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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 that 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 and became a trimester publication in 1999.

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 six volumes.

The Society has also copublished several books with CQ Press. **The Supreme Court Justices: Illustrated Biographies, 1789-1995** is a 588-page book that was developed by the Society and features biographies of all 108 Justices, as well as rare photographs and other illustrations. In 2000, the Society cosponsored the publication of **We the Students: Supreme Court Cases for and About Students**, a high school textbook written by Jamin B. Raskin. Also in 2000, the Society copublished **Supreme Court Decisions and Women's Rights: Milestones to Equality**, a guide to gender law cases developed by the Society for use by high school students and undergraduates.

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 has approximately 5,100 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.

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Introduction

Melvin I. Urofsky

Readers who start at the beginning of each issue will know that a recurring theme in my introductions is how the contents of this *Journal* never fail to amaze and instruct me as to the innumerable aspects of history they illustrate. When many of us were in college, graduate school or law school, the history of the Court was essentially the history of its major decisions, with an occasional anecdote thrown in about Holmes or Brandeis or Black. We never analyzed cases for their literary content, only for their jurisprudential arguments; in fact, I believe the general assumption among most of my professors was that the only stylist ever to have served on the Court was Oliver Wendell Holmes, Jr., and that too often his style merely masked a deficiency in legal analysis. Moreover, once we had read a case, we rarely, if ever, looked beyond the date of the holding. Oh, yes, the Income Tax Cases spawned a constitutional amendment, but no one taught—nor did we ask—what happened to laundry-owner Curt Muller after he lost his case.

We feature in this issue an article by one

of America's best-known amateur historians, the Chief Justice of the United States, who in his lecture to the Society's Annual Meeting looked at what is one of the truly great constitutional transformations in American history, the evolution of the Supreme Court from a "second-class partner" in the scheme of government to what we believe the Framers truly envisioned, a judicial system as one of the co-equal branches of a tri-partite system. Chief Justice Rehnquist's concluding anecdote—about Theodore Roosevelt, Oliver Wendell Holmes, Jr., and the Insular Cases—should serve all of us as a useful reminder about the transitory nature of certain "great" issues.

James Boyd White gives us a most unusual article, one that found me searching back in my memory to my Humanities I course at Columbia, in an effort (not altogether successful, I might add) to recall what I had learned about Greek drama. And if my law and history professors never analyzed cases for their literary content, then I can assure you as well that my literature teachers

never even considered using a law case in their courses.

In terms of literature, there have been several best-selling mystery novels about Supreme Court clerks; the murders they get involved in, and the dire results of their leaking word of future decisions. But in the more than a century since some members of the Court began using clerks, there would appear to have been nary a leak from Chambers. We are most grateful to John B. Owens for unearthing one of the very few examples when there was

a leak, and where a clerk was suspected of having been the culprit.

Finally, we have reviews of books about the Court. Grier Stephenson weighs in with another well-written and considered evaluation of current books, and I have added an essay review on a case that every law student confronts, but whose message and continuing impact is rarely understood.

Again, it is a rich feast, and we invite you to enjoy!

The Supreme Court in the Nineteenth Century*

WILLIAM H. REHNQUIST

At the beginning of the nineteenth century, we find a Court which has not yet found its role, and whose principal impact is deciding which litigant wins in a particular lawsuit. Chief Justice John Marshall, appointed in 1801, changes that; he and his successor, Roger B. Taney, are the dominant figures in the Courts over which they preside. From 1801 until 1864—sixty-three years—the nation had only two Chief Justices; during the same time, it had fifteen presidents. In the latter part of the nineteenth century, the Chief Justices are less dominant and influential, sharing their authority with several notable Associate Justices. By the end of the century, the Court is beginning to wrestle with the many problems facing the nation after a little more than a century of existence.

Today, the federal judiciary, headed by the Supreme Court, is regarded as a co-equal branch of the federal government, along with Congress and the Executive Branch. But in the first decade of the new republic—from 1790 to 1800—the judiciary was very much a junior partner. The Supreme Court's present-day status is due in large part to John Marshall, who served as Chief Justice for thirty-four years, from 1801 until 1835.

During the first decade of the new republic, the Supreme Court got off to a very slow start. It decided a total of sixty cases in this ten-year period—not *sixty* cases per year, but

about *six* per year, because there was so little business to do. The Justices met in the national capital for only a few weeks each year. They spent the rest of their time riding circuit and sitting as trial judges in their respective circuits, from Portsmouth, New Hampshire to Savannah, Georgia.

John Jay, the first Chief Justice, was a rather elegant New Yorker. He was appointed by George Washington in 1789. In the East and West conference rooms at the Supreme Court, there are portraits of each of these early Chief Justices, and only Jay is shown wearing a red robe. He had held most of the important



In the decade after the Supreme Court came into existence, it decided a total of sixty cases—about six per year—because there was so little business at hand. However, the Justices kept busy sitting as trial judges in their respective circuits. To fulfill their obligations on circuit, they had to endure bumpy stagecoach rides, hazardous conditions, and long stretches away from their families.

positions in the state government of New York, and was half English and half Dutch—just the right combination for political success in New York at that time.

In 1794, Washington decided that he needed a special ambassador to go to the Court of St. James and negotiate with Great Britain various disputes that had come up as a result of the Treaty of Paris of 1783, which had ended the Revolutionary War. He picked John Jay. Jay sailed for England in the spring of 1794, and did not return until the summer of 1795. There is no indication that he was greatly missed in the work of the Supreme Court during this time. When he returned, he found that he had been elected Governor of New York *in absentia*, and resigned the Chief Justiceship to assume what he regarded as the more important job.

The next Chief Justice who actually served was Oliver Ellsworth of Connecticut, who had been a delegate to the Constitutional Convention and the chairman of the Senate Judiciary Committee in the First Congress. But Ellsworth, too, was selected for a special mission—this time to France—by President

John Adams, who succeeded George Washington. He left for France in the fall of 1799, and fell ill while there. He submitted his resignation to President Adams in December 1800.

Thomas Jefferson had defeated John Adams in the presidential election of 1800, but in those days the term of the outgoing president expired not on January 20, as it does today, but on March 4, and the terms of members of Congress were similarly longer. Thus, for several months after they knew the outcome of the election, John Adams and the Federalists continued to control the Presidency and both houses of Congress.

Adams first wanted to reappoint John Jay as Chief Justice, but Jay declined. Adams ultimately chose as Ellsworth's successor John Marshall, a Virginia Federalist of considerably different stripe than Jefferson. In his "Autobiographical Sketch," Marshall recounted the circumstances of his appointment:

When I waited on the President with Mr. Jay's letter declining the appointment he said thoughtfully "Who shall I nominate now"? I re-



This striking robe was worn by the first Chief Justice, John Jay. An elegant New Yorker, Jay negotiated the Treaty of Paris with Great Britain in 1783 while still a member of the Supreme Court.

plied that I could not tell, as I supposed that his objection to Judge [Paterson] remained. He said in a decided tone "I shall not nominate him." After a moment's hesitation, he said, "I believe I must nominate you."

Confirmation hearings in those days not being what they are today, Marshall was quickly confirmed by the Senate on January 27, 1801.

To illustrate the low estate of the Supreme Court at this time, the federal government was in the process of moving from Philadelphia, which had been the capital for ten



The Supreme Court had such low stature in the early nineteenth century that when the government moved from Philadelphia to Washington, DC, no provision was made for housing the Court. At the last minute, a basement room was set aside in the new Capitol building (pictured), where the Supreme Court sat for eight years.

years, to the new capital of Washington in the District of Columbia. The White House—then called the President's House—was finished, and John Adams was the first president to occupy it. The Capitol building had been constructed on Capitol Hill, and was ready for Congress, though it was not nearly the building we know today as the Capitol. But no provision whatever had been made for housing the Supreme Court. Finally, at the last minute, a room in the basement of the Capitol was set aside for the third branch. The Court would sit in that rather undistinguished environment for eight years.

John Marshall was born in the Blue Ridge foothills of Virginia, about fifty miles west of present-day Washington. He had very little formal education. However, by the time he reached twenty-five years of age, he had served as a captain commanding a line

company of artillery in the Battles of Brandywine and Monmouth during the Revolutionary War. He had also suffered through the terrible winter at Valley Forge with George Washington and the rest of the Continental troops. It was this experience that led him to remark that he looked upon "America as my country, and Congress as my government." This is not an unusual sentiment today, to be sure, but quite an unusual sentiment for a Virginian at that time.

After mustering out of the service, Marshall studied law very briefly, attending the lectures of George Wythe in Williamsburg, and was admitted to the Virginia Bar. In 1782 he was elected to the Virginia legislature, serving for two years before he resigned to return to his law practice. He was again elected to the Virginia legislature in 1787, where, despite the tide of Anti-Federalist sentiment in

Virginia, he was an ardent supporter of ratification of the Constitution.

During the next several years, Marshall continued in the Virginia assembly and with his law practice. He turned down President Washington's offer to become Attorney General, but in 1797 agreed to President Adams' request that he serve as a member of a delegation sent to France to resolve the mounting tensions between the two countries. This episode, of course, came to be known as "the XYZ Affair."

After returning to Richmond, Marshall agreed to run for Congress at the urging of George Washington. During Marshall's election campaign, President Adams offered him a seat as Associate Justice of the Supreme Court. Marshall declined and Bushrod Washington, President Washington's nephew, was appointed instead. Marshall was elected to Congress in 1799, and at the time of his ap-

pointment as Chief Justice he was serving as Adams' Secretary of State. He was much better known as a politician than as a legal scholar.

When he became Chief Justice in 1801, the Supreme Court of the United States was very much like other courts of last resort, finally deciding cases between litigants but otherwise contributing very little to the manner in which the country was governed. Marshall's principal claim to fame as Chief Justice—though by no means his only one—is his authoring the Court's opinion in the famous case of *Marbury v. Madison*. When it was decided in 1803, two years after he became Chief Justice, he turned what otherwise would have been an obscure case into the fountainhead of all of our present-day constitutional law.

The case arose out of a suit by William Marbury, who had been nominated and confirmed as a Justice of the Peace in the District of Columbia, against James Madison, whom Thomas Jefferson had appointed as his Secretary of State. Although Marbury had been nominated and confirmed, his commission had not been issued by the time of the change in administration, and James Madison refused to issue it.

Marbury contended that once he had been nominated by the president and confirmed by the Senate, the issuance of his commission was simply a ministerial task for the Secretary of State who had no choice but to issue it. He brought an original action in the Supreme Court, relying on a provision of the Judiciary Act of 1789 that said that the Supreme Court could issue writs of mandamus to any federal official where appropriate; he said that James Madison was a public official, which no one denied, and that a writ of mandamus—a recognized judicial writ available to require public officials to perform their duty—was appropriate in his case.

Marshall's opinion for the Court is divided into several parts. He first addresses the question of whether one nominated and con-



The Supreme Court did not contribute much to the manner in which the country was governed—it merely decided cases between litigants—until John Marshall became Chief Justice in 1801. Marshall's celebrated decision in *Marbury v. Madison* (1803) established the principle of judicial review, significantly bolstering the Supreme Court's authority. Pictured is William Marbury, whose commission to be Justice of the Peace was at issue in the case.

firmed by the Senate is entitled to receive his commission without further ado, so to speak. He concludes quite reasonably that Marbury is entitled to his commission, and goes on to say that if Marbury has this right, surely the law must afford him a remedy. And, says Marshall, that remedy is a writ of mandamus, which exists just for this purpose.

But now comes the hidden-ball play. The next question Marshall asks in his opinion is whether it is proper for the Supreme Court to issue a writ of mandamus in this case. He agrees with Marbury that Congress in the Judiciary Act of 1789 authorized the Supreme Court to issue writs in such a case. But wait a minute, he says: Look at Article III of the Constitution. It says that the original jurisdiction of the Supreme Court—that is, cases that may be brought in the Supreme Court in the first instance, without ever having gone to another court—is limited to lawsuits between the states and lawsuits involving ambassadors and other foreign ministers. Clearly this suit is not within the original jurisdiction provided by Article III of the Constitution.

So, Marshall goes on to say, we have an act of Congress saying the Supreme Court may do a particular thing, and the Constitution saying it may not. What is a court then to do under a system like ours? Marshall says that, unlike the British Parliament, which is supreme, no branch of the federal government—whether it is the legislative, the executive, or the judiciary—is supreme. The Constitution is supreme, because it has been adopted by the people in the various states, and it delegates particular powers to each of the three branches. If any of these three branches may exceed their delegated authority, the whole idea of a written constitution is meaningless. So the Constitution must prevail over an act of Congress that is inconsistent with the Constitution.

But who will have the final say as to what the Constitution means in a situation like this? Marshall says that the Constitution is a written agreement among the several states and the

people in those states, and the courts have always had the final say in interpreting the provisions of a written agreement. Therefore, it is the federal courts, and particularly the Supreme Court, which is the ultimate arbiter of the meaning of the Constitution. The Court ruled that the federal judiciary had the authority and responsibility to strike down those laws that violate the Constitution.

The opinion in *Marbury v. Madison* is a remarkable example of judicial statesmanship. The Court says that Marbury is entitled to his commission, and Madison is wrong to withhold it. It says that this is the sort of ministerial duty of a public official such as Madison that can be enforced by a writ of mandamus. But it concludes by saying that Congress—in granting the Supreme Court the power to issue a writ of mandamus in a case like this—has run afoul of the original jurisdiction provision of the Supreme Court contained in Article III of the Constitution. Madison and Jefferson are verbally chastised, but it turns out that there is nothing that the Supreme Court can do about it because Congress tried to give the Supreme Court more authority than the Constitution would permit. The doctrine of judicial review—the authority of federal courts to declare legislative acts unconstitutional—is established, but in such a self-denying way that it is the Court's authority that is cut back.

During the thirty-four years he served as Chief Justice, Marshall wrote most of the important opinions that the Court decided. In *Gibbons v. Ogden*, decided in 1824, he wrote the opinion adopting a broad construction of the power of Congress under its authority to regulate interstate commerce contained in Article I of the Constitution. In the *Dartmouth College* case, he gave a generous interpretation to the prohibition in the Constitution against state impairment of the obligation of contract. One cannot name all of the significant opinions authored by Marshall. Suffice it to say that by the time of Marshall's death in 1835, the Supreme Court was a full partner in the federal government.

What was the secret of John Marshall's success? It was not that he was "present at the creation," because he was not; he was not the first Chief Justice, but the fourth. John Jay and Oliver Ellsworth were both able jurists by the standards of their time, but neither of them had the vision of constitutional government that Marshall did.

Marshall was certainly no more "learned in the law" than his colleagues on the Court, and there were probably several of those who would have been thought more learned than he was. He also faced a built-in headwind against his views for the first twenty-four years of his tenure as Chief Justice: during this period the "Virginia dynasty" of presidents—Thomas Jefferson, James Madison, and James Monroe—were in office, and these presidents had quite a different view of the relationship between the federal and state governments than Marshall did. But the Justices they appointed tended eventually to side with Marshall, rather than to express the views of the Virginia dynasty. Surely exhibit A in this category is Joseph Story of Massachusetts, who was appointed by James Madison in 1811 but became Marshall's right bower during his long tenure on the Court.

I think Marshall's success arose from several sources. He had a remarkable ability to reason from general principles, such as those set forth in the Constitution, to conclusions based on those principles. And in a day when legal writing was obscured and befogged with technical jargon, he was able to write clearly and cogently.

But—every bit as important—I think Marshall probably had an outgoing personality and was very well liked by those he moved among. Here his service in the military probably made him a more engaging personality than someone who had simply drafted writs of replevin for his entire adult career. The familiar story of the dinner ritual when the Justices were in Washington perhaps illustrates this point. The Justices all stayed at the same boarding house, and had their meals together

during their few weeks in Washington. If it were raining, they would have a glass of wine with dinner. They looked forward to this ritual, and one day were expressing regret that the weather outside was fair and sunny. But Marshall said "somewhere in our broad jurisdiction it must surely be raining," and from then on they had a glass of wine with dinner every day.

One occasionally hears the expression that an institution is the lengthened shadow of an individual. It may be risky to suggest that any institution which has endured for two hundred ten years, the way the Supreme Court of the United States has, could be the lengthened shadow of any one individual; but surely there is only one individual who could possibly qualify for this distinction, and that individual is John Marshall. After his retirement from the Presidency, John Adams said that "the proudest act of my life was the gift of John Marshall to the people of the United States."

At the time of Marshall's death, Andrew Jackson was serving his second term as President of the United States. He appointed his loyal lieutenant Roger B. Taney of Maryland to succeed Marshall as Chief Justice. Taney had a first-rate legal mind and was a clear, forceful writer. Like Marshall, he did not believe in legal learning for its own sake, and he realized that constitutional law required not only legal analysis, but also vision and common sense. The Taney Court, over which he presided for twenty-eight years, was less nationalist in its orientation than was the Marshall Court. The principal doctrines of the Marshall Court remained in place, but they were tempered by a greater willingness to uphold state authority. In the *Charles River Bridge* case, for instance, decided in 1837, the Court, in an opinion by Taney, limited the scope of the earlier Marshall Court decision in the *Dartmouth College* case, saying that implied covenants would not be read into state contracts for purposes of the impairment of the Contracts Clause. In *Cooley v. The Board of Wardens*, the Court held that some activi-



The monopoly of this chartered toll bridge, built in the 1780s to link Boston with Cambridge, Massachusetts, was later challenged by a rival bridge. The result was a landmark Supreme Court decision, *Charles River Bridge v. Warren Bridge* (1837), in which the Taney Court established the modern doctrine on contracts.

ties, even though within the scope of congressional authority over commerce, could nonetheless be regulated by the states until Congress had acted. There were dissents on both ends of this case; Justice John McLean of Ohio would accord no such power to the States, and Justice Daniel of Virginia—surely one of the most extreme champions of states' rights ever to sit on the Court—would have allowed the state regulation even though it was contrary to an act of Congress.

Taney's long and otherwise admirable career is, unfortunately, marred by his opinion in the ill-starred *Dred Scott* case, in which he opined that even free blacks could not be citizens for purposes of diversity jurisdiction, and that Congress lacked the constitutional authority to ban slavery in territories that had not yet been admitted as states. Charles Evans Hughes rightly described the *Dred Scott* decision as a "self-inflicted wound" from which it took the Court at least a generation to recover.

