandeis was a strong theme in the film as well

as the play, and according to one reviewer, the production "revealed the two of them as the most progressive judges on the High Court bench."<sup>70</sup>

The televised version of "The Magnificent Yankee" in 1964 brought the campaign to liberalize Holmes to a new level, as the Lavery-Biddle-Frankfurter collaboration was seen by millions of Americans on NBC. That this show garnered five Emmy awards reveals how seriously the public took the presentation of Holmes that these old-time New Dealers had helped to shape. While Americans watching Alfred Lunt and Lynn Fontaine portray Mr. and Mrs. Holmes from their living rooms may not have been aware of the influence of men like Frankfurter and Biddle on their perceptions, they certainly absorbed their message: Holmes was a liberal who deserves a spot in the pantheon of great Americans.

## V. Conclusion

It has been the aim of this essay to examine the specific mechanisms employed by the New Deal's image-makers to legitimate liberalism by liberalizing Oliver Wendell Holmes, Jr. At this point it bears repeating that my intent has not been to participate in the debate as to whether Holmes was, or was not, a "liberal." Moreover, I have resisted taking a position as to whether the campaign in the 1930s to garner support for positive government, and the campaign in the 1940s to defend the rights of man as embodied in the First Amendment, would have succeeded without the machinations of New Dealers like Felix Frankfurter, Charles Clark, Francis Biddle, and Emmet Lavery to associate Holmes with these "liberal" ideals. What has been argued here is that the dominant public perception of Holmes, as a supporter of both of these strains of liberalism, was shaped by the efforts of these men.

The famous radio address celebrating Holmes' ninetieth birthday, the oft-told story of FDR's visit to Holmes' home in 1933, and the dramatization and popularization of Holmes' life in "The Magnificent Yankee" should not be seen as three isolated events in the warehouse of Holmesiana. When viewed together, as three aspects of the same campaign to create an image of a man, these episodes take on a significance that Holmes' biographers have ignored.

To point out the role that Holmes' admirers played in orchestrating his liberal public image is not to deny the Justice's own part in the creation of his exalted reputation. Holmes' life-long ambition for historical greatness cannot be ignored as a factor in his popularity, nor can his wit, his longevity of service, or the fact that he bequeathed a quarter of a million dollars to the U. S. Treasury (the largest unrestricted gift ever given to the United States up to that time).<sup>71</sup> Holmes' comment to Charles Hopkinson, the Supreme Court portraitist, upon the completion of the Justice's painting in 1929, reveals how

he relished the opportunity to shape his image. Admiring the artist's work, Holmes exclaimed "[t]hat isn't me, but its a damn good thing for people to think it is."<sup>72</sup> While it is open to debate whether Holmes shared the ideological convictions of those who helped create his reputation, he certainly shared their faith in the ability to manipulate the public.

\* I gratefully acknowledge the assistance of William Nelson, R.B. Bernstein, and Louis Anthes of the New York University Legal History Colloquium, and of Carl Prince, Thomas Bender, and Neil Maher of the History Department at New York University.

## Endnotes

<sup>1</sup> Howe, "Mr. Justice Holmes," speech, March 13, 1941, in Oliver Wendell Holmes, Jr. Papers, Harvard Law School. (Hereinafter "Holmes Papers").

<sup>2</sup> For an interesting article on Holmes' ambition and his strategy of "self creation," see Robert A. Ferguson, Robert "Holmes and the Judicial Figure," 55 *U. of Chi. L. Rev.* 506 (1988).

<sup>3</sup> G. Edward White "The Rise and Fall of Justice Holmes" 39 *U. of Chi. L. Rev.* 51 (1971). These themes are also addressed, along with many others, in White's biography entitled *Justice Oliver Wendell Holmes: Law and the Inner Self* (New York: Oxford University Press, 1993).

<sup>4</sup> For purposes of this essay, "liberalism" refers broadly to a faith in the power of ideas to achieve progress. In the 1930s, this belief manifested itself in the rejection of laissez-faire principles and in support for active governmental experimentation with social and economic schemes. In the 1940s, it had evolved to also embrace support for the protection of individual rights and liberties from government intrusion.

In either case the "liberalism" referred to in this article is to be distinguished from the modern term "liberalism," that refers, more narrowly, to certain forms of government activity on behalf of specific groups in society.

<sup>5</sup> For an argument emphasizing Holmes' "liberalism," see Mark De Wolfe Howe, "The Positivism of Mr. Justice Holmes," 64 *Harv. L. Rev.* 529 (1951). For the view that Holmes was not a liberal, but a conservative, Social Darwinist, see Yosai Rogat, "Mr. Justice Holmes: A Dissenting Opinion," 15 *Stan. L. Rev.* 3 (1962), and Jan Vetter, "The Evolution of Holmes, Holmes and Evolution," 72 *Cal. L. Rev.* 343 (1984).

<sup>6</sup> See Holmes' dissent in *Abrams v. United States* 250 U.S. 616 (1919).

<sup>7</sup> In reality, Holmes' record on free speech cases is an ambiguous one. He employed his "clear and present danger test" to both uphold and deny claims made under the First Amendment. For cases in which he upheld freedom of speech against government interference, see *Gitlow v. New York*, 268 U.S. 652 (1925), and *United States v. Schwimmer*, 279 U.S. 644 (1929). For cases in which he reached the opposite conclusion, see *Schenck v. United States*, 249 U.S. 47 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919); and *Debs v. United States*, 249 U.S. 211 (1919).

<sup>8</sup> The link between academic institutions and progressive causes was expressed in a book by Charles McCarthy, *The Wisconsin Idea* (New York: Macmillan Company, 1912), about the emerging tendency to use the university as a seed bed for practical ideas. See Harlan B. Phillips, *Felix Frankfurter Reminisces*, (New York: Reynal & Co., 1960) p. 116.

<sup>9</sup> Frankfurter felt that Holmes' voice would be perfect for the radio. As he told Harlan Phillips, "Holmes had one of the most beautiful voices the Lord ever put into a throat." *Ibid.*, 58.

<sup>10</sup> *Time Magazine*, March 15, 1926 p.8.

<sup>11</sup> Letter from Clark to Biddle, October 1, 1942 Charles E. Clark Papers, Yale University. (Hereinafter, "Clark Papers").

<sup>12</sup> *Boston Herald*, March 8, 1931, 3.

<sup>13</sup> The collection of essays and tributes was edited by Frankfurter and entitled *Mr. Justice Holmes* (New York: Coward-McCann, 1931).



- <sup>14</sup> *Boston Herald*, 8 March 1931, 1.
- <sup>15</sup> Letters from Clark to Holmes, January 30, 1931; February 27, 1931; March 3, 1931. Clark Papers.
- <sup>16</sup> Letter from Holmes to Clark, March 2, 1931. Clark Papers.
- <sup>17</sup> White, *Justice Oliver Wendell Holmes*, 464. The line was taken from a poem attributed to Virgil "The Syrian Dancing Girl."
- <sup>18</sup> *Ibid.*, 464-465.
- <sup>19</sup> *Ibid.*, 463.
- <sup>20</sup> *Ibid.*, 463.
- <sup>21</sup> *The New Republic*, March 11, 1931, 87; *The Nation*, March 11, 1931, 262.
- <sup>22</sup> Frankfurter, "Mr. Justice Holmes and the Constitution," Dunster House Papers, (1927), 24. Holmes Papers.
- <sup>23</sup> See Liva Baker, *Felix Frankfurter*, (New York: Coward-McCann, 1969); Michael E. Parrish, *Felix Frankfurter and His Times*, (New York: Free Press, 1982); Nelson L. Dawson, *Louis Brandeis, Felix Frankfurter and the New Deal*, (Hamden, CT: Archon Books, 1980).
- <sup>24</sup> Phillips, 248-250.
- <sup>25</sup> *Ibid.*, 247.
- <sup>26</sup> *Ibid.*, 241.
- <sup>27</sup> *Ibid.*, 242.
- <sup>28</sup> See, e.g., *The New York Times*, which under the heading "President and Wife Call on Mr. Holmes," reported that "Mr. Holmes . . . was asked to comment upon the political situation and to give his views as to the trend of governments." March 9, 1933, 17.
- <sup>29</sup> Liva Baker, *The Justice From Beacon Hill*, (New York: Harper Collins, 1991) 641; see also Sheldon Novick, *Honorable Justice*, (Boston: Little Brown, 1989) 376.
- <sup>30</sup> Howe, "Mr. Justice Holmes," see also Yosel Rogat, "The Judge as Spectator," 31 *U. of Chi. L. Rev.* 213 (1964).
- <sup>31</sup> *The New York Times*, January 13, 1932, 1, 3.
- <sup>32</sup> State of Michigan, 58th legislature, Senate Concurrent Resolution No. 15, March 7, 1935.
- <sup>33</sup> Text of Columbia Broadcast System Memorial Program, April 26, 1935, 6:00 p.m. Holmes Papers.
- <sup>34</sup> *Ibid.*, 4.
- <sup>35</sup> As quoted in Felix Frankfurter, "Oliver Wendell Holmes," in *Dictionary of American Biography*, Vol. xxi, Supplement One (New York: Charles Scribner's Sons, 1944) 427.
- <sup>36</sup> This phrase is taken from the title of John William Wards' book entitled *Andrew Jackson: Symbol for an Age*, (New York: Oxford University Press, 1955).
- <sup>37</sup> Paul Gregg, "The Pragmatism of Mr. Justice Holmes," 31 *Geo. L.J.* 262, 294, (1943), as quoted in White, "The Rise and Fall of Justice Holmes," at 66.
- <sup>38</sup> Typical of these articles attacking Holmes' philosophy is Ben Palmer, "Hobbes, Holmes and Hitler," 31 *A.B.A. J.* 569 (1945).
- <sup>39</sup> See David Hollinger, "Two NYU's and 'the Obligation of Universities to the Social Order' in the Great Depression," in Thomas Bender ed., *The University and the City*, (New York: Oxford University Press, 1988) 249-266. See also Hollinger, "The Tough Minded Justice Holmes, Jewish Intellectuals and the Making of an American Icon," in Robert W. Gordon ed., *The Legacy of Oliver Wendell Holmes, Jr.* (Stanford: Stanford University Press, 1992) 223-28.
- <sup>40</sup> Lavery's biographical information was obtained from several sources, including a telephone conversation with his son, Emmet Lavery, Jr., a retired lawyer living in Encino, California. Other sources are *The International Motion Picture Almanac* (New York: Quigley Publishing Company, 1945-46) and the *New York Herald Tribune*, March 31, 1946. His Catholic plays include "The First Legion" (1935); "Monsignor's Hour" (1937); and "Second Spring" (1938). All were produced by Samuel French.
- <sup>41</sup> Joanne Bentley, *Hallie Flanagan: A Life in the American Theatre*, (New York: Alfred A. Knopf, 1988) 277-78.
- <sup>42</sup> *The New York Times*, January 2, 1940.
- <sup>43</sup> Letter from Emmet Lavery to Dr. David Stevens of the Rockefeller Foundation, November 8, 1940. Rockefeller Foundation Archives. (Hereinafter "RFA").
- <sup>44</sup> Letters from Lavery to Stevens December 13, 1940, and from Norma Thompson, Secretary of the Rockefeller Foundation to Herbert Davis, president of Smith College, May 19, 1942. RFA.
- <sup>45</sup> Letter from Lavery to Stevens, June 26, 1942. RFA. See also, Smith College Memorandum from Treasurer's Office to Mrs. Hallie F. Davis, re: Rockefeller Foundation Grant for Drama, October 8, 1948, RFA.
- <sup>46</sup> Emmet Lavery, "Felix Frankfurter and the Theater," 51 *A.B.A. J.*, (1965), 1162.
- <sup>47</sup> *Ibid.*, 1163.
- <sup>48</sup> Francis Biddle, *Mr. Justice Holmes* (New York: Charles Scribner's Sons, 1942). Copy of letter from Biddle to Lavery, July 8, 1944, enclosed, in confidence, with letter from Lavery to Frankfurter, August 7, 1944. Felix Frankfurter Papers, container 75, reel 46. (Hereinafter "Frankfurter Papers"). See also letters from Thomas Corcoran Esq., to Lavery, July 18, 1944. Thomas Corcoran Papers, Library of Congress.
- <sup>49</sup> *Ibid.*, 82.
- <sup>50</sup> In a letter written to Lavery shortly after the play had opened, Frankfurter expressed his disappointment over the playwright's decision to retain the fatherhood theme by accusing Lavery of creating "a dominant impression of sentimentalism and self regard . . . which were not his [Holmes'] deepest veins . . ." Letter from Frankfurter to Lavery, 8 January 1946. Frankfurter Papers, container 75, reel 46.
- <sup>51</sup> Biddle, 22-3.
- <sup>52</sup> *Playbill*, Royale Theatre, New York City, week beginning Monday, Feb. 25, 1946.
- <sup>53</sup> *The New York Herald Tribune*, January 14, 1951, sec. 4, p. 5.
- <sup>54</sup> Letter from Frankfurter to Lavery, August 28, 1941. Frankfurter Papers, container 75, reel 46.
- <sup>55</sup> Letter from Frankfurter to Lavery July 6, 1946. Frankfurter Papers, container 75, reel 46.
- <sup>56</sup> Annotated Script of "The Magnificent Yankee," 21, 16. Emmet Lavery Papers, UCLA Arts Library, Special Collections.
- <sup>57</sup> Letter from Lavery to Frankfurter, July 1, 12, 1944. Frankfurter Papers.
- <sup>58</sup> *Ibid.*, 6.
- <sup>59</sup> Annotated Script, 106.
- <sup>60</sup> *Ibid.*, 84.
- <sup>61</sup> Letter from Lavery to Frankfurter, November 6, 1945. Frankfurter Papers, container 75, reel 46.
- <sup>62</sup> Annotated Script, 105.
- <sup>63</sup> Corrected and Revised Script to "The Magnificent Yankee," October, 1945, Act II, p. 48. Copy on file at The New York Public Library for the Performing Arts.
- <sup>64</sup> Letter from Frankfurter to Lavery, November 12, 1945. Frankfurter Papers, container 75, reel 46.

<sup>65</sup> See Francis Lucey, "Holmes-Liberal-Humanitarian-Believer in Democracy?" 39 *Geo. L. J.* 523, 548, 553 (1951).

<sup>66</sup> Letter from Frankfurter to Lavery, June 25, 1950. Frankfurter Papers, container 75, reel 46.

<sup>67</sup> Corrected and Revised Script, 140. See also screenplay.

<sup>68</sup> Dialogue, MGM film "The Magnificent Yankee."

<sup>69</sup> Press release from the Motion Picture Association of

America, Community Relations Department, December, 1950. Copy on file at The New York Public Library for the Performing Arts.

<sup>70</sup> *Variety*, November 15, 1950, 6.

<sup>71</sup> Felix Frankfurter, "Oliver Wendell Holmes," in *Dictionary of American Biography*, Vol. xxi, 427.

<sup>72</sup> Catherine Drinker Bowen, *Yankee From Olympus*, (Boston: Little, Brown and Company, 1944) 408.



# John Marshall's Supreme Court Practice: A Letter Comes to Light

James C. Brandow<sup>1</sup>

The discovery of a previously unknown letter written by John Marshall is a noteworthy event. When that letter sheds light on his legal practice before the Supreme Court in the 1790s, it becomes an even more welcome addition to the historical record. Only a few of Marshall's letters and other contemporary sources provide information about his activities as a lawyer. As the editors of his papers have readily admitted, "[t]he want of documentation for Marshall the lawyer" has always been a limiting factor in our understanding of the great jurist.<sup>2</sup> That limitation has now been breached somewhat. While engaged in research for the fifth volume of *The Documentary History of the Supreme Court of the United States, 1789-1800*, the editors of that series found a copy of a one-page letter by Marshall deposited in the Virginia Library in Richmond. The letter helps to fill in a gap in our sketchy knowledge of Marshall's legal practice before the Supreme Court.

Marshall's peers recognized him as an outstanding appellate litigator in the superior courts of Virginia by the early 1790s, but prior to his appointment as Chief Justice in 1801 he had appeared as counsel in only one case before the U.S. Supreme Court. That suit was *Ware v. Hylton*, decided in February 1796, a British debt case that tested the supremacy of a federal treaty over state law. Marshall's client, the Virginia debtor Daniel Hylton, lost to the British creditor and the case had wide repercussions throughout the United States.<sup>3</sup> One year later, in February 1797, Marshall was back in Philadelphia to

argue *Hunter v. Fairfax*, a land dispute case in which he had a personal interest.<sup>4</sup> According to standard accounts, Marshall never had an opportunity to address the Court, and after the suit was dismissed, he returned home. Soon after, in June 1797, President Adams appointed Marshall to serve as an envoy extraordinary to France. Never again would he be able to devote all of his energies to his legal practice.<sup>5</sup>

That accepted chronology or sequence of events must now be amended by adding another Supreme Court case in which Marshall participated. While in Philadelphia in February 1797, Marshall was retained by the state of Virginia to act as counsel in *Hollingsworth v. Virginia*, or as it was originally docketed, *Grayson v. Virginia*, a suit filed by the Indiana Company in the Supreme Court in 1792.<sup>6</sup> *The Papers of John Marshall*, an outstanding documentary project and the recognized authority on his career, printed a letter dated February 1, 1797, from James Wood, the governor of Virginia, to United States Attorney General Charles Lee, a native of Virginia, in which Lee was directed to confer with Marshall about the case.<sup>7</sup> In the absence of additional evidence, the editors of the Marshall Papers were unable to comment further on Marshall's employment.<sup>8</sup> However, with the Documentary History Project's discovery of Marshall's response to the governor, as well as a response from Attorney General Lee, we now have a more complete record of the part Marshall played as counsellor in *Hollingsworth v. Virginia*.

Virginia's troubles with the Indiana Company dated back to 1768, when that organization of wealthy Pennsylvania and New Jersey merchants and land speculators secured a deed from the chiefs of the Six Nations to almost two hundred thousand acres of land in what is now West Virginia. The company petitioned the Virginia legislature for recognition of its deed in 1776, but that petition as well as others in later years was denied on the grounds that Virginia and not the Indians owned the lands. Continually frustrated in its quest to have the deed accepted, the Indiana Company finally instituted a suit in the Supreme Court against Virginia in 1792.<sup>9</sup>

The governor of Virginia refused to accept service of the subpoena but informed the General Assembly of the suit. The legislature responded by promptly passing resolutions which declared that the Supreme Court of the United States did not have jurisdiction in the case and that Virginia could not be made a defendant in a suit without its consent. On February 18, 1793, however, the Court, in another case, *Chisholm v.*

*Georgia*, announced its decision that states could be sued by citizens of other states in the Supreme Court. Two days later the Court issued a second subpoena in *Hollingsworth*. Virginia again ignored the process and entered no plea in court.

In the meantime, the Supreme Court's ruling in *Chisholm* resulted in the widespread demand for a corrective amendment, and Virginia was at the forefront of that movement. As early as February 13, 1793, the governor had written to Virginia's senators requesting they propose an amendment to "preserve the States from the pernicious effects . . . of the federal judiciary."<sup>10</sup> Nevertheless, it was a senator and representative from Massachusetts who took the lead in Congress by introducing resolutions on February 19 and 20, 1793, that insured that no state could be dragged into federal court by an individual. The resolutions elicited little support, and no action was taken in either house. One year later, however, Congress passed similar resolutions by wide margins, and they were sent on to the states for ratification.

While the constitutional amendment progressed through the state legislatures, Virginia continued to maintain its claim to sovereignty in the Indiana Company matter. After a two-year impasse in the suit, the Justices issued an order in 1796 stating that a plaintiff in the Supreme Court could proceed *ex parte* if a defendant failed to appear in response to a subpoena. When the governor and attorney general of Virginia were served with a third subpoena in November 1796, the state realized that the Supreme Court had drawn a line in the sand and intended to force a decision in the dispute. In December 1796, the governor informed the General Assembly of the possibility or threat of *ex parte* proceedings, and that same month the legislature passed a resolution directing the executive (governor and Council of State) to pursue measures that would prod those states that had not yet ratified the amendment. At the same time, in another resolution, the legislature granted the executive discretion to exercise its own best judgment in responding to the suit and authorized the payment of legal fees.

In January 1797, Governor Wood discussed the suit with the Council of State. That body advised the governor to send the recent resolutions of the General Assembly to Attorney General Lee with the request that he act as counsel



The discovery of a new letter written by attorney John Marshall to Governor Wood regarding a suit by the Indiana Company against the state of Virginia sheds light on Marshall's participation in the case. In the letter, Marshall informs the governor that he and Attorney General Charles Lee (above) had decided that it was not advantageous to the state for them to appear before the Supreme Court.



for Virginia. Lee replied that he would be happy to represent the state but first had to know if the executive wanted him to appear before the Court, an act that might be viewed as a recognition of the Court's jurisdiction in the suit.

After consideration of Lee's letter, the Council advised the governor to inform Lee that the state had placed the suit in his hands as well as those of John Marshall, who was then in Philadelphia.<sup>11</sup> The Council also replied to Lee's query as to whether he should appear in court to answer the subpoena. According to the Council, the legislature had already decided on the justice of the claim and had expressed its opposition to the principle that a state could be sued without its consent. Although the Council wished that the trial could proceed without the state's appearance, it nevertheless authorized the counsellors to go into court and enter a plea if they thought it advantageous. That decision, five years after the first sub-

poena was issued, represented a significant shift in Virginia's thinking about the suit.

At the February 1797 Term of the Supreme Court, neither Lee nor Marshall appeared in court to enter a plea. That did not deter the plaintiff, however, for William Lewis, counsel for the Indiana Company, moved to have commissioners appointed to take the testimony of witnesses residing in Pennsylvania, Virginia, and Kentucky. Without further delay, the Court granted the motion. Apparently, the suit was back on track.

After the Court adjourned for its February 1797 Term, Marshall reported to the governor on what had happened in court. He and Lee had agreed that Virginia should not enter an appearance because they had been informed prior to the session that only one more state was needed to ratify the Eleventh Amendment.<sup>12</sup> Marshall's account, corroborated by Lee, was as follows:

Richmond  
Sir—

February 23d. 1797.

In Conformity with your request, I had while in Philadelphia a Consultation with Mr. Lee Concerning the Suit Instituted by the Indiana Company against the Commonwealth of Virginia. as no measure Cou'd be taken at the last Term Injurious to the Interests of the Commonwealth, we deemed it most Adviseable not to enter a formal Appearance, as it is possible that before an Appearance may become Absolutely Necessary One Other State may Accede to the Amendment proposed to the Constitution Concerning the Suability of States.

in the mean time\* a Copy of the Bill<sup>13</sup> which Contains a Variety of matters is directed to be made Out and transmitted to you, that a defence may be Maturely digested.

I am Sir, with very much respect

Yr. Mo. Obt. Servt.

JMarshall.

\* the Copy not yet received

A Copy.

His Excellency Governor Wood.<sup>14</sup>

At the next Term of the Supreme Court, in August 1797, the suit was postponed once more. Finally, in February 1798, after President Adams proclaimed that the Eleventh Amendment had been ratified, the Supreme Court ruled that it had no jurisdiction in *Hollingsworth v. Virginia*, and the suit was dismissed.<sup>15</sup>

While one document rarely reveals everything the historian wishes to know about an event, a person, or a case, the collecting of a wide variety of such manuscript sources can enable the scholar to paint a more complete picture. John Marshall's letter to Governor Wood is certainly not a bombshell, but it does help us to understand better Marshall's role as a Supreme Court counsellor. The letter corroborates our

knowledge that Marshall was a highly respected member of the Supreme Court bar and his judgment on legal issues was welcomed in the highest offices of Virginia. In addition, it demonstrates Marshall's familiarity with the informal as well as the formal proceedings of the Court — a familiarity that helped him to predict accurately that the state's case would not suffer in any way by the state's nonappearance before the Court. Small bits of information like this have a cumulative effect that may not be readily apparent on a first reading of a document. And in the instance of John Marshall, who left relatively few letters behind, the discovery of any substantive writing by him is an important one.

## Endnotes

<sup>1</sup> The author would like to express his gratitude to his fellow editors on *The Documentary History of the Supreme Court, 1789-1800*. Maeva Marcus, William Rolleston-Daines, Robert P. Frankel, Jr., and Stephen L. Tull.

<sup>2</sup> Herbert A. Johnson et al., eds., *The Papers of John Marshall*, 7 vols. to date (Chapel Hill: University of North Carolina Press, 1974-1993), 5:xxiii.

<sup>3</sup> Julius Goebel, Jr., *Antecedents and Beginnings to 1801*, vol. 1 of *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States* (New York: Macmillan, 1971), pp. 748-756; Johnson, *Papers of John Marshall*, 5:295-329; Alexander James Dallas, *Report of Cases Ruled and Adjudged in the Several Courts of the United States*, vol. 3 (Philadelphia: J. Ormrod, 1799), pp. 199-285. In order to represent his client in *Ware v. Hylton*, Marshall had been admitted to practice as a counsellor before the Supreme Court on February 2, 1795. Maeva Marcus and James Perry, eds., *The Documentary History of the Supreme Court of the United States, 1789-1800*, vol. 1 (New York: Columbia University Press, 1985), p. 231.

<sup>4</sup> Johnson, *Papers of John Marshall*, 5:228-56.

<sup>5</sup> Albert J. Beveridge, *The Life of John Marshall*, 4 vols. (Boston: Houghton Mifflin, 1916-1919), 2:209-13; Johnson, *Papers of John Marshall*, 3:xxix, 67-73; 5:xxiii, lvi-lvii.

<sup>6</sup> Maeva Marcus, ed., *The Documentary History of the Supreme Court of the United States, 1789-1800*, vol. 5 (New York: Columbia University Press, 1994), pp. 274-351. That work contains the most complete account of *Hollingsworth v. Virginia* published to date. Unless otherwise stated, all information regarding that suit is from volume 5 of the *Documentary History*.

<sup>7</sup> Johnson, *Papers of John Marshall*, 3:67-68. Attorney General Lee had a high degree of respect for Marshall's legal abilities. He wrote to President Washington the year before: "Mr. Marshall is at the head of his profession in Virginia, enjoying every convenience and comfort; in the midst of his friends and the relations of his wife at Richmond; in a practice of his profession that annually produces about five thousand dollars on an average." Beveridge, *Life of John Marshall*, 2:201.

<sup>8</sup> Johnson, *Papers of John Marshall*, 3:67-68. Subsequent volumes, including volume 5, which is devoted to Marshall's legal practice from 1784 to 1800, make no mention of *Hollingsworth v. Virginia*.

<sup>9</sup> Based upon a literal reading of the Constitution, it was possible to interpret Article III, section 2 as authorizing suits by individuals against states in federal courts.

<sup>10</sup> Marcus, *Documentary History*, vol. 5, p. 606.

<sup>11</sup> While Marshall was undoubtedly chosen for his knowledge of the law and experience before the bar, members of the Council may have recalled a speech he delivered at the Virginia Ratification Convention in 1788. At that time, Marshall said it was not rational to suppose that a sovereign state like Virginia would "be called at the bar of the Federal Court" or "dragged before a Court." Merrill Jensen, John P. Kaminski, and Gaspare J. Saladino, eds., *The Documentary History of the Ratification of the Constitution*, 10 vols. to date (Madison: State Historical Society of Wisconsin, 1976-1993), 10:1433.

<sup>12</sup> In fact, the required number of states had ratified the amendment by 1795, but this was not yet known. Marcus, *Documentary History*, vol. 5, p. 601.

<sup>13</sup> Although not found, this enclosure was probably the 1793 amended bill in equity submitted on behalf of the Indiana Company. Marcus, *Documentary History*, vol. 5, p. 299n.

<sup>14</sup> John Marshall to James Wood, February 23, 1797, Executive Communications, Virginia Library; Marcus, *Documentary History*, vol. 5, p. 350. Five days earlier, Lee had written to Wood: "While Mr. Marshall was in the City I had the honor to receive your Letter of the 1st. Instant, with whom I Conferred relative to the Suit of the Indiana Company. We Concurred in Opinion that it wou'd be most prudent not to enter an Appearance for the State until a future term of the Court, as for the present it might be postponed with Safety to the Cause Committed to Our Care." Lee also noted that Virginia's objection to the Court's jurisdiction would have more weight after the amendment was ratified than before. Charles Lee to James Wood, February 18, 1797, Executive Communications, Virginia Library; Marcus, *Documentary History*, vol. 5, p. 347.

<sup>15</sup> Marcus, *Documentary History*, vol. 5, pp. 637-38; Dallas, *Reports of Cases*, 3:378-82.



# **The Court Diary of Justice William O. Douglas**

## **Preface**

**Sheldon S. Cohen**

I first met William O. Douglas in 1957. I was working as a tax attorney in the Washington office of Paul, Weiss, Rifkind, Wharton & Garrison. Carol Agger (Mrs. Abe Fortas), who was a partner, asked me to go to the Supreme Court to meet Justice Douglas to discuss his income tax planning. Justice Douglas had several books in progress at the time and was a regular speaker at universities and other forums. The Justice was sitting at his desk in an open-neck sport shirt and trousers when I met him. We discussed his financial and tax situation, and I went off to do his planning.

From that time until his death in 1975, we were close friends. In fact, we were almost like family. He came to our home often, always for our Passover Seder and for the children's birthdays, and other occasions. We were at his home for New Year's Eve and many other occasions. If the Justice received a first day cover of a new stamp, he often sent it to one of my children as a gift.

His will was drafted by Betty Fletcher, now Circuit Judge, U.S. Court of Appeals for the Ninth Circuit. The Justice named Betty, Dr. Tom Connolly (his personal physician), and me as his executors. Betty, however, was unable to serve

as she was appointed to the Court of Appeals by President Carter.

The Justice's will instructed us to leave his Court papers to the Library of Congress. His gift of the pre-Court papers to the Library was made in 1957 and it was one of the early items I handled for him. We delivered 1,784 boxes of papers, which comprise one of the prize collections of materials regarding the thirty-five years during which the Justice served. He took careful notes of every conference of the Court and tried to write in his log his impression of what every Justice thought about every important point on the case. It is a remarkable historical log of his Court years. Justice Douglas had the longest Court service of anyone yet to serve.

One of the items the Justice left was a handwritten diary, which starts March 19, 1939; the day President Roosevelt informed him he was to be appointed to fill Justice Brandeis' vacancy. The diary covers the first year and one half of his service on the Court and runs through October 19, 1940. We all think that this remarkable log of a vital period of our history, just before World War II, is a great addition to the history of the Court.

## Introduction

Philip E. Urofsky

Soon after President Franklin D. Roosevelt appointed him to the Supreme Court, Justice William O. Douglas began keeping an official diary — a diary clearly intended as the basis for a future autobiography and limited solely to the public part of Douglas's life: the Court, politics, and personalities. The "voice" of this diary, two years of which have survived, is the same voice as the Douglas of *Go East, Young Man* and *The Court Years*: a Douglas intending only to give his opinion on whatever struck his fancy, but not willing to allow anyone into his personal life. For instance, his children are only mentioned twice: in his description of his swearing-in ceremony at the Court and in referring to his difficulty in explaining to his son the Jehovah's Witnesses' position in the first flag salute case. Similarly, in his discussion of his work on the Court, he never mentions his own staff, although he refers occasionally to other Justices' clerks.

Taking it on its own terms, several themes emerge in the diary. First, Douglas clearly did not, if he ever did, retreat into the monastery of the Court in his first few Terms. The diary is sprinkled with references to meetings with President Roosevelt, including references to helping him draft a significant speech on the European war, advising him on the 1940 campaign, and, of course, attending the famous poker parties. Douglas also discussed policy and politics with many members of the Roosevelt Administration, such as Harold Ickes. Finally, Douglas was himself the apparently involuntary object of political speculation, with many of his friends promoting him for the vice presidential spot in Roosevelt's 1940 campaign.

A second theme is Douglas's near-worship of Louis D. Brandeis, whose seat on the Court he took, and his sensitivity to Brandeis' opinion on everything from the decisions of the Court to politics. In the diary's very first entry, Douglas describes how he and the President spoke of their shared acceptance of Brandeis' views on *The Curse of Bigness*. During the period leading up to the 1940 Democratic Convention, Douglas

mentions several times Brandeis' disapproval of rumors that Douglas would be asked to run for Vice President, and he states that, at Brandeis' urging, he publicly disavowed any wish to leave the Court and, further, delayed publication of a collection of his works to avoid any appearance of courting the nomination. Brandeis' presence was also felt on the Court as Douglas reports instances in which both Chief Justice Charles Evans Hughes and Justice Felix Frankfurter invoked his name and claimed his support to obtain a majority on a particular opinion. In one of the most significant instances, Douglas states that he joined Justice Frankfurter's opinion in the first flag salute case in large part because Brandeis had "no doubts" that Frankfurter's position was correct.

Finally, although Douglas does not go into detail on any of the cases decided in the first two Terms of the Court, the cases he chooses to mention highlight several themes that marked his jurisprudence. First, throughout these Terms, the Court wrestled with the difficult issue of double taxation. During the Depression, the states sought new revenue by taxing any intangible assets that had even a tenuous connection to the state. This, of course, resulted in several states attempting to tax the same asset, such as the capital stock of a corporation incorporated in one state but doing business in another. Chief Justice Hughes, with other members of the "Old Court," pushed throughout this period for the Court to adopt, on constitutional due process grounds, a rule permitting taxation only in the state in which the intangible assets had a "business situs." The "New Court," the Roosevelt appointees and Justice Harlan Fiske Stone, resisted this manifestation of substantive due process, stating, as Douglas succinctly puts it in his diary, "I certainly have not been able to find anything in the constitution about 'business situs.'" In these cases, as in several others, the Roosevelt Court, two years after "the switch in time that saved nine," solidified its opposition to economic substantive due process and



declared its intention to defer to the legislatures on economic matters.

A second judicial theme emerges in the several bankruptcy cases decided in Douglas' first two Terms, in many of which he wrote the Court's opinion. Douglas, of course, was an expert in bankruptcy law, having studied and taught business reorganization at Columbia and Yale law schools and having supervised a major study for the Securities and Exchange Commission. In his bankruptcy opinions, he often declared it was the duty of the federal courts to see justice done and to prevent the insiders and influential creditors from manipulating the bankruptcy process to their own ends. Several of Douglas's opinions in this area continue to influence bankruptcy practice today.

Third, although still low on his horizon, civil liberties cases began to occupy Douglas's attention. Although Douglas did not write any civil liberties opinions in his first Terms, he was in the majority on all of the significant cases. These included several in which Justice Frank Murphy applied First Amendment principles to strike down laws targeted in whole or in part at union picketing and Jehovah's Witnesses. He was also, however, in the majority on the *Gobitis* case, in which the Court upheld a law requiring all students to salute the flag even when it went against sincerely and strongly held religious convictions. Douglas found this case "a most difficult one to decide," and he later stated that he had "grave doubts" about the Court's decision. Three years later, of course, Douglas joined Stone and the rest of the Roosevelt Court, except Frankfurter, in reversing *Gobitis* in the *Barnette* case.

Finally, Douglas received a lesson in the politics of the Court during his first Terms. Felix Frankfurter figures prominently in the diary. Although Douglas's tone is frequently admiring and friendly, several passages presage their later bitter enmity. For instance, Douglas reports several instances in which Frankfurter manipulated

him or other Justices. However, some of these passages sound suspiciously as if they were written in hindsight, as even Douglas admitted in **The Court Years** that he and other Roosevelt appointees considered Frankfurter their leader in their early Court years.

Frankfurter, however, during these Terms was not Douglas's chief adversary. As described in these diaries, Douglas often waged war with Chief Justice Hughes over the docket of the Court. Hughes believed in running the Court efficiently and wanted only "significant" cases on its docket. Douglas, however, was not willing to let wrongs go by simply because they did not present a significant legal issue and, as he reports in his diary, sometimes succeeded in "taking up" a "fact case" and righting the injustice done by inferior courts.

The picture that emerges of Douglas from these diaries is not significantly different from that in his autobiographies. What is most apparent is his willingness to wage battle both on and off the Court. On the Court, Douglas argued that the Court should right injustices in any case before it, even at the expense of efficiency or abstract legal principle. Off the Court, Douglas remained an active Roosevelt partisan who, although avoiding outright political action, often worked behind the scenes to help his friends and causes. This pattern continued throughout Douglas's career, as he used his position on the Court as a "bully pulpit" to lecture the country on civil liberties while lobbying privately and through his writings for the extralegal causes he held dear, such as the environment. In the period covered by his diary, Douglas was still part of both the Court and the political world. Although his roles in each changed as time went by, he never became wholly one of either.

**Editor's note:** *We have chosen not to correct Justice Douglas's spelling, punctuation or grammar so as to preserve his unique, informal style.*

# The Diary of Wm. O. Douglas

edited by Philip E. Urofsky\*

March 19, 1939 - When I returned to my house about 4 p.m. from a game of golf I ascertained that the White House had been trying to reach me by telephone all afternoon. I telephoned at once and was told that the President was anxious to see me. I arranged to go down at 4:30 p.m. He was alone in his study when I was ushered in. He greeted me in his inimitable manner and after a few gracious words of greeting became quite serious and said: "Bill, I have a new job for you." On an earlier occasion I had told the President that I would like to return to private life in June 1939 when my SEC commission expired; that I felt that would be a good time to leave as my SEC program was well underway; that I doubtless would be offered the deanship of Yale Law School which I thought I should accept etc. The deanship had been tendered me a few weeks prior to March 19<sup>th</sup>. Hence when the President referred to a "new job," I concluded that he was going to shift me to another governmental agency in an effort to keep me in Washington. The agency which I concluded he had in mind was the Federal Communications Commission, since that agency had been poorly administered and needed renovation. While I felt I should return to private life, nevertheless I knew that if the President "turned on his charm" and commanded me to stay awhile longer, I would not be able to resist. I was too devoted to him to withstand that personal plea. So I replied, "Well, Mr. President, I had planned

to leave soon, as you know. But if you insist on drafting me, I will stay, provided it's a real tough job."

"The job I have for you," he said, "is just that. It is one of the toughest jobs in Washington. Furthermore, it is a thankless sort of job with long hours. And it is dreary, confining, and uninteresting. The fact this new job of yours is something like being in jail." I then suspected that he was talking about the vacancy on the Supreme Court. He went on to say, "I want you to succeed Louie Brandeis.<sup>1</sup> I am sending your name to the Senate tomorrow noon."

I was quite overcome — dazed, to be more accurate.<sup>2</sup> That had always been my ambition, as I suppose it is with most lawyers. I thanked the President. And then we talked for an hour, not about the work of the court but about its personalities — past & present. At one point he said, "You know, I think that Louie Brandeis is right on this problem of big business." He was referring to *Other People's Money*<sup>3</sup> & *The Curse of Bigness*.<sup>4</sup> At another point, he referred to the Chief Justice<sup>5</sup> in terms that only one versed in the art of politics would appreciate. He spoke with especial warmth of Felix<sup>6</sup> and Hugo<sup>7</sup>. And he spoke with some admiration of Stone.<sup>8</sup> I told him that in my opinion the C.J. was the craftiest politician on the contemporary scene & I said that in so saying I did not intend to belittle his own (the President's) talents in that line. He laughed heartily and approvingly, I felt.



March 20, 1939 -- Shortly before my name went to the Senate I despatched a letter to Brandeis (who was still in Wash. DC) telling him of the appointment (or rather the nomination) and of the feeling of awe and humility which it created in me — not merely because I was being nominated to the Court but because I was being named to fill his shoes. Shortly after my nomination reached the Senate a note came back from Brandeis saying that my letter brought him the first “news” and that he was “delighted.”

March 26, 1939 -- I saw Brandeis at his apartment and he told me something which gave me as great a thrill as the nomination itself. He said “You were my personal choice for my successor.” He was most gracious and held my hand with great warmth as he said it. I was deeply touched. That, I felt, was the greatest compliment ever paid me. Whether he had communicated that thought to the President, I do not know. I suspect he had done so, indirectly through Felix who was most anxious that I receive the nomination. It also surprised me because I had never known Brandeis well.<sup>9</sup> I had frequently called to pay my respects but our contacts were none-

theless casual. His “Other People’s Money” had been of course a Bible for me for years, as had his “Curse of Bigness,” the philosophy of which was my own.

April 17, 1939. I took the regular oath in the conference room a few minutes before noon, the C.J. administering it. As we filed in from the conference room to the courtroom, I bringing up the rear as the junior I could not help recalling with a smile Stone’s words of greeting when I was nominated. “Welcome to the chain gang.” Shortly after I took the oath in open court & was escorted to my seat, my son, who was seated with my wife, daughter, sister & brother, caused great merriment on the bench by insisting on leaving the courtroom for the very obvious purpose of going to the toilet. He had violently objected to attending the ceremonies because they would cause him to miss gym at his school. My daughter less violently objected because she would miss French at school. I told Felix that I thought each of them showed excellent judgment and revealed a sense of relevancy and importance of events.

In the presence of McReynolds<sup>10</sup> none of the judges smokes. Roberts<sup>11</sup> gave me that bit of



“Welcome to the chain gang” was Justice Harlan Fiske Stone’s ominous greeting to William O. Douglas upon his nomination to the Court. Despite the warning, Douglas beamed for photographers after learning the news.

advice. He said that at his first conference he light [lit] a cigar. In a moment, McReynolds passed him a note saying, "Tobacco smoke is personally objectionable to me." Van de Vanter,<sup>12</sup> so I am told, used to move over once in awhile to a far corner of the conference room and take a puff or two on a pipe — McReynolds or no McReynolds. Apparently tobacco smoke is not the only thing McReynolds dislikes. He seems to dislike all of his colleagues, judging by his crusty manner. He thoroughly disliked Brandeis. Why even this is told which I am certain is true. During conference whenever Brandeis spoke, McReynolds would get up and leave the room and stand outside the door leaving it barely open so that he could tell when Brandeis had finished. Then he would return. He also disliked Clarke<sup>13</sup> whom I never knew. He was a paramount reason for Clarke's resignation.<sup>14</sup> What torture he could not apply by complete disregard of Clarke's presence he made up for by badgering. McReynolds also dislikes thoroughly the Roosevelt administration. As I was talking to him about a mutual friend, George Bates<sup>15</sup> of Harvard, he let loose some cracks about the New Deal, terming its program as nothing but "moonshine." I said to myself "What a great state of mind for a judge!!"

April 22, 1939. Today was the first conference since I became a member of the court. No one is permitted inside except the judges. Messages etc. are passed in and out by means of a page stationed on the outside. It is the job of the junior judge to answer the door. Felix formally handed over the door to me saying, "These things must be done constitutionally." The C.J. certainly handles the conference in a masterful manner. He states the cases which have been argued & those coming up by certiorari & appeal most meticulously & carefully. He sets them up in a very grand Olympian manner. And the way he puts the facts tells you the place he is headed for. He is most skillful and adroit & for the most part fair in his presentation. Yet he is nonetheless crafty and overbearing. *Coleman v. Miller*<sup>16</sup> & *Chandler v. Wise*<sup>17</sup> from Kansas & Ky were discussed & voted upon. The judges were hopelessly split not on the conclusion so much as on the reasons. At the end the C.J. said, "I will take the opinion & resolve all the differences and harmonize the points of view."

I said to Felix "That means we are all to swallow his doctrine. These views cannot be harmonized." At the end of the conference the C.J. told me it was the custom to permit the new justice to select the first case on which he writes an opinion. He told me he thought it would not be best for me to take a case like the *Morgan case*<sup>18</sup> since that dealt with administrative law & I was fresh from the S.E.C. He also stated that the *Newark Fire Ins. case*<sup>19</sup> was also too important. I told him then to give me one of his choice. Accordingly I got *U.S. v. Powers*.<sup>20</sup> The C.J. assigns the opinions. There is quite a lot of feeling in the court against permitting him to have it because he uses it to protect his own pet postulates to hold up his political fences inside the court, etc. It's safe to say that he never will give Hugo anything of importance. That will happen to Hugo only when the C.J. is in the minority & some other judge assigns the case. But Hugo says he doesn't mind; it will give him more chance to write dissents and concurring opinions.

April 29, 1939. At conference the CJ did his best to knock out the Resolution in the gold cases e.g. *Bethlehem Steel Co. v. Zurich* etc.<sup>21</sup> In his pontifical manner he asserted it was "plain" and perfectly "obvious" etc. He got licked and didn't like it. In discussion of the *O'Malley case*,<sup>22</sup> the C.J. seeing the way the wind was blowing said he had to admit that he had always felt a little queer or sensitive in not paying an income tax. The C.J. laid down quite a barrage on *Long v. Stokes*<sup>23</sup> & *Graves v. Elliott*<sup>24</sup> dealing with the right of Alabama & Tennessee & New York & Colorado to tax. He stated that we must be "ever mindful of the great postulates" against double taxation. He was fearful of the consequences of a contrary holding; he emphasized that the court had been gradually working towards the goal of a protective system. Stone aptly said there is nothing in the constitution about it & it was not our job to rewrite the constitution. But the C.J. has his own ideas on protection of "property." That comes first for him; everything else second, unless popular winds blow too hard. It was quite a blow to him to be in the minority here also.

May 13, 1939 -- At conference I announced that my opinion in *US v. Powers*<sup>25</sup> had been cleared



with all except McReynolds. He said he objected because in referring to what Marshall C J said in *The Irresistible*<sup>26</sup> I used the word "dictum." That, he said, was casting aspersions upon a great chief justice. So I got McR's vote merely by substituting "statement" for "dictum." The C.J. recommended deferring adjournment until June 5. McReynolds said "I had planned to leave town May 27<sup>th</sup> and I shall leave then."

May 27, 1939. I fear Reed has been seduced by the C.J.'s tax postulates. In discussion of his draft opinion in the Newark Fire Ins. Co. case, it was apparent that he sees as the function of this court construction of a tax theory based on "business situs" etc. He finds great difficulty in swallowing the Cream of Wheat case.<sup>27</sup> I certainly have not been able to find anything in the constitution about "business situs." Nor do I see that it is up to this court to design an "equitable" tax system. But these "property" boys are cer-

tainly emphatic on it.

May 31, 1939. A conference was called primarily to find out where everyone stood on the C.J.'s draft opinion in the Child Labor cases.<sup>28</sup> As I had predicted, the C.J. tried to "harmonize" the various views by cramming his own down our throats. He was most disagreeable when the brethren would not goose-step for him. He was particularly indignant at me & roared forth with eyes ablaze at me. I stuck to my position. The rest did likewise — more or less. The C.J. lost his head completely — the first time any can recall — and stormed out at the end with "Well, God Bless you, gentlemen!", as if we were the Damned for our independence. It is clear that the C.J. is a sick man.

June 3, 1939: We had our last conference of the term. The C.J. is ill. The siege of flue he had earlier in the spring left him weak and an ulcer



"He was particularly indignant at me & roared forth his eyes ablaze at me. I stuck to my position," wrote Douglas of Justice Stone's behavior when the new Justice would not toe the line on the Child Labor Cases.



is bothering him. McReynolds having left as he threatened to do on May 27<sup>th</sup> Butler<sup>29</sup> presided. He is as able hard-hitting & keen a lawyer as I have ever met. He is a powerful advocate of all vested interests & of laissez-faire. When you cross swords with him you have a worthy opponent. He knows what he wants & how to get it. He has thought through your side from the major premise on and knows its every weakness. In a discussion on a case Stone said to Butler, "There is something in what you say." Butler broke in "I am not interested in your sympathy except it be expressed in a vote." Stone said, "Well, you won't get my vote." Butler replied, "I didn't think I would." I learned from Felix an interesting sidelight on the Morgan case the opinion in which was handed down by Stone on May 15, 1939.<sup>30</sup> When the case was here before, Brandeis wrote the opinion.<sup>31</sup> Then, while Brandeis was still here, the case came back on the question of the disposition of the impounded funds. The C.J. said that of course the funds belonged to the stockyard people & that the court should not even hear the case. Brandeis then stepped in and put up an awful battle & got the case back on that ground. That now explains Butler's indignation at the C.J. at our conference April 22, 1939 when the C.J. voted to reverse. Butler was counting on the C.J.'s vote to affirm in view of his earlier expression on the case. At that April 22, 1939 conference I recall Butler muttering to the C.J. about the latter's former "adumbration." The C.J.'s vote for affirmance would have meant a 4 to 4 decision with the result of affirmance. I really think the C.J. switched in this case merely to be with the liberal vote.

I had started on a concurring opinion in *American Toll Bridge Co. v. Railroad Commission*<sup>32</sup> along the lines of *Marion v. Illinois*.<sup>33</sup> Black was all for it & I thought I might get Frankfurter to go along with me. I had had some talks with him & Black & had started to work. Then Frankfurter came in and went into a long song and dance to the effect that time was too short for me to do a "real full dress job," that I should wait until another term etc. I fell in with his

suggestion somewhat reluctantly & merely voted my concurrence in the result. Later I found out (my law clerk told me) that the C.J. had talked with F.F. & enlisted his support in getting the members of the Court "in line", in reducing the number of dissents, etc. F.F. made no such disclosure to me. From that time I began to question F.F.'s frankness & to suspect the inside job he was doing.

October 7, 1939. The C.J. returned from vacation restored in health & spirits. He looks fine & is his old suave, congenial self. Roberts told me that several years ago the CJ had hired a man to go through all of his personal papers, editing & arranging them so that they would be in order for his literary executor.

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October 18, 1939. The CJ has a "special list" for certioraris. Those which he thinks are not even worthy of discussion in conference are placed by him on the "special list." He circulates the "special list" a day or so before conference. Case v. Los Angeles Lumber Products Co.<sup>34</sup> was on his "special list." I wrote him that I wanted it discussed. So he discussed it & firmly recommended that the petition be denied. Before conference I had planted some seeds

of doubt in the minds of the Brethren. As a result we got 4 votes necessary for a grant. The C.J. seemed quite upset. I later learned that this was the first time in the C.J.'s regime when a case had been removed from his "special list." The case was argued today. From his questions from the bench I judged that the C.J. would go into conference loaded for bear and intent on affirming the judgment below.

October 14, 1939. The C.J. was strong for reversing *Ziffrin v. Reeves*.<sup>35</sup> He spoke long and intently. From him the discussion went to McReynolds. Usually McR has been quiet and sparing with comments. "I agree" or "I think otherwise" have been his customary remarks these days. Although in an earlier period Stone says that McR was more talkative & demonstrative. Today he pitched in on *Ziffrin v. Reeves* &



took the opposite view from the C.J. He spoke for some minutes & was most emphatic — almost sarcastic. The vote was 8 to 1 for affirmance, the C.J. dissenting.

October 21, 1939 The C.J. was bent on affirming the judgment below in Case v. Los Angeles Lumber Products Co. He had McR & Reed with him. Stone assigned the opinion to me. *Nurbo Co. v. Bethlehem Shipbuilding Corp.*<sup>36</sup> came up for discussion today. On the argument of that case F.F. consumed practically all the time of counsel for respondent by asking questions. His questions were so long & complicated that those of us on the bench could hardly follow them. We all felt sorry for the lawyer. It was a most unseemly performance. McR who is obviously anti-Semitic, threw down his books early in the course of FF's questions and left the bench muttering to himself. Hugo whispered to FF "now

that you have driven McR from the bench you have finally justified the President's appointment of you."

Nov. 4, 1939. The opinion in Case v. Los Angeles Lumber Products Co. was cleared today. The CJ tried to get Reed to write a dissent. Reed was terrified but finally declined. So he & the CJ & McR acquiesced. The opinion should have a healthy effect & curb the reorganization racketeers — the holding companies & the investment bankers who want to keep their preserves inviolate and under their control.

Nov. 9, 1939. *Pepper v. Litton*<sup>37</sup> was argued. I was loaded to give counsel for respondent a real raking over for the frauds he had manipulated. But it turned out that he stuttered very badly & I had to leave him alone. As we went out I told the C.J. that sometimes "it pays to stutter." This



The Justices leaving the church behind the casket of their departed colleague, Pierce Butler, in 1939 (from left to right: James C. McReynolds, Owen J. Roberts, Stanley Reed, George Sutherland, Willis Van Devanter, William O. Douglas, Felix Frankfurter, Hugo L. Black, Harlan Fiske Stone, and Charles Evans Hughes). "Butler's death marked the passing of a doughty warrior who knew how to fight for his principles & on what side his principles lay . . . He was a most congenial person of great warmth," wrote Douglas in his diary.

case had been on the C.J.'s "special list." I was responsible for taking it off. He was against it since it involved only a factual question, not an "important principle." I thought otherwise & carried the Court.

Nov. 11, 1939. We have had some stormy conferences over the appointment of the Director for the new Administrative Office. The C.J. had an inexhaustible supply of old Republican war horses for the post. We kept voting them down. Finally he suggested Grenville Clark.<sup>38</sup> He insisted on an immediate vote. It came around to me & I said that I wanted a few days to make some inquiries about him. The C J exploded. He said "You won't know anything more about him a week from now than you know today." I told him I thought I would know much more about him in a few days since my brother had worked in his law firm for 10 years. Later I acquiesced & the job was offered Clark. He declined. Black, Reed,<sup>39</sup> F.F. & I wanted Stuart Guthrie — formerly with SEC & Civil Aeronautics Authority — for the post. The C.J. interviewed him & apparently smelled a New Dealer for he reported that while Guthrie might do for a secondary post he was not the man for the top position. The C J's scent was good. Stuart was a dear friend of mine & of Tommy Corcoran.<sup>40</sup> Both Tommy & I were anxious to have Stuart get the job. But we four Roosevelt appointees finally decided that it would tear the Court apart to force the issue. The C.J. was bent on having his way. And he had it.

Nov. 16, 1939. Butler's death<sup>41</sup> marked the passing of a doughty warrior who knew how to fight for his principles & on what side his principles lay. I never got to know him well. My wife & I called on him & his wife but once. He was a most congenial, pleasant person with great warmth. He & McR were great buddies. McR being by nature the laziest person I ever knew got Butler to write most of the dissents.

Nov. 18, 1939. McR, Stone & Roberts volunteered as the Committee to attend Butler's funeral in St. Paul, Minn. We are equally divided on U.S. v. Stone.<sup>42</sup> The four old men against us four new ones.

Dec. 1, 1939. The Beta Theta Pi fraternity held

a big dinner in New York City, this year being its 100<sup>th</sup> anniversary. It was held in honor of Van Devanter & me — the 7<sup>th</sup> and 8<sup>th</sup> Beta respectively to sit on the Court. Van Devanter had planned to attend. He & I had a long talk about it, he reviewing for me a lot of Beta & Supreme Court history. But at the last minute his Doctor forbade him from going on account of a slight cold. I went up with Van Devanter's son — Winslow — a very charming person, very much like his father. It was a big dinner. I made a short address about the Betas on the Court.

To my surprise Willkie followed me on the program, as the last speaker. So the meeting turned out to be not a Beta occasion but a Willkie<sup>43</sup> for President rally. Willkie is an excellent speaker before a fairly small audience. He put on quite a show. His speech was an attack on the New Deal and on the new Supreme Court. He employed all the tricks of a jury lawyer and was most vitriolic in his attack.<sup>44</sup> I deeply resented it — not that he attacked the Court & the Administration but that I had been induced to go up to New York City on the basis of misrepresentations. If I had spoken last, I could perhaps have got some satisfaction out of it. But as it was I was merely the victim. I voiced my resentment to certain officials of the fraternity. Van Devanter who heard about it expressed his deep chagrin at the whole affair.

On returning to Washington I told some members of the Court about the episode. To my great surprise Stone said he had always thought that Willkie would be a great standard bearer for the Republicans — a wonderful leader of the opposition to the New Deal. And he wondered if the Republicans would ever have sense enough to realize it. I was amazed because I had many, many contacts with Willkie at the S.E.C. I was convinced that he was one of the most unscrupulous men I had ever met, that he was interested only in power for himself & for the vested interests, that he had no principles, and that he was the most dangerous Fascist threat on the scene.

Dec. 8, 1939. Some interesting Labor Board cases have been argued.<sup>45</sup> I am convinced that the C.J. would eagerly swash the Board if he could muster the votes. If he was sure of the votes he would find some way.



Dec. 15, 1939. Kolb v Feuerstein<sup>46</sup> was argued. Hugo & I have been keeping our eyes on these Frazier Lemke Act<sup>47</sup> cases in the lower courts. We are pressing & pressing all the time in Conference to bring the cases up. The C.J. & F.F. are much opposed. They think that we should take only the cases which involve some "great principle." But Hugo & I are persistent. What is happening is tragic. The lower courts who do not like the Frazier Lemke Act are tearing it apart, construing it all the time in favor of the creditors and by technical instructions denying the farmers the relief afforded by Congress. Reactionary judges are nullifying the Act. Whether it is a wise Act I do not know. But it is a law designed for the relief of farmers & should be sustained in that spirit. Hugo & I have been pressing on other types of cases too — cases involving palpable injustices, frauds and the like. Occasionally, tho not as consistently as perhaps we should, we have indicated our dissent from a denial of a petition for certiorari as in the case of Woods v. Indemnity Ins. Co.,<sup>48</sup> decided Nov. 9, 1939 & which involved a crooked reorganization scheme or more accurately a phase of such a scheme. That break with precedent is most annoying to the C.J. But he takes his annoyances with very good grace, except when he is not up to par physically. F.F. has pulled a boner in the opinion of Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.<sup>49</sup> He and his clerk failed to shepardize certain Okla. cases. If they had they would have found more recent ones, not cited in the briefs, which bear on the problem. As a result a new opinion has to be drafted. F.F. is quite embarrassed because he rates himself high as a legal scholar — & quite properly so.

Jan. 5, 1940 The C J is a good loser. He felt very strongly about McGoldrick v. Berwind-White Coal Mining Co.<sup>50</sup> But he collected few votes in Conference. We thought Stone made mince meat of him. The relations between Stone & Black are quite strained, tho not noticeable on the surface. Black was attracted to Stone when he first came on the Court. But Stone was responsible for the Marquis Child's article<sup>51</sup> attacking Black as a lawyer. What motivated Stone, I do not know. I suspect it was not animus but mere indiscretion. Ever since then Black has been suspicious of Stone. Stone reciprocates. There is no cordiality between the

two. It is too bad because Hugo started as a great admirer of Stone's. Hugo told me so. Now he is inclined to rate him as a crafty and devious fellow. I do not think he is either. But basically he is quite conservative, tho very very fair — one of the most judicious on the Court. When you write an opinion it will be well to cite opinions which Stone has written on or near the point. If you don't he will always suggest it. F.F. calls it "Stone's disease." When F.F. suggested to me that I might cite in one of my opinions an earlier one by F.F. I told him "I will gladly do so. But it is interesting to me how Stone's disease is spreading." F.F. who has a keen sense of humor was highly entertained.

Jan. 12, 1940. F.F. & I repair to Stone's house on Friday's after court & review the argued cases preparatory to Conference the next day. Stone used to do the same with Brandeis. Brandeis commended the scheme to me. He, Stone, Cardozo<sup>52</sup> & Roberts did it. Roberts joined FF & me for awhile but dropped out. I think he chafed under the arrangement. He & Stone under the surface have little respect for each other. Why, I do not know. It dates back to an early day in their association on the Court. Stone always refers to Roberts' opinions as "fly-specking" ones. F.F. insists that Stone likes these Friday afternoon session because it puts him in the position of C.J. for our little group. I think Stone would like to be the next C.J.<sup>53</sup> I personally would like to see him get it. He would be excellent.<sup>54</sup> Stone harbors a deep resentment at Hughes. That also goes back a long way. I do not know what is its origin. But it is manifest in a myriad of ways. I think it relates to the early treatment Stone got as a member of the Court. According to Stone, Hughes ran the Court with a high hand when he was made C.J. Stone has told me many times how the Chief would whisk a case around the table, intolerant of opposition etc. Stone says that it was not profitable to express your views at Conference, so he & Cardozo & Brandeis would keep silent & later produce their dissents. It is not that way any more. There are long, frank, give-and-take discussions in Conference. And that is the way it should be. By the Constitution at most the C.J. is entitled only to one vote. F.F. tells the story of Holmes'<sup>55</sup> reaction to Hughes during Hughes' first term on the Court. It appears that Hughes was delayed with work &



When Justice Stone expressed his admiration for Wendell L. Willkie and his hope that he would become the Republican standard-bearer, Douglas privately reacted with alarm. "... I had many, many contacts with Willkie at the S.E.C. I was convinced that he was one of the most unscrupulous men I had ever met, that he was interested only in power for himself & for the vested interests, that he had no principles, and that he was the most dangerous Fascist threat on the scene." Here Willkie testifies before Congress as president of The Commonwealth and Southern Corporation a year and a half before announcing his candidacy for President. The subject of his testimony was the unfairness of price controls to local energy businesses under the Tennessee Valley Authority.

way behind with opinions. Holmes, who was a fast worker apparently finishing his assigned opinions very quickly, went to Hughes & asked him if he could not give him some assistance. Hughes drew himself up & said with great dignity "I thank you but I will not shirk my duty." "As if I had asked him to," said Holmes. I believe it was at that time that Holmes said he would like to introduce Hughes "to Moody's girl."

Jan. 26, 1940 Mildred & I attended a dinner given by Mrs. Loose. McR — an old friend of the family — was the host. It was the first time I had seen him outside of the Court. He was a most gracious host. Near the end of the dinner when the champagne was poured Mrs. Loose asked me about a toast. I said "why not toast the Court?" She said "Splendid" & called across

the table "Mac, we are going to have a toast." Mac raised his glass & said "To whom are we drinking?" She said, raising her glass, "To the Supreme Court of the United States." McR put down his glass promptly saying, "They are drunk enough already" and he refused to drink. I roared with laughter. There is one more thing about old McR you know exactly where he stands on every issue. There is no trimming of his sails. In great contrast to the Chief, he does not know the word "expediency."

Jan. 27, 1940. Murphy's<sup>56</sup> appointment was no surprise to us. I think it was a good appointment. I like Frank. I think he has good instincts, tho he is not learned in the law like F.F. I saw a lot of him when I was at the S.E.C. During the few months he was A.G. & when I was at the S.E.C. we were thrown closely together on two



matters in which I was involved — one McKesson & Robbins,<sup>57</sup> the other Transamerica.<sup>58</sup> On the first one I had had trouble with the Homer Cummings<sup>59</sup> crowd in Justice. They wanted to close the investigation early. I resisted & suspected, tho I did not know, that Homer's crowd (perhaps crafty old Homer himself) was mixed up with Coster (Musica). I knew that Coster had shipped cases of champagne to Homer. When Frank went in as A.G. I reviewed the case with him. He was on the pro bono publico side 100% and was in no way interested in covering up anyone. So he plunged ahead with his investigation & I with mine. I also enlisted him in resisting the pressure of Jesse Jones<sup>60</sup> & Marriner Eccles<sup>61</sup> to "settle" the Gianini Transamerica matter. He stood firm there. So I like Frank — I like him for his stamina, integrity & courage. Some of his friends on the hill tell me he is "whacky." They think he is a lousy administrator & a loose witted fellow, full of indiscretions. The department heads in Justice share that view. They are delighted that he is leaving & express great sympathy for those on the Court who will receive him. They say he is irresponsible & a publicity hound. Those criticisms do not come from just the old Cummings' boys whom Frank side-tracked but his own appointees. I do not share their views.

Feb. 5, 1940. Frank Murphy has been sworn in. F.F. has started his poisonous whispering campaign on Frank's incompetence & stupidity.<sup>62</sup> I hear that Frank did not want the job — in fact kicked like a steer. But the President was under great compulsion to appoint him not alone because he was a Catholic but also because he had to get rid of him as A.G. I know that the President had promised to make Bob Jackson<sup>63</sup> A.G. on July 1, 1939. Bob was chafing under the delay & threatening to leave. He & Frank were at swords points. So in spite of Frank's protestations he was kicked upstairs. After Frank was appointed, he indicated that he would stay on as A.G. after confirmation until he had certain pending matters cleared up. Bob was furious & saw the President and got that plan changed. Bob has a low opinion of Frank, thinks he should be Ambassador to Mexico. Frank is unhappy on the Court already.

Feb. 10, 1940. Stone's antipathy to the Labor Board was evidence in the Conference discussion on the Nat'l Licorice Co. case.<sup>64</sup> On that subject he & the Chief have much in common. I left the Conference prepared to write a long dissent if Hugo didn't.

March 2, 1940. The Conference voted five to four to reverse Dickinson Industrial Site v. Cowan.<sup>65</sup> Reed was assigned the opinion. I wrote and circulated a dissent. Five joined in my dissent, four with Reed. The dissenters then withdrew & I was asked by the Chief to write for the Court. F.F. said that that episode convinced him that the judicial process was "deliberative." I have reduced my dissent in Nat'l Licorice to a few sentences. Stone substantially modified his opinion after I had circulated a rather extended dissenting opinion. Up to the last minute I thought F.F. was with me. He had been free in his suggestions for my dissent. I had discussed it with him at great length and he was in complete agreement. But he refrained from joining Black & me because he said he had made a prior commitment to Stone. How supple the judicial process!

The Thornhill<sup>66</sup> & Carlson<sup>67</sup> cases came up for discussion today in conference. Frank M. as was his privilege, asked the C.J. to assign them to him. Stone said "I hope he has a good law clerk. He'll need one." F.F. insist that F.M.'s law clerk is doing all of F.M.'s work.

March 4, 1940. Arnold<sup>68</sup> argued the Ethyl Gasoline Co. case.<sup>69</sup> F.F. thoroughly dislikes Arnold, a genuine hate that goes back to Yale-Harvard disputes on legal education. Arnold, a dear friend of mine, did put on a bad show. He tried to be funny. But he was not. As a result his performance was undignified & ineffective. Roberts was boiling as he left the bench. He said "To think that this great government would bring such little dignity into the courtroom"! I shared his feeling. Typical was Arnold's statement "Now, I will tell the class all about the Sherman Act." Dean Acheson<sup>70</sup> is a great advocate — suave, dignified, thorough. He makes a deep impression however weak his case, as was this one. Arnold sometimes reaches the real peak of advocacy. His argument in *U.S. v. Stone*<sup>71</sup> was perfectly superb.

March 25, 1940. The long delay in handing down the decision in *Inland Waterways Corp. v. Young*<sup>72</sup> has been due to the fact that Court was divided 4 to 3. When Butler died we decided to wait for the judge, as the C.J. quite properly likes to avoid 4 to 3 decisions. But Murphy was disqualified. F.F. says that Brandeis likes his opinion in the case. I believe he showed it to him in advance in view of the C.J.'s great reliance on the *Pottorff*<sup>73</sup> case in which Brandeis wrote the opinion. When it is useful for his purposes the C.J. certainly does work on our respect for Brandeis. F.F. certainly has enough nerve when it comes to himself. He was itching to write the opinion in *Puerto Rico v. Rubert Hermanos*.<sup>74</sup> He told me so. At Conference when the case was discussed he practically told the C.J. to assign it to him. I do not think any other member of the Court — not even McR — would take that liberty with the Chief's prerogative.

March 29, 1940. We were all much impressed on the argument in *Cantwell v. Connecticut*<sup>75</sup> with McR's sympathy for the appellant. We had thought he would be the other way. I believe Martin Luther had something to do with that reaction of his. He kept asking, "Well, didn't Martin Luther preach that doctrine?" Finally he said, "When Jesus went into Jerusalem, didn't he create quite a rumpus?" "Yes," replied counsel for the state "and the authorities did something about it." That was one of the few times I have seen McR stumped. He is usually very quick in his rejoinders. One day not so long ago he stopped Dilley — one of the men in the clerk's office — and said, "Well, Dilley how are you? Are you still married?" Dilley replied, "Thank you Mr. Justice I am very well and I am still married." "Well," said McR "man's troubles never cease, do they?" and he walked on without cracking a smile. Roberts says that when he came on the Court McR was a regular tyrant



*United States v. Northern Pacific Railway Co.* (1940) was such a complicated case, involving land rights going back to the mid-nineteenth century, that Douglas suspected the Chief Justice of being able to marshal a majority to squash the government's case because no one understood the issues well enough to resist him. Moreover, he wrote in his diary: "[t]he more I go into it the more convinced I am that the road has played ducks & drakes with the government over the years and in spite of its great defaults is about to collect an unconscionable award from the public treasury & public domain." Above is a Northern Pacific car in 1910.



with the new members — mean, sarcastic, and extremely annoying. He spent the first year of Roberts membership on the Court showing Roberts how to punctuate his opinions, criticizing sentences that started "It is", etc. etc. To Roberts it was most annoying. Roberts says that McR was the same with all the other new members, that he made life miserable for sensitive Cardozo.

March 30, 1940. Roberts has the opinion in *U.S. v. Northern Pac. Ry Co.*<sup>76</sup> When the C.J. discussed the case at Conference a few weeks ago he certainly pulled the plug on the government's case & mustered the necessary votes. The case is so involved & complicated that I became convinced that the C.J.'s success was partly due to the lack of understanding by some of the Brethren on the underlying issues. They were not particularly helped by the argument, McClennen<sup>77</sup> doing a very very poor job. I have dropped most of my other work to concentrate on this case. The more I go into it the more convinced I am that the road has played ducks & drakes with the government over the years and in spite of its great defaults is about to collect an unconscionable award from the public treasury & the public domain. At present Hugo & I are the sole champions of the other side. F.F. is all for soft pedaling the issues. I am convinced it is part of his technique of playing up to Roberts. Perhaps he was also influenced by the Chief's plea in Conference that the Court stand united on this case. I am all for unity if no compromise on principles is involved. But I cannot stomach this one.

April 2, 1940. The C.J. has a wonderful sense of humor. On the argument in *Sunshine Anthracite Coal Co.*<sup>78</sup> Jackson kept emphasizing the great procedural red tape of the statute in answer to appellant's arguments on due process. Finally the Chief said, "What you mean is that we have here a case of undue due process." "Exactly" said Jackson.

There is much discussion these days about me running for President or, if Roosevelt runs again, for Vice-President. It is embarrassing because my closest friends are responsible — Jerome Frank,<sup>79</sup> Lowell Mallet,<sup>80</sup> Tom Corcoran, Ben Cohen,<sup>81</sup> Frank Maloney,<sup>82</sup> Dick Smith<sup>83</sup> etc.

I have told them over & over again that I am not a candidate for either office, that I want neither one, that my desire is to stay on the Court for 30 or 40 years, etc. I have begged them to desist. But it keeps up. Arthur Krock<sup>84</sup> is all perturbed. He, pretending to be my friend, is actually fearful that I will be a candidate & that my candidacy would hurt the chances of his man — either Joe Kennedy<sup>85</sup> or Willkie. Krock insists that I make a statement renouncing any such ambitions. I have had talks with Brandeis about it. He & I agree that Krock's course would be the worst one. In my opinion that would be the best possible way of throwing my hat in the ring. The President has never discussed the matter with me and I doubt if he ever will. I think he knows that I have no political ambitions.

Awhile back the President, who thoroly dislikes & distrusts Krock (and for very good reasons) told me a grand story about Krock. Some years ago Krock was visiting Europe & wanted to satisfy a life's ambition to see Venus de Milo. It was arranged & after Krock had gazed on the work of art he turned to a companion & said "Isn't it too bad that she had halitosis." There is talk about Roberts being the Republican standard bearer. Roberts would refuse it. He told me so & I believe him. Stone told me that he hoped I would not be drafted. I told him that I thought there was no danger & that if any attempt were made I would decline. He intimated that in early years he had been approached by Republicans & had declined to entertain the idea. I share Brandeis' feeling that the Court should not be used as a stepping stone to anything. Brandeis thinks it most fortunate that Wilson defeated Hughes, that a victory for Hughes would have meant that the Court was a stepping stone. Brandeis still feels very strongly that it was a grave mistake for Hughes to resign in order to run. Brandeis points to sad chapters in the history of the Court when its members have had political ambitions. He speaks of these ambitions as conflicting interests — powerful ones. I agree. On that basis Brandeis partly explains the *Dred Scott*<sup>86</sup> decision — McLean's<sup>87</sup> ambitions.

Apex Hosiery Co. case<sup>88</sup> has been argued. The C.J. is certainly bent on putting the screws on labor.

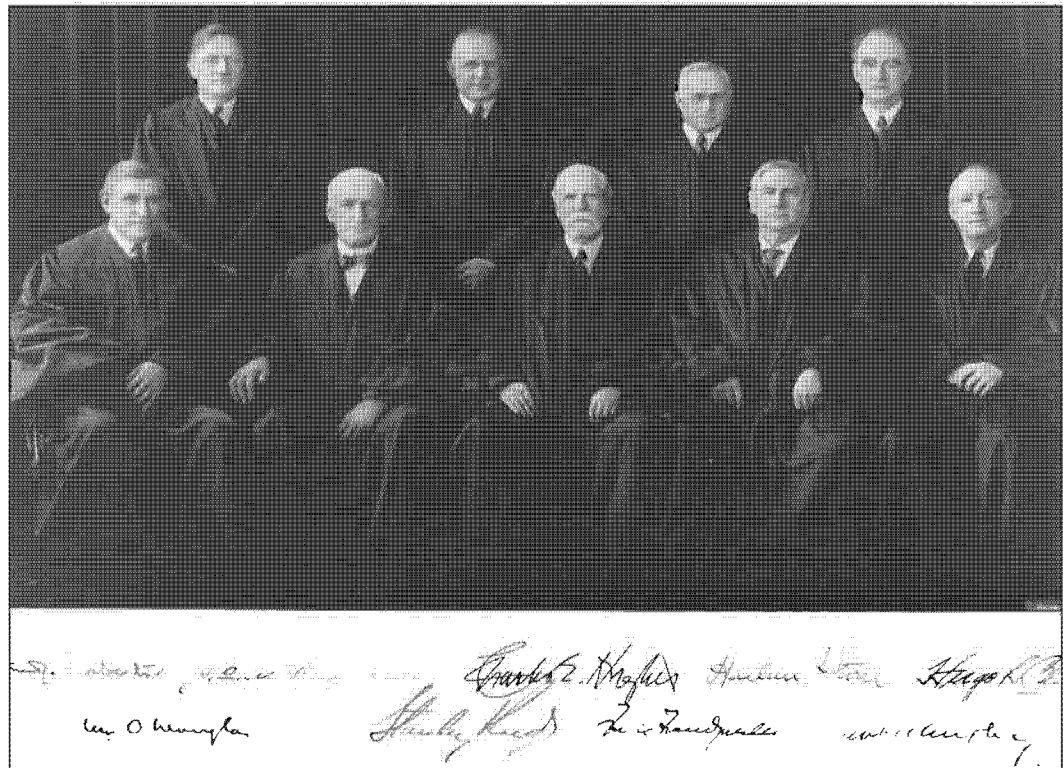
April 8, 1940. We were at the British Embassy for dinner — my wife & I. Lord Lothian<sup>89</sup> is a most charming person. F.F. — a real Anglophile — adores him. I like him but consider him a little dangerous. I think he would temporize with many basic issues. He has a lot to answer for in respect to the appeasement of Hitler. He told me that the art of government was the art of satisfying the people at the least cost to the property interests or words to that effect.

April 11, 1940. We went to Col. Martin's<sup>90</sup> for dinner — army friends of Maj. Dick Hoher whom we knew in New Haven. I had hoped to hear the Army men discuss methods of licking Hitler. To my regret the German Ambassador<sup>91</sup> was there. So we discussed the weather.

April 13, 1940. The Gridiron Dinner — some good shots. One on Frank Murphy was cruel. They had him in a bathing suit dancing on the beach at Miami while deciding cases. Frank M. was present & took it like a good soldier. After being confirmed & sworn in, Frank did go to

Fla. during the first two week recess. He had no work to do & cleared it with the C.J. Immediately the papers took it up<sup>92</sup> — how he was evading duty, playing hookey, how the C.J. was sore at him, etc. It was all false. Ray Tucker<sup>93</sup> had a particularly vicious column. Ray told me he got it from Roberts. Roberts said Ray had talked with him & that Roberts wasn't going to see him again. I concluded that Roberts had been indiscreet & that Tucker had proceeded to fabricate a yarn on what Roberts had said. Murphy is boiling mad at what the papers have been saying. He thinks some one on the Court should make a public statement. I told him to try to forget it — that nothing was deader than yesterday's newspapers. I feel sorry for Frank M. F.F. says that Frank wants to be Sec. of War — would give his eye teeth for the job. I suspect it is true from what Frank has told me.

April 25, 1940 -- At Henry Grady's<sup>94</sup> for a stag dinner. A man by the name of Buell<sup>95</sup> was there. He started promoting Willkie. I took up the debate & we had it hot & heavy. Afterwards I



The members of the Supreme Court in 1940, with Douglas and Frank Murphy as the newest Justices (left to right, top: Douglas, Reed, Frankfurter, Murphy; bottom: Roberts, McReynolds, Hughes, Stone, Black). "Roberts says that when he came on the Court McReynolds was a regular tyrant with the new members — mean, sarcastic, and extremely annoying ... [and] that he made life miserable for sensitive Cardozo," wrote Douglas.



concluded I had been most indiscreet — as Buell was about to become associated with Willkie's drive for the Republican nomination.

May 4, 1940. U.S. v. Socony-Vacuum Oil Co.<sup>96</sup> was cleared today. Roberts feels that the decision is an outrage. He usually speaks his piece & remains quiet — philosophic about the result. In this case he was most exercised, thought a grave injustice was being done. At lunch the C J was telling (after McR left) a most interesting story. He said that McR. was Special Assistant to the Attorney General at the time of the Standard Oil Co. & American Tobacco cases<sup>97</sup> under the Sherman Act. White<sup>98</sup> had written the opinion in the Standard Oil case. It was handed down a few weeks before the opinion in the American Tobacco case, the latter being held up while a dissent was being prepared. A few days after the opinion in the Standard Oil case came down White received a note from McR saying the opinion was quite unsatisfactory & expressing the hope that the one in American Tobacco Co. would be better. According to the Chief, White showed him the note & was very furious — trembling with wrath, according to the Chief, at the effrontery & brass of McR. Well, McR has lost none of those qualities. Roberts tells a story about McR. A few years ago he was in conference with his law clerk when the buzzer for convening of Court rang. McR paid no attention. Finally his law clerk said "Shall I tell the Chief Justice that you will be late?" "No," said McR, "I don't work for the Chief Justice." McR is commonly late for Court. And he leaves the bench when he feels like it & does not return until the next day. He particularly dislikes to hear arguments by the government. This present administration galls him. He said awhile ago about Bob Jackson (one of the very best advocates before the Court) "I never find the arguments of that gentleman helpful."

*"We had had quite a time with the Gobitis case. It has been a most difficult one to decide. I had grave doubts about F.F.'s decision, as did Hugo & Frank M. We decided to go along, tho it was very very close in our minds. I talked it over with Brandeis. He was very clear that F.F. was right — he had no doubts. That influenced me."*

March 11, 1940. Attended another poker party at the White House tonight. These are held half a dozen times or so a year. The President gets a lot of relaxation out of them. Usually the same gang — Pa Watson,<sup>99</sup> Ross Mc Intyre,<sup>100</sup> Steve Early,<sup>101</sup> Bob Jackson or Harold Ickes<sup>102</sup> or Henry Morgenthau<sup>103</sup> & I. I dubbed one game — a mean one with lots of cards wild — Charles the Baptist, after the C.J. The President roared. And another similar one, tho a little dirtier, Mr. Justice McReynolds. These sessions start at dinner & end at 1 A.M. I am usually a loser. This year, especially. Pa Watson is consistently a winner. The President has not been doing so well this season. Stakes are not high. A poker party is rollicking fun when the President is there. No serious word is spoken from 7, when the President mixes the dry martinis, to 1 AM when we finish. Anyone who tries to get the President's ear on business is never invited again.

March 21, 1940. Attended a dinner of the Juristic Society in Phila., gave an informal address. Nice group of young lawyers.

Judge Wm Clark<sup>104</sup> (3d Circuit Court of Appeals) was there — tight as a tick. Made quite a spectacle of himself trying to tell a risque story.

May 8, 1940 -- Attended another poker party at the White House — grand evening.

May 10, 1940 -- Was in New Haven Conn for a Corkey Court dinner. Tried to get Yale interested in financing through scholarships etc. a completion of Brandeis' study of the New Haven road.<sup>105</sup> Several years ago I had promised Brandeis I would bring his old study up to date. When I went on the Court we agreed that I should not attempt it. Accordingly I got Abe Fortas<sup>106</sup> to undertake it. I have been trying to get Abe back to Yale — he wants to go. But Yale does not seem to want him. Partly it is because he is a Jew, partly because he is a New Dealer. The latter is more important this time.



Furthermore the long arm of FF is intruding. One of his boys — Abe Fuller — wants to go to Yale & F.F. is at work on it. Doubtless he will succeed. I have arranged with Gene Rostow<sup>107</sup> of Yale Law to work with Fortas on the Brandeis project. It is essential to have some one near the source materials in New England. Rostow is tops. Yale listens politely but is cool. One important factor is the close relationship of the New Haven management to Yale.

May 27, 1940. S.E.C. v. U.S Realty & Mfg Co<sup>108</sup> case was handed down today. I sat on the case & was not disqualified, having had nothing to do with the matter when I was at the S.E.C. But I discovered later that the C.J. was very anxious to have me withdraw. Stone told me "The Chief would like to have you out of the case." "Why?" I asked. "Because your vote will make it more difficult for him to carry the Court," said Stone. So I spoke to the Chief, telling him that I was not disqualified but stating that perhaps I should not participate. He said he thought that would be wise, since I had been so recently connected with the S.E.C. If the Chief had had his way it would be another Jones decision.<sup>109</sup>

June 1, 1940. We had had quite a time with the Gobitis case.<sup>110</sup> It has been a most difficult one to decide. I had grave doubts about F.F.'s decision, as did Hugo & Frank M. We decided to go along, tho it was very very close in our minds.<sup>111</sup> I talked it over with Brandeis. He was very clear that F.F. was right — he had no doubts. That influenced me. One thing influencing F.F., I suspect, is his early experience as an immigrant.<sup>112</sup> He has told me with what exhilaration he as a lad used to salute the flag in his school in N.Y.C. It was a symbol of a new life to him. Those early experiences had a powerful pull, I believe, in the Gobitis case. The Conference when he discussed it, F.F. was under obvious emotional strain. The case has troubled me no end. I had never discussed the case at home. But the other day my son said, "Daddy, why don't children want to salute the flag?" I think F.F. had the feeling also that a contrary decision, in view of the great Nazi propaganda in this country, would have a powerful, disintegrating effect.

I circulated a long dissent in the No. Pacific case. It created so many doubts in the minds of some members of the Court that they were shaken

in their support of Roberts. So we are having a reargument in the fall. Both Roberts & I felt it best to do that rather than to force a decision now. Accordingly we put it up to the Chief. He was agreeable to that, though opposed to having no action taken until fall. He wanted to keep the docket up to date. Brandeis has told me of his endeavor to get more time on cases, how he often wanted to have a summer to mull over a case, but how the Chief was always insistent that cases argued in a term be decided during that term. The Chief is certainly an efficient chief. But as Brandeis says you sometimes pay a heavy price for that efficiency.

July 1, 1940. Have been spending the last few weeks with the family at Mystic Conn. Leaving today for Ft Worth Texas for the Texas Bar meeting. Tom Corcoran called. He wants me at the White House for dinner & a session with the President July 3<sup>rd</sup>. Efficient Tommy has reserved space in the plane that leaves Wash DC that night so that I will get into Ft Worth July 4<sup>th</sup>. I asked him what it was all about. He said that he had fixed it so that I would be Vice-President on the ticket with the President. He & F.F. had even picked my successor on the Court — who I could not find out. I wanted to know who was going to be there. He said that Ickes, Jackson & Hopkins would be there. I asked him if the President had insisted that I come. He was evasive, so I knew this was Tom's idea of getting me nominated. He said that they could put me over if I would only come. I said that I didn't want the job. "I know" he said, "but you must come down & talk it over. The President will need you to help lick Willkie." I told him I would call him back. I talked it over with Mildred. She was clear that I should not go. I tried to get Tom by telephone but couldn't. So I left word for him at the White House, and I left for Texas.

During the last few weeks in Conn. I have had talks with Dick Smith & Frank Maloney. They want me on the Democratic ticket. They say they have the Democratic delegation from Conn. lined up for me. I told them that I did not want it & that they should not take any steps to promote the idea. I had a long talk with Maloney about the President's campaign strategy. Before I left Washington the President asked me to send him before the Convention any ideas I had. Mildred & I had spent a weekend with him



on the river. This was before the Republican convention. I was convinced that he did not want to run for a third term. So was Missy.<sup>113</sup> She said it was the last thing he would prefer, that he wanted to retire at Hyde Park. That was my clear impression, tho he didn't say so. But it was reflected in a host of little ways. When we got back to the White House after that cruise the President asked me to stay & help him in his Charlottesville address.<sup>114</sup> So I did. He, Harry & I worked on it until midnight. That evening while we were at work Henry Morgenthau telephoned the President. "Yes," said the President, "We have been down on the boat initiating Bill into the Vice-Presidential Club." And then he laughed, as he winked at me. He meant that every one who cruised with him during those months preceding the convention was labelled as prospective Vice-President. That was what the papers said as Jimmy Byrnes<sup>115</sup> returned from a cruise with the President a week or so earlier. But the President never mentioned Vice-Pres. to me.

As I left that evening he told me to send him from time to time such ideas as I might have on the campaign and convention. So after I had had my long talk with Maloney in Conn. I prepared & sent to the President a memo on the campaign as I saw it. I told him that he was the only one who could lick Willkie, that Willkie was a most dangerous character, that he would ape him on foreign policies during the campaign, that he would gut his domestic program if elected, that during the first months of the campaign the President should be busy being President — too busy to campaign. In spite of my belief that the President will not ask me to be his running mate, I am fearful that he might. Were I not on the Court, it would be different but since I am on the Court, I do not want to do it. Bob Allen<sup>116</sup> (Washington Merry Go Round) & Ernest Lindley<sup>117</sup> say I will be drafted. I hope I will not have to face the President on that issue. I asked Frank Maloney why they did not draft Frank Murphy who is more than anxious.