Towards the end of Taney's tenure, Abraham Lincoln became president and ap-

pointed several new Justices to the Court whose opinions would have little in common with those of Taney. But one of them, Samuel F. Miller, left this memento of his feeling for the aged Chief Justice:

When I came to Washington, I had never looked upon the face of Judge Taney, but I knew of him. I remembered that he had attempted to throttle the Bank of the United States, and I hated him for it. I remembered that he took his seat upon the Bench, as I believed, in reward for what he had done in that connection, and I hated him for that. He had been the chief spokesman of the Court in the *Dred Scott* case, and I hated him for that. But from my first acquaintance with him I realized that these feelings toward him were but the suggestions of the worse elements of our nature; for before the first [T]erm of my service in the Court had passed I more than liked him; I loved him. And after all



Engraved by

S. P. Chase

Engraved from a portrait by George F. R. Jones, 1864

Published by S. & Co. Publishers New York

President Abraham Lincoln chose former Secretary of the Treasury Salmon P. Chase (above) to be Chief Justice in 1864 because he expected him to uphold the measures the government had taken to finance the Civil War by making paper money legal tender. Lincoln's fears that Chase would be unable to relinquish his presidential ambitions proved well founded.

that has been said of that great, good man, I stand always ready to say that conscience was his guide and sense of duty his principle.

Taney was in his mid-eighties, and looked feeble, when he swore in Abraham Lincoln as president in 1861. But he continued to serve as Chief Justice until his death in 1864. His long tenure prompted Ben Wade, an abolitionist Senator from Ohio, to remark that he had prayed every night during the Buchanan administration that Chief Justice Taney's life might be spared until a new president could appoint a successor. But eventually the Senator worried that he had overdone it, because Taney lived well into the next administration as well. Actually, Taney remained on the job because he needed the income to support himself; at that time, no provision was made for pensions for federal judges.

Lincoln now had an opportunity to appoint a successor, and he pondered several different choices. Finally, in an act that epitomizes his absolute magnanimity, he nominated his former Secretary of the Treasury, Salmon P. Chase. While in that office, Chase had committed the unpardonable sin of seeking to wrest the Republican nomination away from Lincoln by use of the extensive patronage of the Treasury Department. Lincoln chose him because he thought he would vote to uphold the Greenback Laws, passed during the Civil War to make paper money legal tender in order to finance the war. But he added a cautionary note—Chase would be a good Chief Justice if he could just give up his presidential ambitions.

For most men, the Chief Justiceship would have been enough, but not for Salmon P. Chase. He was an able man, a devoted foe of slavery, but an egotist through and through. One of his detractors said that there were four persons, rather than three, in his trinity. During his rather brief tenure on the Court, from 1864 until his death in 1873, his ambition for

the presidency never left him. He authorized the submission of his name as a presidential candidate to the Republican convention in 1868, and when that convention turned to U. S. Grant, he authorized the submission of his name to the Democratic convention. There he actually received a few votes before losing to Horatio Seymour of New York, who in turn lost the election to Grant. In 1872, Chase made inquiries not only of the Republican convention, but also of the Liberal Republican convention in Cincinnati, a small splinter group of the party. Neither one was interested.

Salmon Chase was not a great Chief Justice, and from his time until the end of the nineteenth century, the Court would be as much influenced by several of its abler Associate Justices as by its Chief Justice. Three of these come to mind.

Samuel Freeman Miller, already mentioned, was born in the bluegrass country of Kentucky in 1816. For ten years he practiced medicine, but then tired of his work as a doctor, studying law while continuing to practice medicine. He was admitted to practice in Kentucky in 1847, but three years later moved to Keokuk, Iowa, because he wanted to live in a free state rather than in a slave state. He became active in Republican politics and played a part in securing Iowa's votes for Lincoln in 1860. Lincoln appointed him to the Supreme Court in 1862.

Stephen J. Field was born in Connecticut in 1816, and grew up as one of nine children, several of whom were to achieve fame. His older brother, David Dudley Field, was a New York lawyer who obtained prominence by drafting the Field Code, which codified the common law in New York and was adopted in other states. Another brother, Cyrus Field, laid the transatlantic cable from Ireland to Newfoundland in 1866. Field began the practice of law with his brother in New York in 1841, but contracted the well-known "gold fever" in 1849 and journeyed to California by means of the Isthmus



Justice Samuel F. Miller (left) wrote for a bare majority in the *Slaughterhouse Cases* (1873), narrowly construing the Fourteenth Amendment to apply only to the newly freed slaves. In a dissent, Justice Stephen B. Field (right) protested that if that were so then the Amendment was "a vain and idle enactment" that accomplished nothing. Field's broader view ultimately prevailed with the Court.

of Panama. He became active in California politics and legal affairs, serving as Chief Justice of the state supreme court before Lincoln appointed him to the Supreme Court of the United States in 1863.

After the Civil War, cases began reaching the Supreme Court involving the Civil War amendments to the Constitution—the Thirteenth, Fourteenth, and Fifteenth Amendments. The first important case of this kind to be decided was the so-called *Slaughterhouse* cases in 1873. Justice Miller wrote for a majority of five, giving the Fourteenth Amendment a narrow construction and saying that it was doubtful that it would have any application to individuals other than the newly freed slaves. Justice Field wrote in dissent that if this were so it was "a vain and idle enactment" that accomplished nothing. Though Field lost this round, it was his broader view of the Fourteenth Amendment, rather than Miller's narrow one, that would ultimately prevail with the Court.

The third of this triumvirate of Associate Justices was Joseph P. Bradley. He was born in upstate New York near Albany, the oldest of 12 children of a subsistence farmer. Deciding that he needed some formal education, he dressed in a homespun suit and walked from near Albany to Rutgers University "on the banks of the old Raritan" in New Jersey—a distance of about two hundred miles. He got his education, studied for the bar, and successfully practiced law in New Jersey. He was known as a "railroad lawyer" because of his clients, and was appointed to the Supreme Court by President Grant in 1870. He authored the opinion of the Supreme Court in the Civil Rights Cases, one of its more important decisions of this era, saying that the Fourteenth Amendment applied only to government discrimination, and that Congress could not prohibit merely private discrimination.

Chief Justice Chase's presidential ambitions were not the only ones among members



To the delight of Puerto Rico's sugar growers, the Supreme Court held in 1901 that tariffs on foreign goods did not apply to U.S. possessions. This 1902 cartoon shows Cuba, a former U.S. possession that had since been granted sovereignty, asking to be accorded similar status. Suits involving America's territories posed the question: "Does the Constitution follow the flag?"

of the Court at this time. Stephen Field wanted to be considered for the Democratic presidential nomination on at least one occasion, and David Davis had always been more interested in politics than in law. Lincoln had practiced before Davis when the latter was a state court judge of a circuit in downstate Illinois, and when Lincoln became president, he appointed Davis to the Court. Davis wrote the Court's opinion in the famous case of *Ex Parte Milligan*, where the Court held that persons not in the military could not be tried before a military commission so long as the civil courts were open.

In the disputed election of 1876, in which Rutherford B. Hayes, the Republican, and Samuel Tilden, the Democrat, vied for the office, the Supreme Court was drawn into the controversy, not as a body, but because five of

its Justices were named to a fifteen-member commission which would in effect have the final say as to how votes from the disputed states were to be counted. Two known Republicans and two known Democrats on the Court were easily agreed upon, but the fifth member from the Court, whose vote would obviously be decisive, was harder to pick. One proposal that gathered considerable support in Congress was to pick the Justice by lot. Tilden, who was on the whole a rather cold and calculating individual, balked at this, and in one of his rare *bons mots* said that he might lose the presidency, but he would not raffle for it. Finally, Davis—who, although a Republican appointee, had shown considerable independence in his views—was chosen. He had received some votes for president at the Liberal Republican Convention in Cincinnati in 1872

and was hoping for a spot on one of the tickets in 1880. But just as the commission was about to begin its deliberations, the Illinois legislature elected Davis a Senator from that state, and he resigned from the Court to take his seat in the Senate. After much consternation, Bradley was chosen by the other four Justices as the most impartial, and was thereby put in an impossible position. If he were to vote with the Democrats in a way that would seat Tilden, he would of course be applauded for his impartiality and his independence. But if he were to vote in a way that would seat Hayes, he would be denounced as simply a partisan tool. He did vote to seat Hayes, and was accordingly denounced, with little, if any, justification.

In 1896, the Court, in an opinion by Justice Henry B. Brown of Michigan, ruled in *Plessy v. Ferguson* that the Equal Protection Clause of the Fourteenth Amendment was not offended if a state provided separate facilities for whites and blacks so long as they were equal. This decision ratified the Jim Crow regime in the South, and was overruled more than fifty years later in *Brown v. Board of Education*.

Miller died in 1890, Bradley in 1892. Field lived until 1899, and his last years at the Court were not happy ones.

In 1901, Theodore Roosevelt succeeded William McKinley when the latter was assassinated in Buffalo. His first appointment to

the Supreme Court was caused by the retirement of Horace Gray of Massachusetts. Senator Henry Cabot Lodge of Massachusetts urged him to appoint Oliver Wendell Holmes, Jr., then Chief Justice of the Supreme Judicial Court of Massachusetts. Roosevelt demurred until Lodge could assure him that Holmes was sound on the "Insular Cases." This incident illustrates the transience of constitutional doctrine. Surely not one law student in fifty could say what the "Insular Cases" were, and I dare say the same is true of most readers. But they were very important to the President at the turn of the century. The United States had defeated Spain in the Spanish American War, had acquired Puerto Rico and the Philippine Islands as possessions, and had acquired a temporary mandate to govern in Cuba. The question was whether the Constitution followed the flag; could Philippine citizens familiar only with the civil law system demand a right to jury trial? These questions have long since either been solved or disappeared, just as many of the questions that now perplex this Court will meet a similar fate a century from now.

ENDNOTES

*This article is an adaptation of the Supreme Court Historical Society's Annual Lecture delivered by the Chief Justice on June 4, 2001.

The Clerk, the Thief, His Life as a Baker: Ashton Embry and the Supreme Court Leak Scandal¹

JOHN B. OWENS

On December 16, 1919, Ashton Fox Embry, law clerk to Supreme Court Justice Joseph McKenna, abruptly resigned from the position he had held for almost nine years. His explanation? His fledgling bakery business required his undivided attention. Newspapers that morning hinted at a different reason: Embry resigned because he had conspired with at least three individuals to use inside knowledge of upcoming U.S. Supreme Court decisions to profit on Wall Street.² A grand jury returned an indictment against Embry and his associates a few months later, and Embry's argument that he had committed no crime ultimately reached the Supreme Court, the very institution he was accused of betraying.

Despite the sensational headlines and fierce legal battle arising from his indictment, the United States Attorney quietly dismissed Embry's case in 1929, almost ten years after the story had broken. Few Court scholars have ever heard of Embry, and the memory of Embry, much like the case against him, has disappeared with time.³ This article unravels the "Supreme Court Leak Case" by reconstructing what happened almost eighty years ago.

I. The Clerk

A. The Early Years

Ashton Fox Embry was born in Hopkinsville, Kentucky, on February 21, 1883.⁴ The third son of ten children in the wealthy family of Wallace and Minerva Embry, Ashton left home at the age of sixteen for Washington, DC⁵ and eventually

earned a law degree at night from Georgetown University.⁶ On January 16, 1905, Embry accepted a position as copyist for the Justice Department.⁷ He moved up quickly, becoming a clerk on July 3, 1905 (at a yearly salary of \$900),⁸ a stenographer on October 21, 1905,⁹ and a confidential clerk by December 22, 1905.¹⁰ By June 23, 1908, his stint as a confidential clerk at the Justice

Department was over: he had resigned to accept a position as "stenographer," or law clerk, with newly appointed District Court Judge Edward T. Sanford in Tennessee.¹¹ Embry earned \$1,500 a year accompanying Sanford "whenever necessary to terms of court at various cities,"¹² and he apparently appreciated his time with the judge: in a letter to a former associate, he said that he "like[d] the change [to clerking for Judge Sanford] very much."¹³ Not only did he grow professionally, but also personally: during his time with Sanford, Embry met and married his wife, Grace Frost, a student at the University of Tennessee.¹⁴ He disdained, however, the criminal element that often dominated Judge Sanford's docket, as he described to his former associate:

The Judge and I have just returned from Greeneville, where he held court for four days last week. Most of the cases were criminal, illicit distilling and so forth, and the defendants presented on the whole a pitiable spectacle, ignorant, low-browed cusses, who undoubtedly will be better off in jail than at large.¹⁵

By October 1909, Embry had left Judge Sanford's chambers and returned to Washington to serve as a stenographer for the Solicitor General.¹⁶ Less than eighteen months later, Embry replaced James Cecil Hooe, who had died, as Justice McKenna's sole stenographic clerk.¹⁷ Embry had ascended to this position by the age of twenty-seven. Less than nine years later, however, newspaper articles, editorials, and even a judge would criticize this golden boy, all believing that he would be better off in jail than at large, much like the "ignorant, low-browed cusses" the young Embry had condemned earlier.

B. The Court

While scholars disagree as to the exact role that law clerks play today, all would agree that the stenographic clerk of Embry's

day differed significantly from the modern law clerk. Justice Horace Gray hired and paid for the first Supreme Court law clerk in 1882, and Congress began funding law clerks in 1886.¹⁸ As their title suggests, the stenographic clerks, or "secretaries," performed mostly clerical tasks, including typing and ensuring payment of the Justices' personal bills. Some of the early clerks, like their modern counterparts, helped draft opinions, but others, including Justice McKenna's, had no role in opinion writing.¹⁹ However, all of the clerks, including Embry, had access to the opinions before the public did. As Dean Acheson, who clerked for Justice Brandeis during the 1919 and 1920 Terms, described:

Each Justice in those days had a docket book. . . . At the bottom of each page, in tabular form for voting purposes at the Court's weekly Saturday conference, were the names of the Justices and, after each, columns marked "Aff[irm]," "Rev[erse]," "Dism[iss]," and—a larger space—"Remarks." One of the joys of being a law clerk was to open the book on Saturday afternoon and learn weeks ahead of the country what our masters had done.²⁰

Embry enjoyed almost nine years with Justice McKenna, but on December 16, 1919, it all came to an abrupt end. That morning, several newspapers ran front-page stories alleging that someone had leaked the results of a decision, *United States v. Southern Pacific Railroad*,²¹ to a group of Wall Street speculators.²² In *Southern Pacific*, the United States attempted to cancel the railroad's land patent because the railroad had made false representations in its application for the land. The Court agreed with the United States and canceled the railroad's patent,²³ and the price of Southern Pacific's stock fell as a result of the Court's holding.²⁴ According to the newspapers, the speculators knew of the Court's decision in advance and sold the stock short hours



Ashton Embry resigned his position as a clerk at the Justice Department in 1908 to become law clerk to newly appointed District Court Judge Edward T. Sanford of Tennessee (pictured). He left Sanford (who was later appointed to the Supreme Court) and returned to Washington, DC, where he eventually became law clerk to Justice Joseph McKenna.

before the decision became public, turning a small profit.²⁵ Later that day, in a handwritten letter, Embry tendered his resignation:

My dear Mr. Justice McKenna:

By reason of my bakery business having expanded to such an extent as to require practically all of my time, I feel that in justice to your work, and my health, I ought not to try to continue as your secretary—for it seems impossible for me to do my full duty to both places.

I therefore beg to tender to you my resignation as your Law Clerk, effective today.

In resigning my position, I desire to express to you my due appreciation of your helpfulness to me in

so many ways—which has meant to me more than I can tell.

Yours sincerely,
Ashton F. Embry²⁶

Justice McKenna responded the same day:

The within resignation is accepted to take effect this day with regrets for the necessity.

Joseph McKenna
Asso. Justice²⁷

While Embry's career as a clerk may have ended that day, his life as a full-time baker had begun. So had his place as the centerpiece of a scandal that would grab headlines, involve a young Bureau of Investigation attorney named J. Edgar Hoover, and eventually reach the Supreme Court.



After clerking for Justice McKenna for nine years, Embry (pictured here in 1932 with a Mrs. V. Eugenia Plaxton) abruptly quit in December 1919. He blamed the expansion of his bakery business in his resignation letter, but he probably stepped down after leaking the results of the Supreme Court's decision in a railroad case to his speculator friends so they could sell the company's stock short and make a profit.

II. The Thief

A. The Break

While the Clerk of the Court, James Maher, denied that inside information came from his office, and Justice Brandeis refused comment,²⁸ the newspapers were abuzz that someone on the inside had leaked upcoming results of cases to a group of speculators. Leading the journalistic charge was Marlen E. Pew, editor and news manager of the International News Service, part of William Randolph Hearst's media empire. For the next two weeks, Pew provided readers with daily updates on the progress of the investigation, always scooping his rival papers.²⁹ Yet Pew was more than an aggressive reporter covering a hot story; he was an integral part of it. As Pew boasted when he first publicly broke the scandal: "An audacious scheme of a coterie of Washington speculators to interfere with the



Marlen E. Pew, editor and news manager of the International News Service, which was part owned by William Randolph Hearst, broke the leak story and then doggedly pursued it. Pew revealed that a month before the scandal hit the newspapers one of his friends had been invited to participate in a scheme to profit on Wall Street with inside Court information, and Pew made Chief Justice Edward Douglass White aware of the potential jeopardy.

orderly processes of the most sacred American political institution, the United States Supreme Court, has been frustrated by publicity information furnished to the Government by the International News Service."³⁰

On November 20, 1919, almost a month before the scandal hit the front pages, Pew visited Chief Justice Edward White at his home and revealed that a friend of Pew's had been invited to participate in a scheme to profit on Wall Street with inside Court information. According to Pew, the Chief had difficulty digesting such news. After expressing disbelief "that such a thing could happen," the Chief Justice "was at one time so [a]ffected by his emotion concerning the alleged imposition on his Court that he wept." After three days of consultations with Justice McKenna, Chief Justice White notified the Justice Department that Pew's story warranted further investigation.³¹

That task initially fell into the hands of Assistant Attorney General Charles B. Ames, who was Acting Attorney General due to the illness of Attorney General A. Mitchell Palmer.³² Ames arranged for Captain Frank Burke of the Bureau of Investigation to visit Pew at his home, and Burke learned that John C. Hammond, a friend of Pew's, was the informant.³³ Hammond, who had worked for Pew and several newspapers,³⁴ relayed the following tale.