*"In spite of my belief that the President will not ask me to be his running mate, I am fearful that he might. Were I not on the Court, it would be different but since I am on the Court, I do not want to do it. . . I asked Frank Maloney why they did not draft Frank Murphy who is more than anxious."*

July 15, 1940. La Grande, Ore. I have arranged with Jim Donald<sup>118</sup> of Baker to go fishing back in the Cascades. We leave by car today. Not even Mildred will know where we are. We will be beyond the reach of any telephone. We will be gone until the Democratic Convention is over. A man cannot be drafted, I don't believe, without his knowledge. My concern has been increased since coming west. A member of the Oregon delegation called on me saying he had some of his group lined up for me. Saul Haas<sup>119</sup> of Seattle telephoned saying that he had all but three of Washington's delegation lined up for me. I told both of them to get another candidate, that I was not willing.

July 22, 1940. La Grande, Ore. Back from the fishing trip. I had a host of messages from the Convention in Chicago. Glad I was not available. Connecticut & Washington delegates trying to reach me. Bob Hutchins<sup>120</sup> pleading that I intervene with the President to have Bob designated as Vice-President, etc. Wallace<sup>121</sup> will do the President no good. I wonder if the President knows that Wallace is a numerologist. Ickes would have been much better.

James Allen<sup>122</sup> is editing my S.E.C. addresses for Yale Press.<sup>123</sup> To be published in the fall. When I was at the SEC I promised my friend Gene Davidson<sup>124</sup> of Yale Press to write them a book on Government & Business when I returned to Yale. When I told Gene that I could not do it after I had come onto the Court, the substitution was worked out. I have no monetary interest in the book. Jimmie & Gene planned to get the book out in June. Gene had his eye on sales, I guess; though they would be interesting chapters for sale at the time of the campaign. Jimmie took the matter up with Brandeis, apparently asking Brandeis to write a preface. When Brandeis learned of the proposed date for publication, he apparently exploded. He said that if the book were put out in June or at any time before the Convention, my hat would



be definitely in the ring. I guess he gave Jimmie quite a lecture. Jimmie reported to me. I at once told Jimmie to delay the book until fall which he agreed to do. I saw Brandeis & talked the whole matter over with him. I believe the episode had created in Brandeis' mind a slight question as to my candidacy. But I cleared the matter up. In view of Krock's continual pounding<sup>125</sup> & the columnists' activities Brandeis thought it would be a good idea if I stated my views in writing to some friend. I agreed. So I wrote Howard Menely<sup>126</sup> of Dartmouth, who had just written me in such a way as to give one a good opening.<sup>127</sup> I showed the letter to Brandeis. He was pleased.

Oct 7, 1940. Court convened today for a brief session. We adjourned shortly until Oct 14, 1940 so that we could have a series of conferences to pass on the petitions and appeals which had come in during the summer. I am anxious to get back to work after the long vacation. I saw Harold Ickes who said "I suppose you have been working hard all summer." "Work?" I asked. "Why, it did not take me more than two weeks out of four months to do over the petitions and appeals." He laughed & said, "You are at least honest. Most of them try to make me believe that they slaved all summer." Actually, the summer's work is very light. I went over all the cases in *La Monde Ore* & *Gearhart, Ore.* Harold Ickes is much disturbed over the way the Democratic Convention was handled. He was disgusted at Wallace's nomination & makes no bones about it. His feeling about Wallace is colored by his personal dislike for Wallace. Yet on the merits he is right. He prays that Wallace will not have to take over the Presidency. He thinks it would be a calamity, that Wallace would be a pushover for the strong pressure groups from the right. I am inclined to agree with him, tho I do not know Wallace well. The few contacts which I have had with him have not been favorable.

In 1938 when I was at the S.E.C. I had discussed with the President my plan for elimination of margin trading by partners of member firms on the stock exchange. He thought it was a grand idea & asked about margin trading on the commodity exchanges. I told him Wallace had jurisdiction there, not I. So he said, "Let's see what we can get Henry to do about it." So he told his secretary to get Wallace & me over soon

together. A few days later Wallace & I were called over. The President opened the conversation by telling Wallace what I was doing about margin trading on the stock exchanges & asked him why the same thing could not be done on the commodity exchanges. The President expressed his opposition to margin trading. Wallace defended it, said it was essential in commodity exchanges. The President kept asking "Why?" and they proceeded to have it hot & heavy for at least 30 minutes. It was in effect a 30 minutes lecture by the President to his Sec. of Agriculture. I felt embarrassed about being present. I had never seen the President go after a person as he went after Wallace. It was plain as we left that Wallace proposed to do nothing about the wheat, etc. traders, tho he promised to look into it.

All this came back to me as Harold Ickes told me how unreliable and untrustworthy Wallace was. Harold was especially sore because he tried to get clearance from the President to throw his own hat in the ring as Vice-President. But the President would not discuss it with him. That effort was made, as I understand it, after he had arrived at the Convention & was done at the suggestion of his wife Jane who quite properly has high ambitions for Harold. I wish Harold had been nominated as Vice-Pres. He would have been a real power house for the President & would have slugged with Willkie, blow for blow, and if anything happened to the President, Harold would have been a strong pillar for the domestic & foreign policies. Harold is also disturbed about the way in which the old Liberty Leaguers, the Hate Roosevelt crowd has moved back to Washington under the Defense program & has taken control. He wonders if the Pres. has turned to the right & how far he is going. He is fearful of the consequences to the New Deal program. I share his fears. But I told him that so far as the President is concerned I was sure it was merely a political manoeuvre [maneuver] for campaign purposes — an endeavor to show the country that he too could get national unity. I think that is all it is. But it does have dangerous consequences. As this Defense program moves on, there will be in the saddle a regular business-financial oligarchy with tremendous power. And that power will be in hands unfriendly to the interests of the common man.

I personally hope that when the campaign is



over that the President will put Ickes in charge of it.<sup>128</sup> I doubt if he does. I think he looks on Harold pretty much as a "hatchet man"—a good guy for special tough assignments but not a man for effective administration. I disagree. I think Harold is a top flight administrator. When the story of P.W.A.<sup>129</sup> is known, it will prove it. With Harold in charge of Defense, no fat cat, no chiseller, no middleman would get a nickel of gravy. "Honest Harold" would eliminate the graft, he would see to it that the public was served first, he would see to it that planes & guns were produced. And more than that, he would put the government into business producing them. The use of ordinary business standards is inadequate for the task at hand. Harold knows it. That is my deep conviction. The government itself should have control of those basic industries essential to defense. Hugo feels very strongly that way. When talking to Leon Henderson<sup>130</sup> the other day I told him that there was one job in the government I really would like to have & that was counsel to the committee that investigates the Defense Commission. Henderson is trying to do a good job for the people. But the cards are stacked against him. I told him that so far as I could see all he could do was to keep his own record straight. Henderson is not an effective fellow—he is loud & given to boasting. He spreads the word among his so-called friends that he sees no reason why he cannot be the Democratic candidate for President before long. With his eye on the main chance he is given to playing both sides of the street. The President dislikes him. Tommy C. thinks he is a dangerous guy.

The C.J. is hale & hearty after a good vacation. He is in excellent spirits—

October 12, 1940. Hugo & I have had quite a struggle getting certain petitions for certiorari granted. The Chief & F.F. were much opposed to taking Equitable Life Ins. Co. v. Holby, Stuart<sup>131</sup>—just another "fact" case according to them. We got Stone & Murphy with us. So the case is coming up. The case was on the "special list." So was Woods v. City Nat'l Bank & Trust Co.<sup>132</sup> The C.J. kicked like a steer over taking that one. But I persisted & finally got the 4 necessary votes tho it looked like I would fail. I wanted the case taken because it represented a typical situation disclosed by my S.E.C. investi-

gation—practices which were bringing reorganizations into disrepute; practices which the lower courts were largely ignoring. I thought it a mistake to take the Browder case.<sup>133</sup> I felt we would have to affirm. The sentence was outrageous & I saw nothing we could do about that. I thought it was best to have it alone. There were only three who voted to bring up U.S. v. Bethlehem Steel Corp.<sup>134</sup>—F.F., Reed & myself. C.J., McR & Black being against it, & the other three being disqualified. So the C.J. said it would be denied. We however argued that with only 6 voting it would hardly be fair to require 4 votes for a grant since only 4 are necessary when nine vote. The C.J. finally agreed & marked the case for a grant. Hugo was against it, because he thought the wrongs complained of were for Congress not for us. He feels very strongly about it. When Millinery Creators Guild v. F.T.C.<sup>135</sup> was discussed the C.J. said "This case has to do with the copying of women's hats." He paused & then said with a twinkle "I hope they do not copy this year's styles." The Conference roared.

Oct 15, 1940 -- U.S. v. Northern Pac. R. Co. is being reargued. I hear that Justice refused to let McClennen have anything to with the reargument because he was so ineffective.<sup>136</sup> Some at Justice think that F.F. told Biddle how poorly McClennen had done. I do not know if that is true. McClennen is the former partner of Brandeis. Littell<sup>137</sup> asked Brandeis for suggestions as to special counsel & Brandeis recommended McClennen. The latter, though he is an arch conservative, adores Brandeis. Brandeis looks on him somewhat like his son. Tommy C. was aroused when McClennen was appointed special counsel in the case, thought some one should have been appointed who had been loyal to the President. On this reargument, the votes are beginning to change. Roberts will not have a majority for his opinion as circulated in May.

Oct. 19, 1940. The C.J. has the stage all set so that he can rip into the Board in Republic Steel Corp. v. N.L.R.B.<sup>138</sup> Curiously, F.F. is with him in his attack. Hugo & I stand alone. F.F. gets highly excitable when talking about the case. Hugo & I conclude it is best not to try to discuss it with him. The Court seems hopelessly divided

on the No. Pacific Case. Roberts — a lovable, generous man who is tolerant & gracious & kind — is very much upset. He does not see how he can possibly write an opinion that will satisfy everyone. He wonders if he should just hold the opinion waiting until McR resigns & then have another reargument. If he was sure McR would resign this term,<sup>139</sup> he would hold the opinion. Roberts thinks it more important to have the case

actually decided than it is to have it decided his way. Murphy is disqualified. So it will always be an 8 man decision.

\* The views expressed in the introduction and endnotes of the Douglas diary are entirely those of the editor and should not be interpreted as stating the views of the Department of Justice, where he is a trial attorney. Justice Douglas's opinions, of course, are entirely his own.

### Endnotes

<sup>1</sup> William O. Douglas (WOD) was a great admirer of Louis D. Brandeis (1856-1941), whom he and many New Dealers referred to as a modern Isaiah, and he devoted almost an entire chapter of his memoirs to Brandeis' life and philosophy. See William O. Douglas, *Go East, Young Man* (New York: Random House, 1974) 441-449.

<sup>2</sup> WOD's later description of this meeting in *Go East Young Man* is generally consistent with his diary, although FDR's words are slightly different and in a slightly different order. However, instead of receiving the message to come to the White House at home, in his memoirs he recalls being paged on the ninth hole of a golf course and going straight to the White House. Further, although in both versions he claims to have expected to be appointed to the FCC and to being "dazed" at being appointed to the Court, in his memoirs he admits to being aware that several influential friends and supporters, including Arthur Krock, Saul Haas and Frank Murphy, were orchestrating a campaign to have him appointed.

<sup>3</sup> *Other People's Money, and How the Bankers Use It* was first published in *Harper's Weekly* in 1913-14 and republished in book form in 1914. Brandeis' articles grew out of the Pujo Commission's 1912 investigation into the "money trust" but went beyond the money trust to attack monopolies and big business for having stifled competition and crowded out small entrepreneurs, thus concentrating capital and turning the United States into a "country of employees."

<sup>4</sup> *The Curse of Bigness* (New York: Viking Press, 1934) was a collection of articles by Brandeis published in 1934. WOD is referring

to Brandeis' belief that "industrial giantism" threatened democracy and that democratic institutions functioned best in a small-unit economy.

<sup>5</sup> Charles Evans Hughes (1862-1948) had first been appointed to the Court as an Associate Justice by William Howard Taft in 1910, but resigned to run for president in 1916. Herbert Hoover nominated him to be Chief Justice in 1930.

<sup>6</sup> Felix Frankfurter (1882-1965) had been appointed to the Court by Franklin D. Roosevelt a few months before. Although their pre-judicial activities appeared to make them of a like mind, WOD and Frankfurter clashed early and often on the Court, with Frankfurter advocating an almost extreme brand of judicial restraint and WOD its opposite.

<sup>7</sup> Hugo L. Black (1886-1971), nominated by Roosevelt in 1937, would be known for his absolute and literal interpretation of the civil liberties guarantees in the Bill of Rights and for advocating the "incorporation" of most of the Bill of Rights into the guarantee of liberty in the Fourteenth Amendment, thus making it applicable to the states. Throughout their tenure on the Court, WOD and Black were close allies and the bitter enemies of Felix Frankfurter.

<sup>8</sup> Harlan Fiske Stone (1872-1946), initially named to the Court in 1925 by Calvin Coolidge, would be elevated to Chief Justice by Roosevelt in June 1941. Although Stone was not as liberal as the Roosevelt appointees, neither did he subscribe to the strictly conservative views of what he referred to as the Old Court, and he was a voice for civil liberties throughout his tenure on the Bench.



<sup>9</sup>. In *Go East, Young Man*, written twenty-five years later, WOD describes his relationship with Brandeis quite differently, stating that he "came to know Brandeis intimately." In his memoirs, WOD states that Brandeis contacted him when WOD first came to Washington in 1934 and that thereafter he met with Brandeis at his apartment on a weekly basis. He stated, "He drew me to him to find out what was going on. My work interested him above that of anyone in the city, for I dealt in high finance, the subject that had absorbed him in his early days." *Go East* at page 442.

<sup>10</sup>. James C. McReynolds (1862-1946), appointed to the Court in 1914 by Woodrow Wilson, quickly established himself as one of the most conservative Justices of this century.

<sup>11</sup>. Owen J. Roberts (1875-1955), appointed to the Court in 1930 by Herbert Hoover, is best known for having made "the switch in time that save nine," joining Justices Brandeis, Stone, Cardozo, and Chief Justice Hughes to end the Court's rigid opposition to New Deal legislation.

<sup>12</sup>. Willis Van Devanter (1859-1941), appointed to the Court in 1910 by Taft, had served until 1937.

<sup>13</sup>. John H. Clarke (1857-1945), appointed to the Court in 1916 by Wilson, resigned in 1922 to devote his life to the League of Nations.

<sup>14</sup>. Perhaps as a sort of payback, Clarke, during the height of the furor over President Roosevelt's 1937 Court-packing plan, which was aimed in part at McReynolds, delivered a widely publicized radio address defending the plan's constitutionality.

<sup>15</sup>. George E. Bates was a professor and later dean of the Harvard Business School. While a professor at Yale Law School, WOD and Bates developed a joint law-business program, taught by the faculties at both schools, at the end of which the students received both law and business degrees.

<sup>16</sup>. *Coleman v. Miller*, 307 U.S. 433 (1939), argued October 10, 1938, reheard April 17 & 18, 1939, decided June 5, 1939, involved the purported ratification of the Child Labor Amendment by the Kansas state senate in 1937, thirteen years after it initially rejected it. Chief Justice Hughes, for the Court, emphatically held that the Court had jurisdiction because the Kansas Supreme Court had interpreted a federal issue: the viability of a constitutional amendment.

However, the Court declined to rule on the validity of the state legislature's ratification, stating that it was a political issue that would have to be addressed by Congress if a sufficient number of states ever certified their ratification.

<sup>17</sup>. *Chandler v. Wise*, 307 U.S. 474 (1939), argued October 10, 1938, reheard April 18, 1939, decided June 5, 1939, also arose out of reconsideration by a state legislature of the Child Labor Amendment. The Kentucky legislature, after initially rejecting the amendment, later voted to ratify it. After the governor then certified the ratification, several "citizens, taxpayers, and voters" filed suit seeking a judgment that the ratification was invalid due to the lapse of time since the amendment's proposal. Although the Supreme Court initially granted a writ of certiorari, it dismissed the writ on the same day as it handed down the *Coleman* decision. The Court, speaking through Chief Justice Hughes, held that it was up to Congress to decide whether to accept the certification.

<sup>18</sup>. *United States v. Morgan*, 307 U.S. 183 (1939), reheard April 20, 1939; decided May 15, 1939, upheld orders of the Secretary of Agriculture in disposing of certain funds, representing the excess fees charged by stockyards over the rate set by the Secretary of Agriculture, that had been held in escrow pending resolution of the stockyards' challenge to the rate.

<sup>19</sup>. *Newark Fire Insurance Co. v. State Board of Tax Appeals*, 307 U.S. 313 (1939), argued April 18 & 19, 1939, decided May 29, 1939. In this Term, the Court repeatedly dealt with questions involving taxation and intangible property. In this case, New Jersey asserted the right to tax the entire capital stock of insurance corporations incorporated in New Jersey but whose general offices, records, and officers were located in New York City. The Court split evenly, thus affirming the New Jersey courts that had upheld the tax.

<sup>20</sup>. *United States v. Powers*, 307 U.S. 214 (1939), argued April 21, 1939, decided May 15, 1939, involved a prosecution under the Connolly (Hot Oil) Act which regulated shipments of contraband oil from the Texas oil fields. First enacted in 1935, the Act was initially supposed to expire on June 16, 1937. Two days before the Act was to expire, however, Congress extended the expiration date until June 30, 1939. The defendants here were indicted after June 16, 1937 for acts



undertaken before June 16. They argued that the original act expired before they were indicted and that, in effect, Congress had passed a new temporary act for the period from the old expiration date to the new. In WOD's first opinion for the Court, the Court unanimously rejected this argument, holding that the original act remained in full force and effect from its inception through its eventual termination upon a date of Congress's choosing.

<sup>21</sup> The "Gold Cases," argued on April 26 & 27, 1939, and decided on May 22, 1939, were the last of several cases arising from the United States' decision in 1933 to go off the Gold Standard. *Guaranty Trust Co. of N.Y. v. Henwood*, 307 U.S. 247 (1939) (combined with *Chemical Bank & Trust Co. v. Henwood*) involved domestic bondholders and *Bethlehem Steel Co. v. Zurich General Accident & Liability Insurance Co.*, 307 U.S. 265 (1939) (combined with *Bethlehem Steel Co. v. Anglo-Continental Treuhand, AG*) involved foreign bondholders. The Court, per Justice Black, held that Congress acted within its power to regulate currency by declaring clauses that permitted creditors to demand payment in gold or foreign currencies to be against public policy.

<sup>22</sup> *O'Malley v. Woodrough*, 307 U.S. 277 (1939), argued April 28, 1939, decided May 22, 1939. In an opinion by Justice Frankfurter, the Court upheld legislation taxing the salaries of federal judges who took office after the date of enactment of a new federal tax statute. In *Evans v. Gore*, 253 U.S. 245 (1920), the Court had struck down similar legislation applying to all judges, holding that Article III, § 1 prohibited Congress from diminishing, in any way, the salaries of federal judges during their term of office. In *Go East*, at 466, Douglas noted that this case, decided in his first Term on the Court, had serious consequences for his future, as the taxes he had to pay, together with the alimony from several failed marriages, forced him to write and travel to earn additional income.

<sup>23</sup> *Long v. Stokes*, argued April 17, 1939, was decided *sub. nom. Curry v. McCanless*, 307 U.S. 357 (1939), May 29, 1939. The case involved the ability of both Tennessee and Alabama to impose a death tax on intangible property held by a trustee in Alabama but transferred by the will of a domiciliary of Tennessee. Justice Stone wrote the majority opinion, in which WOD

joined, holding that the Fourteenth Amendment's due process guarantee did not prevent both states from taxing intangible property.

<sup>24</sup> *Graves v. Elliott*, 307 U.S. 383 (1939), rearr-gued April 28, 1939, decided May 29, 1939. *Graves* was a companion piece to *Curry v. McCanless*. Whereas in *Curry*, the decedent transferred the intangible property by will, here the decedent died without revoking the terms of a revocable trust. Justice Stone, for the majority, agreed with the State of New York that the power to revoke the trust was a potential source of wealth to the decedent and its relinquishment upon her death was an appropriate subject of taxation.

<sup>25</sup> See footnote 20.

<sup>26</sup> *The Irresistible*, 20 U.S. (7 Wheat.) 551 (1822). The petitioners in *Powers* had argued that they could not be prosecuted after the original expiration date of the Connolly (Hot Oil) Act for acts committed during its original term and cited *The Irresistible* for the proposition that "an offense against a temporary act cannot be punished after the expiration of the act" unless the act provided for such punishment. As the Court held that the original Act remained in full force and effect through the extended termination date, the Court did not have to determine if the Connolly [Hot Oil] Act was in fact a temporary act.

<sup>27</sup> In *Cream of Wheat Co. v. Grand Forks*, 253 U.S. 325 (1920), the Court, per Justice Brandeis, had held that a state had jurisdiction to tax the intangible assets of any corporation incorporated under its laws regardless of whether that corporation did any business or had any offices within the state.

<sup>28</sup> See footnotes 16 and 17. Chief Justice Hughes did deliver the opinions of the Court in the Child Labor Amendment cases. However, as Justices Black, Roberts, Frankfurter, and Douglas each concurred and Justices Butler and McReynolds dissented, his opinion was joined in full only by Justices Stone and Reed.

<sup>29</sup> Pierce Butler (1866-1939) had been appointed to the Court in 1922 by Warren G. Harding after a career in private practice. On the Court, he was one of the conservative "Four Horsemen."

<sup>30</sup> See footnote 18.

<sup>31</sup> Justice Brandeis did not write a published opinion in any of the *Morgan* decisions. The first two *Morgan* opinions were written by Chief Justice Hughes with Justice Black dissenting and



Justices Cardozo and Reed not participating.

<sup>32</sup> *American Toll Bridge Co. v. Railroad Commission of California*, 307 U.S. 486 (1939), argued on April 21, 1939, decided on June 5, 1939. This case involved an order by the California railroad commission reducing the tolls over a privately-built bridge. The franchise owner claimed that the commission's order violated its contract rights in violation of the Contract Clause, Art. I, § 10, that its procedure violated the due process clause of the Fourteenth Amendment, and that the rates set by the commission were confiscatory. Justice Butler, for six Justices, rejected all three arguments, finding no violation of the franchisee's contract or due process rights.

<sup>33</sup> This is probably an error on WOD's part, because the only Supreme Court case with this title, *Marion & Eastern RR Co. v. Illinois Central RR Co.*, 276 U.S. 626 (1928), involved a denial of certiorari with no comments by the Court or any of its members.

<sup>34</sup> *Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106 (1939), argued October 18, 1939, decided November 6, 1939, was a bankruptcy case in which a small minority of bondholders objected to a reorganization plan that, despite the equitable insolvency of the debtor, provided for the shareholders to retain a twenty-three percent share in the reorganized company. The district court approved the plan, stating that the shareholders were contributing various intangible benefits to the company, including waiver of certain rights and their continued management. WOD, for a unanimous Court (with the exception of Justice Butler who did not participate), reversed, stating that the Bankruptcy Code's requirement that a reorganization plan be "just and equitable" precluded granting the shareholders any rights in derogation of the bondholders' rights without the latter's consent.

<sup>35</sup> *Ziffirin, Inc. v. Reeves*, 308 U.S. 132 (1939), argued October 12, 1939, decided November 13, 1939. In this case, Justice McReynolds, for a unanimous Court (Justice Butler not participating), upheld Kentucky's strict regulation of common carriers transporting whiskey against a claim that the regulation violated the due process, equal protection, and commerce clauses.

<sup>36</sup> *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165 (1939), argued on October 17 & 18, 1939, decided November 22, 1939, involved

federal court jurisdiction over corporations in diversity of citizenship cases. Justice Frankfurter, for a six-Justice majority, held that the reality of modern business practices mandates that a corporation be subject to suit in the federal court sitting in any state in which it did business.

<sup>37</sup> *Pepper v. Litton*, 308 U.S. 295 (1939), argued November 9 & 10, 1939, decided December 4, 1939, involved a corporate insider's attempt to frustrate the legitimate claims of a creditor by causing the corporation to confess a judgment in his favor and then taking the corporation into bankruptcy. For a unanimous Court, WOD, as he had done a month earlier in *Case v. Los Angeles Lumber Products*, vigorously asserted the federal court's responsibility to do equity in bankruptcy cases. In his opinion, he described the fraudulent scheme in detail and, in an opinion which continues to be cited today, held that the bankruptcy court could subordinate the claims of insiders who breach their fiduciary duties and manipulate the affairs of the corporation to frustrate a corporation's creditors.

<sup>38</sup> Grenville Clark (1882-1967) was a partner in Root Clark & Bird in 1939 and chairman of the American Bar Association's committee on the Bill of Rights.

<sup>39</sup> Stanley Forman Reed (1884-1980) had been appointed to the Court in 1938 by President Roosevelt. On the Court, he was a quintessential New Dealer, almost always deferring to the legislature's judgment in economic matters.

<sup>40</sup> Thomas Gardiner Corcoran (1900-1981) was one of President Roosevelt's intimate advisors. He was closely involved in drafting the Securities Act of 1933, the Securities Exchange Act of 1934, and the Public Utilities Act of 1935, all of which put him in close contact with WOD who was a member and later chairman of the Securities and Exchange Commission before being appointed to the Court.

<sup>41</sup> Justice Butler died on November 16, 1939.

<sup>42</sup> In *United States v. Stone*, 308 U.S. 519 (1939), decided on November 22, 1939, the lower court's decision was affirmed by an equally divided Court. This case grew out of the criminal anti-trust prosecution of Standard Oil Company of Indiana and other oil companies. Following a jury trial, the trial court entered judgments notwithstanding the verdict, acquitting Standard Oil and dismissing it from the case. In *Ex parte United States*, 101 F.2d 870 (7th Cir. 1939), the



Seventh Circuit Court of Appeals denied the government's petition for a writ of mandamus to require the trial court to reinstate the jury verdict.

<sup>43</sup> In December 1939, Wendell Lewis Willkie (1892-1944), soon to be the Republican nominee in the presidential election of 1940, had not yet declared himself a candidate for president, and he did not do so until May 1940. After his defeat by Roosevelt, Willkie worked to build support for aid to Britain and supported the Lend Lease Act. He later became a vocal advocate of internationalism and civil liberties.

<sup>44</sup> As WOD later described Willkie's speech, "When [Willkie's] turn came he cut me to ribbons. He used me as an example of Roosevelt's ruination of the Court. It was a campaign speech, as Willkie was then running for President, and I happened to be the vehicle he used to launch an attack on FDR. He ended by saying that perhaps in twenty years I would have learned enough to be a good Justice." See, William O. Douglas, **The Court Years** (New York: Random House, 1980) 11-12.

<sup>45</sup> On December 7, 8, and 11, 1939, three important labor cases were argued: *American Federation of Labor v. National Labor Relations Board*, 308 U.S. 401 (1940); *National Labor Relations Board v. International Brotherhood of Electrical Workers*, 308 U.S. 413 (1940), and *National Labor Relations Board v. Falk Corp.*, 308 U.S. 453 (1940). All three cases involved judicial review of National Labor Relations Board decisions and turned upon the structure of the National Labor Relations Act. The Act specifically authorized judicial review only in the section governing the Board's authority to prohibit unfair labor practices, and the section governing the Board's authority to order elections and to certify unions as bargaining units did not expressly authorize judicial review of those orders. Accordingly, in the *A.F.L.* and the *Electrical Workers* cases, the Court, per Justice Stone, held that the federal courts had no jurisdiction to review the Board's certification of a union or its direction for an election until the issue was presented to it in the context of an appeal from an unfair labor practice order. In the *Falk Corp.* case, the Court, per Justice Black, further held that the federal courts had no authority to review the conditions of an election set by the Board.

<sup>46</sup> *Kalb v. Feuerstein*, 308 U.S. 433 (1940),

argued December 15, 1939, decided January 2, 1940, involved the Frazier-Lemke Act, a bankruptcy act intended to provide special protection to farmers. The Court, per Justice Black, held that the Frazier-Lemke Act automatically stayed all state court proceedings involving a debtor who filed for extension of time under the Act and that, therefore, a state court's order of forfeiture was void *ab initio* and could be attacked collaterally in the federal bankruptcy proceedings.

<sup>47</sup> Bankruptcy Act § 75, 11 U.S.C. § 203. The Frazier-Lemke Act, originally passed in 1933 and amended in 1935, was intended, in Justice Black's words, to be "an exclusive and easily accessible statutory means for rehabilitating distressed farmers who, as victims of a general economic depression, were without means to engage in formal court litigation." It permitted the farmer to consolidate all proceedings concerning his debts into a single proceeding in federal court where, in simplified proceedings, he could seek to extend the payment of his debts.

<sup>48</sup> *Woods v. Indemnity Ins. Co. of North America, Inc.*, 308 U.S. 557, 635 (1939), 308 U.S. 639 (1940). The Court denied the petition for a writ of certiorari on October 9, 1939, the motion for rehearing on November 6, 1939, and the motion for leave to file second petition for rehearing on January 2, 1940. In this case, the district court had disallowed a claim filed by a creditor who had purchased a receiver's certificate that had been authorized in prior state court proceedings. The Seventh Circuit Court of Appeals reversed, holding that such certificates, which were lawfully created by a state court and for which the creditor paid full value, were not subject to collateral attack in federal bankruptcy court. It also affirmed the district court's dismissal of the trustee's claim that the certificate was part of a conspiracy involving the creditor and an insider to defraud other creditors. See *In re Granada Apts.*, 104 F.2d 528 (7th Cir. 1939). WOD and Justice Black, without explanation, had dissented from the denial of certiorari. However, given WOD's repeated assertion of the expansive power of a district court in bankruptcy proceedings to do equity, he may have objected to the lower court's general prohibition of collateral attacks on state court receiver certificates.

<sup>49</sup> *Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.*, 309 U.S. 4 (1940), decided Decem-



ber 4, 1939, withdrawn and replaced January 15, 1940. The issue in this rate case initially concerned the ability of two natural gas utilities to attack collaterally in federal court an Oklahoma Corporation Commission order that had been approved by the Oklahoma Supreme Court. At the time of the Oklahoma court's review, it considered its role in such review to be "legislative" and, as such, there was no appeal to the U.S. Supreme Court from its decision. The Oklahoma Supreme Court later held in a different case that its role was actually "judicial" (which would permit an appeal), and Justice Frankfurter relied on that decision to hold that *res judicata* prevented the utilities from relitigating the issue in federal court. Chief Justice Hughes, joined by Justices McReynolds and Roberts, dissented on this point, stating that it defied reason to hold that the utilities were precluded by *res judicata* from obtaining collateral review when, at the time the Oklahoma Supreme Court ruled on their claims, they had no recourse to the Supreme Court of the United States. Doubtless to Justice Frankfurter's chagrin, the utilities in their motion for rehearing cited an Oklahoma Supreme Court decision stating that its 1935 decision that rate cases involved judicial review operated prospectively only. Thus, on January 15, 1940, the Court, while denying the motion for rehearing, withdrew its original opinion and substituted a new opinion in which it acknowledged that the *res judicata* argument was invalid due to the Oklahoma Supreme Court's decision. Instead, the Court held that the relief sought by the utilities — an injunction against the state court ordering a rebate to the utilities' customer from its supersedeas appeal bond — was forbidden by the Anti-Injunction Act, section 265 of the Judicial Code.

<sup>50</sup> *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940), argued January 2, 1940, decided January 29, 1940, involved the New York City sales tax, as applied to the sale of Pennsylvania coal in New York City. Justice Stone, speaking for a 6-3 majority, reversed the New York courts which had held that the sales tax was a regulation of interstate commerce in violation of the Commerce Clause. The Court held that, in the absence of an intent to discriminate against interstate commerce, the tax did not fall afoul of the Commerce Clause merely because it affected goods

that traveled in interstate commerce.

<sup>51</sup> Marquis William Childs (1903-1990) was a reporter and columnist for the *St. Louis Post-Dispatch*. He and Justice Stone often took walks together during which Stone discussed his opinions of his fellow Justices and his concern that Roosevelt's future appointments would continue to emphasize politics over judicial craftsmanship. On January 22, 1938, Childs had written an article (later published in an expanded version in the May 1938 issue of *Harper's*) summarizing Stone's fears that Black, at the time a new Justice, was not able to craft opinions quickly enough to keep up with the Court's workload and reporting that Black's "lack of legal knowledge and experience" and "deficiencies in background and training" had led him "into blunders which have shocked his colleagues." The article caused an enormous furor and sparked wide speculation as to the identity of Childs' "informed source."

<sup>52</sup> Benjamin N. Cardozo (1870-1938) had been nominated to the Court in 1932 by Hoover after achieving national recognition as Chief Judge of the New York Court of Appeals.

<sup>53</sup> Stone was in fact appointed Chief Justice by President Roosevelt following Charles Evans Hughes' retirement from the Court in 1941.

<sup>54</sup> On June 22, 1941, when Stone was elevated, WOD wrote to Hugo Black, stating that he believed that Felix Frankfurter had engineered the appointment and stating, "You will recall that I expressed my fear that Felix would make that move. I am sorry that it did not go to you. I thought you deserved it. And I knew it would strengthen the Court greatly if you were the Chief. The bar — being a conservative outfit — hails the Stone appointment. But unless the old boy changes, it will not be a particularly happy or congenial atmosphere in which to work, at least as far as I am concerned."

<sup>55</sup> Oliver Wendell Holmes, Jr. (1841-1935), appointed to the Court in 1902 by Theodore Roosevelt, served until 1932.

<sup>56</sup> Frank Murphy (1890-1949), appointed to the Court in 1940 by Roosevelt, was perhaps one of the most active Justices ever to sit on the Court and throughout his tenure was a fervent voice, often in concurrence or dissent, for civil liberties.

<sup>57</sup> McKesson & Roberts was a large publicly-held pharmaceutical and liquor company whose



president was Frank Donald Coster. In December 1938, reports surfaced that the company had falsified financial statements and was insolvent. Both federal and state investigations ensued, and the company quickly sought protection and reorganization in federal court. Within weeks, it became apparent that some of the company's subsidiaries were no more than shells, that the company had forged favorable Dun & Bradstreet reports, and that the company had seriously misled its independent auditors. In addition, the papers were full of stories that the company was involved in alcohol and arms smuggling. As the investigation progressed, the investigators learned that Coster, the company's president, was in fact Phillip Musica, a convicted felon. Coster (Musica) committed suicide even as federal investigators arrived to arrest him. During this period, WOD was chairman of the SEC which held hearings into the company's audit and the accuracy of its public filings.

<sup>58</sup> Also in 1938 and 1939, the SEC began investigating whether Transamerica, a bank holding company, had made false statements in its registration filings. Further, the SEC charged that Giannini, Transamerica's president, had profited by insider information. Giannini fought the SEC investigation by filing suits to enjoin it from holding a hearing and challenging its use of bank examiner reports, and the SEC responded by seeking contempt citations when the company failed to comply with its subpoenas.

<sup>59</sup> Homer Stille Cummings (1870-1956) served as Attorney General from 1933 until January 1939.

<sup>60</sup> Jesse Holman Jones (1874-1956), an important banker, newspaper publisher, and real estate developer in Houston, Texas, held several important positions during the Roosevelt administration, most notably as a director and chairman of the Reconstruction Finance Corporation. Jones believed that the SEC should be part of the RFC, and he and WOD often engaged in turf battles over their respective agencies' jurisdiction to regulate securities and business practices.

<sup>61</sup> Marriner Stoddard Eccles (1890-1977) was chairman of the Board of Governors of the Federal Reserve System from 1936 to 1948 and served on the board until 1951.

<sup>62</sup> By most accounts, Frankfurter first wooed and only later disparaged Murphy, with their rela-

tionship beginning to deteriorate in the October 1941 Term and worsening thereafter. In his early Terms on the Court, Frankfurter expected that he would be the natural leader of the Roosevelt appointees. As it turned out, his adherence to an extreme form of judicial restraint, as well as his personal manner, frustrated this ambition. Nevertheless, it was not until several years later that he began to refer to Black, Douglas, and Murphy as the "Axis" for their fairly consistent voting pattern in favor of expansive judicial review, especially in civil liberties issue.

<sup>63</sup> Robert H. Jackson (1892-1954) joined the Roosevelt Administration in 1933 as general counsel of the Bureau of Internal Revenue and moved to the Justice Department in 1936 as Assistant Attorney General and later Solicitor General. He did succeed Murphy as Attorney General in 1940 but served only until the following year when President Roosevelt appointed him to the Court. Although the author of several influential opinions on civil liberties, federalism, and the separation of powers, he is best remembered for having taken a leave of absence from the Court to serve as chief prosecutor at the Nuremberg War Crimes Trials following World War II.

<sup>64</sup> *National Licorice Co. v. National Labor Relations Board*, 309 U.S. 350 (1940), argued February 7, 1940, decided March 4, 1940. A majority of the company's employees had signed a petition designating a union local as their bargaining agent. The company, however, refused to bargain and established an employee's committee with whom it negotiated a contract that contained several anti-union clauses, and into which each employee was required to enter individually. The Board found that the company had engaged in unfair labor practices, enjoined enforcement of the contracts, and ordered the company to bargain with the union. On appeal, the Court, per Justice Stone, held that the Board had the power to issue an order concerning the contracts even though the employees who had signed the contract were not themselves parties to the Board's proceedings. WOD, joined by Justice Black, dissented in part, arguing that the Court did not need to reach the issue of whether employees were indispensable parties in actions in which the Board did not undertake to nullify their rights.

<sup>65</sup> *Dickinson Industrial Site, Inc. v. Cowan*, 309



U.S. 382 (1940), argued February 6, 1940, decided March 11, 1940. In 1938, Congress passed the Chandler Act which substantially revised the existing Bankruptcy Act, simplifying the appeals process and permitting an appeal of right from any bankruptcy order involving \$500 or more. In a separate section, the Act provided for an appeal from orders allowing fees to fiduciaries such as committee members, and the question in *Dickinson Industrial Site* concerned whether the Chandler Act changed existing law, which made appeals from these allowances discretionary. For a unanimous Court, WOD held that Congress, by providing for review of fee orders separately from appeals from other orders, had intended to continue the prior practice that appeals from such orders were discretionary. WOD was particularly concerned that permitting an automatic appeal from such orders would "encourage an unseemly parade to the appellate courts and add to the time and expense of administration."

<sup>66</sup> *Thornhill v. Alabama*, 310 U.S. 88 (1940), argued February 29, 1940, decided April 22, 1940. Thornhill was convicted of unlawful picketing during a strike. In eloquent language, Justice Murphy proclaimed the importance of free speech in a democratic society: "Abridgement of freedom of speech and of the press . . . impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government." Although recognizing the right of the employer to carry on his business and of the state to protect the community against the violence that often accompanied strikes and picketing, Justice Murphy stated that "the dissemination of information concerning the facts of a labor dispute" were protected by the First Amendment and that the statute, which covered "nearly every practicable, effective means" of doing so, was overbroad and unconstitutional on its face. Justice McReynolds dissented.

<sup>67</sup> *Carlson v. California*, 310 U.S. 106 (1940), argued February 29 and March 1, 1940, decided April 22, 1940. Like *Thornhill*, this case involved a municipal ordinance prohibiting picketing in the vicinity of a labor dispute. Justice Murphy, for the Court, again struck down the ordinance, stating that the ordinance singled out speech concerning labor disputes and that its "sweeping and inexact terms . . . disclose the

threat to freedom of speech inherent in its existence." Justice McReynolds dissented.

<sup>68</sup> Thurman Wesley Arnold (1891-1969) was one of many Roosevelt men "who came to Washington to do good and stayed to do well." A professor of law at Yale Law School where he had acted as a consultant to many New Deal agencies, in 1938 he was appointed Assistant Attorney General for the Antitrust Division, which post he held until 1943. After a short period as a federal circuit judge for the U.S. Court of Appeals for the District of Columbia, he returned to private practice and cofounded the firm of Arnold, Fortas & Porter.

<sup>69</sup> *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436 (1940), argued March 1 and 4, 1940, decided March 25, 1940. Ethyl Gasoline Corp. developed, patented, and sold the lead additive that was used to increase the octane of motor fuels until the 1970s. In this case, the Court affirmed an injunction against the company's enforcement of licenses that, among other things, required refiners to sell leaded gasoline only to licensed jobbers. The Court, per Justice Stone, found that the licenses were intended to control prices and to reduce competition.

<sup>70</sup> Dean Acheson (1893-1971) represented the appellants in the *Ethyl Gasoline* case. Acheson, a former law clerk to Justice Brandeis, briefly served as Undersecretary of the Treasury in 1933 but returned to private practice until 1941 when he was appointed Assistant Secretary of State. He remained at the State Department until 1953, serving as Secretary of State under President Harry S. Truman.

<sup>71</sup> See note 42.

<sup>72</sup> *Inland Waterways Corp. v. Young*, 309 U.S. 517 (1940), argued October 11, 1939, decided March 25, 1940, involved the power of national banks to pledge their assets as security for deposits of various entities associated with or created by the federal government, here the Inland Waterways Corporation, the U.S. Shipping Board Merchant Fleet Corporation, and the Panama Canal Zone. In previous decisions, including three written by Justice Brandeis, the Court had held that national banks could not pledge their assets as security for private, state, and municipal deposits unless expressly authorized by the National Banking Act. In this case, however, Justice Frankfurter, while bowing to Justice Brandeis' opinions and expertise, held



that the "silence of the Act" reflected Congress's approval of the long-existing practice of the Secretary of the Treasury in exacting security for federal government deposits and that the form in which the federal government appeared, *e.g.*, by special purpose corporations, was irrelevant. Justice Roberts, joined by Chief Justice Hughes and Justice McReynolds, dissented, relying on the Court's precedent to hold that national banks could not pledge assets to government agencies and corporations not explicitly authorized to exact security. Justices Reed and Murphy did not participate.

<sup>73</sup> *Texas & Pacific Railway Co. v. Pottorff*, 291 U.S. 245 (1934). In *Pottorff*, the Court, per Justice Brandeis, held that a national bank could not pledge its assets as security for private deposits in the absence of explicit authorization in the National Banking Act.

<sup>74</sup> *Puerto Rico v. Rubert Hermanos, Inc.*, 309 U.S. 543 (1940), argued March 7 and 8, 1940, decided March 25, 1940, involved the authority of the Puerto Rican legislature to enact penal laws to enforce federal law. The Court, per Justice Frankfurter, held that the legislature was entitled to do anything that Congress had not expressly forbidden, including enforcing Congressional mandates.

<sup>75</sup> *Cantwell v. Connecticut*, 310 U.S. 296 (1940), argued March 29, 1940, decided on May 20, 1940. In this case involving Jehovah's Witnesses, the Court, speaking through Justice Roberts, unanimously struck down a state statute prohibiting soliciting for contributions for religious or charitable purposes without a license. Although recognizing the state's right to regulate the time, place, and manner of protected religious speech and action, the Court found that the statute, which gave the licensing official discretion to issue a license or not, was a "forbidden burden upon the exercise of liberty protected by the Constitution."

<sup>76</sup> *United States v. Northern Pacific Railway Co.*, 311 U.S. 317 (1940), was first argued on March 4 and 5, 1940, reargued on October 15 and 16, 1940, and finally decided on December 16, 1940. During the nineteenth century, Congress had granted various land rights to the Northern Pacific Railroad as incentives and compensation for building a transcontinental railroad. Due to various reserves and withdrawals, the burning issue by the early twentieth century was from

which lands the railroad could choose, whether it was entitled to any grants in view of various alleged breaches of its agreement, and what compensation, if any, it should receive if it was not able to claim the full amount of acreage due it. In the final opinion, Justice Roberts for a unanimous Court (Justice Murphy not participating) noted that the Court had split on several issues, found against the government on some, and against the railroad on others. Most significantly, the Court refused to affirm the district court's grant of large amounts of land to the railroad and instead remanded for a trial on various allegations of fraud and breach by the railroad.

<sup>77</sup> Edward Francis McClennen (1874-1948) joined the firm of Warren & Brandeis in Boston immediately after graduating from Harvard Law School in 1895. He remained with the firm throughout his professional life but occasionally served as consultant or special master in public interest cases such as the *Northern Pacific* case.

<sup>78</sup> *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940), argued April 29, 1940; decided May 20, 1940. This case was the only case involving Sunshine Anthracite Coal Co. to be accepted by the Court during the Oct. 1939 Term. Although *U.S. Reports* states that it was argued on April 29, WOD's diary entry, dated April 2, refers to an exchange that took place during the argument. (I have no explanation for this except to speculate that WOD wrote this entry, which is on the whole a piece of historical reflection on the 1940 campaign, later and predated it.) The case involved a challenge to the Bituminous Coal Act of 1937, which established a commission to fix prices and to eliminate unfair practices. WOD, for the Court, held that the Act was a constitutional exercise of Congress's power under the interstate commerce clause and that it was entitled to use its power to tax as a sanction to enforce the Act. The Court further held that judicial review of the commission's orders was limited to determining whether it had made the statutorily required findings. Justice McReynolds dissented, stating that he believed the Act "was beyond any power granted to Congress."

<sup>79</sup> WOD considered Jerome N. Frank (1889-1957), together with Robert Hutchins, Roosevelt, Benjamin Cohen, Brandeis, and Black, as one of six "seminal forces in the law who shaped my life." See *Go East, Young Man* at p. 182. Frank,



after holding various New Deal posts, served with WOD as a commissioner on the Securities and Exchange Commission and succeeded him as chairman. In 1941, President Roosevelt appointed him to the U.S. Court of Appeals for the Second Circuit.

<sup>80</sup> Lowell Mellett (1884-1960) had been a columnist with the Scripps-Howard newspaper chain until joining the Roosevelt administration in 1937. In 1939 he moved to the Executive Office of the President where he was an administrative assistant to Roosevelt.

<sup>81</sup> Benjamin Victor Cohen (1894-1983) was general counsel to the National Power Policy Commission. He probably became friends with WOD when he helped draft the Securities Act of 1933, the Securities and Exchange Act of 1934, the Utility Holdings Company Act of 1935, and the Fair Labor Standards Act of 1937, and while he was special assistant to the Attorney General during the early challenges to the Utility Holding Company Act.

<sup>82</sup> Francis Maloney (1894-1945) was first elected to Congress as a representative from Connecticut in 1933. WOD became active in the Connecticut Democratic Party while he was a professor at Yale, and he worked on Maloney's successful 1934 senatorial campaign. Maloney served in the Senate until his death in 1945. He was one of WOD's closest advisors on SEC issues and one of his strongest supporters when Roosevelt nominated WOD to the Court.

<sup>83</sup> Richard Joyce Smith, a specialist in public utility rate regulation, was a professor at Yale Law School at the same time as WOD. Smith and WOD had both been active in Democratic politics in Connecticut and had worked together to elect Frank Maloney as Senator in 1934.

<sup>84</sup> Arthur Krock (1887-1974) was a four-time Pulitzer Prize winner who was the Washington bureau chief and columnist for *The New York Times*. WOD's tone in this passage is very different from his discussion of Krock in his two memoirs. In *Go East, Young Man* (459-61), WOD described Krock as a friend of his and says that Krock had campaigned to have WOD appointed to the Court. Similarly, in *The Court Years* at pp. 210-11, WOD praised Krock as "of the old school of journalism: fastidious, and dedicated to honesty and to the keeping of confidences." WOD remained on good terms with Krock for many years, often providing him with

"scoops" of stories from his travels.

<sup>85</sup> Joseph P. Kennedy (1888-1969), the founder of the Kennedy political dynasty, was a successful financier and film distributor. In 1934, he became the first chairman of the Securities and Exchange Commission and brought WOD to Washington to work on a reorganization study for the SEC.

<sup>86</sup> *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). In this seminal case, Chief Justice Roger B. Taney hastened the coming of the Civil War by destroying the delicate balance wrought by the Missouri Compromise. In his opinion, Taney held that the Fifth Amendment's protection of property encompassed slaves and that free blacks were not citizens of the United States even though they might be recognized as citizens of individual states.

<sup>87</sup> John McLean (1785-1861) dissented from the *Dred Scott* opinion on abolitionist grounds. He had been appointed to the Court in 1829 by Andrew Jackson and served until 1861. McLean had at various times been considered as a potential presidential candidate for the Anti-Masonic Party, the Free Soil Democrats, the Whigs, and, especially after the *Dred Scott* decision, the Republicans.

<sup>88</sup> *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940), argued April 1 and 2, 1940, decided May 27, 1940. In this case, a labor organization declared a strike and then took possession of the employer's factory, destroying equipment and denying the employer access to the goods on hand. The employer then sued under the Sherman Anti-Trust Act, claiming that the union had conspired to restrain interstate trade and seeking treble damages under the Act. On appeal, the Court, per Justice Stone, held that although the Sherman Act applied to labor unions in some circumstances, it was not intended to reach local interference with interstate commerce that could be dealt with by state law. Instead, "restraint of trade" under the Act was a term of art referring only to organized efforts to achieve market control of a commodity, something plainly not contemplated by the union here. Chief Justice Hughes, joined by Justices McReynolds and Roberts, dissented, stating that once the Court decided that the Act applied to unions, the plain language of the Act outlawed organized efforts to interfere with interstate commerce.

<sup>89</sup> Philip Henry Kerr (1882-1940), 11th Marquess of Lothian, became British Ambassador to the United States in 1939.

<sup>90</sup> Charles Fletcher Martin (1876-1949), a U.S. Army colonel, was assigned to the Office of Inspector General from 1937 to 1940 after service in the Philippines. Although he retired in 1940, he was recalled to active duty and served at the Army War College throughout World War II.

<sup>91</sup> There was at this time no German ambassador in the United States. Following the anti-Jewish riots known as Kristallnacht in November 1938, Roosevelt had recalled the American ambassador as a protest; Germany had then retaliated by recalling its ambassador, Hans Dieckhoff. At this time the highest official in the embassy was Hans Thomsen, chargé d'affaires (one grade below that of ambassador).

<sup>92</sup> See Sidney Fine, **Frank Murphy: The Washington Years** (Ann Arbor: University of Michigan Press, 1984), pp. 142-43. Murphy in fact went to Palm Beach twice: once for two weeks before the Court sat on February 5 and again during the two-week recess.

<sup>93</sup> Ray Tucker, a nationally syndicated columnist, wrote that Murphy was concentrating on getting Michigan's support for a vice presidential bid in 1940 rather than concentrating on the Court.

<sup>94</sup> Henry Francis Grady (1882-1957), a foreign service career officer specializing in international trade matters, was Assistant Secretary of State in 1940, after serving as vice chairman of the U.S. Tariff Commission from 1937 to 1939. He later served as U.S. Ambassador to India, Greece, and Iran.

<sup>95</sup> Raymond Leslie Buell (1896-1946) was a lecturer on international affairs at various colleges and universities.

<sup>96</sup> *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), argued February 5 and 6, 1940, decided May 6, 1940. In this complex case, fifty pages of WOD's opinion is taken up with a recitation of the facts. The government had indicted numerous gas and oil distributors in the Midwest for conspiracy to fix prices in violation of the Sherman Anti-Trust Act. WOD, for a 7-2 Court, upheld their convictions, finding that the agreement to fix prices violated the Act, regardless of whether that agreement actually fixed prices, was targeted at real or imagined "com-

petitive abuses," or was "reasonable."

<sup>97</sup> *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911); *United States v. American Tobacco Co.*, 221 U.S. 106 (1911). In these two cases, the Court approved lower court orders ordering the dissolution of the oil and tobacco trusts.

<sup>98</sup> Edward D. White (1845-1921) was first appointed to the Court by Grover Cleveland in 1894 and was elevated to Chief Justice by President William H. Taft in 1910. In his opinion in the antitrust cases, Justice White dealt a blow to the government's future enforcement of the Sherman Anti-Trust Act by holding that the Act prohibited only *unreasonable* restraints on trade. Further, he stated that the authority to make the final determination whether a particular agreement was unlawful under this "rule of reason" was vested in the courts and held that the courts should interpret the Act in a manner that would not destroy the "individual right to contract."

<sup>99</sup> Major General Edwin Martin "Pa" Watson (1883-1945) was Roosevelt's military aide. In his memoirs, WOD also refers to him as "Two Dollar" Watson because he was always willing to bet that amount on his poker hands.

<sup>100</sup> Admiral Ross T. McIntyre (1889-1959) was Surgeon General of the U.S. Navy from 1938 to 1946 and the President's personal physician.

<sup>101</sup> Steven Early (1889-1951) was President Roosevelt's secretary. Following Roosevelt's death, he served as a special assistant to President Harry S. Truman and later as Undersecretary and then Deputy Secretary of Defense.

<sup>102</sup> Harold L. Ickes (1874-1952) was Secretary of the Interior during the Roosevelt and Truman Administrations.

<sup>103</sup> Henry Morgenthau, Jr. (1891-1967) was Secretary of the Treasury during the Roosevelt Administration.

<sup>104</sup> William Clark (1891-1957), after thirteen years as a U.S. District Judge for the District of New Jersey was appointed to the U.S. Court of Appeals for the Third Circuit in 1938. He resigned in 1942 to join the U.S. Army and later held various legal posts in the Military High Command for Germany.

<sup>105</sup> From 1907 through 1913, Louis Brandeis had actively fought the proposed takeover of the Boston & Maine Railroad by the New York, New Haven, and Hartford Railroad. During that time, he published numerous studies of the finances



and management of the New Haven Railroad.

<sup>106.</sup> Abe Fortas (1910-1982) was assistant director of the corporate reorganization study sponsored by the Securities and Exchange Commission while WOD was chairman. Afterwards he held several government positions until 1946, when together with Thurman Arnold, he founded the law firm of Arnold, Fortas & Porter. In 1965, to WOD's delight, President Lyndon B. Johnson appointed Fortas to the Supreme Court. In 1968, however, President Johnson attempted to elevate Fortas to Chief Justice, sparking a bitter and unsuccessful confirmation fight the following year. After failing to be confirmed as Chief Justice, Fortas resigned from the Court.

<sup>107.</sup> Eugene Victor Rostow (b. 1913) had joined Yale Law School in 1938 after one year in private practice. An economist as well as a lawyer, he became dean of the law school in 1955 and introduced a pioneering curriculum, much like the one WOD advocated in the 1920s, that emphasized the teaching of law as it related to other areas of study like history, philosophy, economics, politics, and sociology.

<sup>108.</sup> *Securities & Exchange Commission v. United States Realty & Improvement Co.*, 310 U.S. 434 (1940); argued April 29 and 30, 1940, decided May 27, 1940. The company, a large publicly held real estate investment firm, attempted to avoid the strictures of Chapter X of the Chandler Act, under which no debtor of a certain size could submit a reorganization plan to creditors until a disinterested trustee had reviewed the debtor's financial and management practices, the SEC had reviewed the plan, and the Court had accepted it, by filing its plan under Chapter XI, which was intended to apply to small companies with a limited number of creditors and shareholders. Although Chapter X did not explicitly prohibit the company from filing its petition under a different section of the Act, the Court, per Justice Stone, held that the district court, sitting in bankruptcy as a court of equity, should have honored the public policy of the Chandler Act and dismissed the petition. On a separate issue, the Court held that the SEC had standing to challenge the district court's acceptance of the petition to protect the public interest. Justice Roberts, joined by Chief Justice Hughes and Justice McReynolds, dissented, on both grounds. As stated in his diary, WOD did not participate

in the decision of the case.

<sup>109.</sup> In *Jones v. Securities & Exchange Commission*, 298 U.S. 1 (1936), the Court, per Justice Sutherland, had sharply limited the authority of the Commission to conduct general investigations. Justice Cardozo, joined by Justices Brandeis and Stone, dissented, arguing that the Commission's jurisdiction extended not only to ensuring truthful filings but also to enforcing compliance with the securities laws and investigating past violations.

<sup>110.</sup> *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), argued April 25, 1940, decided June 3, 1940. *Gobitis* involved a state statute mandating the pledge of allegiance and a flag salute in public schools. Gobitis was a Jehovah's Witness, and his children refused to make the salute, believing it contradicted the biblical injunction against bowing down to graven images and other gods. Justice Frankfurter, for an 8-1 Court, held that the interests of the state in promoting patriotism outweighed their First Amendment rights of religious freedom. Only Justice Stone dissented.

<sup>111.</sup> In *Jones v. Opelika*, 316 U.S. 584 (1942), Douglas, Black, and Murphy took the unusual step of announcing that they now believed that *Gobitis* had been "wrongly decided." In *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), they voted (with Stone, the lone dissenter in *Gobitis*, and newly arrived Justices Wiley Rutledge and Robert Jackson) to reverse *Gobitis*.

<sup>112.</sup> In the conference following argument, Justice Frankfurter spoke passionately about the role of schools in instilling love of country. Chief Justice Hughes told WOD that he assigned the opinion to Frankfurter because "an immigrant could really speak of the flag as a patriotic symbol."

<sup>113.</sup> Marguerite (Missy) LeHand (1898-1944) was Roosevelt's long-time secretary.

<sup>114.</sup> President Roosevelt had been invited to give the commencement speech to the graduating class, of which his son was a member, at the University of Virginia. In his speech he attacked the isolationists, whom he described as those who "still hold to the now somewhat obvious delusion that we of the United States can safely permit the United States to become a lone island, a lone island in a world dominated by the philosophy of force." Characterizing such an island as



a prison, he stated that the United States would "extend to the opponents of force the material resources of this nation and, at the same time, we will harness and speed up the use of those resources in order that we ourselves in the Americas may have equipment and training equal to the task of any emergency and every defense." The speech was given added impact by Italy's decision to declare war on France and Great Britain the day before and the fact that German troops were then approaching Paris. Describing his efforts to prevent Italy from entering the war, Roosevelt departed from his text to assail Italy's decision by stating "the hand that held the dagger has struck it into the back of its neighbor."

<sup>115</sup> James F. Byrnes (1879-1972), a senator from South Carolina, was one of Roosevelt's early allies in the Senate. Although he later opposed some of the New Deal legislation, he was a strong supporter of Roosevelt's foreign policy and was responsible for shepherding the Lend Lease Act through the Senate. Roosevelt named him to the Court in June 1941, but he resigned one year later in October 1942 to become director of economic stabilization and later director of war mobilization. He later served as Secretary of State during the first two years of the Truman Administration and later as Governor of South Carolina.

<sup>116</sup> Robert Sharon Allen (1900-1981) was the co-author, with Drew Pearson, of a syndicated daily column named "Washington Merry-Go-Round," that was published from 1932-1942. After active service in World War II, Allen wrote another syndicated column, "Inside Washington," from 1949 to 1981.

<sup>117</sup> Ernest Kidder Lindley (1899-1979) was in 1940 chief of *Newsweek's* Washington Bureau and a political commentator for the *Washington Post*, the *Register* and *Tribune* syndicate, and various radio networks.

<sup>118</sup> WOD first met James T. Donald when Donald opened a law practice in Yakima, Washington. Donald played an instrumental part in WOD's decision to attend Columbia Law School and wrote letters of introduction for him to the dean there, Harlan Stone. In 1928, after he had resigned from his professorship at Columbia over a dispute concerning the appointment of a new dean, WOD seriously contemplated joining Donald in private practice in Baker, Oregon, but instead accepted a professorship

at Yale Law School.

<sup>119</sup> Saul Haas was then a political aide to Senator Homer Bone (D. Wash.). He later owned a television station, KIRO, in Washington.

<sup>120</sup> Robert Maynard Hutchins (1899-1972) had been dean of the Yale Law School and was responsible for bringing WOD to Yale after he resigned from Columbia Law School. In 1929 he left to become president and later chancellor of the University of Chicago. At Yale, Hutchins gathered and nurtured professors, such as WOD, who advocated "Legal Realism," an approach that required that the law be evaluated in terms of practical experience and that used the tools of non-legal disciplines such as sociology and economics.

<sup>121</sup> Henry Agard Wallace (1888-1965) was Secretary of Agriculture during Roosevelt's first two terms. Roosevelt, of course, was elected to a third term with Wallace on the ticket. In 1944, however, he replaced Wallace with Harry S. Truman, who became President upon Roosevelt's death in 1945. Wallace served as Secretary of Commerce during the first two years of Truman's administration and ran for President in 1948.

<sup>122</sup> James Allen (1906- ), a former reporter for *The New York Times*, had been WOD's press spokesman at the SEC. He later joined Northrop Corporation.

<sup>123</sup> W.O. Douglas, **Democracy and Finance** (James Allen, ed.) (New Haven: Yale University Press, 1940).

<sup>124</sup> Eugene Arthur Fuller (1902- ) was an editor at Yale University Press from 1929 to 1959 and then at *Modern Age* until 1970. He was also an active commentator, lecturer, and author on European affairs.

<sup>125</sup> On July 7, 1940, Krock wrote a column in *The New York Times* ("Tradition Plays Role at Chicago Conclave" sec. IV, p. 3), criticizing Roosevelt for contemplating abandoning the tradition of two terms for President and berating Douglas for not publicly renouncing the drive to have him nominated for vice president or, if Roosevelt declined the nomination, for President. Characterizing WOD as a "study in silence," Krock asserted that WOD had written a letter renouncing any political ambitions to "an old school teacher in the Far West" which he had intended to make public but had been "dissuaded by those who said he would seem to be taking seriously something which was not,



and thus would appear ridiculous." Krock concluded, "Now his boom is serious. But his toleration-by-silence continues."

<sup>126</sup>. A. Howard Meneely (1899-1961) was a professor of history at Dartmouth College. He later became president of Wheaton College in Norton, Massachusetts.

<sup>127</sup>. WOD apparently wrote several such letters at this time. For instance, on July 2, 1940, he wrote to Felix Frankfurter stating that the rumors of his candidacy were becoming disturbing and asking him to let others know that he wished to remain on the Court.

<sup>128</sup>. Ickes was never put in charge of the Defense Program. During the war, however, he held numerous industrial policy posts, including solid fuels administrator, coordinator of fisheries, petroleum administrator, and coal mines administrator.

<sup>129</sup>. Public Works Administration.

<sup>130</sup>. Leon Henderson (1895-1986), an economist, held a variety of positions in the New Deal, including director of research and planning for the NRA and member of the National Industrial Recovery Board. In 1940, he was on the Securities and Exchange Commission and the Advisory Commission for the Council of National Defense. During the war, he served as administrator of the Office of Price Administration and Civilian Supply, member of the Supply Priorities and Allocation Board, and as director of the Division of Civilian Supply O.P.A. and the War Production Board.

<sup>131</sup>. *Equitable Life Insurance Co. of Iowa v. Halsey, Stuart & Co.*, 312 U.S. 410, 668 (1941), argued January 15 and 16, 1941, decided March 3, 1941; revised on March 31, 1941. This was, in fact, a "fact case" with no significant federal issue other than that the Court of Appeals had decided it wrongly. It arose out of a diversity lawsuit, in which the plaintiff alleged that it had purchased municipal bonds from the defendant on the strength of knowingly and recklessly false representations. A properly instructed jury returned a verdict for the plaintiff but the court of appeals reversed. The Supreme Court, finding that there were sufficient facts in the record to support the jury's verdict, reinstated the verdict.

<sup>132</sup>. *Woods v. City National Bank & Trust Co. of Chicago*, 312 U.S. 262 (1941), argued January 13, 1941, decided February 3, 1941. The dis-

trict court in this bankruptcy case had denied costs and compensation to an indenture trustee, a bondholders' committee controlled in large part by the indenture trustee, and an attorney who represented both, finding that they had dual or conflicting interests. The Court of Appeals reversed, finding no fraud. The Court, per WOD, reinstated the district court's decision, holding that trustees and committees, as well as the counsel that advise them, are fiduciaries who must render "loyal and disinterested service in the interest of those for whom the claimant purported to act."

<sup>133</sup>. *Browder v. United States*, 312 U.S. 335 (1941), argued January 16, 1941, decided February 17, 1941. The defendant here was prosecuted for knowingly using a passport obtained by a false statement to re-enter the country. The passport was in the defendant's actual name; the false statement involved his denial of previously having other passports which, for unknown reasons, were not in his name. The defendant was sentenced to two years imprisonment on each count, to run concurrently, and an aggregate fine of \$2,000. Although WOD indicates that the severity of this sentence was the reason for taking up the case, the Court's opinion does not address any challenge to this sentence.

<sup>134</sup>. *United States v. Bethlehem Steel Corp.*, 315 U.S. 289 (1942), argued December 9, 1941, decided February 16, 1942. The government had sued Bethlehem Steel to recover what it considered to be excess profits under World War I ship-building contracts. Justice Black, writing for the Court, privately considered the profits outrageous, but found nothing unconstitutional in the contracts that had allowed the company to earn so much. Frankfurter dissented, and WOD dissented in part.

<sup>135</sup>. *Millinery Creator's Guild v. Federal Trade Commission*, 312 U.S. 469 (1941), argued February 7 and 10, 1941; decided March 3, 1941. The Guild was a group of designers and manufacturers of women's hats who sold only to retailers who agreed to boycott manufacturers who copied their designs and sold at a lower price. The Court, in this case, and a similar case involving designers of dresses and designer fabrics, *Fashion Originators' Guild of America v. Federal Trade Commission*, 312 U.S. 457, 668 (1941), held that the boycott constituted an unfair method of competition in violation of the

Sherman Anti-Trust Act and the Clayton Act.

<sup>136</sup> On reargument, Frederick Bernays Wiener, Special Assistant to the Attorney General, argued on behalf of the government.

<sup>137</sup> Norman Mather Littell (1897-1994) had been appointed special assistant to the Attorney General in 1936 to handle the government's case in the *Northern Pacific* case. In 1939, he became assistant attorney general in charge of the Justice Department's Lands Division. He served in that post until November 1944 when he was dismissed following political and personal differences with Attorney General Francis Biddle.

<sup>138</sup> *Republic Steel Corp. v. National Labor Relations Board*, 311 U.S. 7 (1940), argued October 17, 1940, decided November 12, 1940. The Board found that Republic Steel Corp. had engaged in unfair labor practices and ordered it, *inter alia*, to rehire certain former employees and to award them backpay to the extent that they had not been compensated by various govern-

mental agencies while employed in work relief projects and to pay that amount directly to the government agencies. The Court, per Chief Justice Hughes, struck down that part of the order requiring compensation to the governmental agencies, stating that the agencies had received the benefit of the former employee's work and that the award was therefore designed to punish the company for placing a burden on the public by firing the employees in the first place. Justices Black and Douglas wrote a joint opinion stating that they would have joined in the Court's opinion had it been limited to interpreting the language of the Act to permit payment of backpay only to the employees. They were not willing to find, however, that an order of full backpay to the employees, regardless of whether they were employed in the interim, was not permitted by the Act.

<sup>139</sup> Justice McReynolds retired on February 1, 1941.



# Clerking for Justice

## Harlan Fiske Stone

Milton C. Handler

*Editor's Note: Professor Handler was asked to provide reminiscences of a personal nature in this article. It is not intended as a critique of Stone's jurisprudence.*

In December of 1925, Harlan Fiske Stone interviewed me in the dean's office of Columbia Law School for possible appointment as law secretary (as it was then called) for the 1926 Term, his second on the Court. When I walked into this office, I noted that the lower part of the window had been opened full length. There was a gale raging in the room. There he sat with his jacket wide open, oblivious to the wind and the cold. It was bad enough to be quaking with nervousness, but to be shivering also from the cold was hardly conducive to a satisfactory interview. He put me at ease, asking me some pertinent questions about the courses I had taken, what I thought of the law school, and probing my qualifications for the clerkship. He then told me that the work was very heavy and that he felt it necessary to impose two requirements. One was that I not marry during the period of my clerkship and, second, that I must be able to type. I had to confess that typing was not one of my talents, but I was very emphatic that there was no prospect whatsoever of my getting married that year. He made it clear that the reason for the unusual condition of not marrying was that the work of a clerk was very exacting and time consuming, and he didn't feel that it would be fair to a young bride to spend a year in Washington, never see-

ing or having the company of her spouse. Thus reassured, he offered the job to me. I then informed him that Emory Buchner had offered me an assistantship in the U.S. Attorney's Office in New York. "You go down and tell Buchner that I want you as my law clerk next year and I am sure he will release you." This I subsequently did, with Buchner graciously releasing me while expressing his opinion I was making a great mistake.

In due course, I spent a week in Washington during the spring vacation, being oriented by Alfred McCormick, my predecessor. I was then informed that I would be required to prepare memoranda on the summer accumulation of certiorari petitions during the month of September, the Justice having arranged for half of the petitions to be sent to his summer home in Isle au Haut, Maine. When he arrived in Washington toward the end of September, I had completed my half of the certiorari task.

The Term began in October. The Court would sit for two weeks of argument, with conferences on Saturdays to decide the cases it had heard, and then recess for two weeks during which the Justices would write their opinions. Stone's routine varied considerably, depending on whether the Court was hearing argument or in recess. I'll try to give a picture of that routine, which he followed as methodically as Immanuel Kant.

Stone was an early riser. He would finish breakfast at 7:00, take a walk until 8:00, and then visit the construction site of his magnifi-

cent home, which was being built during my clerkship. He rarely missed a day in going to the site, where he would examine everything that had been done the previous day. Every bit of material that went into the house was personally examined by him. In this connection, I was called upon to obtain literally hundreds of books from the Library of Congress on the design of fireplaces, mantle pieces, locks and hardware, paneling, trim and floors, etc.

After visiting the site, he would come in to his chambers, which were on the first floor of the Senate Office Building. On arrival, he would open all the windows, regardless of the weather. When he buzzed Miss [Gertrude] Jenkins, his secretary, she would don her heavy winter coat and take his dictation fully attired for the outdoors.

The first order of business, no matter how pressing his calendar, was the reading of his mail and the dictation of responses to the letters received that day.

He would go over all the catalogs of prints and engravings, of which he was an inveterate collector. He explained to me that if he didn't examine the catalog immediately and wire or

telephone his order, somebody else would pick up a desired item. He had literally thousands of etchings, prints, and engravings.

When the Court was hearing arguments, the session ran from 12:00 noon until 4:30, with a lunch break from 2:00 to 2:30. This was a period of Coolidge economy. The government did not appropriate enough money for the Senate restaurant, so it was closed when Congress was out of session, which was most of the year. The congressional session in those days would start in March and end by the summer. During the fall and winter, the nine Justices could not get their food from the Senate restaurant. Like the kids going to elementary school, they used to carry their lunches with them in lunchboxes to their chambers and have their luncheon together in the Court conference room in the Capitol.

The Court was then a "cold" bench, with the Justices not seeing the briefs or records until a case was called for argument. These could be very voluminous. Sometimes a record in a case might be six to ten huge printed volumes. There were very few blockbuster cases and Stone had little difficulty making up his mind on the basis



Justice Harlan Fiske Stone working at his desk in his spacious home office with his secretary, Gertrude Jenkins, in the spring of 1938. His passion for collecting prints and engravings is evident from the room's decor. When the author clerked for him in 1926, the Justice's house on Wyoming Avenue and 24th street was under construction and he still had his chambers in the Senate Office Building.



of the oral argument, confirming his tentative judgment by glancing at the table of contents of the briefs and skimming those pages that dealt with the issues that interested him.

Returning to chambers upon the conclusion of arguments, the Justice would sign his mail, leaf through some of the briefs and records, and be ready for his afternoon walk at about 5:30. As you can see, the Justice, like his former student and later colleague, Bill Douglas, was not, at this stage of his judicial career, overburdened by the job of judging.

On these walks, which we took virtually every day, Stone would talk about the issues before the Court, his years at Columbia, his deep antipathy for Nicholas Murray Butler, his experiences as Attorney General and as a member of the Coolidge Cabinet, and his appraisal of his fellow Cabinet members and of the President of the United States. He would talk about Woodrow Wilson the way the Liberty Leaguers spoke about Franklin D. Roosevelt. He despised him because he didn't think he was a man of his word. Stone was very conservative in those days, but as conservative as he was, he was regarded by Taft, Butler, Sutherland, and Van Devanter as a progressive liberal.

On Saturday, the day of the conference, Stone would amble in after 10:00. Even though the conference was scheduled for 12:00 at the Capitol, he would begin by reading his mail and dictating responses. It was not until sometime after 11:00 that he started preparing for the conference. The agenda normally included about seventy-five matters, including eighteen argued cases, several submitted cases on which I prepared memos, certiorari petitions and motions. Each of the twenty-five certiorari memos that I had done during the week was normally about one page long; he would read them in about one half hour — approximately one minute for each. Then all of the briefs and records had to be assembled and transported to the Capitol by a messenger. It was not unusual for Stone to get his material mixed up in the conference and when he came back, to complain, for example, that I had not had a memo on such and such a case. He took with him his locked docket book in which all the votes of the conference were recorded. There was also room for comments on the cases under consideration and notes on what the other Justices said. However, Stone rarely took any

notes. Indeed the only marking he made on the briefs of each case was a number sign (#) indicating that he had examined the papers. After reading the memos, Stone would then set off on the ten-minute ride on the underground railway from the Senate Office Building to the Capitol.

The present courthouse had not yet been built and the Court sat in the old Senate Chamber. The conference room was behind the courtroom. The procedure at the conference was for the Chief Justice to present a reasoned statement of every item on the agenda, followed by each Justice stating his views briefly in the order of seniority. The votes were taken in the reverse order, the junior Justice voting first. By 5:00, every matter normally would have been covered. The Justice returned to chambers shortly thereafter. I would be very anxious to find out what happened to matters on which I had worked and to the cases on which I had some knowledge. I would accompany Stone on his walk homeward. His procedure was to walk half the way home and then have his chauffeur pick him up. In these walks, he would tell me what happened in conference and I would get an inkling of what the decisions had been. He would also express his views of his colleagues with a frankness that was sometimes startling.

The picture was radically different during recess, when the opinion-writing process was in swing. He would get in very early and be sitting at his desk before 9:00. He felt a compulsion to keep abreast of his assignments. He generally would receive an assignment of one to two cases each week, so that when the Court went into recess he would have three or four opinions to work on. His aim was to complete these opinions before the recess ended. The assignments would come in on Sunday morning from the Chief Justice. On Monday, I'd get started on the preparation of a memorandum on the applicable law. Stone did not welcome having his clerk prepare a suggested opinion. He believed a Justice should do his own work. The procedure is quite different today. Chief Justice Rehnquist frankly states in a recently published book that, after discussing a case with his clerks, he asks them to get up a first draft of an opinion, which he then revises. This is not the way Stone, Holmes, or Brandeis worked. They drafted every opinion bearing their names themselves. As the initial assignments came at the end of the first



week of argument, I had plenty of time to work on the cases on which he would later write his opinions.

Stone would tackle the hardest case first, leaving to the last the simpler ones. With his experience as an appellate lawyer, he could digest records and briefs with phenomenal speed. Before long, he would begin to write. His first draft was written in pencil on yellow sheets of paper, in a scrawl notorious for illegibility. After he wrote two or three pages, he would summon Miss Jenkins and immediately dictate what he had written. If he waited too long, neither he nor any other human being could decipher his writing. Frequently, he would call me in, and it would always be very amusing because he would not be able to read what he had written. He would take the sheet and revolve it clockwise and counterclockwise trying to decipher it. Miss Jenkins would type out what he had dictated, and after a while there was a draft.

At this stage, Stone's sole objective was to get his thoughts on paper; he was not yet striving for literary perfection. He explained to me that he never paid the slightest attention to organization, wording, punctuation, or any of the elements of writing. He said the important thing was to get his ideas down on paper. If he did that, he would have plenty of time to reorganize, to rewrite, and to polish.

When Stone had completed the draft, he would turn it over to me for revision. That was the clerk's main role in the process. I would then work on the opinion, chewing it up, tearing it to pieces and reorganizing it. What I did constituted the second draft. We would argue about the validity and cogency of the opinion's reasoning. We might even fight about the result, although there was little chance that the Justice would go counter to the vote of the Court, although, to be sure, this sometimes happened. Then the two of us would sit together, sometimes for days, rewriting and reorganizing, dealing first with structure and organization. This was a scissors and paste job, with the draft being cut up into various pieces and put together in a different sequence. It was not until the third or fourth draft that we began to pay attention to language. At this juncture, we pored over the text word by word, phrase by phrase and sentence by sentence to achieve maximum clarity. All of this would go on for as many as six to ten typed drafts, only

to be continued again when we got page proofs, which themselves might go through an additional five or six drafts. Even at this late stage, the Justice would sometimes go home and come back in the morning with a totally rewritten opinion, explaining that he had been dissatisfied and felt that a briefer and better-integrated version was to be preferred. When he did this, the resulting opinions were the very best he published that Term.

The workday during the opinion-writing period would run for ten hours, if not more. This was the time when the books would be piled ceiling high as the precedents were carefully studied, applied, or distinguished. It might not have taken the Justice very long to make up his mind, but it took endless hours to produce a document that met his Olympian standards.

During the recesses, we had lunch together every day at the Methodist Building across the street from the Senate Office Building. These were working luncheons. I didn't have to watch my diet in those days, so I would have a full luncheon. The Justice loved food, a trait hardly belied by his 290 pounds. Nonetheless, he would order a pimento cheese sandwich on raisin bread, a glass of buttermilk, and a raw apple. He would sniff at my food, his salivary glands working



Justice Stone took a walk every morning before 8:00 and every afternoon at 5:30. His enthusiasm for exercise was matched by his considerable love for food.



overtime, and admonish me to remind him the next day to order what I had just had. However, the next day, once so reminded, he would invariably order his usual luncheon, complaining sadly that Mrs. Stone would not permit him any more because they usually had a huge breakfast and generally were guests at a formal dinner at night.

One of the most important cases that Stone handled that year was *The United States v. Trenton Potteries*,<sup>1</sup> which led to my becoming an antitrust specialist. When the *Trenton* case came before the Court, it was argued by "Wild" Bill Donovan, then assistant to the Attorney General and the head of the Antitrust Division. Charles Evans Hughes argued for the defendants. The defendants were manufacturers of what was then known as sanitary pottery — bathtubs, sinks, and other bathroom items. They had engaged in price fixing. The nefarious activity had come to light in an investigation made by a committee of the New York State Legislature.

The trial court had ruled that price fixing was unlawful *per se*, and refused to submit to the jury the issue as to the reasonableness of the prices fixed. The Second Circuit reversed, holding that horizontal price fixing under the rule of reason was unlawful only if the prices fixed were

unreasonable. The Supreme Court rejected Hughes' argument and upheld the conviction.

*Trenton Potteries* was the most important case that Term to be assigned to Stone. Many of the others were rather trivial. As the junior Justice, Stone got all the junk. The interesting and important cases were taken by the Chief Justice for himself or assigned to the more senior Justices. Moreover, Chief Justice Taft was very suspicious of Stone. The next year, when Taft became ill and it looked as though he would have to resign, he opposed and lobbied against the appointment of Stone as his successor. However, he didn't retire at the time, continuing as Chief Justice until 1930. He wrote a letter to his brother, who was the head of the Taft School in Connecticut, in which he described Stone as being a progressive in the sense that Herbert Hoover was. This well indicates where Taft stood in the political spectrum. He suspected both Hoover and Stone as people who would undermine the Constitution by upholding personal rights against property rights.

In addition to *Trenton Potteries*, Stone frequently dissented with Brandeis and Holmes. By the end of the Term, he was pretty much committed to the Holmes-Brandeis outlook on constitutional law and became a stalwart member of the triumvirate. The procedure was that the senior dissenting Justice, as a matter of protocol, had the right to write the opinion for the dissenters. If he did not care to do it, it went down the order of seniority. Holmes, or more often Brandeis, would write a dissent and Stone would go along. Occasionally, however, Holmes and Brandeis would suggest to Stone that he write the dissenting opinion. It was in these dissents that he disassociated himself from the conservative group of Justices who had nullified virtually every bit of social legislation enacted by the states both before and during the New Deal.

I also remember quite well one of the less controversial cases handled during the Term, *Hudson v. United States*.<sup>2</sup> The issue was whether a court could impose a prison sentence, and not only a fine, after accepting a plea of *nolo contendere*. In a case of first impression that laid the foundation for the widespread use of the plea in the criminal law, the Court agreed unanimously that a defendant who pleaded *nolo* could be sentenced to prison. The case was assigned to Stone. I spent many hours in the Library of



Milton C. Handler, photographed a few years after he clerked for Stone. He went on to teach for many years at Columbia University before joining a New York law firm.

Congress supplementing the Justice Department's brief on the history of the plea. Among other things, the government had traced the plea back to the fifteenth-century **Year Books** and had arranged for Professor Joseph Henry Beale of the Harvard Law School to translate one of the rulings from Norman French to English. Stone quoted the Beale translation in the draft opinion that he sent to the other Justices during the November recess.

When the Court was back in session, Stone returned to his chambers one day after hearing arguments and recounted a brief conversation that he had had with Justice Holmes. "Why did you use the Beale translation in the footnote to the *Hudson* opinion?" Holmes had asked Stone. "Surely, we can translate the **Year Books** our-

selves." "Perhaps you can, but you must exclude me and my law clerk," Stone responded. "I'll translate it then," Holmes said. Stone directed me to provide Holmes with the **Year Book** in question. That's where the fun began.

I returned to the Library of Congress and asked to take out the volume containing the extract from 9 H. VI. I was informed that the rare edition was under lock and key and could only be examined on the premises. I explained that the book was being taken out by Justice Stone for Justice Holmes. "I'm sorry," the bureaucrat said, "but I must abide by the rules. Whoever wants to consult the **Year Books** must come to the Library." I told him that the eighty-five-year-old Holmes, a distinguished member of the Supreme Court and a revered figure in public

life, should not be required to come to the Library to examine a book. He was unimpressed. I thereupon decided to try my luck with the Librarian of Congress, who agreed to release the book on two conditions. I would have to sign a document taking full responsibility, and a security guard would have to deliver the book to Holmes.

When the guard brought the book to Stone's chambers the next day, it was wrapped in paper and tied with the proverbial governmental red tape and a wax seal. He set off for Holmes' house on Eye Street with the Justices' messenger, Edward Joice, whose father and grandfather had also served the Court. When they returned, I noticed that the seal on the package was unbroken, the red tape still in place. I asked Joice for an explanation. "Well," he said, "we were ushered to the top floor of Holmes' home, where he has his chambers overlooking the garden. The Justice met us and said, 'Gentlemen, please wait here in the anteroom.' Through the open door, we could see him walk over to a bookshelf, pick out a book, open it, take a piece of paper and translate the passage.



Edward Joice continued the tradition of his father and grandfather by serving as the Justices' personal messenger. Above, he stands at Stone's desk, where a medicine ball and sculptures from the Justice's vast collection are displayed.



He then handed me the paper, which I now give to you." As I looked at Holmes' remarkably legible handwriting, I had to shake my head. Here I had gone to all this trouble to withdraw the volume, and Holmes had a complete set of the **Year Books** on his library shelves.

It was Holmes' translation, and not Beale's, that appeared in a footnote on the fifth page of Stone's opinion.

(About twenty years ago, I took Judge Landau, the President Justice of the Israel Supreme Court, to Columbia to show him what a modern law school in this country looked like. He met the Columbia faculty and then Dean William Warren and I took him through the building. We went into the library stacks which take up most of the interior of the building. At one point we passed shelves on which had been placed, in bound form, the massive records and briefs which Justice Stone supplied the school at the end of each Term. Justice Landau was curious as to what were the contents of these massive bound volumes. I took one off the shelf and turned the pages. It was the record on appeal of the *Hudson* case. This led me to tell the Justice the story of how Holmes had translated the **Year Book** case referred to in the text. I embroidered the story and tried to enhance its amusing aspects. When Justice Landau returned to Israel, he recounted this story to my friends there, telling everyone that I knew the contents of the hundreds of thousands of items in the stacks of the Columbia Law School library and how I had picked out a volume at random and was able to tell him the story of its entire contents. I became known in Israel as a very learned person. Needless to say, I never exerted any effort to disabuse those who were told about my exploits by Justice Landau.)

It was rare in those days for the Justices to comment on each other's draft opinions, unlike the practice of later Courts to circulate elaborate memoranda of their views, particularly in the high-profile cases. Van Devanter, however, whose productivity ebbed as he grew older, produced very little of his own, but he would take a Stone opinion and virtually rewrite it from beginning to end. This, as a brash youngster, infuriated me. When I exploded one day and said to Stone "I don't know why he doesn't attend to his own assignments, rather than messing up your opinions," Stone turned to me and said,

"Have you ever read the first line of a Supreme Court opinion?" He then pointed to it and read aloud, "Mr. Justice Stone delivered the opinion of the Court" (emphasizing the word "Court"). Thus admonished, I never thereafter expressed any indignation at Van Devanter's practice of rewriting the opinions of others.

The procedure at that time was for a Justice to circulate the page proofs of his proposed opinion for the Court. The proofs were folded four times and on the top fold he would write (for example), "To Holmes, J. from Stone, J." If the Justice receiving the draft agreed with it, he would return the proofs, writing the word "yes" followed by his initials. If the draft was not returned, that meant that the nonresponding Justice was dissenting and that his dissenting opinion would be circulated in due course. Most of the Justices merely returned the page proofs with the word "yes." During Stone's first Term, they would write some fulsome compliments about the draft, but by the 1926 Term, the compliments stopped. Occasionally, Holmes would playfully write a short comment. For example, he wrote on one draft: "I asked for bread (my #110) and you've returned two Stones (#222 and #230) instead." McReynolds, generally, would send a spiteful and malicious comment. For example, in one case he wrote "Not one lawyer in a thousand would agree with your reasoning, but it's not important enough for me to dissent." Stone, at the last conference of the recess, would apprise the Justices of the opinions that were ready for announcement the following Monday, indicating that he had a full Court and reading such comments as had been made, including the one from McReynolds. This embarrassed the Tennessean and after a while these hateful endorsements ceased.

Late in the Term, Stone graciously set up an appointment for me to meet the great Olympian before the end of my clerkship. We walked over to Holmes' spacious home, which had an elevator that took us to the fourth floor. Although the Court was in recess, Holmes was formally attired in a cutaway, striped trousers, and a stiff-bosom shirt with a winged collar. He invited us into the study where he had translated the passage from the **Year Books**. I sat on a couch with Stone and Holmes' law clerk, Thomas "Tommy the Cork" Corcoran; Holmes sat at his desk, which overlooked the garden. The two



Justices did most of the talking, as both Corcoran and I were awed in their presence.