B. The Scheme

1. *Dancing with the Devil.* Hammond's introduction to the scheme came via his longtime associate Aaron Rachofsky, who had also worked for Pew at one time.³⁵ A New Yorker, Rachofsky had spent some time in Washington and had become good friends with Major E. Millard Mayer, former assistant to the chief of the Army's Surplus Property Division. After World War I, Rachofsky and Mayer formed the Federal Supply Company to resell surplus property.³⁶ In the middle of October 1919, Rachofsky met Barnett Moses, an attorney who shared an office with Mayer at the Munsey Building in Washington, DC. A

few weeks later, Moses called Rachofsky and pitched him several business deals. One involving surplus ships intrigued him. Rachofsky called his friend Hammond³⁷ and set up a meeting at Hammond's apartment to discuss financing.³⁸

Hammond, Rachofsky, and Moses briefly discussed the ship-selling scheme, but the conversation quickly shifted to the stock market. Moses wanted to know if Hammond still played the market and whether Hammond had invested heavily in whiskey. He also wanted to know if "it would help me [Hammond] any if I knew in advance what the government was going to do. . . . He wanted to know if I still chummed around with some of the plungers of Wall Street. He suggested that Bernard Baruch had made millions and why could not other folks take advantage of inside dope?"³⁹ While Hammond admitted that he knew Baruch, the legendary Wall Street financier who had been accused in 1917 of benefiting from inside information gained through his close connection with the Wilson administration,⁴⁰ Hammond refused to acknowledge any insider trading on Baruch's part. "That's right, protect your friends," Moses replied. "That's the kind of a man I like. A man who will stick and will not run out."⁴¹

Hammond had indeed invested heavily in whiskey, and *Hamilton v. Kentucky Distillers & Warehouse Co.*⁴² the pending "wet-dry" Supreme Court case, particularly interested him. In the "wet-dry" case, the Court would decide whether the Wartime Prohibition Act of 1918, which prohibited the sale of distilled spirits for beverage purposes after June 30, 1919, was constitutional. A decision upholding the act would financially wipe out those like Hammond with large investments in whiskey. If the Court struck down the act, then Hammond would hit the jackpot. Moses knew this and hinted at a deal. In exchange for the "dope" on upcoming cases, including the wet-dry case, Hammond would arrange the financing for Moses's ship-selling scheme. After the meet-

ing, Rachofsky openly confirmed what Moses had been suggesting:

Moses and Mayer can get the real goods. They have a strong connection and the best part of it is that this is not a case of bunk on their part. They can make good in advance and are willing to prove that they can make good. I will have a list of cases in advance. I will get them Friday, Saturday, or Sunday—the Supreme Court meets at noon. Look in the *Washington Post* of the following Tuesday and you will see that the cases come down as Moses reports them.⁴³

Hammond initially did not buy into the scheme. After all, this was not the first time he had heard a rumor about Court leaks.⁴⁴ But Rachofsky persisted, and on Thursday, November 14, 1919, he provided Hammond with a list of upcoming cases, and promised that one of them would be decided soon. The list was remarkably accurate, correctly predicting the outcome of six of seven cases.⁴⁵ The only case the list got wrong, *South Coast Steamship Co. v. Rudbach*,⁴⁶ was one in which Justice McKenna dissented.

On Sunday, November 17, 1919, Rachofsky took the next step: he told Hammond that the Court would hand down its opinion in *United States v. Southern Pacific* the next day and that he would share the Court's decision with Hammond before its public announcement. "Get in touch with some of your Wall Street friends and they will carry you," Rachofsky recommended. He said that Hammond would meet a man named Graves at a brokerage house the next morning before the Court's decision became public. The once skeptical Hammond was becoming a believer. Unlike the wild rumors of the past, this one seemed real.⁴⁷

It was now Monday morning, November 18, 1919, at 8:30 a.m., the day the Court would

hand down its decision in *Southern Pacific*. As promised, Rachofsky called Hammond and told him that the Court would rule against Southern Pacific, meaning that the United States would recover large tracts of land from the railroad, thus driving down the price of the stock. Hammond phoned several friends and told them about the upcoming *Southern Pacific* decision, but he did not personally trade upon the information.⁴⁸ A few hours later, the Court proved Rachofsky correct. In an opinion by Justice Van Devanter, the Supreme Court reversed the Ninth Circuit in favor of the government,⁴⁹ and the stock price fell almost ten percent by the end of the day.⁵⁰ Hammond soon learned that the man named Graves had provided the information to Moses, and that the information had come from the Justice Department.⁵¹ Rachofsky then provided Hammond with a list of five pending cases that would affect the stock market when decided. While Wall Street was always filled with rumors about leaks, Hammond knew that this was different: "[T]his was a case of getting real information."⁵²

2. *A Crisis of Conscience?* Real information meant real money, which Hammond needed. Accustomed to great wealth, he had lost most of it in recent years "[t]hrough illness and a combination of domestic and war affairs,"⁵³ including the disintegration of his marriage.⁵⁴ Hammond claimed that he had access to more inside government information "than most any man in N.Y."⁵⁵ He boasted of knowing "the tipster gang in Washington," as well as the "Wall Street agents."⁵⁶ While he insisted that he never profited from any of this knowledge, he admitted that this time was different. "As I had never taken a dishonest dollar, it was not much of a fight to decide that I would not take advantage of the wet and dry decision, but I was tempted to play the market on other information."⁵⁷ But another concern weighed on Hammond's mind—his respect for the Court:

It so happens that I have always held the Supreme Court as the ONE

SURE part of our government that should be respected in every detail. From boyhood days, I have held the Supreme Court in the greatest awe; I surrounded it with all the glory and deepest respect and confidence. This was one branch of the government which could not, would not, ever go wrong.⁵⁸

After wrestling for two days with what to do, Hammond decided that he would not "destroy [his] faith in the Supreme Court, by being a party directly or indirectly in using advance information."⁵⁹ So he "would not have the mental fight over again," Hammond decided "to burn all bridges" and tell his friend Marlen Pew about the scandal. "I just wanted to remove any temptation on my part of taking advantage at a later date of inside data. I knew if I told anyone, it would then remove my chance of playing the market."⁶⁰ In other words, once the cat was out of the bag, Hammond's greed could not force it back in.⁶¹

3. *Undercover.* Pew and Hammond discussed "the horror of it all and [they] both agreed that the facts should be laid before the Supreme Court," which Pew did shortly thereafter.⁶² Hammond met with Justice Department officials, and all agreed that Hammond should continue speaking with Moses, the attorney who first suggested that they could profit from inside Court information, to ferret out the full scope of the conspiracy. At this point, however, Hammond knew very little about the source of the leak. He knew that the information reached Moses from the Justice Department, and that someone named Graves was somehow involved, but nothing more.

He quickly learned the answer to these questions. With Pew paying his expenses, Hammond soon met Moses at the Munsey Building. While they awaited the arrival of Mayer, the army veteran turned surplus government property entrepreneur, Moses told Hammond "[f]or years and years—some ten



The defendants in the leak scandal assembled a crack legal defense team that included Frank Hogan, the founder of Washington, DC firm Hogan & Hartson.

years I have been in touch with a man who can get the inside dope from the Supreme Court. . . . My friend Graves is in close touch and we do not take any chance. We are sure before we move." Moses then promised information on several upcoming cases, including the wet-dry decision, but cautioned Hammond that they should not "go off half-cocked. . . . It will pay us to devote all our time to the one case." What was Moses's ultimate goal? "[T]o prove to one man with enough money that we are not guessing—then make the big bet."⁶³

Mayer arrived and met Hammond for the first time. They briefly discussed the Federal Supply Company, the outfit Mayer used to resell surplus government property, but the conversation quickly shifted to the Supreme Court. "Let us prove to you our data is correct—let us prove it in advance," Mayer suggested. "You should be satisfied now after the [*Southern Pacific*] case and the other cases you have, but I suppose we must prove to your principals."⁶⁴

Hammond accompanied Mayer to dinner

that evening and asked if Graves, who got "the dope" from his inside source at the Court, worked for the Department of Justice. "Sure. Didn't you know that?" answered Mayer. "Why, Moses told me he had given you all the dope. That's the trouble with Moses, he is too careful. . . . [B]ut I'm a gambler—I will take a chance. That's the only way we can get by in this world."⁶⁵ Mayer also thought that Moses should let Hammond "meet the private secretary of the Supreme Court Judge. You should know him. . . . [T]hat as you know is the way Moses gets the dope."⁶⁶ Notes from the investigation listed the then-current "secretaries" for the Court: Acheson, Byrne, Day, Embry, Kiefer, Simpson, Stonier, Widdifield, and Morrison.⁶⁷ Hammond, however, still could not identify the specific secretary who was leaking information to Graves.

At the direction of Pew, Chief William J. Flynn of the Bureau of Investigation, and others, Hammond continued to press for more information. Rachofsky, who introduced Hammond to the conspiracy, claimed that he had dirt on Mayer, the surplus property entrepreneur, which would keep Mayer in check. Mayer, in turn, said that Moses, the attorney, had the goods on Graves. And when Moses and Mayer were not collecting dirt on one another, they had, according to Hammond, "only one topic of discussion—easy money and women. Not once during the days I was with them, did they ever utter one constructive sentence or give vent to one clean thought. It was graft, wine, and women—ALL THE TIME."⁶⁸

Yet Hammond continued to wade through this den of iniquity to get to the truth. On December 2, 1919, the conspirators got word from their inside source that the Court would hand down its anticipated wet-dry decision the next day. They wanted to meet with Hammond, but they normally "shied when they found four walls about them" because of eavesdropping fears.⁶⁹ Hammond forced the issue by pretending he was ill, even calling for a doctor and nurse. Because his "illness" pre-

vented an outdoor meeting, Mayer visited Hammond at his room in the New Willard Hotel. They discussed financing the "cleanup" in the upcoming wet-dry case, and Hammond boasted of having a credit line sufficient to make a big hit; he was ready for twenty thousand shares. "[T]his is serious," Mayer said. Hammond agreed: "Let's be cold blooded about this."⁷⁰ Mayer, who chided Moses for being overly careful, should have heeded his partner's advice: Underneath the hot-water bottles and pillows propping up Hammond lay a dictagraph that recorded their entire conversation.⁷¹

The wet-dry decision did not come down on December 3, the next day, but Moses got word from his source that the Court would announce the decision on Monday, December 8. The leak team planned to go to New York and "clean up," something the Justice Department did not want to happen. So when the conspirators met at the New York brokerage house on Monday morning, Hammond failed to appear. As did the Court, which again did not announce its decision in the wet-dry case.⁷² That night, Moses, Mayer, and Rachofsky met with Hammond at his apartment and demanded to know why he did not show that morning. The stench from the room answered their question: Hammond was hung over. "If you take another drink I am going to get up and shoot you. You make me sick," one of them said.⁷³ Of course, this was not the case. Hammond had pretended he was hung over, splashing whiskey on his clothes, the sheets, and all over the room to justify his absence that morning.⁷⁴ And again, a dictagraph recorded their conversation.

Hammond spewed his own venom, upset that the Court still had not issued an opinion in the case. "I told you in the beginning and all the way through that we could not guarantee that the decisions would be down on a specific day. . . . One of the judges may get a headache," Moses explained.⁷⁵ Hammond threatened that his money man would pull out of the deal: "My principal called me a sort of liar,

crazy, was a bug and a fellow that was dreaming, and there could not be any leak from the Supreme Court."⁷⁶ "We can take it to a half dozen other men who will back us just as hard as your principal is backing us," they fired back.⁷⁷ While they did not clean up as they had hoped and were angry at each other, all agreed that they would try once more to make the big hit. Hammond gave them one more week. Otherwise, "the deal is off."⁷⁸

4. All Good Things . . . On Saturday, December 13, 1919, Moses received the magic words from his contact at the Justice Department: the wet-dry decision would come down the following Monday, and the Court would uphold the restriction on the sale of liquor. Moses contacted Hammond with the good news so Hammond's principal could make the "clean up" they had been awaiting for so long. The conspirators planned to meet Monday morning, December 15, in New York and sell their liquor stocks short before the Court's noontime announcement of the decision.

Yet, when Monday morning rolled around, Hammond was nowhere to be seen, and Rachofsky's phone calls to him went unanswered. Finally, Hammond showed up at Rachofsky's hotel room door, told him a conspiracy to corrupt public officials had been exposed, and that federal officials would soon arrive at the hotel and arrest Moses.⁷⁹ The Court announced its decision later that day,⁸⁰ and the price of United States Food Products' stock, heavily tied to distilled spirits, dropped eight points in eight minutes after the decision became public.⁸¹ The game was over, but it had ended with Hammond never learning the actual identity of the law clerk responsible for the leak.⁸²

C. The Other Investigation

1. The Inquisition. The Justice Department, however, thought it knew the source. When Hammond told the Department on Saturday, December 13, that the decision was due the following Monday, the Department decided it could wait no longer. On the after-



A young J. Edgar Hoover (pictured) was assigned to investigate the allegations of John Craig Hammond, a confidential government informant who identified the perpetrators of the Supreme Court leak to the Justice Department.

noon of Sunday, December 14, Assistant Attorney General Ames asked Chief Flynn, Captain Burke, and Assistant Attorney General Frank Davis, Graves's boss, to meet him at the Justice Department. After discussing the case amongst themselves, they sent for Graves.

Born on April 26, 1877,⁸³ James Harwood Graves began his Justice Department career as a confidential clerk with the Justice Department on June 1, 1903,⁸⁴ and, like Embry, rose quickly within the department. Promoted to appointment clerk on October 8, 1903, he notarized Embry's oath of office when Embry began as a copyist for the Justice Department.⁸⁵ The Department promoted Graves to assistant attorney in the Antitrust Bureau by July 1, 1905, and special assistant to the Attorney General by November 27, 1907.⁸⁶ He worked on cases around the coun-

try, including the "Fertilizer Trust" litigation in Tennessee with Edward Sanford before Sanford became a judge (and Embry's boss).⁸⁷ According to Pew, Graves "was very fond of outdoor sports and often went hunting with his department superiors who held him in high esteem."⁸⁸

Graves arrived at Assistant Attorney General Ames' office, and the interrogation began. Ames told Graves that the Department had heard that he had given Moses inside information about upcoming Supreme Court decisions, and that Graves had profited on the sale of Southern Pacific stock on November 17, 1919, the same day the Court handed down its decision in that case. Most important to the investigation, Ames told Graves the Department already knew the source of his inside information—Ashton Embry.⁸⁹

Graves admitted that he had known

Moses for years, first meeting him when Moses was in Washington for a Supreme Court case involving the Mississippi River,⁹⁰ and becoming better friends when Moses moved to the Capitol permanently. He also admitted that on Sunday, November 16, 1919, the night before the Court announced its decision in *Southern Pacific*, he took the midnight train from Washington, DC to New York City. The following morning, hours prior to the Court's release of *Southern Pacific*, he sold five hundred shares of Southern Pacific short at a profit of three dollars per share.⁹¹ He then spent Monday night in Moses's hotel room.⁹² As for Embry, Graves acknowledged that they had been close friends for several years and were partners in a bakery business.⁹³ But Graves denied that he ever gave or received any inside information about upcoming Court decisions. His explanation for his timely speculation?

[H]is reason for making this speculation was that Moses had told him that he had studied the case and had reached the conclusion that the Court would decide against the railroad, that this decision would depress the stock, and that even if it did not he thought it was a safe speculation; and that he (Moses) had guaranteed him (Graves) against loss.⁹⁴

Yet, Graves did not explain why Moses would be so generous as to guarantee him against any loss he suffered,⁹⁵ nor why he decided to sell the stock short only hours before the Court announced its decision.

Exactly why the Department suspected Embry is unclear. One likely explanation is that after Hammond tipped off the Bureau about Graves, connecting Graves to Embry was easy because of their joint bakery business. Whatever the reason, they tested their hypothesis later that Sunday afternoon. Ames called Justice McKenna, who sent Embry to meet with Ames and company.⁹⁶

Embry admitted that he knew both Moses

and Graves, but he excitedly denied any involvement in a speculation scheme. The investigators asked Embry about his actions on Sunday, November 16, 1919, the day before the Court handed down its *Southern Pacific* decision. According to Embry, he accompanied his wife Grace and Mr. and Mrs. Mahlon Kiefer to his bakery, where they met Graves.⁹⁷ Grace and the Kiefers left the bakery for the Kiefers' home, leaving Embry alone with Graves. Graves proceeded to ask Embry for money that the bakery owed him, and Embry gave Graves \$4,000 in checks and \$1,000 in Liberty Bonds.⁹⁸ He said he had no idea why Graves needed the money, and Graves repaid it a few days later—with an extra \$600. Embry claimed he could not remember why Graves paid him an extra \$600, but he would record it as a bakery transaction, as he had no personal interest in it. After Embry gave Graves the money, Embry met his wife at the Kiefers' home, and Mahlon told him that the Court would announce the *Southern Pacific* decision the next day.⁹⁹ Embry acknowledged that the circumstances—Graves taking \$5,000 from him, traveling on a midnight train to New York, selling Southern Pacific stock short only hours before the Court announced its decision, and then a few days later returning the money plus \$600—were "very suspicious as against him and that probably they were sufficient to convict him, but that notwithstanding those circumstances he was entirely innocent in the matter."¹⁰⁰

A couple of days later, Graves returned to the Department, this time with Moses. Moses admitted that Graves shared a hotel room with him the night after the *Southern Pacific* decision, that he told Graves to speculate on *Southern Pacific*, and that he introduced Graves to Alfred Howe, the stockbroker who took Graves's order. However, according to Moses, his intimate knowledge of *Southern Pacific* came not from an inside source, but from his careful study of the case, which allowed him to predict its outcome accurately.