At one point, Holmes observed that in the course of writing the opinion in the recent trademark case, *Beech-Nut Packing Co. v. P. Lorillard Co.*,<sup>3</sup> he had occasion to read a fascinating book on the history of law and usage of trademarks. Stone asked whether Holmes was referring to a doctoral dissertation by Frank Schechter.<sup>4</sup> The senior Justice nodded. Stone told him that he had persuaded Schechter, who was trademark counsel for BVD Co., to take a year off from practice to stand as the first candidate for a doctorate in law at Columbia. Learning that Stone had inspired the writing of this book, Holmes rose, walked across the room and shook Stone's hand. "I congratulate you on one of the great acts of your life," he said.

I told this story to Frank Schechter and to his wife. Unfortunately, Schechter died at a very young age. He was the son of a very great theologian, Solomon Schechter, who was a distinguished professor at the Jewish Theological Seminary and a prolific writer on Jewish and Hebrew subjects.

When the two Justices moved on to other topics, Corcoran and I dutifully retired to his office for a chat. The conversation drifted to the subject of Holmes' writing habits. I knew from experience and from previous discussions that Holmes was by far the fastest writer on the Court. When Taft handed out assignments at the end of a Saturday conference, Holmes would set right to work. He would write his opinion on Sunday and have his law clerk check the references on Monday morning. By Monday afternoon or Tuesday morning, when most of the other Justices had hardly begun writing, Holmes would circulate in page proofs a beautifully crafted opinion. After Stone had looked at the proofs, he would pass them along to me, and I noticed that Holmes' opinions had an uncanny tendency to fill exactly two printed pages. Corcoran explained this conundrum easily enough. Holmes penned each paragraph on a separate sheet of paper and counted the words. That way, if possible, the opinion would end on the last line of the printed page.

Corcoran told a little story to illustrate this predilection. One Monday morning, after studying a new opinion by Holmes, "Tommy the Cork" went into the Justice's chambers and suggested

the inclusion of an additional point. Holmes listened and shook his head sadly. "Is the idea no good?" Corcoran asked. "No, it's a very good idea," Holmes said, "but I can't use it. It would take another paragraph."

When I rejoined the Justices a little later, I asked Holmes if he would sign the authorized etching of himself that I had recently purchased. "I autographed the plate," he pointed out. "I know, but I was wondering if you might add a special inscription." "Send it over," he said. When he sent it back, the brown ink read:

To Milton Handler. We cannot live our dreams, we are lucky enough if we can give a sample of our best, and if in our hearts we can feel that it has been nobly done. Oliver Wendell Holmes  
June 2, 1927.

I was thrilled with the special inscription. In my ignorance, I thought it had been composed especially for me. Subsequently, when I read Holmes' collected papers, I discovered that it was a sentence from an address delivered at Brown University many years before. Happily, I was not the only one inspired by this thought.

In the spring of 1926, my mother came to Washington to visit me. She was a marvelous cook and baker and she was famous for the little cakes that she would prepare. She brought a boxful with her when she visited the Stone chambers. I took her in to meet the Justice, who was very gracious and, being a knowledgeable parent, he knew that the way to my mother's heart was to praise her son — which he did quite lavishly. My mother then opened the box of cakes and offered one to him. He thanked her but demurred, explaining that his wife would be upset if he ate between meals. My mother, being a temptress, said, "Look, Justice Stone, one cake is not going to hurt you!" So he partook, both to satisfy her and his insatiable appetite. He devoured the cake and thanked her, whereupon she withdrew and returned to my room. About an hour after she left, I was buzzed and I went into the Justice's chambers. He greeted me by saying, "Did your mother take those wonderful cakes back with her?" I explained that I still had the box. He then said, "If you don't tell anybody, I would be interested in having another one."



During the Term, my young cousin, Helen Meyer, who was the circulation manager of the Dell Publishing Company, stepped into our office one day to say hello. As was my custom, I took Helen in to be introduced to the Justice. He engaged her in conversation and after her departure, buzzed me. When I returned to his room, he said, "Handler, she's so pretty that I withdraw the condition of your not getting married during the course of the Term. I now give you my blessing and if you want to get married, go right ahead." Actually, my cousin was quite dear to us all but we were not in love with one another, and the lifting of the injunction, kind as it was, did not result in my giving up what was then my sacred bachelorhood.

In later years, I was always invited to the Stones' home for breakfast whenever I came down to Washington. With the Stones, it was open house for all the former law clerks, each of whom was treated as though he were their son. When one was invited for breakfast at 8:00, it meant 8:00 a.m., and not 7:59 or 8:01. When you arrived promptly at the appointed time, the two of them couldn't restrain their impatience to get started at breakfast. You were ushered into the dining room without a second's delay. On one occasion, Paul Shipman Andrews, then dean of the Syracuse Law School, was another guest. He didn't arrive until 8:02 and was greeted with angry glances and told in no uncertain terms that he was late. We sat down to breakfast, which started with orange juice, then a half grapefruit, followed by a big bowl of porridge, then the butler brought in the toast with butter and marmalade, accompanying a platter of scrambled eggs and bacon, of which our hosts partook generously and forced the guests who already had had three or four times as much food as they normally consumed at breakfast to partake. That was not the end. Then came buckwheat cakes and waffles with syrup. The breakfast was topped off with some Danish pastry.

I was at all times treated by the Stones as though I were a member of the family. The Budapest Quartet gave a series of concerts in the Coolidge Auditorium of the Library of Congress in which they played all of the Beethoven Quartets. The Justice attended most of the concerts, some being given in the afternoon and some at night. He arranged for me to obtain tickets for all of the concerts. In later years, Stone told me

the following story about a visit he made to Justice Holmes after his retirement. In chatting with Holmes, he told him that he had attended a concert by Yehudi Menuhin with the Philadelphia Orchestra under Stokowski, at which Menuhin played three concerti. Holmes remarked that he would have given his right arm to have had a musical career. When Stone chided him, asking, "How can you say such a thing, when I would give up everything if I could write just one opinion like the many that you have authored?" Whereupon Holmes said, "Boy, you can't fool God with those modest words."

Holmes treated this incident as evidence of Stone's humility, but Justice Frankfurter, to whom I repeated what Stone had recounted, took it as proof positive of Stone's vanity. In baseball, this is known as a fielder's choice. I go along with Holmes.

The personal benefit to a Justice from being on the Supreme Court is the opportunity the office provides for intellectual growth. A Justice is quite a different person after being on the Court for ten or twenty years from what he was at the time of appointment. In Stone's case, it was like the growth of a young sapling into a mighty oak. Stone was a man of the soil. He was a typical New Englander, having been born and reared on a farm. His summers were spent in a small community on Isle au Haut, Maine, where he was known by his neighbors as "Doc" — never referred to as "Mr. Justice." He could fraternize with them as though he had never left New England for his career at the bar and on the Bench. Like them, he was a conservative in his views.

I never found that his decisions were influenced in the slightest by his conservative principles. He was, to my mind, the perfect judge. He approached every case without any predisposition. He listened intently to the facts and, good lawyer that he was, he applied the precedents as he knew them. He became known as a progressive jurist as he grew in the job. He disappointed Taft and others who had hoped he would put the protection of property above the protection of human rights. He recoiled from a static conception of constitutional law. As one well-trained in the common law, he felt that all law must be capable of adjustment in response to changing conditions and circumstances. Hence, he joined with Holmes and Brandeis in

overturning the *Lochner* line of authority. When new problems came to the forefront during the New Deal, whatever his personal views may have been as to the political soundness of its program, he nevertheless responded favorably, recognizing the needs of the country in overcoming the ravages of the Great Depression. Similarly, he recognized that there had been a deficit in social, economic, and political reforms and thus authored many important constitutional decisions during the late 1930s and early 1940s.

He, as I have stated before, was a judge's judge and today is recognized as one of the titans of the law.

### Endnotes

<sup>1</sup> 273 U.S. 392 (1927).

<sup>2</sup> 272 U.S. 451 (1926).

<sup>3</sup> 273 U.S. 629 (1927).

<sup>4</sup> Frank I. Schechter, *The Historical Foundations of the Law Relating to Trade-marks* (New York: Columbia University Press, 1925).



# Reminiscences of the Solicitor General's Office

Robert L. Stern

**Editor's Note:** *The Office of the Solicitor General is formally part of the Department of Justice, but its influence in the history of the Supreme Court is both tremendous and relatively unknown. Lincoln Caplan believes the office is so important that he entitled his book **The Tenth Justice: The Solicitor General and the Rule of Law** (1987). And Caplan singles out as the man who knows more about the practice of the Court than anyone else Robert L. Stern, whose **Supreme Court Practice** (now in its seventh edition) is not only the bible of lawyers coming before the tribunal, but has proven quite influential with the Court as well.*

*A few years ago Danielle Stern suggested to her grandfather that as the oldest member of the family, he ought to put down his memories of both the family and of his law practice. Stern did, and in it he describes various members of the family, and how he came to go to Harvard Law School, graduating in 1932 during the Great Depression. Although he had been an editor of the Harvard Law Review and graduated magna cum laude, the major New York firms passed him by because he was a Jew. He did manage to get a job with a small law firm at \$25 a week, and about a year later, went to Washington to join the New Deal. We are pleased to present that part of Mr. Stern's memoirs that deals with his years in the Justice Department and then in the Solicitor General's office.*

My first sixteen months after graduation from Harvard Law School I worked in a four-lawyer office in New York City. In October 1933 Herbert S. Marks, a classmate at Harvard Law School who had probably been the top student on the *Harvard Law Review*, telephoned to tell me that if I wanted to come to Washington I should see his superior, Nathan Margold, the Solicitor of the Interior Department, the next morning at a dentist's office in New York. Margold (a former Harvard law professor) was recruiting lawyers for the Petroleum Administrative Board, who were to work under him and his first assistant, Charles Fahy (an Air Force pilot in World War I). Both of them had come to the Interior Department because of its concern with Indian affairs, not because of its knowledge of the petroleum industry! (Margold eventually became

a District of Columbia Municipal Court Judge. Fahy became the Solicitor General of the United States who brought me into that office in 1941. He later became a judge of the Court of Appeals for the District of Columbia Circuit.) Margold promptly offered me a job at thrice my prior salary, which I accepted. My boss at the small law firm where I worked had refused to raise my pay, so his suggestion that I should have asked the government for more shocked me.

John F. Davis and John H. Hollands, who had also been on the *Review* with me at law school, came to the Petroleum Board at the same time in November 1933. The Board's function was to administer the code for the petroleum industry under the National Industrial Recovery Act. All other industries were assigned to a separate agency, the National Industrial Recovery

Administration. I remember telephoning Milton Handler, up to then a Columbia law professor, who we thought was in charge of brief writing under the Act, to send us a copy of their briefs on the constitutional issues. We discovered, however, that they had not yet drafted any briefs, and that it would be up to Davis, Hollands and me to prepare the first drafts on our own. The result was that we drafted the first brief on the constitutionality of the National Industrial Recovery Act for the United States Court of Appeals in Texas in *Panama Refining Co. v. Ryan*.<sup>1</sup> The case involved the provisions of the Petroleum Industry Code that forbade the production of oil in excess of quotas for each well in the East Texas oil field (where the price of oil had gone down to five cents a barrel), and which limited the amount that oil producers could ship across state lines.

The three of us divided up the first drafting of the constitutional topics, and I took the Commerce Clause. The other issues were the Due Process Clause and the adequacy of the delegation of power by Congress. I went down to the Library of Congress and read all the cases on the power of Congress under the Commerce Clause as well as everything else I could find on its constitutional history. This eventually led to my writing my first article on the history and meaning of the Commerce Clause, which appeared in the *Harvard Law Review* in 1934, and, in the long run, to my participating in most of the Commerce Clause constitutional cases in the next ten years.<sup>2</sup>

### **The Panama Case in the Supreme Court**

When the *Panama* case finally reached the Supreme Court, having been decided in the government's favor by the Court of Appeals, the Department of Justice sent over a slightly older lawyer named Moses Huberman to take charge. We discovered that he had also been on the *Harvard Law Review* and actually had written briefs before, which was more than any of the three of us had done. We soon became good friends, and within a few months I was asked to join Huberman in the Antitrust Division at the Department of Justice (headed by Assistant Attorney General Harold M. Stephens), which at that time was handling all cases involving the regulation of business under the New Deal stat-

utes. It had not been necessary for me to get any political clearance to join the Interior Department, because the Secretary of the Interior, Harold Ickes, was apolitical and not concerned with Democratic endorsements. But when I was asked to join Justice, political clearance was requested although I was told it was not absolutely necessary. I called Tom Corcoran, who helped recruit young lawyers from Harvard Law School for the New Deal agencies, and my uncle Arthur Garfield Hays in New York who was chief counsel for the American Civil Liberties Union. Within a day or two I had the necessary political clearance from Senator Wagner.

The Antitrust Division at that time contained a number of able lawyers who were assigned to defending the constitutionality of the National Industrial Recovery Act (NIRA). Those involved in the *Panama* litigation included Stephens, Carl McFarland (one of Stephens' top associates), later president of the University of Montana and a professor at the University of Virginia Law School, Huberman, Charles Weston, and Abe Feller, more experienced and very able lawyers from Harvard. I continued to work as one of the junior lawyers with John Davis. Assistant Attorney General Stephens argued the case for the government.

It was Huberman, who, by checking the original executive order establishing the Petroleum Code at the State Department, discovered that the crucial paragraph of the code providing for the fixing of production quotas for each oil well had been unintentionally deleted when the section was amended. We felt obligated to call this to the Court's attention, although the omitted provision was immediately reinstated in the code. Somewhat surprisingly, the Court found that insufficient to bring this issue back into this suit for an injunction. The result was that after we wrote an exhaustive and exhausting brief (195 pages), mainly on the constitutionality under the Commerce Clause of federal regulation of the production of oil, the Supreme Court was able to duck the question on the ground that it was no longer presented.

The *Panama* case was decided by the Supreme Court in January 1935. The Court held that a small section of the NIRA not covered by the omission contained too broad a delegation of power without adequate standards. This was the first time a federal statute had been held



invalid for that reason — and there have been hardly any others since. This clearly foreshadowed a similar holding of invalid delegation as to the rest of the NIRA, which was even more vulnerable on the same ground, as the Court soon held in the *Schechter Poultry* case.

### The Schechter Case

The next Supreme Court test was to have been a case against a lumber manufacturer named Belcher. The government appealed from a dismissal of the indictment, and prepared a long brief along the same lines as it had presented in the brief for the petroleum industry in the *Panama* case. Weston and I wrote the government brief. By then, the NIRA was due to expire in a couple of months. Accordingly, Solicitor General Biggs dismissed the government's appeal to the Supreme Court in the reasonable belief that the statute could be amended and the delegation problem cured when the act expired in June of that year. For this the Department was roundly criticized in the press.

Within a very short time thereafter, the government prevailed in part in the prosecution of the *Schechter Poultry* case in the federal Court of Appeals in New York.<sup>3</sup> This involved marketing and labor practices in the kosher poultry industry for products that had come into New York City from other states. We could not prevent the defendants from asking the Supreme Court to review the case. On its face, the *Schechter* case had little connection with interstate commerce.

Nevertheless, when the *Schechter* case came along, the trial lawyer in the Antitrust Division who had handled and won it below urged that the government join in consenting to the review by the Supreme Court, in the belief that the 1,500-page record contained a great deal to show how interstate commerce was affected by unfair practices in the kosher poultry industry. Partly as a result of his entreaty, the government agreed to Supreme Court review of the case.

By then the Antitrust Division had been told to clear everything with Stanley Reed, who was general counsel of the Reconstruction Finance Corporation and about to be appointed Solicitor General (and eventually a Supreme Court Justice). Paul Freund was his assistant. That meant

submitting everything to Reed through Freund, with whom I was living at the time in a house on Q Street. We were all very happy to have him review anything we did. He had been a Brandeis law clerk, and was as able a lawyer as could be found — as his subsequent career as a top professor at Harvard Law School for over fifty years attested. While this was going on I was reading the 1,500-page record in the case. I reported to Freund and Reed that there was practically nothing in the record that supported the government's position under the Commerce Clause. Nonetheless, they concluded that it was too late for the government to change its position.

Reed was a conscientious lawyer and Justice with whom I remained friendly until I left Washington for Chicago. Later in 1935 I heard then Solicitor General Reed argue what I recall as several cases in a row involving the constitutionality of the Agricultural Adjustment Act and related statutes, the first of which held the basic statute unconstitutional.<sup>4</sup> What I particularly remember is that he collapsed onto the floor of the courtroom during the last case, which alone was in substance decided in the government's favor.<sup>5</sup> Two years later, Reed was appointed to the Court, where he remained for nineteen years, and then lived twenty-three years more, often sitting in lower courts.

The *Schechter* case proceeded on an accelerated schedule, even though, if the government had let it take its regular course, the statute would have expired (and could have been revised) long before the case could have been argued. It was argued by Reed and Donald Richberg, by then the head of the National Recovery Administration and a well-known and able Chicago labor lawyer. As was predicted, on May 27, 1935, the Court unanimously held the NIRA unconstitutional both under the Commerce Clause and as an invalid delegation of power.<sup>6</sup>

### The Guffey Coal case

A few months later, in order to deal with the special and serious ills of the bituminous coal industry, the Guffey Coal Act was passed; it sought to raise prices and wages and encourage collective bargaining in the coal industry. Immediately a test (and to a large extent phony) suit challenging the act's constitutionality was brought by the officers of the Carter Coal Com-



pany against the corporation itself, as well as against government officials. I was the junior member of the government's trial team, which tried the case in the District of Columbia trial court for a few weeks. The head of the Antitrust Division, John Dickinson, previously professor at the University of Pennsylvania Law School and a brilliant but pompous lawyer, was in charge of the case and argued it in the Supreme Court. Three of us wrote the Supreme Court brief. The government proved that strikes in the bituminous coal industry would affect interstate commerce by closing down all of the railroads and most of the industries that shipped by railroad — which amounted to a major portion of the interstate commerce of the country. The Supreme Court held, however, in May 1936, that such effects on interstate commerce were merely indirect and not sufficient to justify federal regulation of labor relations in the coal industry.<sup>7</sup> Justices Brandeis, Stone, and Cardozo dissented.

### **The Change in the Supreme Court**

After that I began to work on Railway Labor Act cases in the Antitrust Division under Leo F. Tierney, who eventually was responsible for my joining my present Chicago law firm. In February 1937, when it looked as if no legislation that might effectively remedy the Depression would be held constitutional by the existing Supreme Court, President Roosevelt proposed that Congress authorize a new appointment to the Court for any Justice over seventy years old. Such a statute would have authorized five new Justices to complement Brandeis and counterbalance the four resolutely conservative Justices.

Amazingly, in April 1937, eleven months after the *Carter* decision and three months after the President's proposal, the Court held, by a five to four vote, that the federal government did have the power to regulate labor relations in large and small companies producing goods for interstate commerce. The ruling in the Labor Board Cases was completely inconsistent with the *Carter* and other recent cases.<sup>8</sup> Did the Court-packing proposal — as almost everyone then assumed — cause Chief Justice Hughes and Justice Roberts to change their votes and swing over to the side of the Brandeis trio? In my article on Court-

packing for this *Yearbook*, which reviewed everything on the subject up to 1988, I concluded that Chief Justice Hughes probably did not change his vote for that reason, but Justice Roberts probably did.

I did not work on those cases, but I wrote the government's brief in the companion case under the Railway Labor Act, which was argued by Solicitor General Reed the day before and decided two weeks earlier.<sup>9</sup> It presented the question of whether Congress could regulate the labor relations of railroad shopmen who did not themselves travel in interstate commerce. The Court held unanimously that Congress had such power over interstate railroads.

Within a year, two of the conservative Justices retired, and soon thereafter the other two retired or died. The Court then upheld the new legislation in a number of cases. The proposed Court-packing statute, of course, disappeared.

### **Fair Labor Standards Act**

In 1938 Congress passed the Fair Labor Standards Act, which imposed minimum wages and maximum hours in industries producing goods for interstate commerce. Like the NLRA, this statute was an offshoot of the NIRA. My job was to defend the constitutionality of the statute in the lower courts and to write the briefs for the Supreme Court. In the trial court I handled and lost the *Darby Lumber* case, in which the minimum wage in Georgia sawmills was shown to be 9.4 cents per hour. This became the test case before the Supreme Court, and was argued by Solicitor General Francis Biddle. By the time the decision was handed down in 1941, all of the four members of the Court's right wing had died or retired and a unanimous Court had no trouble accepting the same Commerce Clause arguments that had been so unsuccessful in the 1935 and 1936 decisions.

The opinion upholding the statute in the *Darby* case was written by then Justice Stone, who later became Chief Justice. This was one of his great opinions on the Commerce Clause and other subjects.<sup>10</sup> Stone does not have the recognition that I think he deserves as one of the great Supreme Court Justices. This may be because he was not as renowned as a Chief Justice (unlike Hughes, whom he replaced in 1941) because he was not an effective judicial admin-



istrator. But his opinions, particularly on constitutional issues, were among the very best. This is not surprising, since he had been a professor and dean of the Columbia Law School shortly before he became Attorney General of the United States and then a member of the Supreme Court in 1925.

### The Solicitor General's Office

Robert H. Jackson was a youngish lawyer of great ability whose father would pay only for medical school studies. Consequently, he had attended only a single term of law school at Albany Law School in New York. President Roosevelt had promoted him to Assistant Attorney General, Solicitor General, and Attorney General before appointing him to the Supreme Court. I briefed a number of cases that Jackson argued, and found that he was the only lawyer of stature who could adequately prepare Supreme Court arguments in no more than two or three days.

While he was Solicitor General, he assigned me to the first case under a new statute regulating the bituminous coal industry for my first argument in the Supreme Court. The assignment was challenged by the new politically appointed commission charged with the statute's administration on the ground that it was demeaning to assign their first Supreme Court case to a young lawyer for his first Supreme Court argument. Solicitor General Jackson apologetically reassigned the argument (which was simple enough for anyone to win) to himself, and then assigned me another case.

When President Roosevelt wanted to trade fifty old destroyers to Great Britain for use against Germany before the United States got into the war, he sought an opinion as to the legality of this from Jackson, his Attorney General. Jackson requested, but did not receive, a persuasive opinion to that effect from the high-ranking Justice Department attorney who usually wrote opinions for the Attorney General, and requested I prepare a new opinion. He found my draft satisfactory!

I only had one personal encounter with the Chief Justice, and that was when I had reason to see Charles Evans Hughes in his chambers. What I remember is his complete friendliness in contrast to the attitude that his bearded counte-

nance had led me to expect.

In 1941, shortly after becoming Solicitor General, Charles Fahy, whom I had known since we had worked together at the Petroleum Board, brought me upstairs from the Antitrust Division where I had worked almost entirely on constitutional, not antitrust, cases, to the Solicitor General's office. Fahy was a delightful, intelligent, and quiet Solicitor General to work for. He argued many important cases himself, and assigned others to his staff. He resigned as Solicitor General in 1945 to become the top lawyer for the American forces in Germany at the end of the war, and a few years later became a member of the U.S. Court of Appeals for the District of Columbia. We remained friends for many years, although I seldom saw him after I moved to Chicago in 1954.

After Charles Fahy retired, President Truman in 1945 appointed J. Howard McGrath, the governor of Rhode Island, as Solicitor General. McGrath had no qualifications for the position, and merely argued a few cases. Fortunately, McGrath was willing to let Paul Freund, who had come back to the office during the war, run the office until he returned to Harvard Law School. McGrath retired in October 1946, to become a Senator from Rhode Island.

McGrath (and Rhode Island) should, however, be given credit for promoting to the Solicitor General's office Colonel Frederick Bernays Wiener, who had been an editor of the *Harvard Law Review* in the years preceding Paul Freund and me. He had specialized in military law during World War II and handled some very important cases for the government in the Supreme Court. After he stepped down as Solicitor General, the Supreme Court designated him as the principal draftsman of the Court's new Rules in 1954. Although he was not easy to get along with, his great ability could not be doubted. He eventually retired to Phoenix, Arizona.

The Solicitor General's office every year had a great many criminal cases coming from the Appellate Section of the Criminal Division of the Department of Justice, headed for many years by Robert Erdahl. Two of his specially competent assistants over the years, both of whom argued a number of Supreme Court cases, were Beatrice Rosenberg and Irving Shapiro. I believe that Erdahl and Rosenberg remained in the Criminal Division until retirement. Irv



Shapiro, however, was hired by the du Pont Company in Delaware, and eventually proved our reasonableness in relying on his ability by becoming chief executive of that company.

In 1947 President Truman appointed as Solicitor General Baltimore attorney Philip B. Perlman, who was a pleasant, intelligent lawyer, but not outstanding and not capable of high-class oral arguments. He lasted five years, resigning in August 1952, five months before the end of the Truman Administration. I was the senior member of the office, and the new Attorney General appointed me as Acting Solicitor General.

During my thirteen years in the Solicitor General's office from 1941 to 1954, I argued almost sixty cases in the Supreme Court, and briefed many more. I also wrote a number of articles for law reviews and other periodicals. The position I took on the Commerce Clause in these articles was eventually accepted by the Supreme Court in the 1940s.<sup>11</sup> In the *South-Eastern* case, the Court held that the antitrust laws extend to the insurance industry, overruling a

long-standing line of decisions holding that insurance was not in commerce. The case was deemed important enough to be argued by Attorney General Biddle.

One of my first, but not most important, arguments was a rape prosecution of an African American from Louisiana. The legal principle was whether the federal government had seemingly accepted jurisdiction over the land on which the rape occurred.<sup>12</sup> The Department of Justice had "abandoned the view of jurisdiction which prompted the institution of the case," and through me had confessed error in the Supreme Court. The defendants were represented by Thurgood Marshall, and our agreement as to the disposition of that case turned out to be the beginning of a long friendship. We were almost the same age.

Long before he became Solicitor General or a judge or Justice, Thurgood made efforts to have the Department of Justice (which meant the S.G.) file *amicus* briefs on behalf of his clients, usually in cases involving racial discrimination against blacks. Often he was successful. The last of these cases in which I participated was none other than the famous case of *Brown v. Board of Education*.<sup>13</sup> The Democratic Solicitor General, Philip Perlman, had refused to allow the government to file an *amicus* brief in support of Thurgood. When Perlman retired for reasons unrelated to that case, my position as first assistant to the Solicitor General resulted in my becoming Acting Solicitor General. As a result, with Philip Elman, who then wrote the *amicus* briefs on race discrimination subjects, I managed to persuade the new (Democratic and then Republican) Attorneys General to file an *amicus* brief on Thurgood's side. This continued when the *Brown* cases were reargued (after I left for Chicago), with Phil still filing briefs that may well have had some influence on the final decisions.

Though Thurgood and I did not see each other often after I moved to Chicago in 1954, we remained friends while he was on the Supreme Court. During his last few years before retirement we met several times at prestigious bar meetings.

In 1945 I argued the Arizona railroad case for the government as *amicus curiae*.



Acting Solicitor General Robert L. Stern leaving the Supreme Court on June 18, 1953, after successfully arguing the government's case to overthrow the stay of execution granted to the Rosenbergs.



The Court accepted our contention that a state could not limit the length of trains in interstate commerce.<sup>14</sup>

In June 1953, while I again was Acting Solicitor General under Attorney General Herbert Brownell, Jr., I argued the final stage of the *Rosenberg* case in which Julius Rosenberg and his wife had been sentenced to death for disclosing secret information to Communist nations as to atomic bombs. The Supreme Court by a vote of six to three overturned the stay of execution granted by Justice Douglas to two lawyers from other cities who had nothing to do with the case or the parties, both on the merits and because it discountenanced that practice.<sup>15</sup> Two other Justices, Black and Frankfurter, then supported Douglas. Justice Black's opinion stated:

I do not believe that Government counsel or this Court has had time or an adequate opportunity to investigate and decide the very serious question raised in asking this Court to vacate the stay . . . . The oral arguments have been wholly unsatisfactory due entirely to the lack of time for preparation by counsel [for both parties].

The majority of the Court stated, in the preceding opinion by Justice Clark, that

[u]nlike other litigants they have had the attention of this Court seven times; each time their pleas have been denied. Though the penalty is great and our responsibility heavy, our duty is clear.

I have always thought that the most important aspect of the holding was the Court's refusal to permit counsel who had nothing to do with a case or its parties to reopen it on their own. The contrary could have been a dangerous precedent.

I found that I got along very well with the new Republican Attorney General, Herbert Brownell, Jr., even though I was a holdover Democrat. Our understanding was that I would call to his attention any case with possible political effects, of which there turned out to be only two: the school segregation cases and a suit between Arizona and California with respect

to the division of Colorado River water.

I was the Acting Solicitor General from March 1953 to February 1954, until Chief Judge Simon E. Sobeloff of Maryland was appointed. Years later I learned from Herbert Brownell that the Republicans originally had planned to appoint Earl Warren as Solicitor General, but agreed that he should first complete his work as governor of California. When Chief Justice Fred Vinson died in September 1953, Earl Warren was appointed Chief Justice instead. Some time thereafter Brownell decided to appoint Judge Sobeloff as Solicitor General, but found that Sobeloff wished to complete his work on the Maryland Court of Appeals, which he did in February 1954. Brownell informally indicated to me (long after the fact) that the Republicans had found that they need not worry about my continuing longer as Acting Solicitor General. Strangely enough, Judge Sobeloff was a friend of my parents who by that time had lived in Baltimore for a number of years, and I got along with him very well during the few months before I joined the law office in Chicago.

Aside from the *Rosenberg* case, my relations with Felix Frankfurter were generally very friendly. But his purpose in my last official meeting in his chambers was to get me, as Acting Solicitor General, to insist that lawyers, including the Solicitor General's office, should not close citations with "certiorari denied." Since law school days he had insisted that this was meaningless and therefore not properly citable. Since most judges and lawyers think that there is some point to disclosing how the Supreme Court disposed of a case, the Solicitor General's office refused to change its practice in that respect. The law and appropriate policy as to this are not at all clear, as discussed in Section 5.7 of the Seventh Edition of **Supreme Court Practice**. Justice Jackson had stated in a separate opinion in 1953:

The Court is not quite of one mind on the subject. Some say denial means nothing, others say it means nothing much. Realistically, the first position is untenable and the second is unintelligible.

The status of denials still seems to be that most other judges and lawyers believe they should be



informed that a petition for certiorari had been denied, even though a denial cannot be regarded as a judicial determination on the merits.

In 1949 the Bureau of National Affairs (a publishing company) invited me and Eugene Gressman to write what became Stern and Gressman, *Supreme Court Practice* (first ed. 1950), the leading treatise on the subject. I was chosen because of my Supreme Court experience in the Solicitor General's office, and Gressman (who eventually became a professor at North Carolina and Seton Hall Law Schools) because he had been a Supreme Court law clerk for five years. I had also written a number of articles relating to the Supreme Court. Stephen M. Shapiro joined us with the Sixth Edition in 1986, and Kenneth S. Geller for the Seventh Edition in 1993. Both of them had been in the Solicitor General's office for many years, and are now partners in Mayer, Brown & Platt.

A few years ago I met Hugo Black, Jr., at an American Law Institute meeting. He opened the conversation by inquiring as to how the "Judge" was doing. When I indicated ignorance as to whom he meant, he explained that his father always called my coauthor, Eugene Gressman, who had clerked for Justice Frank Murphy for five years, the "Judge." Since Gene never revealed anything as to his relationship with Justice Murphy, who had died in 1949, this was the closest confirmation of the guesses of many of us as to the authorship of Justice Murphy's well-written opinions.

In the 1970s a Justice admonished the president of the ABA that its *amicus* briefs were often not of high quality. The result was that the ABA president appointed a committee, of which Erwin Griswold was the chairman and I was the next in line, to review and approve any *amicus* briefs in the Supreme Court before they could be filed. I remember a case for which the brief from Texas was clearly unsatisfactory. The only other available member of the committee and I were required to rewrite it in a very few days while she was also teaching at Rutgers Law School in New Jersey and I was in Chicago. Thus I became acquainted with the high quality of Ruth Bader Ginsburg's work before she became a judge or a Justice.

While I was Acting Solicitor General under both Democrats and Republicans in 1952 and 1953, I persuaded the heads of the Department

of Justice to permit the employment of high-ranking law students into the department before their graduation from law school, just as was being done by private law offices. Until then law students could not be employed as lawyers until they had been admitted to the Bar, which was usually well into their first year after law school and too late to hire them. Since then the department has adopted a nonpartisan honors program for hiring able law students, now as many as one hundred per year.

*Shortly after this Stern left government work for, as he put it "strictly financial reasons. No other law work would be as interesting or as important. . . . But I was beginning to doubt that my income would be sufficient for straightening the teeth of my three sons, much less sending them (and their children) to college." An old friend from the Antitrust Division, Leo Tierney, invited Stern to join his Chicago law firm, now known as Mayer, Brown & Platt. He remained in active practice from 1954 until 1993, when he became "of counsel," which means that he now has more time to devote to his family, to writing, and to golf.—Ed.*

## Endnotes

<sup>1</sup> 71 F.2d 1, 8 (5th Cir. 1934), reviewed in the Supreme Court at 293 U.S. 388 (1935).

<sup>2</sup> See Stern, "That Commerce Which Concerns More States Than One," 47 *Harvard Law Review* 1335 (1934), and "The Commerce Clause and the National Economy, 1933-1946," 59 *id.* 645, 883 (1946).

<sup>3</sup> *United States v. Schechter Poultry Corp.*, 76 F.2d 617 (2d Cir. 1935).

<sup>4</sup> *United States v. Butler*, 297 U.S. 1 (1936).

<sup>5</sup> *Moor v. Texas and New Orleans Railroad Co.*, 297 U.S. 101 (1936).

<sup>6</sup> *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

<sup>7</sup> *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

<sup>8</sup> *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). The story of the Court's changes is recounted in my 1946 *Harvard Law Review* article, *supra* note 2, and in my "The Court-Packing Plan and the Commerce Clause," 1988 *Yearbook Supreme Court Historical Society* 91.

<sup>9</sup> *Virginia Railway v. System Federation*, 300 U.S. 515 (1937).

<sup>10</sup> *United States v. Darby Lumber Co.*, 312 U.S. 100 (1941).

<sup>11</sup> *United States v. South-Eastern Underwriters Ass'n.*, 322 U.S. 533, 551 (1944); see also *North America Co. v. S.E.C.*, 327 U.S. 686 (1946).

<sup>12</sup> *Adams v. United States*, 319 U.S. 312 (1943).

<sup>13</sup> 347 U.S. 483 (1954).

<sup>14</sup> *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945).

<sup>15</sup> *Rosenberg v. United States*, 346 U.S. 273 (1953).

<sup>16</sup> *Brown v. Allen*, 344 U.S. at 542.



# **The Business of the Supreme Court Revisited**

**John Paul Jones**

Sixty-eight years ago, Felix Frankfurter and James M. Landis published **The Business of the Supreme Court: A Study in the Federal Judicial System**. Its eight chapters originally appeared as articles in the *Harvard Law Review*, the first in June of 1925, and the last in April of 1927. When the work afterward emerged as a book, its authors dedicated it to Oliver Wendell Holmes, Jr., acknowledging his twenty-five Terms as a member of the Supreme Court of the United States.

My copy of **The Business of the Supreme Court** has been ill used by time, as have both the validity of its basic assumption and the design of its research. My copy is thickened by a swollen binding; its curved covers close like a clamshell around pages brown with age and stiff with decay. At some time since its binding, it has been left to the damp; now it is stained, and it smells of mildew. When this book first appeared, as a history of legislation it epitomized the latest trend in legal scholarship; now, the narrowness of its focus best illustrates its datedness. When first published, its underlying assumption that the Supreme Court's workload was beyond the Court's control went unquestioned; now, that assumption is regularly questioned. The book is dated and myopic. It is, nevertheless, a classic in the strictest sense. It is elegantly composed and presented. It superbly models a wider-ranging scholarship of which its authors were recognized pioneers. As the early work of scholar-reformers influential in the reshaping of American legal culture, it ought to

be of enduring interest to students of social as well as legal history.

Felix Frankfurter's name is surely familiar, but that of James McCauley Landis, his coauthor, is likely less so. When they wrote the book, Frankfurter had been for eleven years a member of the faculty of the Harvard Law School, and Landis, his former student, had returned after graduation to act as Professor Frankfurter's research assistant and pursue Harvard's brand-new degree, Doctor of Juridical Science. Frankfurter would make his historical mark as the protégé of the Progressive leader Justice Louis Brandeis, as advisor to both Roosevelt Presidents, and eventually, as an often-dissenting Justice in the Supreme Court of the United States, most notably during Chief Justice Earl Warren's stewardship.<sup>1</sup> James McCauley Landis, while perhaps not as famous as his coauthor, played key leadership roles in the New Deal, both in reviving the Federal Trade Commission and in launching the Securities and Exchange Commission. At the tender age of thirty-six, Landis became dean of the Harvard Law School. Eventually, he would end a distinguished career of public service as a close advisor to President John F. Kennedy.<sup>2</sup>

**The Business of the Supreme Court** was well received at its publication. Harold Lasswell wrote in *The American Journal of Sociology*:

That such a book as this should issue from the most famous law school in the United States is nothing less than

an epochal event. It evidences the broadening of research interests on the part of the instructional staff, and this is presumably not without effect upon the actual routine of law training. In view of the peculiar dependence of American polity upon the lawyer, this is truly a matter of national concern.<sup>3</sup>

From Princeton, John Dickinson wrote that one of the outstanding values of this book was the light it shined on the processes and quality of American legislation.

The thoroughness and detail of this account disclose, as would a similar account of the history of any other important branch of legislation, the enormous slowness of our legislative process, and the character of the obstacles it must overcome.<sup>4</sup>

Edward S. Corwin, never a generous critic, found the work "... based on wide research, ... well arranged and pleasingly written. It suffers, if anything, from the excess of its virtues."<sup>5</sup> W.P.M. Kennedy, writing for the *English Historical Review*, was lavish in his praise:

The history of the nation seems to pass before us, as we follow the details of the "business" of the Supreme Court in interpreting the Constitution ... Nowhere else is it possible to study in such a fine setting the interaction of political, economic, and legal forces in the jurisprudence of a modern state.<sup>6</sup>

In **The Business of the Supreme Court**, Frankfurter and Landis confronted a recurring problem for the Supreme Court, a docket overcrowded with requests for appellate review. Attributing this oversupply in the Highest Court to growth in the business of courts below, the authors traced, from the first judiciary act in 1789 to the so-called "Judges' Bill" of 1925, a long line of congressional reactions to perceived needs or faults in federal jurisdiction. For the most part, the authors concentrated on three major changes in their chronicle of jurisdictional evolution:



Frankfurter's coauthor, James McCauley Landis, became dean of Harvard Law School at age thirty-six after having helped establish several New Deal agencies, including the Securities and Exchange Commission.

elimination of circuit riding by Supreme Court Justices, establishment of intermediate federal courts of appeal, and gradual replacement of statutory rights of appeal in the Supreme Court with forms of appellate review affording the Court the power to refuse a hearing. In passing, Frankfurter and Landis made note of lesser jurisdictional modifications, such as changes to the way decisions of the Court of Claims and territorial courts are reviewed, and the brief life of the Commerce Court. Some of these topics, like circuit riding, may seem of interest today only to historians of the Court, but others touch on matters of modern as well as historical relevance. For example, the account by Frankfurter and Landis of bills in both houses of the forty-fourth Congress to withhold federal jurisdiction in cases arising from the actions of corporations outside the state of their incorporation<sup>7</sup> certainly seems relevant to recent discussions of the continued importance of diversity jurisdiction. The book's contrast of the relative success of a court entertaining nothing but appeals from administration of the tariff laws with the short life of the court established to review nothing but orders of the Interstate Commerce Commission provides



a useful background to contemporary debate concerning new courts for other subjects now deemed more or less specialized. Only in 1988 would occur the apparently final step in congressional substitution for appeals to the Supreme Court as a matter of right of appellate forms affording the Court the power to refuse review.<sup>8</sup>

Even the long and detailed account (with which Professor Corwin expressed impatience) of the process by which circuit riding by the Justices was ultimately abandoned offers some intriguing food for contemporary thought. Most students of the Court's history are probably familiar with the practical difficulties confronting early Justices attempting to fulfill their circuit riding duties, especially those assigned to the frontier circuits. Most are also likely to recall that an appreciation of these difficulties led the last Congress controlled by Federalists to dispense with such requirements after little more than a decade. It is conventional wisdom that partisan retaliation by congressional members of Jefferson's Republican Party prompted legislation the following year, frustrating that salutary reform. Not so widely known, perhaps, is why circuit riding by Supreme Court Justices remained a requirement long after the Federalists among the national judiciary were outnumbered by Jeffersonian Republicans. In 1838, for example, Justice John McKinley traveled 10,000 miles and faced a docket of nearly two thirds of all the cases then pending in a federal circuit court.<sup>9</sup> Justice Peter V. Daniel in 1851 covered 7,000 miles in two months.<sup>10</sup> Both men were nominated to the Supreme Court by President Martin Van Buren, a Jefferson disciple, and confirmed by Congresses controlled by his party's successor. Frankfurter and Landis reveal that apparently influential members of several Congresses regarded circuit riding by individual Justices as necessary for an adequate appreciation by the Court collectively of the subtleties of state and local law. Congressional satisfaction with circuit riding sufficient to prevent reform therefore persisted, even when the requirement gored judicial oxen of the same party, and even as territorial expansion added appeals in ever-increasing numbers to the Supreme Court's docket, so that a Justice's collegial duties to the national tribunal came in ever-sharper conflict with his duties to his circuit.