When asked if he had read the briefs, Moses responded that he had read only the record. Assistant Attorney General Ames then asked Moses for a general statement about the case, including the questions involved and the decision of the Court. Moses's answers did not impress Ames: "It was at once apparent that his knowledge of the case was very vague and general, and he became very much confused and requested everyone to leave the room but me—which they did."¹⁰¹

With the room empty, Moses asked what would happen to him, and whether any laws were broken. Ames warned Moses that, at the very least, he faced disbarment and that criminal charges were possible. Despite this warning, Moses admitted that he had not "studied" the cases, and confirmed what Hammond had been saying all along: that "he had gotten his information about [*Southern Pacific*] from Graves; that he had also gotten information from Graves about a number of other cases."¹⁰²

Ames then called the others back into the room and repeated Moses's story. His head hanging, Moses was too embarrassed to look any of them in the face.¹⁰³ Furious, Graves called Moses a liar and demanded that he provide the times, places, and cases in which Graves allegedly had provided him with inside information. Moses equivocated, unable to implicate Graves with him present. But once Ames sent Graves away, "Moses admitted in the presence of all the balance of what he had previously said."¹⁰⁴

A few days later, it was Mayer's turn.¹⁰⁵ According to Mayer, he met Moses through the Federal Supply Company and admitted they had adjoining offices in the Munsey Building. He also knew Graves, but said that he had never seen him prior to November 16, 1919, the day the Court handed down its *Southern Pacific* decision. Most importantly, he acknowledged playing Southern Pacific stock short that same day, but had an innocent explanation. Mayer described himself as a commercial expert, or one "who told another how to run his business."¹⁰⁶

Because he was a "commercial expert," Mayer explained, he traveled to New York to "analyze a proposition that Hammond and Moses were working on,"¹⁰⁷ presumably the plan to sell surplus ships. While meeting with Hammond and Moses, they discussed Moses's scheme to guess in advance upcoming Supreme Court decisions. As an attorney, Moses assured Mayer that after careful study he had a sixty percent chance of correctly predicting the Court's decisions.¹⁰⁸ According to Mayer, it was Moses's prediction, and not "inside information," that led him to sell Southern Pacific short. In any case, he had little faith in Moses's prognostication; he claimed to have played the stock both long and short that day. Despite this innocent explanation, Mayer let slip that he was suspicious of Hammond. Mayer told his inquisitors that he warned Moses that "[i]f I wanted to catch you I would do just like Hammond is doing." "What made you think Moses would be caught? What was he doing wrong?" they asked. "[N]othing," Mayer replied, "except that his actions just made me think that was what he was trying to do, that he was trying to catch him."¹⁰⁹

2. *The Investigation Ends.* By the end of December 1919, the Department had the evidence it believed necessary to wrap up the case. Attorney Moses had admitted his involvement in the scheme and was begging for mercy. Army veteran Mayer had traded Southern Pacific hours before the Court released its decision, had strong links to Moses, and had let slip his suspicions about Hammond. Justice Department attorney Graves had received five thousand dollars from Embry the night before the Court announced its *Southern Pacific* decision, had met with Moses and Mayer the next morning, had sold the stock short, and had spent the following night in Moses's hotel room. Law clerk Embry, the key to the case, had had ample access to confidential materials, as Acheson described,¹¹⁰ and had received six hundred dollars from Graves only days after the Court handed down *Southern Pacific*. And

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the dictagraph recordings, as well as Moses's inability to explain the very basics about the case, shattered their "prediction" alibi.

On December 29, 1919, Pew, relying upon his own inside information, told his readers that the Bureau's investigation was "about finished."¹¹¹ That same day, Assistant Attorney General Ames announced that the Justice Department would submit the case to the grand jury with an eye towards an indictment.¹¹² Embry was now a step closer to sharing a cell with those "ignorant, low-browed cusses" he had denounced a few years earlier.

III. His Life as a Baker

A. The Investigation Continues

Embry began his new life as a full-time baker as the grand jury began its investigation into his former life as a law clerk. While the grand jury heard the testimony of several witnesses, including Ames, Hammond, and Rachofsky,¹¹³ Embry wanted to tell the grand jurors his side of the story. On January 21, 1920, after meeting with Justice McKenna that morning, Embry visited Ames at the Justice Department.¹¹⁴ Embry explained that while he was confident that no jury would find him guilty, he wanted to avoid the embarrassment of an indictment. He could do this by detailing other leak sources to the grand jurors, thereby proving his innocence. For example, Embry claimed that information from Justice Brandeis's library made it to the White House, where persons other than the President would see it. When Ames pressed Embry for more information about this "White House" leak, Embry declined to go into detail, but hinted he would do so at a later time. Embry also recalled an incident in Justice McReynolds's rooms at the Shoreham hotel, where he saw an opinion lying on a table in the very room that the hotel visitors had just toured. Reid, Justice McReynolds's now deceased secretary, took the opinion, locked it in a drawer, and told Embry "he had difficulty in keeping

[the] opinions locked up."¹¹⁵ Embry also described the conference list that featured the votes for upcoming opinions that mysteriously traveled from the Chief Justice's library to McKenna's library.¹¹⁶ Embry claimed that he did not want to "stir up a sensation" with his leak allegations, but out of fear of a possible indictment, he thought it was "only fair to himself" to show that someone else was responsible.¹¹⁷ Ultimately, he was never given the chance to tell his side of the story.

The grand jury's investigation continued, and Embry again visited Assistant Attorney General Ames on March 15, 1920. He told Ames that he had met with both Chief Justice White and Justice McKenna.¹¹⁸ According to Embry, Justice McKenna hoped that the grand jury would not indict his former clerk, and the Chief Justice changed his attitude toward him once Embry had related his side of the story. Embry reiterated his hope that the grand jury not indict him, and reminded Ames that, if indicted, he would "indicate how information relative to decisions might escape." Ames responded to Embry's veiled threat:

The circumstances against you are very strong; for instance, you saw Graves Sunday afternoon. At the time you saw him you knew what the decision was going to be. You gave him \$5,000 in funds. He went to New York and speculated in this particular security in connection with Moses, who was making a business of dealing in securities affected by Supreme Court decisions. That in the course of two weeks or so he returned the money he made for you . . . approximately half of his earnings.¹¹⁹

Embry reluctantly agreed with Ames's review of the facts and admitted for the first time that when he met with Graves at their bakery on Sunday, November 17, 1919—the day before the Court announced its decision in *Southern Pacific*—he had known what the Court would hold. More important to Ames, Embry ac-



Embry's bakery business was so successful that it expanded into seven chain bakeries in the Washington area. Despite his prominence as a businessman, Embry (seated between his wife Grace and daughter Estelle) asked his son Lloyd (standing at right) to scatter his ashes on the Supreme Court's grounds. A prominent Washington, DC portrait artist, Lloyd Embry fulfilled his father's wish after his death in 1965.

knowledgeed "that the circumstances against him seemed to be very strong."¹²⁰

B. A Case of . . . What?

1. The Theory. The Securities and Exchange Commission Act of 1934 prohibits an insider from misappropriating information and benefiting financially from it, and a law clerk today likely would face stiff criminal penalties for intentionally leaking inside information to speculators. But Embry had been a full-time baker for almost fifteen years by the time Congress passed the Act, so federal prosecutors in 1919 faced a tricky question. Although all would agree that what Embry and the others allegedly did was ethically wrong, was it actually illegal?

A Justice Department memorandum dated December 5, 1919 argued that the conspirators violated Section 37 of the Criminal

Code.¹²¹ The memorandum relied heavily upon *Haas v. Henkel*,¹²² in which the Supreme Court upheld the indictment of a Department of Agriculture statistician who leaked upcoming crop reports to speculators. According to the indictment in *Haas*, the release of these reports defrauded the United States by "defeating, obstructing, and impairing it in the exercise of its governmental function in the regular and official duty of publicly promulgating fair, impartial and accurate reports concerning the cotton crop." The Court agreed:

The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of Government. . . . [A]ny conspiracy which is

calculated to obstruct or impair [the Department of Agriculture's] efficiency and destroy the value of its operations and reports as fair, impartial and reasonably accurate, would be to defraud the United States by depriving it of its lawful right and duty of promulgating or diffusing the information so officially acquired in the way and at the time required by law or departmental regulation.¹²³

In other words, the government had a "property right" in announcing its crop reports in a certain manner, and the premature release of this information defrauded the government of this right.

The same principle was arguably true here. By leaking and then trading upon internal Court information, Embry and his co-conspirators deprived the Court of the right to announce its decisions at the customary time. One potentially important difference, however, was that the Court's practice of announcing decisions at a designated time was just that: a practice, not a "law or departmental regulation." The memorandum recognized, then discounted, this possible conflict with *Haas*: "It is evident, however, that by 'regulations' [in *Haas*] is meant simply the customs and usage of the Department." Satisfied that the government could overcome this hurdle, the memorandum then examined the Court's relevant customs. While "[t]he rules of the Court do not seem to bear directly upon the subject, . . . they evidently contemplate that the matter is not to be made public except in the way specified therein through formal action of the Court itself."¹²⁴ The government then proceeded with the *Haas* theory in pursuing an indictment against Embry, Graves, Moses, and Mayer.

2. *The Indictment.* The grand jury bought the government's theory. Breaking a three-month silence concerning the case, an indictment against Embry, Graves, Moses, and Mayer was unsealed on April 1, 1920.¹²⁵ The

indictment began by outlining the Court's "custom and practice" of delivering its judgments at designated times "so that all the citizens of the United States . . . might and did have and enjoy equal opportunity to be informed and know, at the same time, of the disposition and decision of appeals and causes pending before the said court. . . ."¹²⁶ Interfering with this "custom and practice" impaired the "right and privilege of the said United States to have the said decisions and judgments of the said court so delivered, given, rendered, and announced in the manner hereinbefore set forth. . . ."¹²⁷

The indictment described Embry's duties as a law clerk, which included "aiding and assisting [Justice McKenna] to perform the confidential business and functions of his office, and in doing and performing clerical and confidential services for the said Justice in connection therewith."¹²⁸ The indictment then set out the scheme. Embry, having access to upcoming decisions, leaked that information to Graves, Moses, and Mayer "privately and in advance of the official decision and announcement thereof. . . ."¹²⁹ Graves, Moses, and Mayer knew of Embry's responsibilities and the Court's "custom and practice" of announcing decisions at a designated time and place. The four then set out to "cheat and defraud" the United States by speculating on the New York Stock Exchange. The scheme brought "into question the privacy and sanctity of the deliberations of said court, and the integrity and efficiency of its Justices and officials."¹³⁰

The indictment then focused specifically upon the events surrounding the Southern Pacific decision. It detailed how Embry leaked the decision to Graves on November 16 and how Graves, Moses, and Mayer then sold 500 shares of the stock short the next day at a profit of \$1,412.50. To complete the deal, Graves paid Embry \$600, "contrary to the form of the statute in such case made and provided, and against the peace and government of the said United States."¹³¹ On April 1,



Justice McKenna's increasing senility may have provided Embry with the perfect setting to carry out his scheme. The close relationship between McKenna (right) and Chief Justice White (left) may also have caused White to overlook some of his friend's flaws.

1920—soon after the indictment was unsealed—Embry and Graves each posted a \$2,000 bond; Moses and Mayer did the same the next day.¹³²

3. *Demurrers and a Ruling.* While Moses, Embry, and Graves remained silent, Mayer declared that he was innocent, “as every one will know when the case is tried.”¹³³ It was his lawyer’s job, however, to make sure that the case never got that far. Pew reported that “[a] terrific legal battle is expected to grow out of the indictments. The defendants have announced an imposing array of legal talent to appear for them at the trial.”¹³⁴ This pre-O.J. “Dream Team” included Frank Hogan (founder of the Washington, DC powerhouse law firm Hogan and Hartson) for Moses, Arthur Peter for Mayer, and the law firm of Douglas, Obear, and Douglas for Embry and Graves. Filing coordinated demurrers, each lawyer targeted the indictment’s most glaring weakness: even if the facts alleged were true, a conspiracy to violate a “custom and practice” of the Court, without more, was not a conspiracy to violate any law of the United States.¹³⁵

Initially assigned to Judge Gould, the case was reassigned to Judge Siddons after Judge Gould’s death. The reassignment delayed the case significantly, with the Government and the Dream Team submitting briefs in June 1921, more than a year after the grand jury returned the indictment against Embry and his associates. Awaiting Judge Siddons’s ruling, influential columnist Norman Hapgood wrote:

One of the most admirable things about our Supreme Court is the success with which its secrets have been kept. . . . To break down this standard is a very serious offense, whatever may be the legal technicalities about whether or not it constitutes in law a fraud against the United States. . . . The employe[e] who undertakes to break down this tradition,

this high trust, for his own gain is engaged in a wicked enterprise that must in every possible way be checked.¹³⁶

A few weeks later, Judge Siddons agreed with Hapgood. Much like the government’s December 5, 1919 memorandum had done, Judge Siddons relied heavily upon the Supreme Court’s decision in *Haas v. Henkel*,¹³⁷ quoting the same language as had the government’s memorandum. The question, for Judge Siddons, was whether the acts alleged in the indictment fell within the statute’s scope. Judge Siddons answered with an emphatic yes, concluding:

It is common knowledge that from the earliest period of the history of the Court, the determinations reached by it were only to be revealed and announced in open court at such times as it should determine, and that until such public announcement, no hint even of the character and scope of the conclusions reached, should be revealed. . . . Were it otherwise, what opportunities would be presented, not merely to litigate, but to others, to take undue advantage of advance information as to how particular causes were going to be determined; what serious political consequences might not result from such disclosures; what grave international complications even might not ensue if some employees of the United States, assigned for service to the Court, should betray unannounced determinations of the tribunal? Every judge, every lawyer, indeed every intelligent citizen, knows that any other course than that pursued by the Court in the announcement of its judgments would be fraught with great danger to the orderly course of justice.¹³⁸

A few weeks later, the Court of Appeals for the District of Columbia refused to review Judge Siddons's opinion,¹³⁹ leaving Embry with only one place to go: the Supreme Court of the United States, the very institution he was accused of betraying.

C. Back in the U.S.S.C.

1. *The Petition.* On October 24, 1921, the Dream Team jointly filed a fifty-eight-page petition for writ of certiorari on behalf of Embry, Graves, Moses, and Mayer, presenting the following question: "Does an agreement to violate a custom and practice of having decisions of the Supreme Court . . . announced in a certain manner constitute a conspiracy to defraud the United States under Section 37 of the Criminal Code?"¹⁴⁰ To prove it did not, the defendants had to distinguish *Haas v. Henkel*, the case that the Justice Department and Judge Siddons had found so seductive.

The Dream Team's main argument was that, unlike in *Haas*, "[t]here is alleged no rule of the court which, had one been promulgated, would have had the force and effect of law. No regulation issued by the court, no order ever made by it, nothing that would bind its members or its employees is attempted to be set forth."¹⁴¹ With no rule or regulation in place, the defendants could not "conceive how the United States could be deprived of anything either having a pecuniary value or having relation to the performance of any of its governmental functions."¹⁴² The petitioners then offered the following hypothetical:

It is the custom and practice of the United States Supreme Court, manifestly for the purpose of maintaining an entirely proper show of respect and dignity in its presence, to require persons entering the court-room to remove their hats. . . . Suppose two or more men outside the court-room agreed to enter with their hats on and keep them on. When they carried

that agreement into effect they would violate a long-established "custom and practice" of the court. That violation would have been the result of their very improper and entirely censurable preagreement. Could it be said, however, that they had thereby illegally conspired to defraud the United States of a right in violation of Section 37 of the Criminal Code?¹⁴³

This case, according to the petitioners, was no different: Embry and the others might have violated the Court's "custom and practice," but no more. As the petition made clear in its closing paragraph:

If, as a matter of fact, the defendants [profited from inside information], then all must admit that their conduct was deserving of severe censure. But it is a different thing to pronounce censure and to voice condemnation of a flagrant breach of propriety from construing that breach into a criminal offense against the statutory law of the land.¹⁴⁴

2. *The Response.* The government's seven-page Brief in Opposition, filed on November 25, 1921, focused primarily upon the case's procedural posture. Because the government had not yet tried Embry and the others, there was no pressing need for the Court to grant the petition and review the case. If the defendants were convicted after trial, the Court at that point could review these same issues in a later petition. If they were found not guilty, then there would be nothing for the Court to review.¹⁴⁵ In addition, while the case presented novel issues, they were not the type upon which the lower courts disagreed (or even discussed), nor were they "of general interest to the public."¹⁴⁶ As for the merits of Embry's argument, the Government responded in only twenty-seven words: "The sufficiency of the indictment, which is the

sole question raised by the petitioners, is manifestly within the doctrine of *Haas v. Henkel*, and therefore without merit."¹⁴⁷

3. *The Ruling.* On December 5, 1921, the Supreme Court denied Embry's petition.¹⁴⁸ How the Justices voted in the case is unknown, and the standard order declining review does not indicate if any of the Justices, such as Justice McKenna, recused themselves from the case—or if the Court relied upon the "rule of necessity" to justify reviewing Embry's petition.¹⁴⁹ Whatever the Court's reasons, Embry, Graves, Moses, and Mayer now knew that the diplomacy phase of the case was over, and it was time to prepare for war with the government at trial.

4. *Not with a Bang . . .* But the war between the department and the Dream Team was never fought. The government dismissed the indictment on November 20, 1929, ten years after the alleged violations occurred, despite United States Attorney John Laskey's assurance to Assistant Attorney General Ames in May 1920 that the trial would commence as soon as possible,¹⁵⁰ and an October 5, 1922 promise to E. Bright Wilson, an associate of Moses's, that the case would be tried "at the earliest practicable date."¹⁵¹ The department's official files remain eerily quiet on the subject, containing no notes or memoranda explaining why the U.S. Attorney dismissed the case. The district court's docket sheet is equally unrevealing. After Judge Siddons's ruling upholding the indictment in June 1921, only two entries remain: Graves paying for a \$500 bond almost five years later, on March 23, 1926, and the government's dismissal of the case in November 1929.¹⁵² The newspapers—and even *Pew*—stopped writing about the case.¹⁵³

The question, then, is why the department dismissed the case despite its strong evidence and its battle in the courts to uphold the indictment. Although it is impossible to be certain of the reason, it appears that serious cracks had begun to appear in the foundation of the government's "mountain of evidence."

D. The Problem with Hammond

1. *A Meeting with Mayer.* From the outset, the department knew that Hammond had his problems as a witness, including the following: his link to the world of "tipsters," his admission that he leaked the *Southern Pacific* decision to his friends on Wall Street, and the fact that what he did for a living was less than clear. Even Hammond knew of the department's concerns. In his memorandum detailing his undercover investigation, Hammond speculated that Chief Flynn, "if put to the acid test, [may] say I was a bit flighty."¹⁵⁴ But Hammond promised that if he could get Moses, Mayer, and Graves into the same room with him, "I can convince you before I am finished with them, that they DID STEAL THE INFORMATION FROM THE SUPREME COURT."¹⁵⁵ He never got that chance.

A conversation between Hammond and Mayer on May 4, 1920 did little to boost the department's confidence in their informant. According to Hammond, Mayer boasted of inside sources at the Justice Department who told him that the department had serious reservations about the case. Mayer told Hammond that the department would "present none of your evidence at the trial unless they can back it up by witnesses. The government does not care for you; do[es] not think you did much of a job and a lot of the D. of J. men are busy knocking you."¹⁵⁶ Mayer claimed that powerful men, including Senator James Hamilton Lewis of Illinois,¹⁵⁷ were ready to back Mayer and his fellow defendants, and that one named Tumulty "hates you and he has given our side some good stuff against you," and would testify against Hammond at any trial.¹⁵⁸ Tumulty was none other than Joseph Tumulty, secretary to President Woodrow Wilson and accused by some of running the country during Wilson's prolonged illness.¹⁵⁹ In earlier correspondence, Hammond had boasted of working well with Tumulty;¹⁶⁰ either he lied or something since went wrong.

On May 6, 1920, Ames assured Hammond

that Mayer's comments were "ridiculous,"¹⁶¹ but that same day he asked United States Attorney Laskey when the trial would commence.¹⁶² The department surely anticipated personal attacks discrediting the rat Hammond, commonplace in any criminal trial, and took them into account when deciding whether to bring the case. However, the department apparently did not know about his mental instability and his incredible history of involvement in similar schemes.

2. *Hoover and Hammond.*¹⁶³ In its March 23, 1918 issue, the *Saturday Evening Post* ran a story called "German Poison," in which the author, Isaac Marcossan, criticized Americans who received money from German propagandists during World War I.¹⁶⁴ Although not specifically named, Hammond was one of Marcossan's targets, having accepted money from a German agent, Von Rintelen. In a fashion similar to what he told investigators about the Supreme Court leak case, Hammond insisted all along that he accepted the money because he was working undercover to expose a great German threat, and not because he belonged to a German conspiracy.¹⁶⁵ Outraged by the *Post* article, Hammond sued the *Post* and Marcossan for libel later that year. The litigation dragged on for a few years, and on February 5, 1921, Marcossan asked the Justice Department to turn over anything it had on Hammond. The department acceded to the request¹⁶⁶ and assigned the task to a young assistant, John Edgar Hoover. Better known as J. Edgar,¹⁶⁷ Hoover reviewed Hammond's Military Intelligence Division (MID) files, the department's case files, and other Bureau of Investigation files, and also spoke with his "confidential informant" to prepare a comprehensive report on Hammond's life.

John Craig Hammond was born in Cadiz, Ohio, on April 21, 1876. He had a long career in the newspaper business, which is where he met Marlen Pew. As Hoover detailed in his report, Hammond always boasted of being "in the know" about several allegedly ongoing scandals, including White House and State

Department leaks, illegal sales of phenol overseas and rifles to Pancho Villa, and so on, but rarely provided any useful information. Hoover summarized each scandal, including the Supreme Court leak case, and analyzed exactly what useful information Hammond had provided the Government. In words eerily similar to descriptions of the future FBI director himself, Hoover concluded that Hammond was

a great bluffer, toots his own horn continuously, is a man of violent likes and dislikes and very vindictive, nourishing grudges against persons for a long time who may have done something to him to which he takes exception. In some ways he is eccentric almost to the point of lacking good mental balance.¹⁶⁸

Hoover concluded that, save for the Supreme Court leak, "[a]ll other matters in which [Hammond] took part either failed to materialize into anything at all or else his connections with the case was [sic] merely incidental."¹⁶⁹

3. *Secret Agent Man.* A review of Hammond's MID files confirms Hoover's conclusions.¹⁷⁰ During World War I, Hammond served as a zone captain for the American Protective League, a private investigation force that searched for German sympathizers and performed other "patriotic" tasks.¹⁷¹ After receiving a strong recommendation from Marlen Pew,¹⁷² Hammond served for one month with MID in 1918, but was let go. His reviewer urged MID never to hire him again, writing in ink on the bottom of his evaluation that "[h]e should be put on the black list for a commission."¹⁷³

Yet, Hammond persisted. In letter after letter, he begged to work for MID, but with no success.¹⁷⁴ His break came, ironically, through the Supreme Court leak investigation. Riding the wave of his successful tips (which even Hoover admitted were useful),¹⁷⁵ Hammond convinced General Churchill of

MID on December 30, 1919 to hire him as an undercover agent to investigate Moses's and Mayer's Federal Supply Company, the firm that Mayer used to sell surplus property. Churchill agreed to pay Hammond's related expenses, but no salary.¹⁷⁶ As Agent "No. 113," Hammond took his new job so seriously that he begged MID to ensure that his name not appear in the newspapers after the grand jury returned the indictment against Embry and the others, for any publicity would compromise his undercover work.¹⁷⁷

As No. 113, Hammond dropped the Federal Supply Company investigation and focused primarily upon the sale of a military chemical compound called phenol to overseas powers, including Japan.¹⁷⁸ He investigated several government officials and important public figures, including Bernard Baruch, the man he had earlier called a friend. The Baruch phase of the investigation ended when General Churchill made clear that "no course of action which would even resemble an investigation of Mr. Baruch would be tolerated."¹⁷⁹ No. 113's phenol-related efforts did little to impress MID, who, on April 20, 1920, ordered him to end his investigation.¹⁸⁰ However, Hammond continued his undercover activities as No. 113, refusing to step down until he heard from Churchill personally.¹⁸¹ Even after he received Churchill's letter affirming that MID no longer needed his services,¹⁸² Hammond would not give up. In a series of progressively rambling letters peppered with paranoia, Hammond begged Churchill to retain his services and accused several military officials of conspiring to silence him to protect their own nefarious dealings. In one letter, Hammond accused an MID agent of destroying key evidence that would vindicate his claims.¹⁸³ In another, he warned Churchill to "[c]heck M.I.D. at every possible turn; don't back any statement some of the M.I.D. men make—they are just as bad as a heap of the outsiders."¹⁸⁴ While Hammond eventually stopped writing, he never relinquished his MID identification badge, despite repeated requests for its return.¹⁸⁵

By 1921, Hammond, according to Hoover, was "broken in spirit, health and purse."¹⁸⁶ A newspaper reporter wrote MID in 1923 that Hammond was boasting of his time as No. 113, wanting to verify his story.¹⁸⁷ MID refused to comment,¹⁸⁸ but it did return General Churchill, the man who hired Hammond, to his prewar rank of Major of Coast Artillery, and sent him "on an extended tour of inspection of Military Attaches abroad."¹⁸⁹

According to family lore, Hammond returned to work for a newspaper as a cartoonist. He sketched a cartoon about Al Capone that Scarface did not find so funny, leading Capone to kidnap Hammond's son, John Hope Hammond. Fortunately, the boy was eventually returned unharmed.¹⁹⁰ The family broke all ties with Hammond, and his son even changed his name to Richard Halliday.¹⁹¹ Hammond's mental problems continued, and he never had the chance to confront Embry, Graves, Mayer, and Moses to prove to his many doubters and the world that his story, the sensational "Supreme Court leak scandal," was true.

E. What Happened?

The mountain of evidence against Embry and the others in 1920 looked like a molehill by December 1921, when the Supreme Court denied certiorari in Embry's criminal case. The government's key witness, Hammond, proved incredibly unreliable and unstable, and it is doubtful the department wished to rely so heavily upon such a lightweight, especially after reading Hoover's report. Even if Hammond had been mentally stable, his unclear role in the scheme would have permitted talented defense counsel to impeach his credibility. For example, Hammond admitted that he leaked the information about *Southern Pacific* to friends before he began cooperating with the Government's investigation, showing very little of the "deepest respect" he claimed he had for the Court. While defense counsel may have had difficulty proving that Hammond directly benefited financially from

inside information, it would be an easy specter to raise. And, if one believes Mayer, public figures such as Joseph Tumulty would impeach Hammond's credibility further at trial. Talented defense counsel like Frank Hogan could have shredded Hammond on the stand, both by punching holes in his story and by permitting him to exaggerate about his inside connections to such a degree that no juror would believe him.

Although the department conducted its own investigation that corroborated much of what Hammond told them, it also made some key mistakes that defense counsel could have easily exploited at trial. For example, department personnel interviewed all four co-conspirators in the middle of December 1919. However, Ames and the others did not write most of the reports of those interviews until May 1920, more than five months later. Considering that these reports came after the grand jury had indicted Embry and the others, defense counsel (assuming they could get their hands on them) could easily attack the reports' validity as being influenced by the very indictment the government sought. These reports also had several inconsistencies among them, further indicating their lack of accuracy. The case files were not much better; Hoover thought them "most incomplete" after his review.¹⁹² Even if the reports had been unavailable to defense counsel, the discrepancies suggest that the government witnesses would have been easy targets for cross-examination. On top of this, the department had to sell a jury on a legal theory that was less than clear.

While there was solid circumstantial evidence (Embry giving money to Graves the night before the decision came down, the dictagraph recordings, and so forth), the jury's verdict ultimately could turn upon who it believed: an unstable and seedy Hammond versus golden boy Embry, Justice Department attorney Graves, respectable lawyer Moses, and Army veteran turned businessman Mayer. The co-conspirators had public figures on

their side, while the government had attorneys *cum* investigators who wrote contradictory reports months after the alleged incidents occurred. The key "witness" aside from Hammond, Assistant Attorney General Ames, had left the Department by April 1921.¹⁹³ According to Mayer, the Justice Department would not proceed without witnesses to back up Hammond's story. Considering that the department had no such witnesses other than their own former attorneys, and that Hammond's former and future actions called his own credibility into serious doubt, it is quite likely that the department dismissed the case because it did not think it could win at trial. Knowing that Embry conspired to leak decisions to Graves was one thing; proving it beyond a reasonable doubt to twelve jurors was quite another.

F. Life Goes On . . .

True to his word, Embry left the Court to focus on his new bakery. With his brother Barton Stone Embry, a recent World War I Army veteran, as his partner,¹⁹⁴ Ashton started his "Barker Original System of Bakeries" at 3112 14th Street, NW, Washington, DC in 1919.¹⁹⁵ Barton and "Bobo," as Ashton's family called him,¹⁹⁶ named their business after an oven developed by William Barker. The bakery specialized in salt-rising bread "from an old Kentucky recipe" and the Pierce Mill Loaf, or "bread baked from grain ground on stones at Pierce Mill in Rock Creek Park."¹⁹⁷ An advertisement for the Bakery touted its "salt rising, gluten, whole wheat Breads" and its "special rates on Rolls for Organizations."¹⁹⁸

Being "very entrepreneurial,"¹⁹⁹ Embry had his finger in several business pies. He served as the secretary and treasurer of the Seaboard Animated Sign Company in 1927,²⁰⁰ president of the United States Wrench Manufacturing Company in 1927,²⁰¹ checker for the Farm Credit Administration in 1934,²⁰² and secretary-treasurer for Cleve's Cafeteria in 1935.²⁰³ But the bakery was his

bread and butter, expanding to three locations in Washington, DC by 1923.²⁰⁴ That number rose to four locations by 1934,²⁰⁵ and by the time Ashton and Barton retired in 1950, it had grown to seven bakeries in the Washington and Silver Spring area.²⁰⁶ He had no further brushes with the law, and with his wife Grace, he had four children (Lloyd, Ashton Jr., Wallace MacKenzie, and Estelle), and several grandchildren and great-grandchildren. Yet his very successful business and family life apparently could not fill the void left by his resignation from the Court. Soon after Embry passed away in 1965, his son Lloyd, a prominent portrait artist from Washington, DC, fulfilled one of his father's last requests. "Carried out under the cover of darkness," Lloyd scattered his father's ashes on the Court's grounds.²⁰⁷

IV. Guilty as Charged?

Embry was not the first clerk alleged to have leaked upcoming opinions. In the story that broke the scandal, Pew quoted a conversation with Chief Justice White at length. Devastated by Pew's news, White related the following tale:

There have been many rumors of leaks in the past, but I have investigated them and all but one were disproved.

In that instance an unfortunate man was tempted and fell. He was a minor attache of the court. That man was brought face to face with the President of the United States at the White House and made to confess his awful guilt. A few days later he died under mysterious circumstances.²⁰⁸

Assuming Chief Justice White's story is true (and that Pew, a Hearst employee trying to sell newspapers, correctly reported it), it gives credence to Hammond's tale; if it happened once, it could happen again. Contemporary

newspaper reports of "tipsters," "insiders," "information guys," or simply "vultures" also support Hammond's story. According to Pew, these inside traders

infest the hotels and the corridors of buildings. They are to be found wherever there is an important conference going on or where some news of national importance is liable to break. They endeavor to make friends with newspaper correspondents and others whom they think might have some of that precious commodity, "inside information."²⁰⁹

Tales of insider trading influenced passage of the modern securities laws, and the high profile "peace leak" investigations involving Baruch and Tumulty allegedly using inside information from the White House strongly suggest that the public was well aware of insider trading, even if Baruch and Tumulty did not engage in the practice. If these "vultures" were swarming the streets of Washington, DC in 1919, as Pew suggested, then one can perhaps understand how the young Embry, wishing to finance his bakery and support his family, might fall prey.

Despite Pew's seemingly thorough reporting, it all came from Hammond's mouth, which leads us to Hammond's tale. Hammond filled his reports with gripping detail and devilish quotations, and they read like suspense novels. This is not surprising, considering Hammond's experience in the publishing world.²¹⁰ He could take simple facts and weave them into stories of intrigue and mystery. Yet the incredible detail in his reports cuts against, rather than supports, his story. People rarely speak as they do in Hammond's reports, and the reports come across more as vivid imagination than hard information. Hammond's constant involvement in similar controversies (involving the White House, the State Department, German spies, and Pancho Villa), his boastful nature, and his apparent mental instability call his credibility into seri-

ous doubt. It is little wonder that Hoover disliked Hammond so much.

Yet, despite all of Hammond's flaws, Hoover still thought he was telling the truth about the Supreme Court leak scandal, and I agree. Even if one ignores everything Hammond said, Embry's actions, along with those of his associates, speak louder than Hammond's words. If one believes Ames, Embry admitted that, on the night before *Southern Pacific* was handed down, he knew what the decision would be, met with Graves, and gave him \$5,000. He also acknowledged that he received that amount back plus \$600 shortly thereafter. Graves admitted to traveling to New York on the midnight train after receiving the money from Embry, and meeting with Moses that morning. Moses's "educated guess" explanation collapsed under close scrutiny, and the admitted business relationships between Moses, Mayer, and Rachofsky only add credence to Hammond's tale. The list of cases Rachofsky gave to Hammond was perfect, save the one case in which Justice McKenna dissented. The dictagraph recordings, though they do not implicate Embry directly, corroborate the government's version of what happened. And, finally, Embry quit the job he had loved for nine years the day after Ames and the others interviewed him. An innocent man would have fought harder to keep his job, especially considering Embry's request that his son Lloyd scatter his ashes on the Court's grounds.

It is important to note that Justice McKenna's increasing senility provided Embry with the perfect setting to carry out such a scheme. Chief Justice White and Justice McKenna were very close,²¹¹ and it is quite possible that White overlooked some of McKenna's flaws. But Chief Justice White died on May 19, 1921 and was succeeded by former President William Howard Taft. While Taft admired McKenna's effort and integrity, he became increasingly distressed over McKenna's inability to carry out his du-

ties as Justice. According to Taft, for at least two years, McKenna "was not able to do hard, sustained mental work" and his "mental grasp was by no means such as it had been."²¹² In fact, the situation became so bad that Taft called a meeting of the other seven Justices, and all concurred that McKenna could no longer "command his mental energies for such a sustained effort as to make his opinions worthy of his own record or for the Court."²¹³ Taft met with McKenna's doctor and family, and eventually convinced McKenna to retire.²¹⁴ Assuming that McKenna's faculties began to slip while Embry still clerked for him, that would have given Embry, McKenna's sole clerk, ample opportunity for mischief, especially with the docket book that Acheson described.

Although this evidence might not have persuaded a jury to convict Embry beyond a reasonable doubt (some of it surfacing long after any trial would have occurred), it convinces me that Embry leaked upcoming Court decisions to Graves, Moses, and Mayer. Too many independent pieces of evidence point in his direction, and he never adequately explained them all away. In any case, Embry never looked back; his bakery business boomed while Hammond's life fell apart completely.

Ultimately, we will never know exactly what happened in the fall of 1919, and whether Embry was a devious con man or merely a dupe. The players in this story are all dead, and much of the evidence long gone. In our modern culture of leaks and scandal, it is amazing that a story as sensational as Embry's has vanished from the Court's memory, much like the case against him. Hopefully what happened in 1919 will no longer remain forgotten.

ENDNOTES

¹ A version of this article originally appeared in the 2000 *Northwestern University Law Review*, vol. 95, no. 1.

² See Marlen E. Pew, "Secret Service Hunts Court

"Leak." *Washington Times*, December 16, 1919, at 1-2, reporting that the Department of Justice had interviewed "a Secretary of one of the members of the Supreme Court" the day before the Court handed down its decision in *Hamilton v. Kentucky Distillers & Warehouse Co.*, 251 U.S. 146 (1919), commonly known as the "wet-dry" case; "Rumor of 'Leaks' in Court Rulings Is under Inquiry," *Washington Evening Star*, December 16, 1919, at 29, reporting that a minor court "attache" denied any involvement with the affair.