Frankfurter and Landis attributed a second

phase of growth in judicial review demand to "vast extensions of federal jurisdiction" following the Civil War. They pointed to not only the familiar example of the Judiciary Act of 1875, for the first time opening federal as well as state courts to most cases involving federal law, but also to a host of enactments permitting defendants to shift cases from state to federal court in more or less specific circumstances. The authors' sage observation regarding this "revolution" bears repeating:

The history of the federal courts is woven into the history of the times. The factors in our national life which came in with reconstruction are the same factors which increased the business of the federal courts, enlarged their jurisdiction, modified and expanded their structure. The problems, to be sure, are the recurring problems which began with the First Judiciary Act and are active today; they are the enduring problems of the relation of states to nation. But their incidence and intensity have varied, as they are bound to vary at different epochs. For law and courts are instruments of adjustment, and the compromises by which the general problems of federalism are successively met determine the contemporaneous structure of the federal courts and the range of their authority.<sup>11</sup>

Ironically, in light of its title, **The Business of the Supreme Court** is much less concerned with judicial than with legislative history. The book is virtually devoid of the stuff of what then constituted conventional Supreme Court scholarship, doctrine and biography. Inside its covers, the influence of events, theory, and personality on the decisional work of the Court is simply left unaddressed. Perhaps the authors considered Charles Warren's recent work to have occupied any wider field of institutional scholarship.<sup>12</sup> Moreover, as legislative history, **The Business of the Supreme Court** is limited, in the main, to materials found in formal and open sources, such as congressional records, official collections, and legal periodicals. The authors made few references to the larger political and



social forces influencing Congress's inclination to tinker with federal jurisdiction. Missing, for example, is how the federal courts' admiralty jurisdiction was extended in the early nineteenth century to inland waters as the nation embraced the Mississippi's watershed and the Great Lakes. The architect of this enlargement of federal judicial power was unquestionably Justice Story, both from the Bench of the Supreme Court and behind the scenes in Congress. Because Justice Story penned an anomalous opinion for the Court in *The Thomas Jefferson*<sup>13</sup> to the contrary, it is surely of interest that the steamboat in that case was owned by brothers of Senator Johnson of Tennessee, sponsor of an ultimately unsuccessful bill to limit federal maritime jurisdiction to cases involving tidal waters.<sup>14</sup>

The preoccupation of the authors with legislation as the remedy for an overworked Supreme Court must have made the book especially curious to contemporary readers conversant with trends in legal scholarship. Frankfurter and Landis presented the history of Supreme Court

appellate jurisdiction as one of more or less timely congressional development in response to observed superabundance of requests for Supreme Court review. The authors said practically nothing about the Court's own efforts to manage more efficiently its crowded dockets and minimize delay in its judgments. In the formative period of which Frankfurter and Landis wrote, when most review by the Court belonged to the litigant losing in a lower court by right, the workload of the Supreme Court was surely affected by several of its own decisions. Examples include: the decision in *Barron v. Baltimore*<sup>15</sup> that the Bill of Rights did not bind states; the decision in *Ex parte McCordle*<sup>16</sup> that Congress could strip the Court of jurisdiction to issue a writ of habeas corpus (even in a case in which oral argument had already been heard); the decision in *The Civil Rights Cases*<sup>17</sup> that the Fourteenth Amendment did not reach acts of private racism; and the Court's uncontested presumption announced three years later in *Santa Clara County v. Southern Pacific Railroad Co.*<sup>18</sup>



Felix Frankfurter answered questions at his confirmation hearings in 1939 with the coaching of Dean Acheson, his advisor (sitting to his right). Perhaps no other nominee has been so familiar with the Court and its workings: Frankfurter had written extensively about the institution during his illustrious teaching career at Harvard Law School. Acheson, an attorney in private practice, had been a clerk to Justice Louis D. Brandeis.



that corporations were persons enjoying rights under the Fourteenth Amendment. These decisions regarding the reach of the Constitution set the outer limits of jurisdiction, and thus influenced the dockets of all courts charged with its enforcement. Among the courts so affected was the Supreme Court itself, which had, in *Martin v. Hunter's Lessee*,<sup>19</sup> laid claim to the power to dispose of appeals that the highest court of a state had erred in its interpretation of the national charter. Frankfurter and Landis made brief mention only of congressional reaction to *McCardle*<sup>20</sup> and referred to *Martin v. Hunter's Lessee* only for Justice Story's dictum regarding the obligation of Congress to confer on the lower federal courts all jurisdiction permitted by Article III.<sup>21</sup> No mention of *Barron v. Baltimore*, *The Civil Rights Cases*, or *Santa Clara County* appears in **The Business of the Supreme Court** at all.

If judgments of the Court respecting jurisdiction under Article III of the Constitution are conspicuous by their general absence from **The Business of the Supreme Court**, other steps by the Court both tending to and intended to move cases more rapidly to decision were noted by Frankfurter and Landis, albeit in passing. One such step was the imposition of limits on oral argument. In a footnote, they recounted how, in 1812, the Court announced a rule of practice for the first time limiting to two the number of counsel permitted to argue for each side in a cause. In three sentences, they present the Court's establishment in 1849 of limits on how long each counsel could hold forth. As Chief Justice Rehnquist tells the same story elsewhere,

Originally there was no limit set on the time a lawyer might devote to arguing his case in the Court. Indeed, the Court had so little to do in its first few years that it would have had no good reason to place time limits on counsels' arguments . . . But as the Supreme Court's docket grew more crowded, this sort of expenditure of time in a very important case [five full Court days in *Gibbons v. Ogden*] proved to be a luxury. In the middle of the nineteenth century the Court placed a limit of two hours on the time to be taken by counsel for each side.<sup>22</sup>

No mention was made in **The Business of the Supreme Court** of another 1849 innovation by the Court, a rule that, when a case has been called for argument in two successive Terms, and neither party is prepared to argue it, the case shall be dismissed.<sup>23</sup> Finally, there was no mention of the Court's development of the practice of dismissing summarily appeals of right for want of a substantial federal question, or when the decision of a state court is sustainable on state law grounds, although the former has been traced to a decision in 1868,<sup>24</sup> and the latter to a decision seven years later.<sup>25</sup>

Frankfurter and Landis offered a picture of appellate jurisdiction evolving in response to strains on the Court's capacity for judicial review. If that picture is less than comprehensive because it concentrates on legislative changes to the exclusion of the Court's doctrinal and procedural home remedies, it is nevertheless trend-setting scholarship, all the more noteworthy because its Harvard-trained authors eschewed study of Supreme Court case law in favor of study of federal legislation. Frankfurter and Landis wrote from Harvard less than fifty years after Christopher Columbus Langdell had revolutionized the study of law by promoting the critical interpretation of judicial opinions and persuading legal scholars that a science of law could be induced from the utterances of judges administering the common law. This revolution began at the Harvard Law School, where Langdell became dean in 1870, but soon spread nationwide, as Langdell's disciples migrated to other schools.<sup>26</sup> Preoccupied with the common law, Langdell's new science discounted the contribution of legislation, and its examination was consequently discouraged.

While law professors in the late nineteenth and early twentieth centuries were confining their students to analyzing judicial opinions, frustration in the greater world beyond law school with the lawmaking of judges was prompting more frequent resort to legislation for dealing with emergent social and economic challenges. At the same time the initiative shifted from courthouse to legislature, the rate of lawmaking accelerated, in response to the rapidity of change in an industrial age. There dawned what Dean Calabresi has aptly named the Age of Statutes.<sup>27</sup> Legal education and scholarship could lag only so far behind, and to Langdell's fixation with

the common law, there inevitably arose a reaction. The early leaders of this reaction, James Bradley Thayer, Holmes, and Roscoe Pound, all influenced Frankfurter, inculcating a skepticism about doctrine and a recognition of law's wider antecedents. Indeed, Dean Pound, the broker of the modern marriage of law and sociology, brought Frankfurter to the Harvard faculty, as Frankfurter subsequently brought Landis. In the year following publication of *The Business of the Supreme Court*, Harvard named Landis its first research professor of legislation. Taking note of this appointment, *The Nation* found it illustrative of "The New Legal Education." In its own way this reaction to Langdellian method and jurisprudence was a revolution, and *The Busi-*

*ness of the Supreme Court* one of the clearest trumpet calls.

When *The Business of the Supreme Court* was published, its greatest strength was its attention to legislation as a primary source of law. Audaciously, the authors demonstrated legislation's importance to jurisdiction, the very law that regulates judicial power. That approach presented a bold challenge to the presumption that case analysis alone constituted legal scholarship. Ironically, that approach has, over time, mutated into the book's greatest weakness, as scholars have continued to recognize and explore additional facets of lawmaking. That the book is now obsolete ought not justify that it is now neglected, but it explains it.

## Endnotes

<sup>1</sup> See generally Michael E. Parrish, *Felix Frankfurter and His Times* (New York: The Free Press, 1982) and Melvin I. Urofsky, *Felix Frankfurter: Judicial Restraint and Individual Liberties* (Boston: Twayne Publishers, 1991).

<sup>2</sup> See generally, Donald A. Ritchie, *James M. Landis, Dean of the Regulators* (Cambridge, MA: Harvard University Press, 1980).

<sup>3</sup> 34 *Am. J. Soc.* 230 (1928).

<sup>4</sup> 22 *Amer. Pol. Sci. Rev.* 463, 465-66 (1928).

<sup>5</sup> 43 *Pol. Sci. Q.* 272 (1928).

<sup>6</sup> 44 *Eng. Hist. Rev.* 327, 328 (1929).

<sup>7</sup> Felix Frankfurter and James M. Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* (1927), 89 and note 146.

<sup>8</sup> Law of June 27, 1988, Pub.L. 100-352, 102 Stat. 662. See 28 U.S.C. §§ 1254, 1257 (1993 Suppl.).

<sup>9</sup> Elizabeth Brand Monroe, "John McKinley," in *The Supreme Court Justices: A Biographical Dictionary* 29 (Melvin I. Urofsky, ed. (New York: Garland Publishing Inc., 1994).

<sup>10</sup> John P. Frank, *Justice Daniel Dissenting*, 277-81 (Cambridge MA: Harvard University Press, 1964).

<sup>11</sup> *Business*, 59-60.

<sup>12</sup> Charles Warren, *The Supreme Court in United States History* (Boston: Little Brown, 1922).

<sup>13</sup> 23 U.S. (10 Wheat.) 428 (1825).

<sup>14</sup> David W. Robertson, *Admiralty and Federalism* (Mineola, NY: Foundation Press, 1970) repeating what an anonymous

student author first published in "From Judicial Grant to Legislative Power: The Admiralty Clause in the Nineteenth Century," 67 *Harv. L. Rev.* 1214 (1954).

<sup>15</sup> 32 U.S. (7 Pet.) 243 (1833).

<sup>16</sup> 74 U.S. (7 Wall.) 506 (1869).

<sup>17</sup> 109 U.S. 3 (1883).

<sup>18</sup> 118 U.S. 394 (1886).

<sup>19</sup> 14 U.S. (1 Wheat.) 304 (1816).

<sup>20</sup> *Business*, 73.

<sup>21</sup> *Business*, 68 at note 43.

<sup>22</sup> William H. Rehnquist, *Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson*, (New York: Morrow, 1992) 70-71.

<sup>23</sup> Philip Phillips, *The Statutory Jurisdiction and Practice of the Supreme Court of the United States*, 2d ed., 340 (Washington: W.H. & O.H. Morrison, 1872).

<sup>24</sup> *Milligan v. Hartup*, 73 U.S. (6 Wall.) 258 (1868). See Francis J. Ulman & Frank H. Spears, "'Dismissed for Want of a Substantial Federal Question:' A Study in the Practice of the Supreme Court in Deciding Appeals from State Courts," 20 *B. U. L. Rev.* 501 (1940).

<sup>25</sup> *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1875). See Ulman and Spears, "Dismissed," *supra* note 24, 505 at n. 20.

<sup>26</sup> See Lawrence M. Friedman, *A History of American Law*, 2d ed., 606-20 (New York: Simon & Schuster, 1984).

<sup>27</sup> Guido Calabresi, *A Common Law for the Age of Statutes* (Cambridge, MA: Harvard University Press, 1982).



# **Justice George Sutherland and the Status Quo: A Biographical and Review Essay**

**Gary C. Leedes\***

Justice George Sutherland (1862-1942) is the subject of Professor Hadley Arkes' provocative new biography.<sup>1</sup> Arkes portrays Sutherland as a judge "who had found the ground of [his] jurisprudence in 'natural rights.'" Although history has not treated the Justice kindly, Arkes attempts to reverse history's verdict.

Sutherland was an unusually intelligent jurist whose well-written opinions champion the following classical liberal propositions:

(1) individuals own themselves and, by extension, they own their labor and its fruits: property and income;

(2) a nation's prosperity in the long run will be enhanced if honest individuals are free to acquire as much wealth as they can get;

(3) freedom of contract is preferable to restrictions imposed by officials who cannot possibly know or take into account each individual's preferences, needs, and unique circumstances;

(4) the government's primary role is to secure every individual's economic liberties and property by protecting each person against criminals, domestic subversives, and foreign enemies.

Sutherland believed that the common good is served best if the Court provides individuals with meaningful protection against the government's abuses of power.<sup>2</sup> Accordingly, he wrote,

To sustain the individual freedom of action contemplated by the Constitution is not to strike down the common good but to exalt it, for surely the good of society as a whole cannot be better served than by the preservation of the liberties of its constituent members.<sup>3</sup>

Sutherland's hierarchy of values, which ranks the individual's rights higher than the government's conception of the good, accounts for his expansive conception of judicial review.

Sutherland realized that not all the basic liberties of individuals are specified in the Constitution, and that the text imperfectly expresses the document's full meaning. Furthermore, the text yields significant messages that were not evident to the founding generation. Consequently, the Framers' presuppositions and specific intentions might not clarify the meaning of the Constitution. What does? According to Arkes, Sutherland understood the Constitution in light of extratextual "'natural rights'[that are] bound up with certain 'self-evident' moral 'truths.'" I disagree. In my view, Sutherland's common sense *modus operandi* was *not* to engage in a quest for moral truths that transcend and preempt the common law. To the contrary, Sutherland understood the Constitution in light of the common law's distinctions between right-

ful and wrongful conduct, traditionally cherished American values rooted in Protestant ethics, and theories of government learned in law school and reinforced during his government service.

Sutherland had definite ideas about the good of society and could express these ideas with precision and clarity. He brought to the Court's deliberations "learning and dialectical skill, a wide knowledge of affairs enriched by varied and eminent public service, and a habit of thoroughness . . ." In short, for most of his career, he was both principled and judicious. When he became dogmatic and injudicious during the Great Depression, he was criticized for good cause.

When the Great Depression arrived in the 1930s, Sutherland was widely regarded as a Justice who would take the nation back to the horse and buggy era. In fact, he was born in England during the pre-automobile days. When he was about eighteen months old (1864), his father, then a Mormon, emigrated to Utah. Sutherland later commented that he was tempted to think of himself as a pioneer.

By the time Sutherland attended Brigham Young University, which distributed Mormon texts endorsing the idea that the Constitution is divinely inspired, his father was no longer a Mormon, and neither was young George. The religious environment in Utah, however, shaped and nourished his view that human beings were moral agents free to choose between good and evil. As an adult, Sutherland was not religious in a conventional sense, although he believed in God and used his high office to proclaim that Americans were a "Christian People."

Sutherland attended the University of Michigan Law School for one term (1882). On the faculty teaching constitutional law were Judges Thomas M. Cooley and James V. Campbell, both of whom believed in a doctrine of constitutional limitations that firmly compartmentalized the powers of the government. Their notion of divided powers was not self-executing. A strong judiciary was necessary to monitor the system. When any governmental entity exceeded its allocated powers, courts were obligated to protect adversely affected individuals. Sutherland adopted and never abandoned their theories of constitutional limitations.

Sutherland returned to Utah (1883) as a fledgling practicing lawyer. By 1893, he was a

successful attorney-at-law and a popular public speaker. In one speech, he stated that the judicial department "is and should be the strongest branch of government." The speech was factually accurate. The Court during the 1890s assumed that it had the prerogative to impede the expansion of the government's power. The Fuller Court's extension of its power of judicial review, in Sutherland's view, was consistent with the views of his law school professors.

Because many of his constituents were engaged in mining, Sutherland was willing to legislate on behalf of men whose unusual occupations caused them to become diseased. When he served in the Utah senate (1896-1900), he advocated the enactment of a law limiting the hours employees may work in underground mines. This was not an uncharacteristic position for him to embrace. He understood "the moral limits on the uses of property," and he abided by the maxim *sic utere tuo ut alienum non laedas* (roughly, use your own property for the sake of causing no injury to others).

When Sutherland served in the United States House of Representatives (1901-1903), he fought to obtain a tariff to protect Utah's sugar crop. He defended his protectionism by arguing that tariffs "make production profitable thereby creating a demand for labor." His position on the tariff also conformed to the Republican Party's platform promises to enact a new tariff. He dipped into the pork barrel to obtain direct federal financial aid for the construction of reservoirs in Utah. He also obtained federal money in the form of a bounty for Utah's sugar producers. From his experience in Congress, he learned first-hand that judges should not defer excessively to the judgment of popularly elected representatives. They yield too willingly to their constituencies seeking benefits at the expense of other groups in society.

From 1905 to 1917, when Sutherland served in the Senate, he continued to support the Republican Party's efforts to enact protectionist legislation. He also supported an extension to the Chinese Exclusion Act. As a Senator, however, he (and his party) yielded to several of the Progressive movement's demands. He supported the Pure Food and Drug Act, the Seaman's Act of 1915, the Employers Liability Act (a strict liability workmens' compensation statute for some employees engaged in interstate com-



merce), legislation stipulating an eight-hour day for laborers employed by the federal government, and legislation establishing the Children's Bureau and Postal Savings Banks. During this period, Sutherland was aiming for an eventual

appointment to the Supreme Court, and his biographer Joel Francis Paschal speculates that he was attempting to allay the fears of influential people who believed that he was incapable of interpreting the Constitution impartially.<sup>5</sup> With



Justice Sutherland's most acclaimed opinion, *Powell v. Alabama* (1932), involved the case of nine black youths (above) arrested near Scottsboro, Alabama, for raping two white women riding a freight train. On the day of the trial their attorney declared he would not represent them, and eight of the boys were convicted and sentenced to death after other attorneys present took over their defense with only minimal preparation. Sutherland ruled that the failure of the trial court to appoint counsel for the indigent defendants denied them the right to a fair trial.



some misgivings, he attempted to find "a middle way" that would reconcile his views of constitutional limitations with the "popular aspirations of the period."

In 1915, he introduced the women's suffrage amendment to the Constitution. His strong support for women's suffrage and gender equality was based on sincerely held moral convictions. During Sutherland's two terms in the Senate, he was a major contributor to reforms improving the administration of justice. Sutherland was also an active member of the Foreign Relations Committee. This involvement and other experiences involving foreign affairs shaped his opinions concerning the President's inherent (extra-constitutional) powers. His conception of the executive branch's functions in foreign affairs became the supreme law of the land many years later when he wrote an enduring opinion in *United States v. Curtiss-Wright Export Corporation*.<sup>6</sup> *Curtiss-Wright* clearly indicates that Sutherland was not wedded to the Constitution as written.

Sutherland vigorously opposed the federal income tax on constitutional and philosophical grounds, and his leadership in the Senate on that issue endeared him to President Taft. Because of his effectiveness as a Senator, he became a nationally known leader and rumors that Sutherland was destined for the Court began to circulate. However, he was not reelected to the Senate for a third term. Following his electoral defeat, he practiced law in Washington, D.C. After only one year of membership in the American Bar Association, he was elected its president. In 1918, he lectured at Columbia University on the subject of the Constitution and world affairs.

Sutherland remained active in partisan politics. He devised a successful strategy that helped Warren G. Harding become President of the United States, and accepted several important assignments from Harding. In 1921, for example, Harding appointed him chairman of the Advisory Committee to the American Delegation to the Washington Conference on the Limitation of Armaments. At this stage of his distinguished career, nearly everyone recognized that Sutherland was a brilliant jurist, politically savvy, scholarly, well connected, and well liked. His only shortcoming was his inability to transcend his own experiences and limited world view.

After having been passed over by President Harding twice when there were openings on the High Court, he became Harding's nominee on September 5, 1922. There were no calls for confirmation hearings or Senate debates. His nomination was immediately approved by acclamation. Newspaper editorialists regarded him as "eminently fit."

Sutherland was sixty years old when he became an Associate Justice of the Supreme Court of the United States. By the time he retired (1938), he had written 377 opinions. Unfortunately, only a few of them can be mentioned in this brief review essay. One well-known decision, *Powell v. Alabama*,<sup>7</sup> is admired by Sutherland's severest critics. In this matter, the Court overturned the rape convictions of Ozie Powell and two other young black men who were charged with raping two white girls, a capital offense in Alabama. Justice Sutherland concluded that Powell was not "afforded a fair opportunity to secure counsel of his own choice." He explained that the Fourteenth Amendment protects each individual's right of counsel, not because the Due Process Clause incorporates the Sixth Amendment's guarantee, but because "[t]o hold otherwise would be to ignore the fundamental postulate . . . that there are certain immutable principles of justice which inhere in the very idea of free government. . . ." To buttress his holding, he cited his professor's treatise. Judge Cooley, relying on common law precedents, had written, "With us it is a universal principle of constitutional law, that the prisoner shall be allowed a defense by counsel."<sup>8</sup> *Powell v. Alabama* discloses that Sutherland's spectrum of values was not narrowly economic in nature.

Sutherland was a stickler for procedural due process, which more than once irked the New Deal supporters of administrative agencies. In *Jones v. SEC*,<sup>9</sup> the Court nullified a subpoena *duces tecum* on the ground that the Securities & Exchange Commission engaged in a fishing expedition. Sutherland's opinion compared the Commission's "odious" investigation with the "intolerable abuses of the Star Chamber." His eloquent opinion contains wonderful language that strikes the intellect and appeals to the heart. Quoting Justice Bradley, he wrote, "It is the duty of courts to be watchful for the constitutional rights of the citizen, and



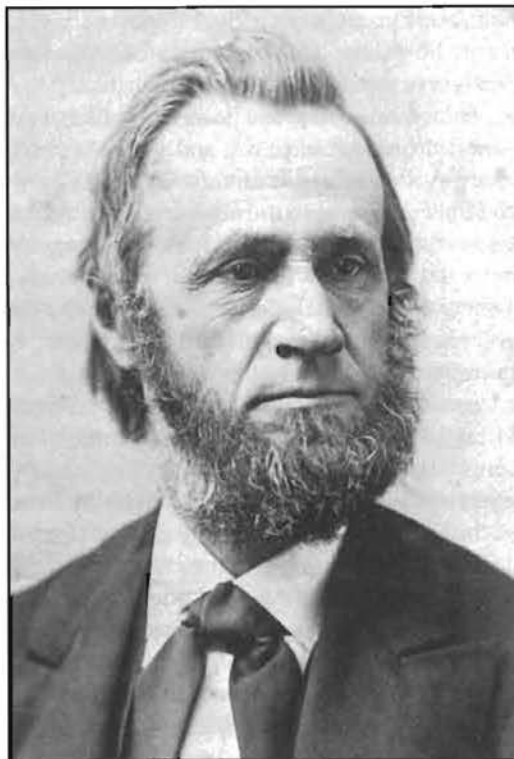
against any stealthy encroachments thereon. Their motto should be *obsta principiis*."<sup>10</sup> He added,

Even the shortest step in the direction of curtailing one of these rights [of individuals] must be halted *in limine*, lest it serve as a precedent for further advances in the same direction or for wrongful invasion of others.

Sutherland's opinion refers *inter alia* to immunities honored by Parliament and the common law since 1640. Sutherland's rhetoric was too excessive for Justice Cardozo, who dissented. The Court's opinion, in Cardozo's words, is flawed by "denunciatory fervor" and "hyperbole." Sutherland, however, attempted to prevent what has occurred in recent years, namely the steady chipping away of the Fourth and Fifth Amendments' underlying principles and guarantees.

Sutherland's masterful opinion in *Euclid v. Ambler Realty* is admired by liberals and viewed as "unfortunate" by many conservatives.<sup>11</sup> Many scholars are puzzled by Sutherland's deference to the local legislature's judgment. Sutherland, however, was influenced by Cooley's analysis of common law precedents that distinguished "the line between what would be a clear invasion of right on the one hand, and regulations not lessening the value of the right on the other." As Professor Wolf explains, Sutherland's opinion provides a conceptual link between the ordinance under consideration and the common law of nuisance in land management. Arkes agrees, and suggests that Sutherland was convinced that the ordinance "seemed to bear an obvious connection to public health." *Euclid* demonstrates that Sutherland's premises enabled him to act at times not as the foe of progress but as its proponent.

Arkes claims that "[b]oth liberals and conservatives recoil from the jurisprudence of Sutherland [because they] [b]oth fear the claims of moral truth." Sutherland's jurisprudence has been repudiated, however, by people whose moral truths are not colored by Sutherland's point of view and distorted by his legalistic approach. Most of his critics disagree with Sutherland's expansive conception of the judicial role in cases involving property and



Thomas M. Cooley, the enormously influential law professor with whom Sutherland studied at the University of Michigan Law School, believed that property was sacred. He taught Sutherland to see constitutional law as part of the greater tradition of common law.

economic liberties. Others are afraid of judges who, "cast the Constitution itself aside, as parchment without significance." Sutherland was *not* one of those judges (although Arkes in one passage suggests that he was). Sutherland admitted that he often relied on "his own conscientious and informed convictions" but after considering the checks required by his oath of office and the Constitution (as he understood its meaning). The earliest source of Sutherland's "conscientious and informed convictions," of course, are the principles that he was taught to value when he was young.

"Laissez-faire ideology was an important part of the religious individualism and self-determination that [had] developed in America"<sup>12</sup> before Sutherland was born. It continued to be the public philosophy when Sutherland was a child simply because competing ideologies were too unpopular to challenge its dominant position. When Sutherland learned about America's values in elementary school, most educators and

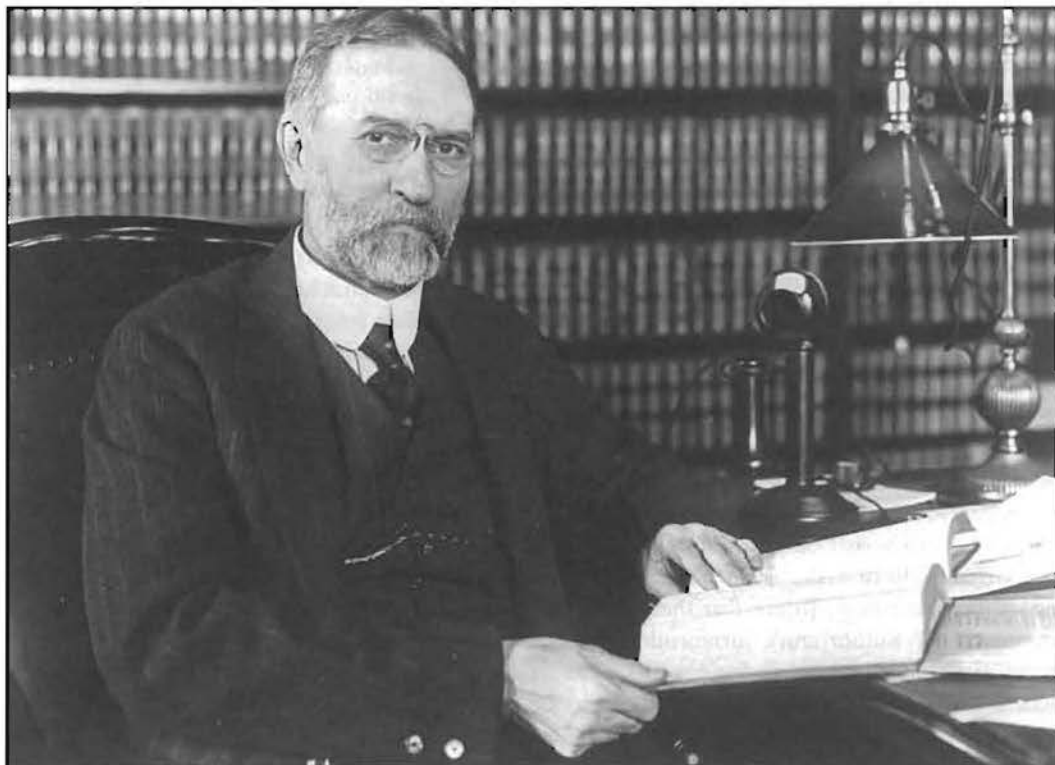
politicians equated individual liberty with economic liberalism. During the second half of the nineteenth century, it is more than likely that his family, neighbors, and peers believed that the American people were, by and large, likely to improve their lot in life if they were industrious and if the government did not interfere with their respective God-given abilities to engage in mutually beneficial economic transactions. These values and ideals fitted in well with the average American's enduring distrust of political power.

Law school affected Sutherland for the rest of his life. He never concealed the intellectual debts he owed to law school professors James V. Campbell and Thomas M. Cooley. Neither one of these jurists "suffered [any] epistemological doubts when they made the rudimentary point that the purpose of the Constitution was to protect its citizens from the 'arbitrary' uses of political power." Both jurists believed "that it was possible to make distinctions between the 'arbitrary' and the 'plausible' uses of legislation."<sup>13</sup> As a first-year law student, Sutherland was undoubtedly impressed, if not awed, by the

presence of these larger-than-life legendary figures. Cooley's texts were regarded with the same veneration as the commentaries of Justice Joseph Story and Chancellor James Kent. Above all, Cooley believed that property is sacred, and protected by the constitution.

In his great treatise, Cooley tried to "produce a unified, systematic set of principles that are the true basis of constitutional order."<sup>14</sup> His treatise contributed greatly to the doctrine of substantive due process, that controversial and open-ended doctrine that augments the power of judges to strike down legislation they believe abridges liberties. But how does one distinguish between a rightful exercise of liberty (that is presumptively immune from governmental restriction) and a wrongful exercise (license)? Cooley studied state court cases to find the applicable principles, and his works taught Sutherland to see constitutional law as a part of the "grand old common law." There, Cooley found unyielding principles useful to judges willing to delay and impede the development of the modern regulatory and welfare state.

According to Cooley, many common law



A conservative Justice eager to protect the status quo, George Sutherland did not welcome the progressive legislation that cropped up early in the century. To the contrary, he dug in his heels and was labeled a reactionary because he continued to champion constitutional limitations. He saw himself as motivated by a strong sense of moral conscience.



principles are trump cards that judges may use to invalidate statutes that arbitrarily disturb the status quo. Cooley's reliance on the common law seems like an inversion of the rule that statutes supersede case rulings. Cooley, however, believed that the common law provides certainty and stability, and that if one carefully studied the state court cases, one would discover the fixed principles that will test the soundness of legislative judgments and the validity of statutes. Sutherland was persuaded by Cooley's analysis and his faith in the common law's certainty.

There were other scholars whose works were undoubtedly familiar to Sutherland. For example, Christopher Tiedeman and Francis Wharton, two influential contemporaries of Sutherland, both placed the Supreme Court above other departments of government. Tiedeman cheerfully admitted that his book, *Limitations of the Police Power*, was written to "protect private rights against the radical experimentations of social reformers."<sup>15</sup> He openly expressed his fears of socialism and communism. He was not alone. When Joseph H. Choate argued that the income tax was unconstitutional,<sup>16</sup> he appealed to the Court's "reason" by arguing (hysterically):

The Act of Congress which we are impugning before you is communistic in its purposes and tendencies, and is defended here upon [communistic and socialist] principles. . . . [W]e submit that all patriotic Americans must pray that our views shall prevail.

His prayer was granted. Subsequently, the case ruling (praised by Sutherland) was superseded by a duly ratified amendment to the Constitution.

As the nation entered the twentieth century, the champions of free trade who opposed major economic reforms became more defensive. The Progressive movement was increasingly popular and, as noted, even (then Senator) Sutherland was amenable to some of their demands for reform. More radical social protest movements were inspired by Henry George and Edward Bellamy. The Fabian essays were published, and there was a growing general familiarity with Marxism. The voters were complaining, and the legislatures were responding. For conservative jurists, eager to protect the status quo, there was

never a greater need for rigidly enforced constitutional limitations.

Laissez faire constitutionalism was reinforced by Social Darwinism, a pseudoscientific doctrine that both Tiedeman and Cooley found attractive. By the time Sutherland became a Justice, many of his friends and colleagues believed that the government's paternalism merely delays the inevitable and welcome demise of the weak members of the human species. It is unclear whether Social Darwinism affected Sutherland's way of thinking. It is crystal clear that his conscientious convictions became too rigid, set in concrete as it were, during the 1930s. When his "objective judgments"<sup>17</sup> were challenged by skeptics, pragmatists, a new breed of law professors called Legal Realists, and especially by paternalistic and statist New Dealers, he dug in his heels. As a result, he lost the trust and confidence of the American people whose public philosophy was evolving. Sutherland became an object of ridicule in some quarters. He was not seen as adapting and became labeled a reactionary.

Sutherland saw no need to reevaluate the logically sound constitutional limitations that he, following Cooley's lead, helped articulate and enforce. The statist central planning of the New Deal, in his view, was a risky, radical, and completely unacceptable attempt to produce a better life for people who are capable of surviving without the government's help. Sutherland summarized his view of the Constitution in a single sentence: "The philosophy that constitutional limitations upon official action may be brushed aside upon the plea that good, perchance may follow, finds no countenance in the American system."<sup>18</sup>

In retrospect, it is apparent that Sutherland's jurisprudence contains at least four flaws.

First, Sutherland should not have relied so heavily on backward-looking common law concepts. For example, he wrote opinions in several cases striking down regulations because of the common law category of businesses not devoted to a public interest; they were immune from regulation according to Anglo-American judge-made law.<sup>19</sup> Reliance on the common law might work well in England, which has an unwritten constitution and no strong tradition of judicial review. However, not all the common law categories of property, restitution, agency, tort, contract, and criminal law are flexible enough to deal with the



polycentric problems created by malfunctioning market forces in a heavily industrialized nation with an increasingly heterogeneous and discontented population.

Second, Sutherland thought that the traditional methods of legal reasoning were trustworthy enough to help him decide whether policies enacted into law were substantially related to permissible governmental objectives. When the efficacy of a statute was challenged, Sutherland often ignored social science data disclosing relevant facts. He ignored Aristotle's common sense caveat: Do not allow logical laws to tempt you into denying experienced facts.

Third, Sutherland mistakenly believed that judicial efforts to preserve the economic status quo were neutral in character, but the very act of choosing the status quo as an appropriate baseline often unfairly disfavors groups already disadvantaged by existing rules of law. Therefore, Sutherland was hardly neutral, unless the word neutral is used naively or fecklessly, especially since he deemed invalid any redistribution of power incompatible with the hoary common law principles that created and maintained unequal distributions of bargaining power and wealth.

As a result of these three related mistakes, Sutherland committed a fourth. He thought that he was interpreting the Constitution in a principled way when, in many cases, he was actually making controversial policy judgments that were legislative in character. The line of cases commencing with *Adkins v. Children's Hospital* (1923),<sup>20</sup> a landmark opinion highly praised by Arkes, illustrates this flaw in Sutherland's jurisprudence.

The issue presented in *Adkins* was whether a legislatively mandated minimum wage for women unconstitutionally abridged liberty of contract. The Court invalidated the law, and Sutherland's opinion in *Adkins* seemed plausible in 1923, despite strong dissents by Taft and Holmes. *Adkins*, however, had been undermined by *Nebbia v. New York* in 1934,<sup>21</sup> and Sutherland's continued opposition to wage and price controls seemed anachronistic by 1937. Yet Sutherland adhered to the same moral requirement that he relied upon in *Adkins*.

In *Adkins*, Sutherland was appalled because "the [minimum wage act's] declared basis . . . is not the *value of the services rendered* but the

extraneous circumstance that the employee needs to get a prescribed sum of money to insure her subsistence." Therefore, the statute "ignores the necessities of the employer by compelling him to pay not less than a certain sum . . . irrespective of the ability of his business to sustain the burden." This violated the moral requirement deemed applicable by Sutherland. In his opinion, the legislative change in the common law baseline was akin to taking money from A and giving it to B, even though A's conduct did not cause B's indigence.

During the depths of the Great Depression, the New York legislature enacted a minimum wage law that appeared to comply with the moral requirement insisted upon by Sutherland. Nevertheless the Court in *Morehead v. New York ex rel. Tipaldo*<sup>22</sup> held that New York's law violated liberty of contract. Chief Justice Hughes' dissent observed that "nothing in the Federal Constitution . . . denies to the State the power to protect women from being exploited by overreaching employers through the refusal of a fair wage as defined in the New York statute. . . ." Justice Stone's dissenting opinion noted the "grim irony in speaking of the freedom of contract of those [employees,] who, because of their economic necessities, give their services for less than is needful to keep body and soul together." Justice Sutherland was not persuaded. He voted with the majority in the 5-4 decision. Professor Arkes inexcusably does not discuss *Morehead*.

The Court's holding in *Morehead* underestimated the furor that ensued. Shortly after the decision, the Republican National Convention disavowed it firmly. The party's platform pledged that Republicans and their candidate for the presidency support the adoption of state laws to protect women with respect to minimum wages. Sutherland, however, in Robert McCloskey's words, continued to be (along with the other four Justices in the majority) "deluded by the notion that the welfare state could be judicially throttled and the brave old world of [his] youth restored."<sup>23</sup>

*Adkins* was overruled in *West Coast Hotel Co. v. Parrish*.<sup>24</sup> Sutherland's impassioned dissent quoted extensively from words written by Cooley and Campbell. Sutherland relied on Campbell's view that the provisions of the Constitution cannot be changed when "unforeseen emergencies" occur. Quoting Cooley, the dissent stated "that much of the benefit expected from



written constitutions would be lost if their provisions were to be bent by circumstances or modified by public opinion.” Sutherland did not understand, or did not want to understand, that the written Constitution contains nary a provision that prohibits a minimum wage requirement. It was his dogmatic opinion in *Adkins* that introduced that requirement.

Arkes sides with Sutherland and criticizes the Court’s opinion in *West Coast Hotel Co.* Like Sutherland, he does not see the relevance of legislative findings indicating that many women were exploited by ruthless employers. He does not agree with the applicable moral principle upon which the Court relied: “The [charitable and taxpaying] community is not bound to provide what is in effect a subsidy for unconscionable employers.”

Given his premises and moral convictions, I understand why Sutherland opposed the minimum wage law back in 1923. I cannot understand, however, why Sutherland voted to strike down the minimum wage law in *Morehead*. It was tailored to satisfy the moral requirement that he insisted upon in *Adkins*. Whatever Sutherland’s reasons, his vote in *Morehead* makes him now look merely like a result-oriented judicial activist. For example, he did not cogently explain in his *West Coast Hotel Co.* dissent why a legislature may regulate the retail price of milk but may not regulate the wages of employees. Moreover, he continued to insist on the ancient common law maxim that a business not devoted to a public interest has the freedom to determine the price of its goods and the wages for its employees. This is the very maxim that had been explicitly rejected three years earlier in *Nebbia*.

Whether minimum wage laws are unwise is a controversial political question that depends, in large part, on a legislature’s finding of relevant facts. For example, will a mandatory minimum wage harm small businesses? Will it cause more people to be unemployed? Will it cause disproportionate harm to persons of color? Will it have inflationary or recessionary effects on prices? Will it redistribute income in ways that do not benefit the low income group for whose benefit it is intended? Or will a minimum

wage law increase purchasing power and help the neediest among the employed, and thereby help the economy? Will it be an incentive for persons to cure their dependency on welfare? The answers to these questions of legislative fact and many other relevant factual questions are not self-evident. A minimum wage law, therefore, should not be deemed unconstitutional if the legislature has made a reasoned judgment based on the evidence — simply because judges who oppose the policy option (because of, or in spite of, the evidence) have made a different reasoned judgment.

Sutherland’s shade will remind us of moral requirements and help us observe that the abandonment of his expansive notion of judicial power in cases implicating economic liberties has resulted in excessive costs, self-defeating laws and the proliferation of administrative agencies running amok. His shade will say, “I told you so” when he observes our ailing regulatory/welfare state, which needs a major overhaul. The forum to argue the need for deregulation, however, is no longer the Court, despite Cooley, Sutherland, and Arkes. Therefore, despite the resurgent interest in natural law and libertarian nostrums, Arkes’ polemic is unlikely to hasten the return and restoration of Sutherland’s jurisprudence.

We no longer suffer under the delusion that judges have unique access to moral truths that are universal, axiomatic, and logically necessary. Deference is owed the legislature if lawyers defending the constitutionality of legislation provide a reasoned explanation to justify a restriction of economic liberty. During the Great Depression, lawyers complied with this obligation when they justified the legislatively mandated minimum wage. Sutherland, however, trusted his own conscientious convictions rather than the legislative judgment of elected representatives. His dogmatic adherence to the status quo placed the Court in serious jeopardy in 1937. The nation, by and large, breathed a huge sigh of relief when he retired in 1938.

\* I thank Greg Sergienko and Jeffrey Millican for helpful comments that improved an earlier draft.

## Endnotes

<sup>1</sup> Hadley Arkes, *The Return of George Sutherland: Restoring a Jurisprudence of Natural Rights* (Princeton: Princeton University Press, 1994).

<sup>2</sup> In an earlier biography, Sutherland has been accurately described as a "Man Against the State." See generally Joel Francis Paschal, *Mr. Justice Sutherland: A Man Against the State* (Princeton: Princeton University Press, 1951). In many ways, I found Paschal's biography more balanced, better written, and more informative than Arkes' apologia for Sutherland.

<sup>3</sup> *Adkins v. Children's Hospital*, 261 U.S. 525, 561 (1923).

<sup>4</sup> 303 U.S. vi (1938) (Letter from Justice Sutherland's colleagues on the Court following their notification of his retirement).

<sup>5</sup> Paschal at 64, 56.

<sup>6</sup> 299 U.S. 304 (1936) (outlining the extraconstitutional powers of the President in foreign relations); see also *United States v. Belmont*, 301 U.S. 324 (1937) (supporting the President's power to enter into executive agreements). In my opinion, Arkes' discussion of this phase of Sutherland's jurisprudence is neither well organized nor easily readable.

<sup>7</sup> 287 U.S. 45 (1932).

<sup>8</sup> Thomas M. Cooley, 1 *A Treatise on the Constitutional Limitations* 8th Ed. (Boston: Little, Brown, and Co., 1927), 700.

<sup>9</sup> 298 U.S. 1 (1936).

<sup>10</sup> *Id.* at 24 (citing *Boyd v. United States*, 116 U.S. 616, 635 (1886)).

<sup>11</sup> 272 U.S. 365 (1926). An expert on land use and zoning, Professor Michael Wolf and many other specialists give Sutherland credit for writing a superb opinion that requires judges to give state and local officials due deference when causes of actions are brought by individuals who challenge the facial validity of land use and environmental restrictions. See Michael Allan Wolf, "George Sutherland" in *The Supreme Court Justices: A Biographical Dictionary* 449 (Melvin I. Urofsky, ed., New York: Garland Publishing Inc., 1994). See also Michael Allan Wolf, "The Prescience and Centrality of

*Euclid v. Ambler*," in *Zoning And The American Dream* 252 (Charles M. Haar and Jerold S. Kayden, eds., Chicago: Planners Press, 1989). For the conservative view, see e.g., Steven J. Eagle, "Bookshelf: The Father of Natural Rights," *Wall Street Journal*, Jan. 5, 1995, at A12 (Leisure and Arts).

<sup>12</sup> Herbert Hovenkamp, *Enterprise and American Law 1836-1937*, at 74 (Cambridge, MA: Harvard University Press, 1991).

<sup>13</sup> *Id.*

<sup>14</sup> Paul W. Kahn, *Legitimacy and History: Self-Government in American Constitutional Theory* 73 (New Haven: Yale University Press, 1992).

<sup>15</sup> Quoted in Thomas C. Grey, *Introduction* to Christopher Tiedeman, *The Unwritten Constitution of the United States*, iii (Roy Mersky and Myron Jacobson, eds., Buffalo: William S. Hein & Co., reprint 1974) (1890).

<sup>16</sup> *Pollock v. Farmer's Loan & Trust Co.*, 157 U.S. 429 (1895), modified on rehearing, 158 U.S. 601 (1895).