³For example, the only published biography of Justice McKenna makes no mention of Embry, despite the scandal and Embry's long term of service. See Matthew McDevitt, *Joseph McKenna: Associate Justice of the United States* (1946). Neither do the biographies of Chief Justice Edward White, a key player in Embry's case, mention Embry. See Gerard Hagemann, *The Man on the Bench: A Story of Chief Justice Edward Douglas White* (1962); Robert B. Highsaw, *Edward Douglas White: Defender of the Conservative Faith* (1981); Marie Carolyn Klinkhamer, *Edward Douglas White: Chief Justice of The United States* (1943). Nor does the most recent look at the Court during Embry's service mention the scandal. See Walter F. Pratt, Jr., *The Supreme Court under Edward Douglass White 1910-1921* (1999). Dean Acheson, who clerked at the Court when the scandal broke, makes no mention of the affair in his book recounting his terms of service. See Dean Acheson, *Morning and Noon* (1965).

⁴See "Obituary, Ashton F. Embry, Lawyer, Former Government Aide," *Washington Evening Star*, November 8, 1965, at C4 [hereinafter "Obituary, Embry"].

⁵See e-mail from Ashton F. Embry to David Garrow 1 (Aug. 21, 1998) (on file with author); e-mail from Ashton F. Embry to John Owens 1 (Sept. 20, 1999) (on file with author). Ashton F. Embry is Ashton Fox Embry's grandson.

⁶See "Obituary, Embry," *supra* note 4. Georgetown University has no record of Ashton Embry, but the school's records from that era are incomplete. It does have records of Ashton Fox Embry, Jr., Embry's son, who left the School of Foreign Service for disciplinary reasons.

⁷See Appointment Papers for Departmental Positions (on file with the National Archives, RG 60, Stack Area 230, Row 31, Compartment 13, Shelf 2, Box 63).

⁸See Appointment Papers for Departmental Positions (on file with the National Archives, RG 60, Stack Area 230, Row 31, Compartment 13, Shelf 6, Box 74).

⁹See *id.*

¹⁰See *id.*

¹¹See Stenographer Files for Judge Edward T. Sanford (on file with the National Archives, RG 60, Stack Area 230, Box 1116).

¹²*Id.*

¹³Letter from Ashton Fox Embry to Mr. Sorinborger 1 (June 28, 1908) (on file with the National Archives, Appointment Papers for Departmental Positions, RG 60, Stack Area 230, Row 31, Compartment 13, Shelf 6, Box 74).

¹⁴See *id.*; "Obituary, Mrs. G. F. Embry, Widow of Owner of Area Bakery," *Washington Evening Star*, February 4, 1969, at B4.

¹⁵Letter from Ashton Fox Embry to Mr. Sorinborger, *supra* note 13.

¹⁶See Appointment Papers for Departmental Positions (on file with the National Archives, RG 60, Stack Area 230, Row 31, Compartment 13, Shelf 6, Box 87). Embry's obituary in the *Washington Evening Star* states that he "served as secretary to the Solicitor General and Attorney General during the Theodore Roosevelt administration. He later was confidential secretary to Supreme Court Justices Joseph McKenna and Edward T. Sanford." "Obituary, Embry," *supra* note 4. Close, but not quite. Embry worked for the Attorney General during Roosevelt's administration, then worked for Judge Sanford. He returned to Washington to work for the Solicitor General during the Taft Administration and then moved on to the Supreme Court, where he clerked for Justice McKenna.

¹⁷See Correspondence on Appointment of Stenographic Clerks, 1881-1931 & 1939-40 (on file with the National Archives, RG 267, Stack Area 17E4, Row 8, Compartment 23, Shelf 1, Box 1). Hooe served as Justice McKenna's first stenographic clerk from March 1, 1898 until his death. Embry took over for Hooe on January 6, 1911. See *id.*

¹⁸See Chester A. Newland, "Personal Assistants to Supreme Court Justices: The Law Clerks," 40 *Or. L. Rev.* 299, 310 (1961).

¹⁹See *id.* at 311-12.

²⁰Acheson, *supra* note 3, at 85.

²¹251 U.S. 1 (1919).

²²See "Alleged 'Leaks' in Supreme Court," *New York Times*, December 16, 1919, at 1; "Leak on Wet Decision Being Probed Here," *Washington Herald*, December 16, 1919, at 1; "'Leak' Rumor Probed," *Washington Post*, December 16, 1919, at 5; Pew, *supra* note 2; "Rumor of 'Leaks' in Court Rulings Is under Inquiry," *supra* note 2.

²³See *Southern Pacific*, 251 U.S. at 15.

²⁴See Pew, *supra* note 2, at 2 (reporting that Southern Pacific stock fell almost 10 percent the day the Court announced its decision).

²⁵See *id.* One of the Senate Reports written in conjunction with the Securities and Exchange Commission Act of 1934 described "short selling" this way:

Short selling is a device whereby the speculator sells stock which he does not own, anticipating that the price will decline and that he will thereby be enabled to "cover", [sic] or make delivery of the stock sold, by pur-

chasing it at the lesser price. If the decline materializes, the short seller realizes as a profit the differential between the sales price and the lower purchase or covering price. (S. Rep. No. 73-1455, at 50 [1934])

For an in-depth review of selling stock short in the pre-1934 Act era, see *id.* at 50-54.

²⁶Letter from Ashton Fox Embry to Joseph McKenna, Associate Justice, Supreme Court of the United States, 1-2 (December 16, 1919) (on file with the National Archives, RG 267, Stack Area 17E4, Row 8, Compartment 73, Shelf 1, Box 1).

²⁷Letter from Joseph McKenna, Associate Justice, Supreme Court of the United States, to Ashton Fox Embry, 2 (December 16, 1919) (on file with the National Archives, RG 267, Stack Area 17E4, Row 8, Compartment 73, Shelf 1, Box 1). When Justice McKenna penned this response, he knew that Embry's legal troubles, and not the bakery, were the true reason for his now former clerk's resignation. See text accompanying note 96 *infra*.

²⁸See "Publicity Hampers 'Leak' Investigation," *New York Times*, December 17, 1919, at 10; "Rumor of 'Leaks' in Court Rulings Is under Inquiry," *supra* note 2, at 29; "Supreme Court 'Leak' Is Denied," *Washington Post*, December 17, 1919, at 3.

²⁹See "Chicago Scene of Leak Investigation," *Washington Times*, December 27, 1919, at 2; "D.C. Clean-Up May Follow 'Leak' Probe," *Washington Times*, December 17, 1919, at 1; "Four Give Bond in 'Leak' Case," *Washington Times*, Apr. 2, 1920, at 3; "Leak Probe to Continue," *Washington Times*, December 31, 1919, at 3; "Leak Traced to Supreme Court Aide," *Washington Times*, December 20, 1919, at 1; "May Involve Chicago Trader in Leak Probe," *Washington Times*, December 26, 1919, at 1; Pew, *supra* note 2; "Probe of Court Leak Nears End," *Washington Times*, December 29, 1919, at 2; "Scope of 'Leak' Probe Broadened," *Washington Times*, December 18, 1919, at 1; "Seek D.C. Man Who Phoned 'Leak' Tip," *Washington Times*, December 19, 1919, at 1; "Supreme Court 'Leak' Evidence Is Given to Laskey," *Washington Times*, December 30, 1919, at 1; "Supreme Court Leak Probe Yields Results," *Washington Times*, December 23, 1919, at 1; "Trail Is Warm in Leak Probe," *Washington Times*, December 22, 1919, at 1. While other papers covered the leak scandal (see *supra* note 28), none did with the vigor of Pew and the *Washington Times*.

³⁰Pew, *supra* note 2, at 1. Both the *New York Times* and an internal Justice Department memorandum confirm Pew's important role in the case. See sources cited *supra* note 22, *infra* note 33.

³¹See Pew, *supra* note 2, at 2.

³²See Memorandum from Judge C. B. Ames, Assistant to the Attorney General, Department of Justice, entitled "Memorandum Relative to the Supreme Court Leak Matter" 1 (May 6, 1920) (on file with the National Archives,

RG 60, Stack Area 230, Row 7, Compartment 33, Shelf 7, Box 3369, Straight Numeric File No. 208944 [hereinafter File No. 208944]).

³³See *id.* Apparently, the Justice Department did not react as quickly as Pew had wished, leading Pew to threaten by the end of November 1919 to take the case to the Senate if the department did not take prompt action. See Memorandum transcription of phone message to Frank Burke, Department of Justice (Nov. 26, 1919) (on file with the National Archives, File No. 208944, *supra* note 32) (message of "Mr. Pugh").

³⁴See Memorandum from J. Edgar Hoover, Attorney, Department of Justice, on John Craig Hammond (May 3, 1921) (on file with the National Archives, RG 60, Stack Area 230, Row 7, Compartment 36, Shelf 6, Straight Numerical File No. 214214).

³⁵See Memorandum from Aaron Rachofsky 1 (December 24, 1919) (on file with the National Archives, File No. 208944, *supra* note 32). See also Letter from Marlen Pew, Editor and General Manager, International News Service, to Judge C. B. Ames (December 26, 1919) (on file with the National Archives, File No. 208944, *supra* note 32).

³⁶See Memorandum from Aaron Rachofsky, *supra* note 35, at 1. Before that time, Mayer had several positions, including head of garbage disposal. See *id.*

³⁷Exactly when this conversation occurred is unclear. According to Rachofsky, it happened about two weeks after the middle of October 1919. See *id.* According to Hammond, it took place after November 10, 1919. See Memorandum prepared by J. C. Hammond 1 (December 28, 1919) (on file with the National Archives, File No. 208944, *supra* note 32) (memorandum prepared at the request of Judge Ames in connection with the Supreme Court matter).

³⁸See Memorandum prepared by J. C. Hammond, *supra* note 37, at 1. Hammond and Rachofsky disagreed as to when Rachofsky learned of the leak scheme. Rachofsky said that he learned of the scheme the same time as Hammond did; see Memorandum from Aaron Rachofsky, *supra* note 35, at 1-2. Hammond alleged that Rachofsky knew about the scheme long before he did; see Memorandum from J. C. Hammond in reply to Aaron Rachofsky's statement (December 26, 1919) (on file with the National Archives, File No. 208944, *supra* note 32).

³⁹Memorandum prepared by J. C. Hammond, *supra* note 37, at 1.

⁴⁰Baruch defended himself against these charges at a congressional hearing and emerged unscathed. For a comprehensive biography of Baruch's life, including the "peace note leak" investigation, see James Grant, *Bernard Baruch: The Adventures of a Wall Street Legend* (1983) at 141-155.

⁴¹Memorandum prepared by J. C. Hammond, *supra* note

37, at 2. Oddly, only a few months later, Hammond investigated his "friend," Baruch, for illegal sales of Phenol. See *infra* notes 178-185 and accompanying text.

⁴²251 U.S. 146 (1919).

⁴³See Memorandum prepared by J.C. Hammond, *supra* note 37, at 2-3 (emphasis added). Again, Rachofsky denied he ever made these comments. See Memorandum from Aaron Rachofsky, *supra* note 35.

⁴⁴See *id.* There is some evidence suggesting that one of those prior rumors was true. See *infra* text accompanying note 208.

⁴⁵Someone, presumably a government investigator, copied this list onto Department of Justice letterhead. See Investigator's notes (on file with the National Archives, File No. 208944, *supra* note 32). The six cases on the list for which the outcome was correctly predicted are: *McCloskey v. Tobin*, 252 U.S. 107 (1920); *New York Central Railroad Co. v. Blanc*, 250 U.S. 596 (1919); *United States v. Board of Comm'rs of Osage County*, 251 U.S. 128 (1919); *Bone v. Comm'rs of Marion County*, 251 U.S. 134 (1919); *Sullivan v. City of Shreveport*, 251 U.S. 169 (1919); and *Schall v. Camors*, 251 U.S. 239 (1919). Oddly, the Court decided *New York Central Railroad Co.* on November 10, 1919, a week before Rachofsky allegedly gave the list of cases to Hammond.

⁴⁶251 U.S. 519, 523 (1920).

⁴⁷Memorandum prepared by J.C. Hammond, *supra* note 37, at 3.

⁴⁸According to Hammond's memorandum, "I did not then, now or will I ever profit one penny" from the *Southern Pacific* information. *Id.* at 4.

⁴⁹See *Southern Pacific*, 251 U.S. 1.

⁵⁰See Pew, *supra* note 2, at 2.

⁵¹At this point, Hammond did not know that Graves and the Justice Department source were one and the same. See Memorandum prepared by J. C. Hammond, *supra* note 37, at 4.

⁵²See *id.*

⁵³*Id.*

⁵⁴See Memorandum from J. Edgar Hoover on John Craig Hammond, *supra* note 34, at 1. According to Heller Halliday, the granddaughter of Hammond, her grandparents never reconciled their differences. See Telephone interview with Heller Halliday (Sept. 11, 1999).

⁵⁵Memorandum prepared by J. C. Hammond, *supra* note 37, at 2.

⁵⁶*Id.* Hammond again bragged that he knew "a great number of Washington men who are in the tipping business; that I know that now and then men do get real information and use it to their personal advantage or give it to their clients." *Id.* at 7. However, even an old pro like Hammond thought it impossible that someone was "corrupting the Supreme Court." *Id.*

⁵⁷*Id.* at 5.

⁵⁸*Id.* This reverence for the Court fails to explain why Hammond admittedly leaked the *Southern Pacific* decision to his friends. See *supra* note 48 and accompanying text.

⁵⁹*Id.*

⁶⁰*Id.* at 5-6.

⁶¹He told Pew of the scandal, but initially left out Rachofsky's involvement because he "was willing to give him a chance." *Id.* at 6. In his report on Hammond, Hoover highlighted Hammond's selective memory concerning Rachofsky as an example of his unreliability. See Memorandum from J. Edgar Hoover, *supra* note 34, at 4-5. This omission also did not please Pew. See Letter from Marlen Pew to Judge C. B. Ames, *supra* note 35.

⁶²Memorandum prepared by J. C. Hammond, *supra* note 37, at 6.

⁶³*Id.* at 7.

⁶⁴*Id.* at 9.

⁶⁵*Id.* at 10.

⁶⁶*Id.* at 12.

⁶⁷See Investigator's notes, *supra* note 45. The "Acheson" mentioned is Dean Acheson.

⁶⁸Memorandum prepared by J. C. Hammond, *supra* note 37, at 14.

⁶⁹"Trail Is Warm in Leak Probe," *supra* note 29, at 1.

⁷⁰Transcript of notes taken from conversations in Room 939, New Willard Hotel, Washington, D.C., MID File 9961-3684, at 1-2 (on file with the National Archives).

⁷¹See *id.*; see also "Trail Is Warm in Leak Probe," *supra* note 29, at 1. Oddly, these dictagraph transcripts are not in the case file, but in Hammond's Military Intelligence Division file.

⁷²It is unknown whether the Department asked the Court to delay the announcement of its decision.

⁷³Transcript of conversation between Hammond, Moses, and Mayer at Hammond's apartment, December 8, 1919, MID File 9961-3684, at 7 (on file with the National Archives). The transcript of this conversation does not identify the speakers.

⁷⁴See "Trail Is Warm in Leak Probe," *supra* note 29. Rachofsky claimed that he knew Hammond was not drunk, but played along. See Memorandum from Aaron Rachofsky, *supra* note 35, at 3.

⁷⁵Transcript of conversation between Hammond, Moses, and Mayer at Hammond's apartment, *supra* note 73, at 1. I presume this is Moses explaining the situation in light of his earlier conversations with Hammond.

⁷⁶*Id.*

⁷⁷*Id.* at 2.

⁷⁸*Id.* at 5.

⁷⁹See Memorandum from Aaron Rachofsky, *supra* note 35, at 3-4.

⁸⁰See *Hamilton v. Kentucky Distillers & Warehouse Co.*, 251 U.S. 146 (1919).

⁸¹See Pew, *supra* note 2.

⁸²See Memorandum from Judge C. B. Ames, *supra* note 32, at 2.

⁸³See Appointment Papers for Departmental Positions (on file with the National Archives, RG 60, Stack Area 230, Row 31, Compartment 13, Shelf 2, Box 87).

⁸⁴See Appointment Papers for Departmental Positions (on file with the National Archives, RG 60, Stack Area 230, Row 31, Compartment 13, Shelf 2, Box 63).

⁸⁵See *id.*

⁸⁶See Appointment Papers for Departmental Positions, *supra* note 13.

⁸⁷See *United States v. Virginia-Carolina Chem. Co.*, 163 F. 66 (M.D. Tenn. 1908). Sanford became a federal district judge in 1908. Because of the nomination by President Harding, Judge Sanford became Justice Sanford in 1923.

⁸⁸"Four Give Bond in 'Leak' Case," *supra* note 29.

⁸⁹See Memorandum from Judge C. B. Ames, *supra* note 32, at 3.

⁹⁰I rely on Ames's memorandum for this information, but his recollection diverged from Davis's on this point. According to Davis, Graves said that he first met Moses in Mississippi while working on an overflow case in which Moses represented the claimants. See Supplemental memoranda from Frank Davis, Jr., entitled "As to Supreme Court Leak Matter" 1 (May 7, 1920) (on file with the National Archives, File No. 208944, *supra* note 32). According to Pew, Graves met Moses in Tennessee while working on the Mississippi overflow case. See "Four Give Bond in 'Leak' Case," *supra* note 29, at 3.

⁹¹See Memorandum from Judge C. B. Ames, *supra* note 32, at 3.

⁹²See Supplemental memoranda from Frank Davis, Jr., *supra* note 90, at 2. Davis's recollection of the conversation differs from Ames's. According to Ames, Graves admitted spending Sunday night as well in Moses's hotel room. See Memorandum from Judge C. B. Ames, *supra* note 32, at 3.

⁹³See Memorandum from Judge C. B. Ames, *supra* note 32, at 4.