<sup>17</sup> These are my quotation marks indicating that I cannot concede that Sutherland's judgments about constitutional limitations were objective.

<sup>18</sup> *Jones v. SEC*, 298 U.S. 1, 27 (1936).

<sup>19</sup> See e.g., *Tyson & Brother v. Banton*, 273 U.S. 418 (1927); *Ribnik v. McBride*, 277 U.S. 350 (1928); *Williams v. Standard Oil*, 278 U.S. 235 (1929); *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932) (all holding that certain types of businesses are immune from state regulation, since they are not devoted to the public interest). The English common law origin of this concept is discussed in *Munn v. Illinois*, 94 U.S. (4 Otto) 113 (1877).

<sup>20</sup> 261 U.S. 525 (1923).

<sup>21</sup> 291 U.S. 502 (1934) (upholding legislature's price-fixing enactment).

<sup>22</sup> 298 U.S. 587 (1936).

<sup>23</sup> Robert G. McCloskey, *The American Supreme Court* 167 (Chicago: University of Chicago Press, 1960).

<sup>24</sup> 300 U.S. 379 (1937).



# Hugo L. Black and the Challenges of Judicial Biography

R. B. Bernstein

Writing a judge's life poses uniquely vexing challenges for the biographer.<sup>1</sup> The most daunting of these is the need to strike a balance between a judge's life and the evolution of his legal thought. The issue of balance becomes most acute for those rare judges who led dramatic and tumultuous lives and who also played pivotal roles in legal and constitutional development.

Hugo L. Black of Alabama, who served on the Supreme Court from 1937 until 1971, was such a judge. His eighty-five years (1886-1971) constitute one of the truly remarkable lives of the twentieth century. Black pursued three distinct yet overlapping careers — as a lawyer, a politician, and a jurist — each of which would have justified scholarly attention. Taken as a whole, Hugo Black's life is a subject so rich in detail and historical importance that it more than justifies the growing number of books devoted to his life and thought. Before examining the book under review, therefore, we must begin with a survey of Black's life.

## I.

Hugo L. Black was born in Harlan, Alabama, February 27, 1886. After struggling to gain an education and to decide on his goals in life, Black began his first career. He was a shrewd and formidable trial lawyer, winning fame for his skill

with juries, his talent for polite yet devastating cross-examination, and his consistent support for small plaintiffs against wealthy, corporate defendants. When he was twenty-five, he accepted with reluctance a temporary appointment as a police-court judge; serving for a year, he carried out his duties with professionalism and efficiency, traits that also pervaded his second public office — that of prosecutor for Jefferson County, Alabama.

These offices gradually drew Black into his second career. An aggressive and combative prosecutor, he also was a committed heir to the Populist tradition; he regularly challenged the state's political establishment in defense of the great body of the people. Throughout his life a devoted member of the Alabama Democratic party, Black was a skilled politician. He was notable for his grasp of strategy and tactics — for example, he was among the first American politicians to grasp the possibilities of using advertising and new technologies of communication and transportation to campaign. In the traditional political sphere, too, he had a remarkable talent for connecting with ordinary voters, either one by one or *en masse*.

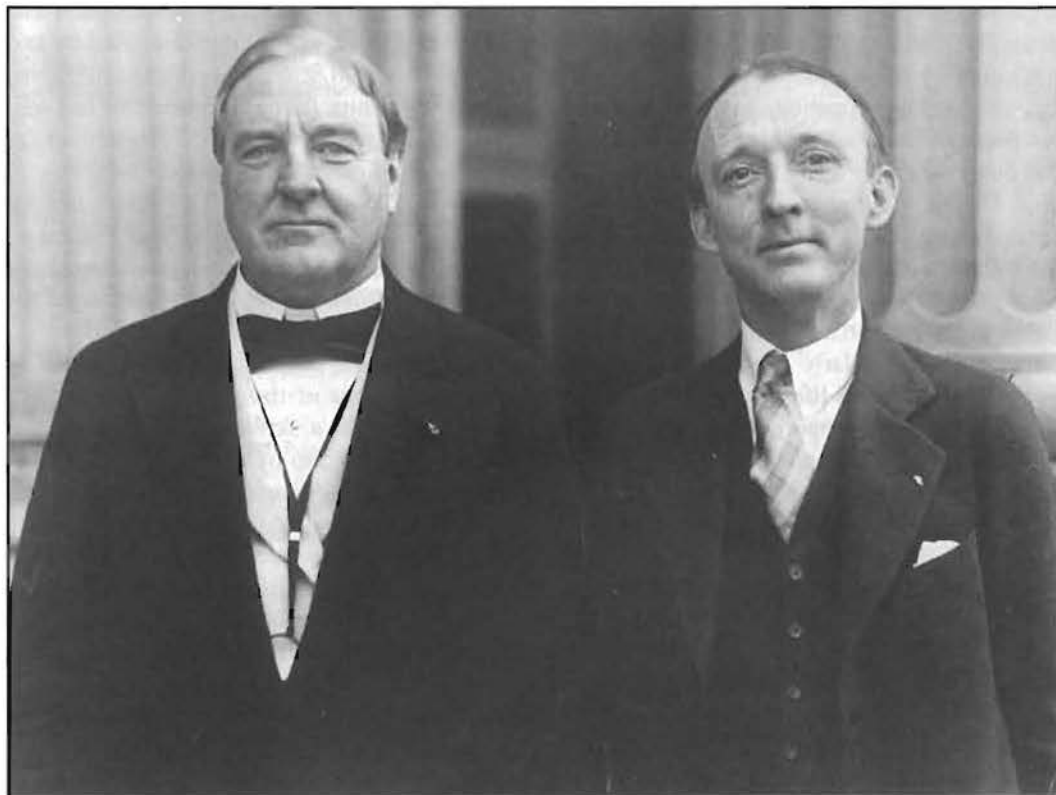
Like many politicians, Black was an inveterate "joiner" who used memberships in organizations as a means to build political support. He therefore joined a host of civic, professional, social, and political organizations — including the Ku Klux Klan. Black's membership in the

Klan was an open secret in Alabama. Throughout the 1920s and 1930s, Klan leaders in Alabama placed their members at his service; at the same time, in keeping with the organization's devotion to secrecy and its grasp of political realities, they also offered him what modern politicians would call deniability along with their political support. Even so, friends and foes throughout Alabama knew that Black had served as a Klan official in the 1920s and owed a considerable part of his political success to Klan support.

In 1926 Black won election to the United States Senate, as the clear winner (and not merely the survivor) of a hotly contested four-candidate race. Black was an unusually active freshman Senator, often taking the floor in defense of his vision of Jeffersonian democracy and Populism and against expanding federal power. Winning a second term in 1932, Black was aghast at the Great Depression's devastation of the lives of ordinary Alabamians and other Americans. What he saw and heard not only strengthened his Populist sympathies — he shifted his politi-

cal thinking away from conventional states' rights pieties toward a vigorous use of government power at all levels, including the federal level, to combat the abuses that led to the Depression and the human costs it exacted. Black thus became an ardent New Dealer, one of Franklin D. Roosevelt's key senatorial supporters — though, as in his efforts to secure enactment of a bill establishing a thirty-hour maximum work week, he occasionally went further and faster than the President was prepared to go. Black presided over a series of senatorial investigations of such issues as airmail service and lobbying; a vigorous, at times ruthless committee chairman, he often tested the limits of the investigatory powers of Congress.

Black's vigorous support of Roosevelt's policies, and his growing frustration with the decisions of the Supreme Court, made Black a natural and enthusiastic supporter of Roosevelt's Court-packing plan — and thereby opened the way to his third, and most significant, career. Black gave loyal and energetic support to Senate Majority Leader Joseph



After a close but victorious senatorial campaign, Hugo L. Black posed with Alabama's other Senator, Tom Heflin, in 1926. When Heflin did not support the Democratic candidate, Al Smith, a Catholic, for President in 1928, Black spearheaded the campaign to drive him and other disloyal Democrats out of the Senate.



Robinson's campaign for the Court-reorganization bill. With Robinson's sudden death in the midst of the struggle, with a sudden series of Supreme Court decisions upholding New Deal measures, and with Justice Willis Van Devanter's decision to resign, the Court-packing controversy imploded. Smarting at his defeat, Roosevelt nonetheless had his first chance to nominate a member of the Court — and seized the opportunity to reward a valued supporter and to shake up an institution he had grown to hate. He therefore sent Black's name to the Senate, which swiftly confirmed him. Just as he was about to take his seat on the Court, the "open secret" of his involvement with the Klan during his political career burst on the national political scene. The controversy surrounding the revelation — and Black's ultimate response to it — were both unprecedented in the history of the Court. Despite vigorous calls for his resignation, Black held firm, defending himself in a nationwide radio address. Never before had a Justice chosen to respond to public criticism through the mass media.

Given the controversy that swirled around him in his first years on the Bench, no one would have been surprised had Hugo Black been a quiet and undistinguished Justice. Black soon emerged, however, as a towering figure on the Court. Though he was a Justice for thirty-four years (a longer tour of duty than all but a handful of other Justices in the Court's history), Black was more notable for what he did and wrote there than for how long he wore the robe. He left his mark on virtually every sphere of modern constitutional jurisprudence. He helped to lead his colleagues in placing the Bill of Rights and the Fourteenth Amendment at the core of the Constitution. He was the theoretical and jurisprudential godfather of the "incorporation" doctrine, which reads the Fourteenth Amendment as imposing the limitations of the Bill of Rights on state and local governments. He also helped to define the "wall of separation" between church and state at the core of the jurisprudence of the First Amendment's Religion Clauses; he labored to secure an absolutist ("no law means no law") reading of that amendment's free speech and free press clauses; and he assisted in the doctrinal rejuvenation of the Fourteenth Amendment's "equal protection" clause. He was a princi-

pal contributor to the Warren Court's pathbreaking series of civil-rights decisions, helping to hold the Court firm in the face of "massive resistance" by Southern state and local authorities and organized white citizens. And, at the methodological core of his constitutional thought, he pioneered the jurisprudence of original intent, referring constantly to the text of the Constitution and the writings, arguments, and practices of those who framed, adopted, and implemented it. He also combined intellectual energy, ability, and tenacity with a rare talent for eloquent, direct writing and a politician's grasp of the best ways to mold public perceptions. Eventually, Black saw his public image transform from "the Klansman on the Court" to the avatar of the Bill of Rights. More than any twentieth-century Justice, save Oliver Wendell Holmes, Jr., Black came to epitomize the Constitution and the Supreme Court for the American people by the time he died, on September 25, 1971.

## II.

Roger K. Newman's massive **Hugo Black: A Biography** is the first comprehensive life of the Justice since Gerald Dunne's 1977 study **Hugo Black and the Judicial Revolution**.<sup>2</sup> The two books are akin in their veneration for Black. What distinguishes Newman's biography from Dunne's is the sheer size and scope of Newman's book. Newman, who held a long-term appointment as a research associate at New York University Law School, conducted hundreds of interviews and combed through dozens of manuscript repositories and newspaper files in more than a decade of research and writing. He presents a wealth of information about Black's life — including the cases and clients he handled as a practicing lawyer, his service as a police-court judge, his private financial dealings, and his eclectic reading. Newman's study, if nothing else, would serve as a priceless road-map for any future student of Black's life and work.

Newman also discusses many disturbing features of Black's life that Dunne either elided or did not know. In the process, though Newman acknowledges his indebtedness to



Virginia Van de Veer Hamilton's fine 1972 study **Hugo Black: The Alabama Years**,<sup>3</sup> he is able to push beyond the limits of Hamilton's research. Key examples include Newman's careful presentation of the full range of evidence pertaining to Black's activities while a Klan member (89-100, 655 n.7), his tacit acceptance of Klan political support (101ff.), and the series of partial and inconsistent explanations he gave in later life for his involvement with the Klan (96-99). Newman also devotes a full chapter (71-88) to Black's representation of Edwin R. Stephenson in his prosecution for murder — a matter that Dunne brushed aside in two pages.<sup>4</sup> Stephenson, an itinerant "marrying parson," had shot dead a Roman Catholic priest who had helped Stephenson's daughter convert to Catholicism and had officiated at her marriage to a paperhanger of Puerto Rican ancestry. As Newman shows, Black knowingly played on the anti-Catholicism of the people of Birmingham, where the murder and the trial occurred, and won Stephenson's acquittal. Newman also touches on more personal matters; for example, he presents a sympathetic account of the depression-plagued life and eventual death of Black's first wife (170-174, 198-199, 385-387, 405-407) and describes Black's demanding, rigorous parenting of his sons (199-200, 392, 560). He also recounts an instance when Black either used his senatorial power to serve his economic interests or countenanced suggestions to that effect by his friend and business partner; when the Prudential Insurance Company threatened to foreclose a mortgage on a real-estate venture in which Senator Black was an investor, Black's friend and lawyer Frank Spain hinted that Black might abandon his support for a bill inimical to Prudential's interests (150-151).

The difficulty with the profusion of information that Newman has unearthed is that he has let it take control of the book, rather than marshaling it for greatest effect. Rarely does he fit the pieces together or explain why Black occa-



Senator Black served his state for ten years, abandoning his states' rights beliefs and becoming an ardent proponent of government intervention at the federal level. During that time he "took" a self-directed readings course at the Library of Congress.

sionally showed inconsistencies in his words and deeds. Newman's hit-and-miss documentation is a source of additional frustration; time and time again, he tells interesting, even startling stories about Black for which the reader cannot find sources. Minor errors creep into the text — and, every now and then, a gap in the story undermines Newman's claims to comprehensiveness. For example, the reader will search in vain to learn just how Black became a member of the bar (19-20).<sup>5</sup> Finally, though Newman's prose is generally lucid, he sometimes perpetrates a howler that leaves the reader wondering how Newman's editor could have let such sentences pass untouched.

Newman's book is vulnerable on more serious grounds than these minor but annoying mechanical difficulties. Newman approaches the biographical task simply as a problem of chronological narration; his ventures into interpretation rarely range beyond the tentative, and often he seems content just to unwind the



threads of his story without seeking to weave them together. For example, though Newman seems to suggest that the roots of Black's emerging constitutional thought were planted by his eclectic and self-directed reading in historical sources while he was a Senator, he does not try to establish the intellectual contexts in which either Black made constitutional arguments or Black's critics responded to his ideas and claims.

Perhaps the single most disappointing feature of this book is Newman's failure to engage with Black's arguments about constitutional interpretation, the primacy of original intent as an interpretative guide, and the relationship of the Bill of Rights and the Fourteenth Amendment. This lack is especially notable today, when sitting Justices advance original-intent arguments eerily reminiscent of Black's to achieve judicial results and stake out jurisprudential positions diametrically opposed to those that Black favored and believed history to command. Thus, readers who want to place Black in jurisprudential context will find far more assistance in Tony Freyer's 1990 study *Hugo Black and the Dilemmas of American Liberalism*<sup>6</sup> or Tinsley Yarbrough's 1988 monograph *Justice Black and His Critics*<sup>7</sup> than in Newman's pages.

### III.

Newman's biography is an example of what might be called "internalist" biography. The most famous and esteemed example of this genre is David McCullough's prize-winning *Truman*.<sup>8</sup> Just as Truman and Black had much in common, these books resemble each other in their shared decision to recount their subjects' lives as lived. McCullough and Newman both seek to evoke immediacy of experience through meticulous, well-researched historical detail; they both are willing to forgo the "externalist" dimension of biography, touching lightly if at all on what historians have made of their subjects' thoughts, words, and deeds. Historians

often criticize "internalist" biographies on precisely this ground. Still, a well-crafted "internalist" biography offers rewards that far outweigh the absence of the historiographical dimension of historical biography. By understanding an eminent person's life as that person lived and experienced it, such a biography gives the reader a valuable perspective on the problem of interpreting such a life. The reader of McCullough's biography understands why Truman thought, spoke, wrote, or acted in certain ways and thus is better able to assess historians' and biographers' conflicting interpretations of those thoughts, words, and deeds. The great challenge for an "internalist" biographer, however, is to maintain scrupulous command of the information generated by meticulous and wide-ranging research — in a phrase, to marshal and deploy that research effectively. McCullough did this in *Truman*, and Newman has failed to do this in *Hugo Black*.

### IV.

Questions about human greatness are irresistible to the biographer and, at the same time, all but unanswerable. Paragons have feet of clay; saints have guilty secrets; distinguished statesmen can falter, fumble, and fall. The biographer's challenge is to convey why a subject whom the world has for whatever reason deemed great, is great. To achieve this goal, the biographer must face the subject's flaws and set them in perspective, and draw together the disparate pieces of the subject's life in whatever patterns emerge from the profusion of evidence. Roger K. Newman has labored with extraordinary industry to assemble the mass of evidence from which the definitive life of Hugo Black will someday be written. We can only hope that someday another biographer will complete a biography of Black that combines Newman's industry with the intellectual rigor, analytic skill, and literary grace of Tony Freyer or Tinsley Yarbrough.

## Endnotes

<sup>1</sup> See generally the proceedings of the New York University Law School 1995 conference on judicial biography, to be published in a forthcoming edition of the *New York University Law Review*.

<sup>2</sup> Gerald T. Dunne, **Hugo Black and the Judicial Revolution** (New York: Simon & Schuster, 1977).

<sup>3</sup> Virginia Van derVeer Hamilton, **Hugo Black: The Alabama Years** (Baton Rouge: Louisiana State University Press, 1972; paperback ed., University, AL: University of Alabama Press, 1982).

<sup>4</sup> Dunne, **Hugo Black**, 103-104.

<sup>5</sup> Dunne, **Hugo Black**, 92, clears up the mystery by pointing out that graduates of the University of Alabama Law School were entitled to be "waived in" without the formality of a bar exam. He cites the text of Black's diploma as his source.

<sup>6</sup> Tony Freyer, **Hugo L. Black and the Dilemmas of American Liberalism** (Glenville, IL: Scott, Foresman/ Little, Brown Higher Education, 1990) (**Library of American Biography**).

<sup>7</sup> Tinsley Yarbrough, **Mr. Justice Black and His Critics** (Durham, NC: Duke University Press, 1988).

<sup>8</sup> David McCullough, **Truman** (New York: Simon & Schuster, 1992).



# The Judicial Bookshelf

D. Grier Stephenson, Jr.

Minus sitting Justices as of mid-1995, ninety-nine persons have served on the Supreme Court, one less than the membership of the Senate and not quite two and a half times the coterie of all Presidents from George Washington through Bill Clinton. If it were a club, the Court would be the most exclusive in American government. For most of its history, membership has been not only earnestly sought but coveted. The continuous outpouring of books about the "Third Branch" attests to its status.

## I.

Scholarly literature has accorded those ninety-nine Justices widely disparate attention, however. Some Justices have been the subject of so many books and articles that any list requires careful pruning. Other Justices have been the focus of published studies respectably numerous so that readers have at least adequate access to their careers. A few remain so neglected that one has to scour the most obscure sources to turn up a handful of entries. Recent books on Stanley Reed, William J. Brennan, Jr., Salmon P. Chase, and David J. Brewer illustrate this state of affairs.

Until publication of John D. Fassett's readable and well-documented *New Deal Justice*,<sup>1</sup> Stanley Reed had the dubious distinction of reposing among the least examined Justices of the "modern Supreme Court," the contemporary era in American constitutional history that

began about 1937. Prior to Fassett's, there was but one book-length study of Reed, and it dealt with a single category of cases;<sup>2</sup> even the articles amounted to barely a handful.<sup>3</sup>

This lacuna is perplexing. In January 1938, Reed became Franklin D. Roosevelt's second appointee to the High Court, practically on the heels of Hugo Black's confirmation in August 1937, and well before the nominations of Felix Frankfurter and William O. Douglas in the winter and spring of 1939, respectively. While Reed did not sit as long as the others in this quartet, his nineteen years of service nonetheless rank him above the average tenure of twentieth-century Justices.<sup>4</sup> And these were nineteen judicially (and politically) tumultuous years. With Charles Evans Hughes as Chief Justice, Reed arrived just as the Court had begun the hasty dismantling of a constitutional order that had reigned from at least 1890. Three Chiefs later, he retired after the young Warren Court had made substantial headway in the erection of a vastly different constitutional order. Why, then, has Reed endured comparative neglect? The scarcity of published work suggests the "curious incident" in one of the Sherlock Holmes adventures — the dog that did not bark.<sup>5</sup>

The presence (or absence) of a combination of factors seems mainly to account for the vastly unequal treatment that former members of the Court have received. Three of these are apparent, in that they can be cataloged and counted. Three are interpretative, in that they derive from

analysis of ideas, events, and relationships.

Foremost is a body of judicial opinions, particularly in constitutional law, spanning at least a decade. Second, there ideally will be a cache of personal and professional papers — letters, Court memoranda, drafts of opinions, and perhaps a diary — from which researchers can glean insights not only into the mind of their subject but into the Justice's place in the inner workings of the Court, as alliances are forged, broken, and formed again, as decisions are reached, and as opinions are crafted. Helpful in supplementing the second, or even in compensating for its absence, is a third factor: a trail of published works from various periods of the subject's professional life.

The fourth factor includes tasks, activities, and events outside the Court, whether before or after appointment, whether in the public or private sector, in which the subject had a major hand and which observers deem particularly noteworthy. A fifth component almost certainly guaran-

teed to stimulate scholarly inquiry is one's impact on, and contributions to, the Court and constitutional interpretation: that is, a Justice's "leadership," whether managerial, intellectual, social, or some mixture of the three.<sup>6</sup>

Last in this inventory is a judicial philosophy that speaks to the present day. This factor derives not so much from the subject's impact on his own times but on the perceived utility of his views for a later day. The Justice emerges as an ally (or an adversary), so to speak, in some current constitutional controversy.

Judged by these six criteria, Reed's comparative neglect is understandable, if regrettable. So far as Court scholars were concerned, at the time of his death Reed satisfied only the first and the fourth criteria. His 339 opinions reflected his views on a variety of constitutional and other legal questions, and his Court years were preceded by nearly three years as Solicitor General in the Roosevelt administration. Missing, apparently, were strengths under the second,



Nearly one fifth of John D. Fassett's new biography of Stanley Reed deals with his battles as Solicitor General to persuade the Supreme Court to uphold the government's New Deal programs. Reed was largely unsuccessful; it was not until his final year that the tide turned and the Court began upholding legislation to help alleviate the economic devastation of the Depression. Above, Mississippi farmers displayed poultry to a government inspector working on a New Deal price control program.



third, fifth, and sixth criteria.

For instance, it was widely (if incorrectly) believed that Reed had destroyed his Court papers, implying that manuscript references to his work as a Justice survived only in the collections of others such as Stone and Frankfurter.<sup>7</sup> Fassett learned, however, that "subsequent to their father's death, Reed's two sons had contributed his papers and memorabilia to the special collections archives at the University of Kentucky library, with no restrictions on their availability or use."<sup>8</sup> Thus, an entire generation passed between Reed's retirement from the Bench and the emergence of his papers. Moreover, Reed engaged in only a little published extrajudicial writing that might have provided secondary access into his views on constitutional values and the judicial function.<sup>9</sup>

Even so, one would have thought that the fourth criterion in combination with the first would have been sufficient to assure Reed prominence in the literature. He was, after all, only the second Solicitor General — Taft was the first — to have later gone to the Supreme Court. Even today, the list includes but two other names: Robert H. Jackson and Thurgood Marshall.<sup>10</sup> Moreover, no Solicitor General has ever served in a more critical time in constitutional adjudication. Reed was the president's "point man" in the Supreme Court as one after another part of the New Deal was subjected to searching judicial scrutiny. He actively campaigned for Roosevelt in the months leading up to the election of 1936,<sup>11</sup> and he publicly defended (but probably did not draft) the ill-fated Court-packing plan of 1937.<sup>12</sup>

Fassett's account of Reed's herculean efforts on behalf of Roosevelt's programs is one of the chief strengths of the book and comprises nearly one fifth of the text.<sup>13</sup> Portrayed in detail is the government-as-litigant in the quest for five essential votes.

And for most of Reed's time as Solicitor General, five affirmative votes for the administration were elusive. Reed's first victory at the Court did not occur until February 1936 in *Ashwander v. Tennessee Valley Authority*.<sup>14</sup> Personal defeats included *Humphrey's Executor v. United States*,<sup>15</sup> *United States v. Butler*,<sup>16</sup> *Jones v. Securities and Exchange Commission*,<sup>17</sup> and *Carter v. Carter Coal Co.*<sup>18</sup> The New Deal's ruin at the judiciary's hands seemed nigh. The extent of the wreckage

was such that Reed tendered his resignation, admitting that he had not "had very good luck with the Supreme Court in the solicitor generalship." FDR demurred: "Oh, bosh, we'll get along all right."<sup>19</sup>

They did, thanks to the constitutional revolution that was just around the corner and which implicates the fifth and sixth criteria. That seismic event consisted of two distinct upheavals in constitutional law. Reed was an eager participant in one but not in the other.

With the first, a Bench that included Reed but that was led by others jettisoned the "jurisprudence of reasonableness," more or less dominant for half a century, by which the Court had the last say on the constitutional acceptability of all manner of social and economic legislation. However, Reed — a small-d democrat as well as a large-D Democrat — was never a full partner in the *other* judicial revolution: the shift of the Court's attention to a new set of preferred values that offered special protection for civil liberties and the nonproperty aspects of civil rights. In the context of the first revolution, Reed thus appeared unremarkable; in the context of the second, he seemed irrelevant.

One way of positioning Reed relative to this second revolution is to examine his votes in favor of decisions later overruled, modified, or otherwise placed on the shelf of judicial obsolescence. Among others, the list includes *Minersville School District v. Gobitis*<sup>20</sup> on a required flag salute, *Betts v. Brady*<sup>21</sup> on right to counsel in state courts, *Adamson v. California*<sup>22</sup> on self-incrimination in state courts, *Wolf v. Colorado*<sup>23</sup> on the exclusionary rule's applicability in state courts, *Feiner v. New York*<sup>24</sup> on soap-box oratory, and *Dennis v. United States*<sup>25</sup> on advocacy of violent overthrow of the government. The first was promptly set aside in 1943, and by the 1960s the Court had deserted the others.

In contrast to Reed, Brennan seems destined to rank among the most examined figures of the modern Court. He has become the subject of at least two books and numerous articles in just the few years since he left the Bench. Volumes thirty-one and thirty-two of the **Index to Legal Periodicals**, for instance, covering only the period September 1991 through August 1993, include no fewer than fourteen entries specifically about Justice Brennan.



This interest is easily understood. Taking his seat in October 1956 some four months before Reed retired, he served for thirty-three years and nine months, a tenure surpassed in this century only by colleagues William O. Douglas and Hugo L. Black.<sup>26</sup> Few Justices have exceeded Brennan's scholarly productivity; his articles in law journals were not only serious and frequent but offered considerable insight into his jurisprudence.<sup>27</sup> Most important, Brennan wrote majority or plurality opinions in some of the most far-reaching constitutional rulings of the Warren and Burger courts and so is as closely identified with the consolidation of the second constitutional revolution of the modern era as Reed was with the first. It is impossible to study the Supreme Court after 1956 without studying Brennan.

That objective is all the easier now with publication of Roger Goldman and David Gallen's **Justice William J. Brennan, Jr.: Freedom First**.<sup>28</sup> Organized much like the same authors' book on Thurgood Marshall,<sup>29</sup> the volume is really three small books in one. Parts one and three are compilations. The first consists of eleven tributes, including statements by Justices White and Marshall, plus Nat Hentoff's interview with Brennan after his retirement. The third reprints opinions by Brennan in a dozen cases dating between 1963 and 1987, inclusive, the same years during which Brennan was probably most persuasive in garnering four other votes for the positions he favored. Revealingly, of the twelve only two are dissents.

Comprising slightly less than one third of the book, part two represents the authors' substantive contribution to the volume: an evaluation of Brennan's vision of the Constitution, including access to the federal courts, congressional protection of individual rights, "takings," due process, equal protection, the First Amendment, and criminal

justice, and his approach to constitutional interpretation. From these, the authors conclude that Brennan's most important opinions appeared in three landmark decisions: *Baker v. Carr*,<sup>30</sup> which thrust the federal judiciary into the "thicket" of legislative apportionment; *New York Times Co. v. Sullivan*,<sup>31</sup> which enlarged press freedom; and *Goldberg v. Kelly*,<sup>32</sup> which extended the protections of procedural due process to the "new property" of government benefits and entitlements. Each illustrates a thread that runs through the fabric of Brennan's thought: a belief "that the Constitution's most important task was to enhance the dignity and freedom of each individual by curtailing government invasions of personal liberty."<sup>33</sup> As much as any colleague, he championed on and off the Bench the causes



A new book about recently retired Justice William J. Brennan, Jr., consists of tributes by his admirers and peers, a selection of his best opinions, and an evaluation of his jurisprudence. Above, a youthful Brennan posed with his son, William J. Brennan III.



of those on whom the hand of official authority weighed most heavily.

A century before Brennan's appointment, Salmon Chase was a leader in the civil rights struggle of his day, the campaign to rid the nation of slavery. As a prominent Ohio attorney, Chase handled so many cases involving slaves that someone called him "the Attorney General for runaway slaves."<sup>34</sup> A dominant figure in the politics of the mid-nineteenth century as a Whig, a Liberty party activist, a charter Free Soiler, and then a Republican, he was twice elected both Ohio's governor and one of its U.S. Senators before joining Lincoln's cabinet as Secretary of the Treasury. In late 1864, Chase was his President's choice to succeed Roger Taney as the nation's sixth Chief Justice.

Yet, despite attempts in 1856, 1860, and 1864 within the Republican party and in 1868 within both parties, he never attained the one office he sought above all others, the presidency. (Chase undoubtedly would have pursued the office again in 1872 had he not fallen victim to a stroke.) As colleague Justice David Davis wrote in 1870,

Chase is the most ambitious man, except [Stephen] Douglas, that I ever knew personally. As long as the Presidency is not reached, every thing else that he has obtained is as dust and ashes. . . .<sup>35</sup>

With such a résumé and drive, there should be little surprise that Chase has been the subject of political biographies, the most recent being John Niven's detailed and penetrating volume.<sup>36</sup> What is not entirely puzzling, however, is that a true judicial biography of the man — that is, an account that fully illuminates the Court years, whatever else it might contain — has yet to be written.<sup>37</sup> One reason for this void is that Chase's public career consisted of so much besides the Chief Justiceship. He served as Chief for only eight years, five months — an approximate tie with Taft for the third shortest tenure of the thirteen nineteenth- and twentieth-century occupants of the center chair. (Harlan Stone sat for about five years, and Fred Vinson for seven.) Second, his name is not synonymous with a particular body of constitutional doctrine, as was true with both Marshall and Taney. Put another way, one does not need to know very much about

Chase in order to know a lot about American constitutional law. Third, Chase seems to be mainly a historical figure, lacking relevance to contemporary constitutional controversies. Finally, he may be less appealing as a judicial character because much of the Court's work bored him. "I have so long taken an active part in *shaping events*," he wrote in 1865, "that I feel the task of *adjudicating cases* however important, as somewhat irksome."<sup>38</sup>

Although Niven's biography devotes less than one fifth of its pages to Chase as Chief, it lays a firm foundation for one who would do more with those years. A distinctive feature of the book throughout is Niven's development of the nearly life-long tension in his subject's character that made him an "exceedingly complex individual."<sup>39</sup> Chase was driven by both ambition and principle, and at times it was difficult to discern which pushed harder. "Political goals were never far from his mind," writes the author.

Invariably they were not to be sought for their own sake but rather for the good of the country and for the highest of moral purposes, the freedom and equality of all mankind. Yet these lofty motives masked a thirst for office and power that was deeply ingrained in his character, rooted as they were in a troubled childhood and adolescence.<sup>40</sup>

Chase's character mattered greatly in the two extraordinary occurrences that set his years apart from those of other Chiefs. Both involved the preservation of separation of powers as a distinguishing feature of American government. He presided over the Senate's trial of the President of the United States, and the Supreme Court survived the constitutional crises of the Civil War and Reconstruction. With the first, he insisted (at considerable political cost to his standing with many Republicans) that the proceedings be judicial and not legislative in form. To the degree that decorum and procedure contributed to Andrew Johnson's narrow acquittal, Niven concludes that Chase kept the ideal of "rule of law" alive and helped to maintain the presidency as an independent part of the political system.<sup>41</sup>



With the second, he inherited a badly tarnished Court from his predecessor but bequeathed a burnished Court to his successor Morrison Waite that approached the prestige that the institution had enjoyed in the early 1850s, before *Scott v. Sandford*.<sup>42</sup> To accomplish the second as well as the first required political as well as legal shrewdness.

Perhaps a reason for the Court's improved health was Chase's leadership: none of the Court's post-War decisions struck at principal pieces of the Republican party's Reconstruction program, the major legislative undertaking of the decade. For the most part, the Court was inclined to impede neither the President nor the Congress.<sup>43</sup> When the Justices declared in *Ex parte Milligan*<sup>44</sup> that civilians could not be tried by military courts in wartime if the civil courts were functioning, they did so after the war was over. When congressional leaders feared that the Court might use *Milligan* to invalidate rule by military commissions in the South, Congress repealed the Court's jurisdiction while the Justices had the case under advisement. The Court then unanimously declared through Chase that it had no authority to decide the case.<sup>45</sup> When the Court in 1870 invalidated legal tender legislation dating from the Lincoln administration, it reversed itself the following year.<sup>46</sup> The decade was a perilous time for the Court, and even the comparatively few pages that it occupies in Niven's account reveals that Chase as leader met the challenge.

In contrast to Chase, a student of David Josiah Brewer has little choice but to fix upon a judicial career. Aside from a few years in private practice (marked by a brief, but unfulfilled, yearning to be a state legislator) and a term as county attorney in 1868-1870, Brewer's professional years were spent on the bench: twenty on the lower and supreme courts of Kansas, five on the Eighth Circuit, and twenty (1890-1910) on the Supreme Court of the United States. Only William Cushing and Horace Lurton have come to the High Court with greater judicial experience.<sup>47</sup>

Yet until lately Brewer was studied not so much individually as collectively, classed usually (and disparagingly) with colleagues presumably intent on writing laissez-faire economic theory into the Constitution. As depicted in one essay,

... Brewer held to a strictly conservative, sometimes reactionary, position on the Court, opposing firmly the expansion of government regulatory power, state or federal. . . . [O]utspoken and doctrinaire . . . [h]e was for the Court of that era the right-wing opposite of . . . Harlan on the left . . . , and a worthy follower of his more famous conservative uncle on the Court, . . . Field.<sup>48</sup>

Another account credits Brewer with leadership "of the ultraconservative economic laissez-faire advocates on the Court. . . ."<sup>49</sup> Are these accurate descriptions?

Until publication of Michael Brodhead's *David J. Brewer*,<sup>50</sup> they had been only rarely challenged.<sup>51</sup> The only full-length account of his career was a doctoral dissertation; articles specifically on Brewer remain scarce.<sup>52</sup> This relative inattention seems explained not by the absence of important constitutional opinions, personal papers, or published articles and speeches. In fact, Brewer was a prolific writer and orator; Brodhead's bibliography lists seventy-one articles, pamphlets, essays, and books by the Justice.<sup>53</sup> Rather, closely identified with a jurisprudence that the modern Court has abandoned and that modern constitutional commentary has condemned, Brewer may remain largely uninteresting not only because he appears irrelevant today but because he has been perceived as being wrong on the great issues of his own time.

Some recent scholarship, however, offers a different perspective, arguing that portrayals of most Justices of that era as little more than anti-regulatory agents of capitalism are too simplistic and, hence, misleading. A subset of this "revisionist" school, to which Brodhead's biography is one of the latest additions, regards Brewer as one who, whatever else might be said about his colleagues, has been badly misread, perhaps the Fuller Court's "most misunderstood member."<sup>54</sup>

Brodhead explains the distortion of Brewer in three ways. First, terms such as Social Darwinism and laissez-faire have been used carelessly by historians and others. Such misuse has served as a poor substitute for real analysis. Second, a small body of his opinions and public



statements (or excerpts from them) has sufficed as evidence of his "conservatism." Also, it has been all too easy to assume that the controversial decisions of Brewer and his contemporaries were based solely on their own ideological predilections and that precedent and settled legal principles played no role.<sup>55</sup>

An admirer of "honest entrepreneurial activity," maintains the author, "Brewer consistently opposed the concentration of power in any form: large corporations, labor unions, and government" all the while he was determined to protect property rights.<sup>56</sup> Both positions grew out of his concern for the individual, which in turn rested on firm religious convictions. Brewer also supported many forms of social legislation, spoke up for charities, world peace, and an improved status for women, and advocated fair treatment of minorities (particularly Chinese Americans).

Brodhead finds these views expressed not only in Brewer's judicial opinions but in the dozens of orations "the great civic apostle"<sup>57</sup> gave across the land. Public statements that

[n]o one can be blind to the fact that these mighty corporations are holding out most tempting inducements to lawmakers to regard in their lawmaking those interests rather than the welfare of the nation,

or that many members of Congress owed their offices to "corporate influence" hardly suggest someone who was an unquestioning defender of big business. The remedy for corporate wrongdoing, which in Brewer's mind accelerated after 1900, was "neither regulation nor trust-busting but rather the publicizing of questionable business practices." "Publicity prevents wrong," Brewer had announced in a Kansas Supreme Court opinion in 1880,<sup>58</sup> thus anticipating Brandeis' observation that "[s]unlight is said to be the best of disinfectants; electric light the most efficient policeman."<sup>59</sup>

Brodhead's carefully drawn portrait of Brewer is surely not the one sketched by an earlier generation of scholars. A sign of the book's success is that it virtually guarantees a lively debate about the "real" Justice Brewer.

Brewer and Brennan, as well as Reed and Chase, are each the subject of an original essay in *The Supreme Court Justices*,<sup>60</sup> as are 103

other Justices. Under the editorship of Melvin I. Urofsky, this biographical dictionary is an exceptionally readable and thorough reference work in a single volume. It joins two other recently published sources on the Justices: *The Supreme Court Justices: Illustrated Biographies 1789-1993*, edited by Clare Cushman in 1993 and updated through Justice Breyer in 1995, and *The Oxford Companion to the Supreme Court of the United States*, edited by Kermit L. Hall in 1992. Urofsky's includes entries through Ruth Bader Ginsburg; the others are complete through Clarence Thomas.

There are other differences. The essays in Cushman appear chronologically by appointment, while the others are ordered alphabetically. Second, because *The Oxford Companion* is a one-volume encyclopedia on the Court, most of its entries are not biographical. For this reason, its treatment of most Justices is far briefer. Third, Cushman and Urofsky differ in emphasis. Essays in the former's cover their subjects' full professional lives, but those in the latter's concentrate on the Court years with greater attention to constitutional theory and doctrine. As Urofsky explains his objective, "the primary charge to the contributors was to write an *interpretive* essay on these men and women as justices."<sup>61</sup> For example, David J. Bodenhamer's essay on Salmon Chase in Urofsky devotes nearly five of its five and one-half pages to Chase's tenure as Chief Justice. In contrast, Cushman's essay in her volume consigns slightly more than half its five pages to Chase's pre-Court career. Such differences work to the reader's advantage.

## II.

Congress and the presidency are at once both proactive and reactive. In contrast, the Supreme Court is almost entirely reactive: the Justices respond to disputes that come before them. They decide (and, more often today, decline to decide) cases. While the Court's decisions may encourage or discourage litigation on certain subjects, it is nonetheless true that the Court may do nothing until a litigant presents the Bench with an opportunity to act. Yet cases are more than mere disputes between individual parties. Frequently embedded within them are larger social, political, and economic issues. Little wonder, then, that Court history is sometimes



written in terms of issues that dominate the docket. Just as biographies depict individual Justices who influenced the jurisprudence of their day, case-oriented judicial literature focuses on one or more legal questions that partly define an era. Constitutional doctrine is litigation driven.

For example, a common element in many of the Court's decisions in the seven decades before the Civil War was the clash between national and state authority. That a serious division persisted for so long over so fundamental a point as the constitutional nature of the Union is not surprising. The Constitution itself emerged from a developing consensus in the 1780s that the United States was plagued by two political defects: too little power in the central government and too much power in the states. The document produced by the Philadelphia Convention in 1787, as amended by the Bill of Rights, clearly enlarged the first and diminished the second. Precisely how the relationship between national and state authority had been altered remained unclear, however, partly because of the Constitution itself. Advocates of national or state power could point to text or to meaning, as one or the other better served their purposes.

One of the first manifestations of this tension is the subject of *Suits Against States*, the fifth volume in *The Documentary History of the Supreme Court of the United States, 1789-1800*.<sup>62</sup> Together there were eight such disputes during the decade; of these editor Maeva Marcus and her associates found an ample record and other documentation for seven. The most famous of these suits was *Chisholm v. Georgia*,<sup>63</sup> which gave rise to the Court's first decision formally construing the Constitution. The Court's response to the question the case presented — whether a state could be made to answer in the Supreme Court in litigation initiated by a citizen of another state — gave rise to the Eleventh Amendment which, upon ratification, caused the Court on February 14, 1798, to dismiss three pending actions against states as party defendants. Aside from *Chisholm*, these cases usually go unmentioned in the literature. As much as it recounts of the Court's first decades, volume one of Charles Warren's classic study, for example, makes only passing reference to most of them and omits mention of one altogether.<sup>64</sup>

*Suits Against States* is noteworthy in several respects. It is the first in *The Documen-*

*tary History* to encompass the Court's decisions — previous volumes treated appointments, the work of the Justices on circuit, and organization and jurisdiction. By reprinting the extant record of cases as well as letters, newspaper commentary, and related material, the volume casts unparalleled light on the work of the Court in its first decade. In the opinions issued by Justices Iredell and Wilson in *Chisholm*, for example, one sees how the versions published in *Dallas's Reports*, now officially part of the *United States Reports*, differ both stylistically and substantively from the opinions as originally written.<sup>65</sup>

Second, the primary sources that the volume contains on the origins and ratification of the Eleventh Amendment surpass what has previously been available, although, as editor Marcus confesses, even this book is unlikely to resolve the long-running debate on the meaning of the amendment.<sup>66</sup> "The search for the original understanding on state sovereign immunity bears this much resemblance to the quest for the Holy Grail," observes a scholar. "There is enough to be found so that the faithful of whatever persuasion can find their heart's desire."<sup>67</sup> This material in turn makes more understandable the controversies that persisted well into the nineteenth century over the amenability of states to federal authority, as in cases such as *Cohens v. Virginia*.<sup>68</sup>

Third, apart from the particulars of the Eleventh Amendment, the debate surrounding *Chisholm* remains instructive: like the light visible from a star, it gives one a glimpse back in time of perceptions in the early 1790s of the Court's place in American government. The decision of course was immensely unpopular in many quarters. Aside from ruffling state sensibilities, it confirmed the existence of a forum outside a state's political system for resolution of claims against the state. (And because of the Revolution and hard times generally, such claims were not in short supply.) The decision presented the first instance where the words of the Constitution clashed with their apparent meaning. The former not only failed to exclude states as party defendants but seemed to anticipate them in that position; the latter rested on assurances given in several state ratifying conventions that the words did not mean what they appeared to say. The response by the political system to amend the Constitution rather than to defy the Court by



ignoring its process set an important precedent. It also suggests that already the judicial interpretation of the Constitution was becoming identified with the document itself.