⁹⁴*Id.*

⁹⁵See *id.*

⁹⁶Considering that all this happened the day before Embry tendered his resignation, Justice McKenna must have known that the bakery was not the real reason for his law clerk's exit.

⁹⁷Mahlon Kiefer served as law clerk to Justice Van Devanter. He went on to work at the Justice Department, becoming an expert in Prohibition law. See George Kennedy, "The Department Says Good-by to Kief," *Washington Times*, May 2, 1951.

⁹⁸According to Davis, Embry did not mention the Liberty Bonds during this initial meeting. See Supplemental memoranda from Frank Davis, Jr., *supra* note 90, at 2.

⁹⁹See Memorandum from Judge C. B. Ames, *supra* note

32, at 3. Embry later admitted that he knew the holding of *Southern Pacific* prior to meeting with Graves at the bakery. See text accompanying note 123 *infra*.

¹⁰⁰Memorandum from Judge C. B. Ames, *supra* note 32, at 3. Assistant Attorney General Ames also wanted to speak with John Embry, Ashton's brother, on December 15, 1919, but John's busy lecturing schedule (which included a talk with some rubber manufacturers) prevented a meeting that day. See Letter from John Embry to Mr. Ames (December 15, 1919) (on file with the National Archives, File No. 208944, *supra* note 32). It is unknown whether investigators met with John Embry at a later date.

¹⁰¹Memorandum from Judge C. B. Ames, *supra* note 32, at 8.

¹⁰²*Id.*

¹⁰³See Supplemental memoranda from R. P. Stewart as to Supreme Court Leak Matter 2 (May 29, 1920) (on file with the National Archives, File No. 208944, *supra* note 32).

¹⁰⁴Memorandum from Judge C. B. Ames, *supra* note 32, at 9.

¹⁰⁵This meeting took place between Mayer, Burke, Davis, and Assistant Attorney General Robert Stewart. Assistant Attorney General Ames was not present.

¹⁰⁶See Supplemental memoranda from R. P. Stewart, *supra* note 103, at 4.

¹⁰⁷*Id.*

¹⁰⁸*Id.* at 3-4.

¹⁰⁹*Id.* at 4.

¹¹⁰See Acheson, *supra* note 3, at 85.

¹¹¹"Probe of Court Leak Nears End," *supra* note 29, at 2.

¹¹²See "Supreme Court 'Leak' Evidence Is Given to Lusk," *supra* note 29, at 1.

¹¹³The witnesses who presented testimony to the grand jury included Ames, Stewart (the Assistant Attorney General who interviewed Mayer), Joseph J. McCann, Rachofsky, Howe (the stockbroker), Kiefer (the law clerk who met with Embry the night before the Court announced its decision in *Southern Pacific*), and Hammond. McCann's role in the case is unclear.

¹¹⁴See Memorandum of conversation with Mr. Embry from C. B. Ames (Jan. 21, 1920) (on file with the National Archives, File No. 208944, *supra* note 32). It is hard to believe that Embry, a sophisticated lawyer, would meet with law enforcement without counsel, but he apparently did so on at least three separate occasions.

¹¹⁵See *id.* at 1-2.

¹¹⁶See *id.* at 2. Apparently, this "list" is different from the book that Acheson described. See *supra* text accompanying note 28.

¹¹⁷Memorandum of conversation with Mr. Embry from C. B. Ames, *supra* note 114.

¹¹⁸See Memorandum of conversation with Mr. Embry from C. B. Ames (Mar. 15, 1920) (on file with the National Archives, File No. 208944, *supra* note 32).

¹¹⁹*Id.* at 2.

¹²⁰*Id.* What Embry did not know was that the grand jury had already returned its indictment against him. See *infra* note 125.

¹²¹See Memorandum from Herron to Judge Ames (December 5, 1919) (on file with the National Archives, File No. 208944, *supra* note 32).

¹²²216 U.S. 462 (1910).

¹²³*Id.* at 478-80.

¹²⁴Memorandum from Herron to Judge Ames, *supra* note 121, at 4-5.

¹²⁵The grand jury actually returned the indictment against Embry and the other defendants on February 28, 1920. See Indictment of Ashton F. Embry, James Harwood Graves, E. Millard Mayer, Barnett E. Moses (filed April 1, 1920) (No. 36363) (on file with the National Archives, RG 21, Stack Area 16E3, Row 14, Compartment 17, Shelf 1, Box 300). It is unknown why a month passed before the indictment was unsealed.

¹²⁶*Id.* at 1.

¹²⁷*Id.* at 2.

¹²⁸*Id.* at 3.

¹²⁹*Id.* at 5.

¹³⁰*Id.* at 6.

¹³¹*Id.* at 8-9.

¹³²See Letters of Recognizance of Ashton F. Embry, James Harwood Graves, E. Millard Mayer, Barnett E. Moses, *United States v. Ashton F. Embry* (D.C. 1920) (No. 36363) (on file with the National Archives, RG 21, Stack Area 16E3, Row 14, Compartment 17, Shelf 1, Box 300).

¹³³"Four Are Indicted for Court 'Leak,'" *New York Times*, April 2, 1920, at 2; see also "Four Give Bond in 'Leak' Case," *supra* note 29, at 3.

¹³⁴"Four Give Bond in 'Leak' Case," *supra* note 29, at 3.

¹³⁵See Demurrer, *United States v. Ashton F. Embry*, (D.C. 1920) (No. 36363) (on file with the National Archives, File No. 208944, *supra* note 32).

¹³⁶Norman Hapgood, "Court Decisions Menaced By 'Leak,' Hapgood Asserts," *Washington Times*, June 4, 1921, at 2.

¹³⁷216 U.S. 462 (1910).

¹³⁸*United States v. Ashton F. Embry*, at 9-10 (No. 36363) (Sup. Ct. of D.C., June 17, 1921).

¹³⁹See "'Leak' Appeal Fails: Defendants Must Stand Trial in Southern Pacific Case," *New York Times*, July 28, 1921, at 13.

¹⁴⁰Petition for certiorari, at 8, *Embry v. United States*, 257 U.S. 655 (1921) (No. 593).

¹⁴¹*Id.* at 21; emphasis in original. The petition also argued that *Haas* was merely about whether the extradition of the defendant was proper and not whether, as a matter of law, the indictment in that case was sufficient. See *id.* at 33-44. At least two Justices previously had suggested this reading of *Haas* was correct. See *Haas*, 216 U.S. at

482 (Brewer, J., concurring); *id.* at 483 (McKenna, J., concurring).

¹⁴²Petition for certiorari, *supra* note 140, at 52.

¹⁴³*Id.* at 53.

¹⁴⁴*Id.* at 61.

¹⁴⁵See Brief in Opposition, at 2-7, *Embry v. United States*, 257 U.S. 655 (1921) (No. 593).

¹⁴⁶*Id.* at 2 (quoting *Field v. United States*, 205 U.S. 292, 296 [1907]).

¹⁴⁷*Id.* at 7 (citation omitted).

¹⁴⁸See *Embry v. United States*, 257 U.S. 655 (1921).

¹⁴⁹The "rule of necessity" provides that a judge must hear a matter if she is the only judge with power to do so, even if she normally would recuse herself from the matter. See *United States v. Will*, 449 U.S. 200, 213-216 (1980).

¹⁵⁰See Letter from John A. Laskey, United States Attorney, to C. B. Ames, Assistant Attorney General (May 8, 1920) (on file with the National Archives, File No. 208944, *supra* note 32).

¹⁵¹Letter from John W. H. Crim to E. Bright Wilson (Oct. 5, 1922) (on file with the National Archives, File No. 208944, *supra* note 32).

¹⁵²See Criminal Docket Books for the District of Columbia (on file with the National Archives, RG 21, Stack Area 16E3, Row 14, Compartment 7, Shelf 3, Entry 74, Volume 36, Case No. 36363).

¹⁵³Pew probably began ignoring the case for two reasons. First, the *International News Service* fired him for insubordination on January 5, 1923. See *Pew v. International News Service*, 244 N.Y. 570, 571 (1927) (upholding his termination for subordination). Second, Hammond, his inside source, also fell from grace and from the investigation. See *infra* notes 154-191 and text accompanying.

However, Pew's career survived his termination. He became the respected editor of *Editor & Publisher*, a journalism trade magazine, and went to war with powerful gossip journalist Walter Winchell. (According to one account, Pew lost that battle. See Neal Gabler, *Winchell: Gossip, Power, and the Culture of Celebrity* [1994] at 134-140.) He died in 1936 after undergoing throat surgery. See "Marlen Pew Dies; Long a Journalist," *New York Times*, October 16, 1936, at 25.

¹⁵⁴Memorandum prepared by J. C. Hammond, *supra* note 37, at 14.

¹⁵⁵*Id.* at 17.

¹⁵⁶Letter from J. C. Hammond to Judge C.B. Ames (May 5, 1920) (on file with the National Archives, File No. 208944, *supra* note 32). Hammond wrote a similar letter to General Churchill, his former boss at the Military Intelligence Division (MID). See Letter from J. C. Hammond to General Churchill (May 5, 1920) (on file with the National Archives, MID File 9961-3684). This came after MID had terminated his position. See *infra* text accompanying note 182.

¹⁵⁷Ironically, Hammond listed Senator Lewis as a refer-

ence in his application to the MID, claiming to have known him for fifteen years. See List of references for John Craig Hammond (on file with the National Archives, MID File No. 9961-3684).

Pew reported on a couple of occasions that the investigation was focusing on a Chicago connection. See "Chicago Scene of Leak Investigation," *supra* note 29; "May Involve Chicago Trader in Leak Probe," *supra* note 29. Apparently, nothing came of this phase of the investigation.

¹⁵⁸Letter from J. C. Hammond to Judge C.B. Ames, *supra* note 156.

¹⁵⁹For a comprehensive biography of Tumulty, see John M. Blum, *Joe Tumulty and the Wilson Era* (1969). Like Bernard Baruch, Tumulty was accused, but ultimately cleared, of profiting from the "peace note leak." *Id.* at 122-129.

¹⁶⁰See Memorandum from Hunter S. Marston about John C. Hammond (Aug. 18, 1918) (on file with the National Archives, MID File 9961-3684).

¹⁶¹Letter from Judge C. B. Ames to Mr. J. C. Hammond (May 6, 1920) (on file with the National Archives, File No. 208944, *supra* note 32).

¹⁶²See Letter from Judge C. B. Ames to Mr. John Laskey (May 6, 1920) (on file with the National Archives, File No. 208944, *supra* note 32).

¹⁶³The MID files on John Hammond are far more thorough than the files on Embry and the others. A truly mysterious man, Hammond deserves his own article.

¹⁶⁴Isaac Marcossan, "German Poison," *Saturday Evening Post*, March 23, 1918, at 17, 81, 84. According to the article, the German sympathizer (Hammond) would flash the letterheads of public figures to suggest they were on close terms. However, these letterheads later turned out to be nothing more than routine form letters. Hoover also reported that Hammond often used this personal puffery scheme. See Memorandum from J. Edgar Hoover on John Craig Hammond, *supra* note 34, at 9.

¹⁶⁵See Memorandum from J. Edgar Hoover on John Craig Hammond, *supra* note 34, at 7-8.

¹⁶⁶See Letter from R. P. Stewart to Francis G. Caffey (Feb. 21, 1921) (on file with the National Archives, File No. 208944, *supra* note 32).

¹⁶⁷Long-time FBI director J. Edgar Hoover had a cousin who also worked at the Justice Department named John Edgar Hoover. In fact, John Edgar started at the Department before J. Edgar did, and even clerked at the Supreme Court with Embry for a while. See Richard Gid Powers, *Secrecy and Power: The Life of J. Edgar Hoover* (1988) at 160; Anthony Summers, *Official and Confidential: The Secret Life of J. Edgar Hoover* (1993) at 27; Appointment Papers for Departmental Positions 1850-1913, Law Clerks & Administrative Offices 1909-1913 (on file at the National Archives, RG 60, Stack 230, Row 3f, Compartment 13, Shelf 7, Box 99).

However, it does not appear that J. Edgar's cousin John had any involvement in this case.

¹⁶⁸Memorandum from J. Edgar Hoover on John Craig Hammond, *supra* note 34, at 1.

¹⁶⁹*Id.* at 9.

¹⁷⁰This is not surprising, considering that Hoover copied much of his report directly from the reports of others. For example, Hoover's line that Hammond "is a great bluffer, toots his own horn continuously" reads very much like Hunter Marston's 1918 MID report, which states that Hammond "is a great bluff, toots his own horn incessantly." Memorandum from Major Hunter S. Marston to Chief of the Military Intelligence Division (Aug. 17, 1918) (on file with the National Archives, MID File 9961-3684).

¹⁷¹For an in-depth look at the American Protective League, see Joan M. Jensen, *The Price of Vigilance* (1968). The Justice Department disbanded the league soon after the end of World War I. See *id.* at 240-256.

¹⁷²See Memorandum from Marlen Pew to Colonel Churchill (July 8, 1918) (on file with the National Archives, MID File 9961-3684).

¹⁷³Memorandum from Major Hunter S. Marston to Chief of the Military Intelligence Division, *supra* note 170.

¹⁷⁴Why Hammond craved a position with MID is unclear. Hoover speculated that Hammond wanted to work for MID to win back his wife. See Memorandum from J. Edgar Hoover on John Craig Hammond, *supra* note 34, at 1.

¹⁷⁵See *id.* at 4.

¹⁷⁶See Letter from General Churchill to John Craig Hammond (December 30, 1919) (on file with the National Archives, MID File 9961-3684).

¹⁷⁷See Memorandum from J. C. Hammond to Major Peters (on file with the National Archives, MID File 9961-3684). Apparently, MID heeded his request. Hammond's name does not appear in any of the newspaper reports about the scandal.

¹⁷⁸Phenol is a compound derived from coal tar and is used as a disinfectant and antiseptic.

¹⁷⁹Memorandum to MU13 from General Churchill (Mar. 19, 1920) (on file with the National Archives, MID File 9961-3684).

¹⁸⁰See Letter from Edmund A. Buchanan to Mr. J. C. Hammond (Apr. 20, 1920) (on file with the National Archives, MID File 9961-3684).

¹⁸¹See Telegram from 113 to Colonel Arthur G. Campbell (Apr. 23, 1920) (on file with the National Archives, MID File 9961-3684).

¹⁸²See Letter from General Churchill to John C. Hammond (Apr. 26, 1920) (on file with the National Archives, MID File 9961-3684).

¹⁸³See Letter from J. C. Hammond to General Churchill (May 12, 1920) (on file with the National Archives, MID File 9961-3684).

¹⁸⁴Letter from J. C. Hammond to General Churchill (May 24, 1920) (on file with the National Archives, MID File 9961-3684).

¹⁸⁵See Letter from Major James L. Collins to Mr. J. C. Hammond (Feb. 12, 1921) (on file with the National Archives, MID File 9961-3684); Letter from A. B. Coxé to Mr. J. C. Hammond (June 5, 1920) (on file with the National Archives, MID File 9961-3684).

¹⁸⁶Memorandum from J. Edgar Hoover on John Craig Hammond, *supra* note 34, at 9.

¹⁸⁷See Memorandum about request for information about J. C. Hammond (Nov. 1, 1923) (on file with the National Archives, MID File 9961-3684).

¹⁸⁸See Memorandum from W. K. Naylor to the Assistant and Chief Clerk, War Department (Nov. 2, 1923) (on file with the National Archives, MID File 9961-3684).

¹⁸⁹Memorandum from J. Edgar Hoover on John Craig Hammond, *supra* note 34, at 6.

¹⁹⁰See Telephone interview with Heller Halliday, granddaughter of John Craig Hammond (Sept. 11, 1999); Telephone interview with Matthew Weir, great-grandson of John Craig Hammond (Sept. 11, 1999).

¹⁹¹Incidentally, Richard Halliday went on to become a prominent Broadway producer who married Mary Martin of *Peter Pan* and *South Pacific* fame. Martin was also the mother of Larry Hagman, "J.R. Ewing" of television's "Dallas." See Mary Martin, *My Heart Belongs* (1976). For Mary Martin's brief description of John Hammond, see *id.* at 98-99.

¹⁹²Memorandum from J. Edgar Hoover on John Craig Hammond, *supra* note 34, at 4.

¹⁹³See *id.*

¹⁹⁴See "Obituary" for Barton Stone Embry, *Washington Times*, June 12, 1956, at A16. Apparently, Graves's involvement with the bakery ended when the scandal broke.

¹⁹⁵City Directories of the United States, Washington, DC, 1920. Over the years, the exact name of his business changed, but always included Barker. These names included Barker Original System of Bakeries, Barker Original System Bakery, Barker Bakeries, Inc., and Barker Bake Shops, Inc.

¹⁹⁶See E-mail from Ashton F. Embry to David Garrow, *supra* note 5.

¹⁹⁷Obituary, *supra* note 194.

¹⁹⁸City Directories of the United States, Washington, DC, 1934.

¹⁹⁹His grandson, Ashton F. Embry, described him this

way. See E-mail from Ashton F. Embry to David Garrow, *supra* note 5.

²⁰⁰See City Directories of the United States, Washington, DC, 1926.

²⁰¹See City Directories of the United States, Washington, DC, 1927.

²⁰²See City Directories of the United States, Washington, DC, 1934.

²⁰³See City Directories of the United States, Washington, DC, 1935.

²⁰⁴See City Directories of the United States, Washington, DC, 1923.

²⁰⁵See City Directories of the United States, Washington, DC, 1934.

²⁰⁶See Obituary, *supra* note 194.

²⁰⁷E-mail from Ashton F. Embry to David Garrow, *supra* note 5. Interestingly, Lloyd scattered Ashton's ashes on the grounds of the current Court, which is not where Ashton physically clerked. The current Court building was completed in 1935; from 1860 until then, the old Senate chamber in the Capitol housed the Supreme Court. See *The Oxford Companion to the Supreme Court of the United States* (Kermit L. Hall, ed., 1992) at 102 [hereinafter *Oxford Companion to Court*].