If contests between national and state authority were frequently a part of the Supreme Court's business before the Civil War, the Fourteenth Amendment increasingly commanded the Court's attention in the last quarter of the nineteenth century. The molding of this amendment into a potent check on state power is the subject of *The Iron Horse and the Constitution* by Richard Cortner. At first glance, Cortner (who is hardly a stranger to the Fourteenth Amendment<sup>69</sup>) seems only to retell the familiar story of how the Justices infused stringent protections for property against state regulation into this second of the Civil War amendments, thus practically converting it into a full employment machine for the legal profession. But *The Iron Horse* is much more. It is both an account of an industry's efforts to achieve political results through the judicial process and an analysis of the long-term constitutional effects of short-term changes.

No one today can explain American culture in the twentieth century by leaving out the automobile. The same can be said for the railroad in the life of the nineteenth century. Particularly after 1865 it transformed the nation in unprecedented ways, vastly accelerating, and therefore expanding, the movement of people and goods to virtually all parts of the land. The railroad could make and unmake personal fortunes; its presence could assure economic growth, its absence decline. Railroads bred a dependency unmatched in extent and effect by slower waterborne transportation that was also more geographically and climatically confined. Because of the industry's power over the livelihoods of so many in so many regions through the rates that were charged and the services that were offered, state legislatures created regulatory agencies and commissions. The railroad lines of course resisted this movement; regulations limited corporate discretion and profits. Having lost in the legislatures, the companies then turned to the courts: their goal was a judicial conclusion that rate-setting by government implicated the Due Process Clause.

Cortner's book recounts the failure of the railroads' first major assault on regulation in the

Granger Cases, specifically *Munn v. Illinois*.<sup>70</sup> Chief Justice Morrison Waite's opinion of the Court in this 1877 decision was a disaster from the railroads' perspective not simply because the rates and regulatory machinery were upheld but because the Court said that the reasonableness of regulations was not a matter appropriate for federal judicial resolution. "For protection against abuses by legislatures the people must resort to the polls, not to the courts," Waite admonished.<sup>71</sup> The Court all but removed the Fourteenth Amendment from the railroads' legal arsenal, leaving them at the mercy of whatever rate public authorities might impose. As Munn's counsel John Jewitt maintained in suggestions in favor of a rehearing,

It is not too much to say that the opinion of the Court in this case has sent a chill of apprehension through the very heart of the business enterprises of the nation, and that there is no interest or employment, however remotely connected with the public advantage, which does not sympathize with the apprehension.<sup>72</sup>

There was now a growing sphere of public policy against which no national constitutional limitations existed.

The railroads then began a campaign lasting thirteen years to undo *Munn*. Victory came in *Chicago, Milwaukee & St. Paul Railway Co. v. Minnesota*,<sup>73</sup> which involved a challenge to a regulatory structure that conferred rate-making authority on a commission and expressly denied judicial review of its decisions. For a majority of six, Justice Samuel Blatchford turned *Munn* on its head:

The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination.<sup>74</sup>

This step was made easier — perhaps possible — by the arrival of new Justices in the years

after 1877. Of the nine Justices who voted in *Munn*, only Stephen Field, Samuel Miller, and Joseph Bradley survived in 1890. New faces included Blatchford, Melville Fuller, Brewer, John Marshall Harlan, Horace Gray, and Lucius Q.C. Lamar. Of the holdovers, Field and Bradley took positions in 1890 consistent with their opposing stances in 1877; concurring with Blatchford, Miller did not. Thus, of the six who arrived after *Munn*, only two (Gray and Lamar) joined Bradley's dissent.<sup>75</sup>

A related courtroom struggle concludes Cortner's iron horse saga. Ideally the railroads preferred to combat rates they found unduly restrictive through injunctive proceedings in federal courts. Yet the Eleventh Amendment, particularly as the Court had construed it after the Civil War, stood as a formidable barrier. In several cases, the Court had gone beyond Chief Justice Marshall's narrow reading of the amendment that distinguished between defendant states, which enjoyed immunity, and defendant state officers, who did not, to include the latter as well. Then, a few decisions in the late 1890s hinted that the Court was ready to revert to the older and more narrow interpretation. Still, other decisions looked the other way. The result was confusion: "Eleventh Amendment jurisprudence by the turn of the century had become wholly contradictory and unpredictable."<sup>76</sup> The objective of the railroads was consistency and predictability in their favor, a goal reached in 1908. With only Harlan in dissent, *Ex parte Young* held that the Eleventh Amendment did not shield from federal law suits officers of a state who enforced unconstitutional statutes. "[U]se of the name of the state to enforce an unconstitutional act to the injury of complainants," Justice Peckham explained for the majority, "is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity." Accordingly, the state official "is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct."<sup>77</sup>

Such victories were of indisputable benefit to the companies in the short run, yet Cortner believes that their consequences in the long run have been more significant. Even though the Court after 1937 disavowed its use of judicial review in the *Minnesota Rate Case* and similar rulings, Cortner believes that its expansion of

the Fourteenth Amendment in those instances made it easier for Justices later to read substantive provisions of the Bill of Rights into the Due Process Clause and to "recognize that due process embraces substantive rights well beyond those" in the first eight amendments.<sup>78</sup> Similarly, the doctrine of *Ex parte Young* was put to different uses, including the dismantling of *de jure* systems of racial segregation after 1954 and of malapportioned state legislatures after 1962. A commanding federal judicial presence is surely a hallmark of late twentieth-century constitutional jurisprudence. Cortner demonstrates that much of that power derived from the defense of corporate interests a century ago. "However much the modern Court sought to exorcise them, behind modern American constitutional law, the ghosts [of railroad counsel] nevertheless still linger."<sup>79</sup>

In perhaps the swiftest constitutional upheaval in American history off the battlefield, the modern Court that **The Iron Horse** anticipates sprang forth in the late 1930s. (One hesitates to say "emerged," a word that suggests more leisurely movement.) As noted near the beginning of this essay in connection with Stanley Reed, a constitutional order collapsed in a matter of days; a mass of doctrines in place for at least forty years became "largely otiose and superfluous."<sup>80</sup> The precipitating event was President Franklin Roosevelt's "Court-packing plan" of 1937. It in turn was the response to an unprecedented clash between a chief executive and the Supreme Court. Never before had a chief executive laid before Congress such an ambitious and far-reaching domestic peacetime agenda; never before had the High Court so thwarted an administration's objectives; never before had a President moved so far against the Court with such apparent speed and with such confidence. The clash seemed sharper because of the felt necessities on both sides. The President sought to lift the nation from the economic ruin wrought by the Great Depression; the judiciary sought to defend the Constitution. Without Roosevelt's assault on the Court, a different Court would have surely in time appeared. But the assault undoubtedly contributed to the abruptness and the scope of the change.

(That much said, one must also remember that the Court had taken a major step in what would be its new direction some days before Roosevelt made his plan public, when a major-



ity voted in conference to uphold a minimum wage law for women from the state of Washington. When this 5-4 ruling was announced on March 29, 1937,<sup>81</sup> after argument in December 1936, it ran counter to a 5-4 ruling in the previous Term which struck down a similar minimum wage law from New York.<sup>82</sup> Justice Roberts was in the majority in both cases, suggesting that the intervening November election returns may have inspired his shift.<sup>83</sup> However, because these cases involved state laws, the later one did not necessarily portend a more favorable reading of Congress's powers, which was the real bone of contention between the White House and the Court.)

The revolution, American-style, that ensued is the subject of *The Supreme Court Reborn* by William E. Leuchtenburg.<sup>84</sup> Seven of the book's nine chapters derive from previously pub-

lished lectures, articles, or essays. One was presented as a conference paper and published for the first time here. The ninth is an original effort. Most have been substantially revised to take account of later research and recently opened archival material. They fit remarkably well into a single work. Except as alerted by the author, few readers would guess that they had been initially crafted over a period of more than twenty years.

Most instructive are the pair of chapters on the Court-packing plan itself: the first (Chapter Four: "The Origins of Franklin D. Roosevelt's 'Court-packing' Plan") explores its gestation, and the second (Chapter Five: "FDR's 'Court-packing' Plan") follows its fate in the Congress and the nation. Within months of the plan's demise, Joseph Alsop and Turner Catledge had in the bookstores the first lengthy analysis of



In his most recent book, William E. Leuchtenburg gives Homer Cummings most of the responsibility for drafting the Court enlargement plan presented by President Roosevelt. The scheme (satirized above in a Berryman cartoon) was based on a proposal for reorganizing the lower courts made by Attorney General James C. McReynolds in 1913.



December 16, Corwin, who had previously been opposed to measures that tampered with the Court's size, proposed the idea of a "friend of mine" to Cummings.<sup>92</sup>

Leuchtenburg believes that Corwin's role added persuasiveness to the plan to enlarge the Bench not only because of Corwin's reputation as the nation's leading constitutional scholar but because it provided a cover of administrative reform for what might otherwise be seen as a violation of the long-standing taboo against overt court-packing. Particularly in light of the recent publication of a gossip-laden book<sup>93</sup> by columnists Drew Pearson and Robert S. Allen, "Cummings could exploit growing popular resentment at the age of the bench. . . . Once Corwin had blazed the path this far, . . . it did not take Cummings long to trace out the rest of the way."<sup>94</sup> Coupled with the savory irony of linking Justice McReynolds' name to the plan, the legislation "seemed to have an inherent logic and even inevitability."

What of course could not be known at the plan's release on February 5 — just three days after the President had entertained most members of the Court at dinner in the East Room<sup>95</sup> — was that Roosevelt had badly misjudged both public opinion and the resiliency of the Court. Both combined to doom the plan to defeat when on July 22 the Senate voted seventy to twenty to recommit the "reorganization" bill to committee, thus sealing its fate. "In politics the black-robed reactionary Justices had won over the master liberal politician of [their] day," future Justice Robert Jackson opined. Nonetheless, he continued, "[i]n law the President defeated the recalcitrant Justices in their own Court."<sup>96</sup> After a hard labor, the modern Court was born.

Mainly economic concerns lay at the heart of the Court-packing fight, the invigoration of the Fourteenth Amendment in the late nineteenth century, and the state suability controversy a century before that. While Prohibition obviously had an economic dimension in that certain commodities could no longer legally be manufactured, transported, or sold, most people who supported or opposed the movement did so for non-economic reasons. Heavily infused with morality, Prohibition was an attempt at social betterment through law. If economics activates constitutional change, can a social movement do

likewise? This is the question Kenneth M. Murchison explores in **Federal Criminal Law Doctrines**,<sup>97</sup> an examination of the impact on Supreme Court decisions of constitutional Prohibition in the United States during the 1920s and early 1930s. His hypothesis is the "general symmetry between the political and doctrinal developments of the Prohibition era. . . ."<sup>98</sup>

Prohibition took effect eighteen months before William Howard Taft became Chief Justice and ended (upon ratification of the Twenty-first Amendment) some three years and nine months after Charles Evans Hughes succeeded him in the center chair. While the Taft and Hughes eras are familiar to students of the Court, both are probably associated most closely with decisions on the extent of permissible government economic regulation. Less remembered today are the decisions precipitated by Prohibition. While some of these cases announced rules that the Court later repudiated, others declared doctrines that have endured.

Because of the sweeping nature of the Eighteenth Amendment and its enforcement offshoot the Volstead Act, criminal cases swelled the dockets of the federal courts. The thirteen years of Prohibition generated hundreds of reported decisions in the lower federal courts, with one study setting the count as of 1927 at 575.<sup>99</sup> Unreported cases numbered in the thousands. Murchison attributes forty of the Supreme Court's decisions — about three per Term — directly to prosecutions under the Volstead Act and its amendments,<sup>100</sup> an imposing number for a single legislative enactment.

Murchison finds evidence "that changing public attitudes toward prohibition was [*sic*] an important force in shaping the direction of the doctrinal modification that occurred between 1920 and 1933."<sup>101</sup> Supreme Court decisions paralleled public opinion through three distinct phases: strong support for enforcement during prohibition's early years, "incipient doubts" during the second half of the 1920s, and "widespread opposition" after 1930. At the Court, an "initial movement to strict construction of individual rights" was followed by "the ambivalence of the middle years and, finally, by increased protection of the rights of individuals at the end. . . ."<sup>102</sup> While the author does not claim that public opinion was the only force at work, the correlation between the two is



close in several categories of criminal procedure: the entrapment defense, Fourth Amendment strictures on searches and seizures, the Fifth Amendment's ban on double jeopardy, forfeiture of property, and the jury trial. Of course, with the small amount of precise data available on public attitudes during Prohibition, one must remain tentative about such conclusions. Even with a relationship between the two, there is no way of knowing, for example, whether attitudes of the public in some way influenced the Justices or whether the Justices' attitudes (as reflected in their decisions) were shaped by the same factors that influenced attitudes of the public generally.

The picture of the "Prohibition Court" that emerges departs from the popular current images of the Taft and early Hughes Courts in that the Justices were "less rigid, more tolerant of governmental regulation, and less consistently divided along New Deal lines than conventional wisdom would suggest."<sup>103</sup> Yet, while tolerant of Federal power, the Court was also concerned about the traditional role of the states in the federal system. Ordinary citizens were more likely to have their rights protected than large commercial violators. Murchison depicts Taft as a consistent supporter of enforcement authorities but reveals that Sutherland, Butler, and McReynolds authored many of the majority opinions siding with defendants. As one might

expect, Brandeis voted and spoke out against enforcement excesses, but Holmes and Stone were more often aligned with the majority.

While the basis for this litigation vanished more than sixty years ago, some blocks of the legal edifice that it erected survived for several decades before being dislodged. For example, prefatory to *Mapp v. Ohio*,<sup>104</sup> the "silver platter" doctrine that allowed federal agents to use evidence acquired under less stringent rules by state agents was dropped in 1960; the exclusion of wiretaps from Fourth Amendment protection was reversed in 1967, as was the rule that barred seizure of "mere evidence."<sup>105</sup> In addition, some pieces remain in place today. The automobile exception and the "open fields" exception to the warrant requirement are still very much a part of Fourth Amendment law, for instance.<sup>106</sup> Even those doctrines that were eventually abandoned shaped federal and later state jurisprudence for a long time. Once prohibition ended and the volume of federal criminal cases declined, doctrines were left in place because fewer opportunities for their reconsideration existed.

Moreover, the prohibition experience has predictive value, in terms not of the outcomes of particular cases but of trends in the law. Drawing a parallel between prohibition and the contemporary "war on drugs," Murchison maintains that an observer would have been able to "anticipate the pattern of contraction [of civil lib-



In 1923 federal agents had photographers document their raid of a speakeasy in the nation's capital. Kenneth M. Murchison makes the case in his new book that the Prohibition-related decisions of the Supreme Court closely mirrored the changing political attitudes toward that temperance law.

erties] as American society became committed to using the criminal law to suppress drug traffic."<sup>107</sup> In short, the Prohibition years teach that substantive policies have serious implications for procedural safeguards. Protection of individual rights, he concludes, may sometimes require defeat of the substantive proposal likely to lead to their infringement.<sup>108</sup>

### III.

At his death on June 25, 1995, Warren Earl Burger held a special place among the nation's Chief Justices. None of the Chiefs appointed in the twentieth century has served longer, and his seventeen years on the Bench ranked him fourth among all fifteen former Chiefs in length of service; only Marshall, Taney, and Fuller sat longer. Moreover, unlike nine of his predecessors, Burger was blessed with a retirement. Only five others (Jay, Ellsworth, Rutledge, Hughes, and Warren) survived their Court years. Except for the unique circumstances in which Jay outlived his judicial career by thirty-four years, Burger's eight years and nine months in retirement exceeded anyone else's. (Closest were Ellsworth and Hughes with seven years each, and Warren with five.)

Of the six retired Chiefs, none gave more in public service than Burger. When he officially left the Court barely a week after his seventy-ninth birthday, he continued as Chairman of the Commission on the Bicentennial of the Constitution until 1992. Indeed, he offered as a reason for his retirement in 1986 the desire to devote full energy to the work of the Commission. And he did. Someone remarked soon thereafter that he faced a daunting challenge in inspiring interest in the Constitution among his fellow Americans. With flags, fireworks, and tall ships recalling revolutionary zeal, it had been easy to work up enthusiasm for the bicentennial of the Declaration of Independence a decade earlier. But Burger was equal to the task of focusing the attention of the public on the purpose and significance of what Chief Justice Taft had once called our "Ark of Covenant."<sup>109</sup> If any one person became a symbol for commemoration of the ratification of the Constitution, and later the Bill of Rights, it was Chief Justice Burger. In the best sense of the word, he "popularized" the nation's fundamental law. He worked hard, and he motivated others to do the same.

It is particularly fitting, therefore, that his last published work is a book about the Constitution: **It Is So Ordered**.<sup>110</sup> The subtitle (**A Constitution Unfolds**) is entirely descriptive of the contents. The book demonstrates that the Constitution has long been partly a juridical object; that is, because of the Supreme Court it is more than its text (and sometimes less). In fewer than 200 pages of narrative are accounts of fourteen cases or episodes that profoundly shaped the development of American constitutional law. The list begins in 1790 with *Bracken v. Visitors of William & Mary College*,<sup>111</sup> where John Marshall and John Taylor were opposing counsel before the highest court of Virginia. It concludes in 1952 with the Steel Seizure Case.<sup>112</sup>

Among the cases Burger selected are two "failures"<sup>113</sup> — *Dred Scott v. Sandford* and *Plessy v. Ferguson*.<sup>114</sup> The former is reserved for the chapter entitled "The Great Mistake." Few will argue with that label, yet it is instructive to ask why. Burger believes that the label is apt for both procedural and substantive reasons. There was the "cozy correspondence"<sup>115</sup> between some of the Justices and President-elect James Buchanan. Moreover, Taney's opinion of the Court was both defective (with "its internal inconsistencies, disjointed sentences, and [a] gross misreading of history") and "immoral,"<sup>116</sup> espousing a vision of America that within thirteen years had been rejected on the battlefield and in a trio of constitutional amendments. One would be hard pressed to imagine a more resounding reversal than that. Implicit in the chapter is a fourth reason as well: the Court short-circuited the political process.

To understand this point, it is helpful to recall that the case involved at least three questions but that answers to all three were not necessary to a decision in the case. First, was Scott's status settled by Missouri law, under which he had already been declared to be a slave? *Strader v. Graham*,<sup>117</sup> decided seven years earlier, pointed to an affirmative answer. Had the Court so held, and only so held, abolitionists would hardly have been pleased, but the case would doubtless have avoided the ignominy of the ages. Probably, few today would ever have heard of *Dred Scott*. Second, was Scott a citizen of the United States, for the purpose of maintaining a suit in federal court against a citizen of another state? Third, what was the effect on his status as a slave of his



sojourn with his owner in territory declared free by the Missouri Compromise? If the Court decided one or the other, or both, of the first two questions against Scott, there would be no need to answer the third. But that was not to be. Boldness displaced caution as necessity seemed to dictate a wide swathe.

When the case came down on March 6, 1857 (two days after Buchanan's inauguration and eleven days shy of Taney's eightieth birthday), nine Justices filed nine opinions, seven holding for Sanford<sup>118</sup> and two (McLean and Curtis) for Scott. Traditionally viewed as the majority opinion,<sup>119</sup> Chief Justice Taney's addressed all three questions. First, while a state might grant citizenship to blacks, they were not citizens of the United States within the meaning of the Constitution and so could not press a suit in federal court. The circuit court therefore had no jurisdiction in Scott's suit. Second, Scott was a slave because he had never been free. The provision of the Missouri Compromise of 1820 banning slavery in certain territories was unconstitutional not only because of the absence of language in the Constitution expressly granting Congress authority to prohibit slavery in the territories but because the law interfered with rights of property the Constitution protected through the Fifth Amendment. Furthermore, Taney reasoned,

if Congress itself cannot do this — if it is beyond the powers conferred on the Federal Government — . . . it could not authorize a Territorial Government to exercise them. It could confer no power on any local Government, established by its authority, to violate the provisions of the Constitution.<sup>120</sup>

Last, and almost as an afterthought, whatever the status of slaves in a free state or territory, once they returned to a slave state, their status depended on the law of that state. And Missouri had decided that Scott was a slave.

While Taney's discourse on citizenship might seem to readers today to be the most troubling part of his opinion, for his own day it would be difficult to exaggerate the impact of his second conclusion. True, Taney's position was hardly novel; questions about Congress's authority to ban slavery in the territories had been raised for

decades. Moreover, the direct short-term effect of the pronouncement on *national* law was minuscule. Congress had expressly repealed the free soil provision of the Missouri Compromise three years earlier. Yet just because the Congress of 1854 had substituted a policy of popular (or local) sovereignty for a policy of free soil did not mean that a future Congress might not choose to do otherwise. *Scott v. Sandford*, however, declared that congressionally mandated free soil was constitutionally unacceptable, and it did so within months of a presidential campaign during which a major political party (the Republicans) had made free soil in the territories its overriding objective. As construed by the Court, the Constitution now placed that objective out of reach.

Yet, the Court did more than pull the legal props from under the Republican party. Taney's opinion took sides on a matter that had divided Democrats and so had been deliberately left in doubt by the Kansas-Nebraska Act. Thanks to the Court, Democrats would soon be divided once more.

A clause in the 1854 Act declared the "true intent and meaning" of the statute was

not to legislate slavery into any Territory or State, nor to exclude it therefrom, but to leave the people thereof perfectly free to form and regulate their domestic institutions in their own way. . . .

The meaning of these words is unclear. They grew out of an understanding among Democrats in Congress at the time to agree to disagree: Could a *territorial* legislature constitutionally prohibit slavery; or was a prohibition of slavery allowable only at or after the time that *statehood* was achieved? A free state was more likely to result from the first interpretation than from the second. By addressing the authority of a territorial legislature in his opinion, Taney was not only addressing a question that had nothing to do with Dred Scott's case (it was Congress, after all, that had enacted the Missouri Compromise), but he did so in a way that made the Court — that "citadel of slavery," Senator John Hale had called it<sup>121</sup> — appear more pro-slavery than even a majority of the 1854 Congress itself.<sup>122</sup> Of the three positions one might take on the subject — con-

gressionally mandated free soil in all territories, slave or free soil at the option of a territorial legislature, and a choice between slave or free soil only at or after statehood — the Court held that only the third was constitutionally acceptable. Taney's position was only one step shy of the most extreme southern position on slavery in the late 1850s: namely, that Congress not only was powerless to prohibit slavery in the territories but was under an affirmative constitutional obligation to protect it.<sup>123</sup>

Ironically, the institutional stature that led the Court to conclude that it could succeed in resolving a nation-rending controversy where others had failed, made *Dred Scott* matter all

the more. The case would probably not have been such a catalyst in ensuing events had the Court itself counted less politically. Neither would the decision have been "the great mistake" had the Court been content with more modest results.<sup>124</sup>

Fortunate for both Court and nation, mistakes of such magnitude have been few. The role of the Third Branch in shaping the Constitution and the resulting impact on the political system are the underlying themes not only of Burger's volume but of the other books surveyed here too. They depict the Justices as recipients, trustees, and creators of a remarkable legacy: the American experiment in constitutional government.

\* \* \* \* \*

#### THE BOOKS SURVEYED IN THIS ARTICLE ARE LISTED ALPHABETICALLY BY AUTHOR BELOW.

BRODHEAD, MICHAEL J., **David J. Brewer: The Life of a Supreme Court Justice, 1837-1910** (Carbondale: Southern Illinois University Press, 1994). Pp. xiii, 262.

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## Endnotes

<sup>1</sup> John D. Fassett, *New Deal Justice: The Life of Stanley Reed of Kentucky* (1994) (Hereinafter cited as Fassett).

<sup>2</sup> Frances William O'Brien, *Justice Reed and the First Amendment: The Religion Clauses* (1958).

<sup>3</sup> For example, see Morgan D. S. Prickett, "Stanley Forman Reed: Perspectives on a Judicial Epitaph," 8 *Hastings Constitutional Law Quarterly* 343 (1981).

<sup>4</sup> Of the forty-three Justices appointed in the twentieth century who had completed their tenures on the Supreme Court by the summer of 1994, the average length of service was fifteen years, the median sixteen years. Reed spent twenty-three years in retirement before his death in 1980 at the age of ninety-five. Of the forty-eight members of the Court as of July 1995 whose departures from the Bench preceded their death (excluding, of course, former Justices still living), only five had more years in retirement than Reed. Moreover, no former member of the Court has yet lived longer than Reed; indeed, including Reed, only five to date have reached their nineties, with only Holmes sitting as an active Justice in his tenth decade.

<sup>5</sup> A. Conan Doyle, "Silver Blaze," in *Memoirs of Sherlock Holmes* 22 (rev. ed. 1901).

<sup>6</sup> See Robert G. Seddig, "John Marshall and the Origins of Supreme Court Leadership," *Journal of Supreme Court History* 63 (1991), for a discussion of the concept of judicial leadership and an overview of the literature on this topic.

<sup>7</sup> In the late 1970s, when the author of this review article researched the location of papers belonging to Supreme Court Justices, he was informed that no separate collection existed for Reed. D. Grier Stephenson, Jr., *The Supreme Court and the American Republic: An Annotated Bibliography* 238-239 (1981).

<sup>8</sup> Fassett, xii.

<sup>9</sup> A representative sample includes: "The Bar's Part in the Maintenance of American Democratic Ideals," 24 *American Bar Association Journal* 622 (1938); "Our Constitutional Philosophy Concerning the Significance of Judicial Review in the Evolution of American Democracy," 21 *Kentucky State Bar Journal* 136 (1957); and, "Observations on the Effect of Constitutional Interpretation on American Life," 10 *Western Reserve Law Review* 504 (1959).

<sup>10</sup> There might have been six. Lloyd Wheaton Bowers died before President Taft could appoint him, and Robert Bork was denied confirmation as Associate Justice in 1987. Lincoln Caplan, *The Tenth Justice: The Solicitor General and the Rule of Law* 12 (1987).

<sup>11</sup> Fassett, 133-136. Reed's endeavor on behalf of candidate Roosevelt is itself remarkable. While certain Solicitors General in recent years have been "political" in the sense that they have used their office to advance judicially some part of the President's agenda, it would surely raise questions of propriety were a Solicitor General today to make stump speeches in behalf of his boss's reelection.

<sup>12</sup> *Id.*, 161.

<sup>13</sup> *Id.*, 59-206.

<sup>14</sup> 297 U.S. 288 (1936).

<sup>15</sup> 295 U.S. 602 (1935).

<sup>16</sup> 297 U.S. 1 (1936).

<sup>17</sup> 298 U.S. 1 (1936).

<sup>18</sup> 298 U.S. 238 (1936).

<sup>19</sup> Quoted in Fassett, 146.

<sup>20</sup> 310 U.S. 586 (1940).

<sup>21</sup> 316 U.S. 455 (1942).

<sup>22</sup> 332 U.S. 46 (1947).

<sup>23</sup> 338 U.S. 25 (1949).

<sup>24</sup> 340 U.S. 315 (1951).

<sup>25</sup> 341 U.S. 494 (1951).

<sup>26</sup> Despite this longevity, however, Brennan never became a "popular" figure or "folk hero" as did Black and Douglas at various stages of their judicial careers, probably because of a difference in both personal and professional demeanor. Also unlike them, once on the Court he never hankered for higher office.

<sup>27</sup> For example, see "State Court Decisions and the Supreme Court," 31 *Pennsylvania Bar Association Quarterly* 393 (1960); "Constitutional Adjudication and the Death Penalty: A View from the Court," 100 *Harvard Law Review* 313 (1986); and, "Are Citizens Justified in Being Suspicious of the Law and the Legal System?" 43 *University of Miami Law Review* 981 (1989). As with each of these, many of Brennan's articles were originally presented as lectures.

<sup>28</sup> Roger Goldman and David Gallen, *Justice William J. Brennan, Jr.* (1994) (hereinafter cited as Goldman and Gallen). An earlier volume on Brennan, Kim Isaac Eisler's *A Justice For All* (1993), was discussed in "The Judicial Bookshelf" in the 1994 issue of the *Journal of Supreme Court History*.

<sup>29</sup> *Thurgood Marshall: Justice for All* (1992), surveyed in "The Judicial Bookshelf" in the 1993 issue of the *Journal of Supreme Court History*.

<sup>30</sup> 369 U.S. 186 (1962).

<sup>31</sup> 376 U.S. 254 (1964).

<sup>32</sup> 397 U.S. 254 (1970). The authors mistakenly place this decision in 1968 and attribute it to the Warren Court; Goldman and Gallen, 97, 133. The case came down in March 1970, during Chief Justice Burger's first Term. The vote was 6 to 3, with Black, Burger, and Stewart in dissent.

<sup>33</sup> Goldman and Gallen, 197.

<sup>34</sup> Quoted in Robert Shnayerson, *The Illustrated History of the Supreme Court of the United States* 123 (1986).

<sup>35</sup> Quoted in Charles Fairman, *Oliver Wendell Holmes Devise History of the Supreme Court of the United States; Volume VI, Reconstruction and Reunion 1864-88, Part One* 1465 (1971).

<sup>36</sup> John Niven, *Salmon P. Chase* (1995) (hereinafter cited as Niven). Chase was also recently the subject of an issue-length symposium in 21 *Northern Kentucky Law Review* 1 (1993).

<sup>37</sup> The closest is best obtained through University Microfilms of Ann Arbor, Michigan: David F. Hughes, *Salmon P. Chase: Chief Justice*, unpublished Ph.D. dissertation, Princeton University, 1963. Hughes published a summary of the dissertation in "Salmon P. Chase: Chief Justice," 18 *Vanderbilt Law Review* 569 (1965).

<sup>38</sup> Quoted in Fairman, *supra* n. 35, at 120 (the emphasis is Chase's).

<sup>39</sup> *Id.*, 5.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*, 426.

<sup>42</sup> 60 U.S. (19 Howard) 393 (1857).

<sup>43</sup> *Mississippi v. Johnson*, 71 U.S. (4 Wallace) 475 (1867); *Georgia v. Stanton*, 73 U.S. (6 Wallace) 50 (1868). Both cases were outright challenges to Reconstruction acts. In the first, a

unanimous bench held that the Court was without authority to enjoin the President from enforcing an allegedly unconstitutional law; in the second, the Court concluded that the case involved political questions over which it had no jurisdiction. However, in other litigation the Court struck down both state and federal laws requiring test oaths. *Cummings v. Missouri*, 71 U.S. (4 Wallace) 277 (1867); *Ex parte Garland*, 71 U.S. (4 Wallace) 333 (1867).

<sup>44</sup> 71 U.S. (4 Wallace) 2 (1866).

<sup>45</sup> *Ex Parte McCordle*, 74 U.S. (7 Wallace) 506 (1869).

<sup>46</sup> Chase wrote the opinion of the Court in *Hepburn v. Griswold*, 75 U.S. (8 Wallace) 603 (1870). The reversal came in *Knox v. Lee*, 79 U.S. (12 Wallace) 457 (1871), over Chase's dissent. As Lincoln's Secretary of the Treasury, Chase had supported the paper money law.

<sup>47</sup> Except as noted, this statement relies on the data in Table 2 in Henry A. Abraham, *Justices and Presidents* 53-55 (3d ed., 1992). For Brewer, however, Abraham apparently excludes his service on two lower Kansas courts, counting only his service on the Kansas Supreme Court and the Eighth Circuit.

<sup>48</sup> Arnold M. Paul, "David J. Brewer," in Leon Friedman and Fred L. Israel eds., 2 *The Justices of the United States Supreme Court 1789-1969* at 1515 (1969).

<sup>49</sup> Abraham, *Justices and Presidents* 149.

<sup>50</sup> Michael J. Brodhead, *David J. Brewer* (1994) (hereinafter cited as Brodhead).

<sup>51</sup> For example, see Joseph Gordon Hylton, "David Josiah Brewer: A Conservative Justice Reconsidered," *Journal of Supreme Court History* 45 (1994), which appeared at almost the same time as Brodhead's book. Probably the first article to argue for a reconsideration of Brewer was Robert E. Gamer, "Justice Brewer and Substantive Due Process: A Conservative Court Revisited," 18 *Vanderbilt Law Review* 615 (1965).

<sup>52</sup> In addition to those cited in the previous note, see Joseph Gordon Hylton, "The Judge Who Abstained in *Plessy v. Ferguson*," 61 *Mississippi Law Journal* 315 (1991); and, Francis Bergan, "Mr. Justice Brewer," 25 *Albany Law Review* 191 (1961).

<sup>53</sup> Brodhead, 241-43, 247-49.

<sup>54</sup> Hylton, "David Josiah Brewer," 58.

<sup>55</sup> Brodhead, xii.

<sup>56</sup> *Id.*, xiii, 103.

<sup>57</sup> This is the title Brodhead gives to chapter 12.

<sup>58</sup> Brodhead, 170.

<sup>59</sup> Louis D. Brandeis, "What Publicity Can Do," in *Other People's Money* 92 (1932), first published in *Harper's Weekly*, December 20, 1913.

<sup>60</sup> Melvin I. Urofsky, ed., *The Supreme Court Justices* (1994) (hereinafter cited as Urofsky).

<sup>61</sup> *Id.*, vii (emphasis in the original).

<sup>62</sup> Macva Marcus, ed., *The Documentary History of the Supreme Court of the United States, 1789-1800; Volume V: Suits Against States* (1994) (hereinafter cited as Marcus).

<sup>63</sup> 2 U.S. (2 Dallas) 419 (1793).

<sup>64</sup> Charles Warren, 1 *The Supreme Court in United States History* 57, 71, 93n., 102, 104n. (rev. ed. 1926).

<sup>65</sup> Marcus, 164-214. To avoid duplication, arguments of counsel and opinions of the Justices that Dallas included without alteration are not reprinted.

<sup>66</sup> *Id.*, 5.

<sup>67</sup> John V. Orth, *The Judicial Power of the United States: The Eleventh Amendment in American History* 28 (1987).

<sup>68</sup> 19 U.S. (6 Wheaton) 264 (1821).

<sup>69</sup> Richard C. Cortner, *The Supreme Court and the Second*

*Bill of Rights* (1981).

<sup>70</sup> 94 U.S. 113 (1877).

<sup>71</sup> *Id.*, 134.

<sup>72</sup> Quoted in Cortner, 8.

<sup>73</sup> 134 U.S. 418 (1890).

<sup>74</sup> *Id.*, 458.

<sup>75</sup> A full consolidation of the railroad victory in 1890 followed in *Smyth v. Ames*, 169 U.S. 466 (1898), when the Court not only reaffirmed its decision in the Minnesota Rate Case but held that the question of the reasonableness of rates depended upon the "fair value of the property being used by [the railroad] for the convenience of the public," and that the company was entitled to "a fair return upon the value of that which it employs for the public convenience." *Id.*, 546-47.

<sup>76</sup> Cortner, 132.

<sup>77</sup> 209 U.S. 123, 159-60 (1908).

<sup>78</sup> Cortner, 215.

<sup>79</sup> *Id.*, 216.

<sup>80</sup> Edward S. Corwin, *Constitutional Revolution, Ltd.* 113 (1941).

<sup>81</sup> *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

<sup>82</sup> *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936).

<sup>83</sup> Justice Roberts offered a different explanation. See Felix Frankfurter, "Mr. Justice Roberts," 104 *University of Pennsylvania Law Review* 311 (1955).

<sup>84</sup> William E. Leuchtenburg, *The Supreme Court Reborn* (1995) (hereinafter cited as Leuchtenburg).

<sup>85</sup> Joseph Alsop and Turner Catledge, *The 168 Days* (1938). About one fourth of the Alsop-Catledge book had previously appeared in the *Saturday Evening Post*.

<sup>86</sup> Homer Cummings and Carl McFarland, *Federal Justice* 531 (1937).

<sup>87</sup> Leuchtenburg, 94.

<sup>88</sup> 297 U.S. 1 (1936).

<sup>89</sup> Leuchtenburg, 98.

<sup>90</sup> Alsop and Catledge, *The 168 Days*, 32.

<sup>91</sup> Quoted in Leuchtenburg, 117.

<sup>92</sup> Leuchtenburg, 117-18.

<sup>93</sup> Drew Pearson and Robert S. Allen, *The Nine Old Men* (1936).

<sup>94</sup> Leuchtenburg, 119. Interestingly, Corwin agreed with Holcombe's idea partly because of the effect on those likely to be appointed. As he wrote Cummings, "[I]t might serve to draw the attention of the appointing power more frequently to the faculties of our great Law schools where superior talent emerges at an earlier age than in practice at the Bar." *Id.*, 118.

<sup>95</sup> The occasion reminded Senator Borah "of the Roman Emperor who looked around his dinner table and began to laugh when he thought how many of those heads would be rolling on the morrow." Quoted in "The Big Debate," *Time*, March 1, 1937, p. 13.

<sup>96</sup> Robert H. Jackson, *The Struggle for Judicial Supremacy* 196 (1941).

<sup>97</sup> Kenneth M. Murchison, *Federal Criminal Law Doctrines* (1994) (hereinafter cited as Murchison).

<sup>98</sup> *Id.*, 21.

<sup>99</sup> Comment, "The Meaning of the Federal Rule on Evidence Illegally Obtained," 36 *Yale Law Journal* 536, 537 n. 2 (1927).

<sup>100</sup> Murchison, 176-77.

<sup>101</sup> *Id.*, 177.

<sup>102</sup> *Id.*, 178.

<sup>103</sup> *Id.*, 183.

<sup>104</sup> 367 U.S. 643 (1961).

<sup>105</sup> *Elkins v. United States*, 364 U.S. 206 (1960); *Katz v. United*



*States*, 389 U.S. 347 (1967); *Warden v. Hayden*, 387 U.S. 294 (1967).

<sup>106</sup> *Carroll v. United States*, 267 U.S. 132 (1925); *Hester v. United States*, 265 U.S. 57 (1924).

<sup>107</sup> *Murchison*, 198.

<sup>108</sup> *Id.*

<sup>109</sup> Quoted in Alpheus Thomas Mason and Donald Grier Stephenson, Jr., *American Constitutional Law* 38 (10th ed., 1993).

<sup>110</sup> Warren E. Burger, *It Is So Ordered* (1995) (hereinafter cited as Burger).

<sup>111</sup> 3 Call 495 (Va. 1790).

<sup>112</sup> *Youngstown Co. v. Sawyer*, 343 U.S. 579 (1952).

<sup>113</sup> Burger, x.

<sup>114</sup> 60 U.S. (19 Howard) 393 (1857); 163 U.S. 537 (1896).

<sup>115</sup> Burger, 121. See also note 122.

<sup>116</sup> *Id.* 123.

<sup>117</sup> 51 U.S. (10 Howard) 82 (1851).

<sup>118</sup> Court records incorrectly spelled Sanford's name "Sandford."

<sup>119</sup> The other six members of the majority did not all agree with Taney on all points of his opinion. Justice Nelson's opinion, which originally the Court had planned to be the majority opinion, basically relied on *Strader*.

<sup>120</sup> "[A]n Act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States . . . could hardly be dignified with the name of due process of law." 60 U.S. at 450-51.

<sup>121</sup> Remarks of 1851, quoted in 2 Charles Warren, *The Supreme Court in United States History* 223 (rev. ed., 1926).

<sup>122</sup> That President-elect Buchanan was aware of what the Court would say about the Missouri Compromise has long been part of the lore of the Dred Scott Case. Carl B. Swisher, *Roger B. Taney* 495-502 (1935). There were at least two letters to Buchanan prior to his inauguration, one from Catron and one from Grier. Both wrote of the Missouri Compromise. What remains intriguing, however, is the pertinent paragraph from Buchanan's inaugural address on March 4, 1857. Noting that Congress had applied the principle of majority rule to the question of slavery in the territories, he added: "[a] difference of opinion has arisen in regard to the point of time when the people

of a Territory shall decide this question for themselves. This is, happily, a matter of but little practical importance. Besides, it is a judicial question, which legitimately belongs to the Supreme Court of the United States, before whom it is now pending, and will, it is understood, be speedily and finally settled. To their decision, in common with all good citizens, I shall cheerfully submit." 5 James D. Richardson, ed., *Messages and Papers of the Presidents* 431 (1897). Buchanan's point, however, was addressed in neither of the extant letters from Catron and Grier.

Several possibilities present themselves. Perhaps reference to congressional power in the territories included the local "timing" question as well so that the signals from Catron and Grier to the president-elect conveyed more information than they might appear. Perhaps Buchanan was confused about the issue the Dred Scott case raised, but this seems highly unlikely given the widespread discussion about the case during the several weeks prior to the decision. Perhaps Taney himself (or someone else) communicated the scope of his opinion to Buchanan. Although no manuscript proof of a contact has emerged, this seems the most plausible explanation of this part of the inaugural address.

<sup>123</sup> Arthur Bestor, "State Sovereignty and Slavery: A Reinterpretation of Proslavery Constitutional Doctrine, 1846-1860," 54 *Journal of the Illinois State Historical Society* 117, 162-166 (1961); Samuel Eliot Morison, *The Oxford History of the American People* 603 (1965).

<sup>124</sup> No kind of decision in this case, however, was risk free. "Interested parties exerted pressure to secure an opinion on the more important political question involved . . . Public opinion appeared to demand that the judges pronounce on it. . . . If they had not spoken, they would have been attacked as delinquent. If there had been no decision, men would probably ask, in the years to come, why the last peaceful means of settling the issue that precipitated the Civil War had not been tried." Vincent C. Hopkins, *Dred Scott's Case* v-vi (1951). Indeed, when the case was set for reargument, thus meaning that the decision would not come down until after the presidential election of 1856, the abolitionist *New York Tribune* commented that "the black gowns have come to be artful dodgers." Quoted in 2 Warren, *The Supreme Court in United States History* 285.

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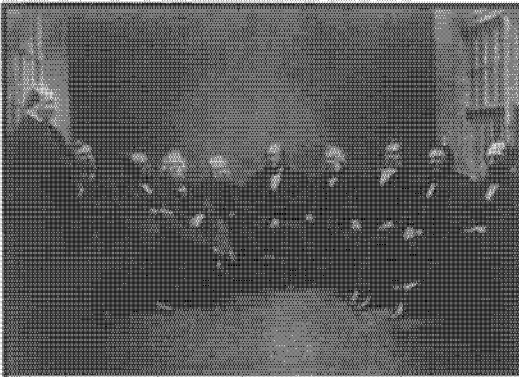
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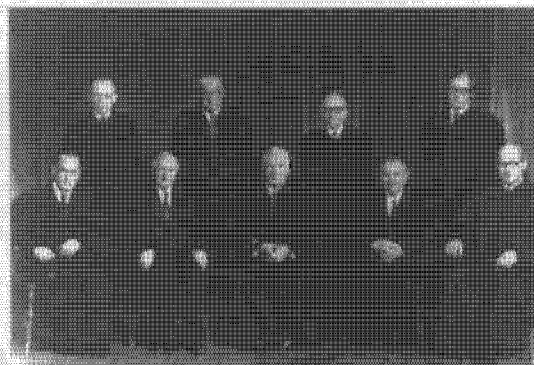
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