²⁰⁸Pew, *supra* note 2, at 2 (quoting Chief Justice Edward White). Pew again related this story two weeks later: "There has never been . . . but one other case where a leak in the decisions of the Supreme Court of the United States was suspected. In that case the culprit turned out to be a minor attache of the court. . . . [That case] was followed by swift retribution." See "Leak Probe to Continue," *supra* note 29, at 3; see also "Four Are Indicted for Court 'Leak,'" *supra* note 38, at 2 ("The secretary to one of the justices was reported to be giving out advance information regarding decisions about fifteen years ago, but the charges were never substantiated and no action was ever taken").

²⁰⁹"D.C. Clean-Up May Follow 'Leak' Probe," *supra* note 29, at 15.

²¹⁰See Memorandum from J. Edgar Hoover on John Craig Hammond, *supra* note 34, at 1.

²¹¹See Pratt, *supra* note 3, at 18.

²¹²William Howard Taft, Confidential Memorandum I, 5 (Nov. 10, 1924) (on file with author).

²¹³*Id.* at 2.

²¹⁴See *id.* at 6-7. McKenna resigned on January 5, 1925. See *Oxford Companion to Court*, *supra* note 207, at 986.

Human Dignity and the Claim of Meaning: Athenian Tragic Drama and Supreme Court Opinions

JAMES BOYD WHITE

I am going to bring together what may seem at first to be two extremely different institutions for the creation of public meaning, namely classical Athenian tragedy and the Supreme Court opinion.¹ My object is not so much to draw lines of similarity and distinction between them, as a cultural analyst might do, as to try to capture something of what I believe is centrally at work in both institutions, in fact essential to what each at its best achieves. I can frame it as a question: How is it that the best instances of each genre (for I will be talking only about the best) work to resist the ever-present impulse to trivialize human life and experience—certainly well known in our own era—and instead confer upon the individual, and his or her sufferings and struggles in the world, a kind of dignity? I think that something like this is in fact the core of the most important achievements of both institutions, and that in both cases it is simultaneously imaginative (or literary) and political in nature.

I mean not to make an especially original or controversial point, but to call upon a familiar and widespread intuition. I assume that we all sometimes have the feeling that what we are reading—or watching or hearing—trivializes human experience, reducing it to something unimportant or insignificant and stimulating a kind of cynicism or despair. But of course we also sometimes have the opposite feeling, that the expression or action to which we are exposed—the Bach cantata, the painting by Vermeer, the poem by Keats or

Dickinson—somehow dignifies or exalts the human, marking out possibilities for significance in life, in our lives, that can serve as a ground of hope in a universe full of confusion and suffering. We can't easily explain how it happens, but in the first case we come away somehow ashamed of being a human being, in the second, proud and glad to belong to such a species.

Speaking of my own experience, and I hope yours too, at least some theatrical productions, and some Supreme Court opinions

too, give me the second (and better) kind of response, and in this talk I want to explore how and why that happens. I shall not summarize my conclusions now except to say that a large part of my attention will be on the way in which both the dramas and the opinions I shall examine imagine human beings as speaking creatures—on what, that is, they make speech mean. This will lead me to suggest at the end what I mean as a major point, that it is in our capacity for claiming meaning for experience that our deepest dignity lies, and that it is in the denial of that capacity, and what it says about us, that the essence of trivialization can be found.

I shall begin with what I assume to be the less familiar form, Greek drama, and then turn to the law.

First, some background. In Athens the

performance of tragedy was a highly public and intensely competitive event which occurred in its full grandeur only once a year, at the great festival of Dionysus. Only three dramatists were permitted to compete; they were chosen several months ahead of time, and given that period in which to perfect the performance of the four-play sequences they had submitted. What we might call "rehearsal" was no small or casual matter; it cost roughly as much to train a chorus for a single set of plays as it did to keep a warship at sea for a year, and rich men were called upon by the state to bear this burden. The plays were performed at the Theater of Dionysus, next to the Acropolis; they were then judged, by officials or by the crowd, with prizes of great honor awarded for the best play, best actor, best chorus, and so forth.²

The tragic theater was a cultural form, an



Theater of Dionysus, Athens

In Athens, the performance of tragedy was a highly public and intensely competitive event, which occurred in its full grandeur only once a year, at the great festival of Dionysus. It cost roughly as much to train a chorus for a single set of plays as it did to keep a warship for a year. The plays were performed at the Theater of Dionysus (pictured), next to the Acropolis.

occasion for the making of public and shared meaning, that had certain ways of working. These were naturally realized differently by different playwrights and in different plays, but running through this body of work there are three important strands that I would like to bring to your attention. As we shall later see, these three strands, perhaps surprisingly, have analogues in some of the best opinions of the Supreme Court.

Bringing the Remote Into the Circle of Attention

I shall begin with the great trilogy of Aeschylus called the *Oresteia*. The first play, the *Agamemnon*, tells the story of that hero's return to Mycenae from the Trojan War, and how he is shamefully killed—in his bath—by his wife Clytemnestra and her lover Aegistheus; the second play tells how her son Orestes, commanded by Apollo to avenge this murder of his father, kills his mother; the third brings on stage in pursuit of Orestes the Eumenides, the dreadful furies who punish the shedding of kindred blood. Orestes finds refuge in Athens, where he is tried for his act by a court and jury established for the purpose. He is acquitted, for he was acting under divine compulsion in the form of explicit orders from Apollo. The trilogy thus ends with the establishment in Athens of courts of justice; courts that will, in the future, break a chain of vengeance such as that which plagued the house of Atreus, and do so by imposing sanctions for homicide that themselves do not occasion blood guilt.

The *Agamemnon* begins with a watchman in Mycenae waiting, at dawn, for the beacon of light that will announce the victory at Troy—for Clytemnestra has arranged for fires to be lit on mountain top after mountain top, to bring this news across the sea in a single night. Next, the chorus, in a song about the events that have led up to the present, tells how Agamemnon, on his way to Troy ten years earlier, his fleet held in harbor by adverse winds, sacrificed his daughter Iphigenia

to persuade the gods to let him go—a terrible crime that Clytemnestra will later invoke as a justification for her own terrible crime. Soon after, a messenger arrives to describe the sack of Troy, in his vivid account bringing directly before the other characters within the play—and before the audience in Athens, too—these remote and perilous happenings.

I wish to draw attention here to a rather simple fact, namely, that the drama brings into the space we call the theater, and before the minds of the people of Athens, imagined events that are distant in both time and place. Thus the audience is here asked to imagine Mycenae at the time of the fall of Troy, Troy itself, the chain of mountain tops running from Troy to Mycenae, the sacrifice of Iphigenia ten years earlier, and so on.³

In an age of television, movies, newspapers, and the Internet, it may be difficult to see this for the surprising and powerful cultural phenomenon it was, for we are besieged with communications that invite us to imagine the remote and distant. But these plays took place in a different kind of world, one in which this was a real invention. In bringing on stage, and into the conscious imaginings of the people, events that were remote in time and space, the drama invited the audience to connect themselves to the distant. This was, I think, one of the central functions of the Athenian theater, and it had a perhaps surprising political and ethical significance.⁴

Think, for example, of another play by Aeschylus, *The Persians*. This tells the story of the great naval battle at Salamis, at which the Athenians destroyed the Persian invaders. Writing ten years after the battle, Aeschylus locates the action of his play surprisingly in Persia itself, where we see the royal women of Persia awaiting news of the expedition. The audience sees these events, not from the point of view of Athens, as a wonderful triumph, but from the point of view of the Persian women, for whom it is a disaster and with whose suffering one must sympathize. Of course, the audience is really Athenian, so



The Persians tells the story of the great naval battle at Salamis in 480 B.C. at which the Athenians destroyed the Persian invaders. Aeschylus, who wrote the play ten years after the battle, chose to tell the tale from the point of view of the royal women of Persia awaiting news of the ill-fated expedition.

they actually see it both ways at once—they are forced to do so—and that double vision is a central part of the meaning of the play.

At the climax of *The Persians*, a messenger reports the story of the battle itself, to which he was an eyewitness—telling how the Persians were tricked into rowing around the island of Salamis all night, then penned into a narrow bay from which they could not escape. These events in fact took place just a few miles away from Athens—the audience can see the mountains of Salamis from their seats—which means that in this play, occurring in Athens but set in Persia, Athens itself is brought on stage, simultaneously into the imagined world of Persia and the real world of Athens itself. The play thus makes Athens look at itself as it appears to others.

In setting the play up this way, Aeschylus is I think talking to his citizens about their own world, simultaneously stimulating pride in their great victory and disciplining that

pride by the recognition of the terrible loss it brought to others. He is also telling the Athenians that they should guard against the heady overconfidence that might otherwise naturally arise in them from the victory. In a real sense this play is thus a teaching play, teaching the public something crucial about its moral situation, as the *Oresteia* taught it something about its central institutions—in both cases, by bringing to awareness what is distant in time and space, and morally distant too.

It is not just that the theater carries distant events before the consciousness of the people. It brings into the light of day facts—or forces or ideas or impulses—that are normally repressed or hidden: the reality of the experience of the Persian women, for example, or of the murdered Iphigenia, or the psychic and moral forces represented by the Furies in the *Eumenides*—monstrous deities who normally live out of sight, underground, so hideous in the performance, says one account, that

women miscarried at the sight of them. Perhaps the most famous example of this habit of bringing on to the stage what in a deep sense is felt to belong off it is the *Oedipus Tyrannos* of Sophocles, where, as Freud helped us see, some of the most profound and disturbing of human psychological forces are brought directly into the consciousness of the audience, as it contemplates Oedipus' violation of the central taboos against incest and parricide.

A particularly striking instance of this impulse lies in the theater's treatment of women. In the world of Athens, women had a legal and social position mainly as the possessions of men, whether fathers or husbands; even in procreation they were imagined to contribute nothing to the child except a kind of oven in which the male seed could grow; and they themselves had no property and no civil rights. Yet by all three dramatists they are represented on stage as psychological and moral actors who are in every sense (except power) the equal of men. It may be indeed that such figures as Antigone and her sister Ismene, Phaedra, Medea, and Alcestis are the most deeply and fully realized women in Western literature until Shakespeare, perhaps even Jane Austen. It is hard to know how fully to explain this phenomenon, but I think it is another expression of the general impulse to put on stage what is real but unseen—a part of life that is normally excluded from the vision of the male citizens who made up most of the audience.⁵

In all of these ways the drama works as a way of expanding and intensifying our sense of what it means to be human, making it possible to pay attention to what we had not fully seen before. This kind of drama is not merely a kind of entertainment, but a major public and political event, one of the purposes of which, at the hands of the three great geniuses whose work we have, is educative and transformative.

I want now to turn from Athenian tragic drama to the form we call the judicial opinion,

especially the opinion of the Supreme Court of the United States. There are, of course, obvious differences between these forms of speech and life, but I think there are also significant parallels. What we call the Supreme Court is in an important sense not this building, nor the nine men and women who sit on the Court, nor even all those who have done so in the past, but an entity that exists primarily in cultural and imaginative and political space. It is a public arena, bounded by its own structures and rules, one function of which is to bring certain stories and the problems they present into public attention, not for the sake of entertainment but in some sense for education or enlightenment. Likewise, it has its own sense of time, in which the remote is brought into the present. The time and space it creates and within which it works are in a sense of its own making; it is the Court itself that gives significance and reality to these dimensions of its existence; and it does so in the form which its great Chief Justice Marshall did much to invent, the opinion of the Court.⁶

Like the ancient theater of Athens, the Court is thus an institution for the making of shared and public meaning. What is more, it shares the more particular feature I have just described, for it too regularly brings into the circle of public attention events and people and places that are normally overlooked or excluded or just not seen. This is in fact one of its central functions.

As a way of exploring how this works in a particular instance, I now turn to *Cohen v. California*, a famous First Amendment case to which I shall refer throughout this article.⁷ Its facts reflect the era of the Vietnam War, including protests against it. The defendant, Paul Robert Cohen, wore a jacket bearing the words "Fuck the Draft" while walking down a corridor of the Los Angeles municipal courthouse. He was then arrested and convicted of violating a California penal statute that made it an offense to "maliciously and willfully disturb the peace or quiet of any neighborhood or person . . . by . . . offensive conduct." The de-



One of the central functions of the Supreme Court, like Athenian tragedy, is to bring to attention events and people that are normally overlooked or excluded. In this article, the author compares *Cohen v. California* (1971), a Supreme Court decision involving a Vietnam War draft protester, to Greek drama.

fendant engaged in no other conduct alleged to disturb the peace. The state court imposed a penalty of thirty days in jail. The Supreme Court, in an opinion by Justice Harlan, reversed the conviction.

The judicial process here brings into a zone of public awareness material that is normally unseen, most obviously and dramatically, and perhaps a bit embarrassingly, in the use of the word "fuck"—a word which, although known, I assume, to almost all English speakers, is normally used only on certain kinds of occasions, with certain kinds of audience, and is definitely excluded from most formal discourse, certainly the discourse of the Supreme Court of the United States. Justice Harlan marks the distance between this term and the language of the Supreme Court—and the decorous conversation he seeks to establish with his readers—by the way he recites the facts of the case, not in his own words but those of the California court: "On April 26, 1968, the defendant was ob-

served in the Los Angeles County Courthouse in the corridor outside of division 20 of the municipal court wearing a jacket bearing the words 'Fuck the Draft' which were plainly visible."⁸ He thus quotes the language but distances himself from it.

This is not the only way in which the repressed or unknown is brought by the opinion in *Cohen* to a place where it can be seen and thought about and responded to in a new and deeper way. Mr. Cohen's story was from almost all other perspectives a trivial one, a minor skirmish in the national war about the war. He was not, so far as I know, otherwise an important person in the world, but just a young man opposed to the draft. This was a case of no political or public significance until the Court made it so, saying that despite the apparent triviality of the event the issues presented here—presented, that is, by the lawyers, and seen and articulated by the Court in this very opinion—"are of no small constitutional significance."⁹

This process—giving significance to the apparently insignificant—is a major part of what the Court regularly does. Think, for example, of a case like *Powell v. Texas*,¹⁰ where an alcoholic pauper was thrown into jail overnight to sober up, to all the actors as minor and routine an event as occurs in police work; the Supreme Court made this the object of learned, and contrasting, reflections on the conditions upon which the state may punish conduct as criminal, especially conduct arising from disease, in a set of opinions that might have remade criminal law in this country.¹¹ In this case—as in every criminal procedure case, in nearly every First Amendment case, and throughout the law, really—the unimportant is made important. This has its own political meaning, for it says that there is no case too small, no person too insignificant, to be worthy of potential attention. Here and elsewhere the Court makes big law by attending to small events. No one is excluded on principle.

When a dramatist invokes what is physically or morally distant, we naturally ask what he will make of it: what meaning will he claim for the story of Iphigenia or the looting of Troy or the events at the Persian court? The answer will always lie in particularities of writing and performance. In the same way, when Mr. Cohen's story is brought into the theater of the courtroom, we ask what it will be made to mean by the lawyers and by the Court, and this, too, is of necessity a highly particular matter, tied intimately to the facts of the case. For, as every lawyer knows, we do not and cannot know ahead of time the cluster of arguments on both sides by which the law will work in a particular case, which the Court must in turn resolve, and which it will use and transform in its own opinion.

This particularity requires a kind of attention, makes possible a kind of invention, different from the kind of talk usual in political or theoretical debate. What is happening in the *Cohen* case, from one perspective, is just another event in the long struggle over the

meaning of the Vietnam War. But the law cannot think in such terms; it must fashion itself to meet the particularities of the case as these emerge in thought and argument. And when the bright light of attention is focused on what we have not seen, or not seen clearly, it almost always reveals a complexity and richness of significance that we had missed, thus putting in question, among other things, our own prior habits of mind and imagination. In the *Cohen* case, the large issue—that of the draft and the war itself—is, of course, on everybody's mind. What the law does here is take a tiny fragment of that larger story, this simple act of protest, and examine it not in the terms of the national political debate—prowar or antiwar—but as a constitutional problem, to be analyzed, argued, and decided in the terms established by this branch of the law. This means, as we shall soon see, that an essential part of the opinion will be a delineation of these terms, an account of the universe of meaning established by the First Amendment and the cases decided under it.

Like the drama, then, the opinion not only brings before us what is remote in time and space but in doing so creates a world of imagination, simultaneously drawn from the world we otherwise know and an alternative to it. The idea in both cases is not to offer the audience an escape into fantasy, but to create an imagined reality that can run against the "real world," both to test it and to be tested by it. In both forms, particularity is essential to the art; and in both forms, the created order is at once final and tentative: final because it reaches a conclusion, comes to an end; tentative because the rest of life continues, creating an ever-changing context that will challenge or confirm the imagined order in new and different ways.

Movement to Discovery by Dramatic Opposition

Perhaps a more familiar feature of Greek tragedy is that it lives and works dramatically,

by the interaction between different characters speaking out of their respective situations in different voices. This too was a real invention, for the first forms of drama were purely choral performances; at first one actor was added to the chorus, then another, then, finally, by Sophocles, the third.¹²

The opposition of character to character is so much the soul of what we think of as drama, then and now, that it is hard to appreciate the force and originality of the invention. Think, for example, of the opposition between Creon and Antigone over the relative authority of the city's decrees and those of the timeless and unwritten laws that the young woman invokes; or of the confrontation between Orestes and the Furies at his trial for the murder of Clytemnestra; or, in the play that bears her name, of the intense struggle between Medea and Jason. Or, to shift nearer our own world, think of Shakespeare's *Hamlet*, which can be seen as a set of antagonistic conversations between Hamlet and others—Gertrude and Claudius and Polonius and Laertes and Horatio—each defining somewhat differently the meaning of the past they share and of contemplated future action too. The question the play presents is, what kind of sense can be made of a world defined by such contrasting possibilities of speech and meaning?

It is equally obvious that, with us at least, the law works in a similar way: by the opposition of character against character, plaintiff against defendant, each representing a different vision of the world—and of the law—and seeking to establish its own as the dominant one. The central legal institution we call the hearing works by a disciplined opposition that is intended to lead, and sometimes does, to deeper understanding, indeed, to the revelation of central questions theretofore obscured by our ignorance, or by our habits of thought and imagination.¹³ It is not simply that play and trial work by opposition, but that the opposition leads the participants and the audience to new discoveries, about what has happened and what it means, about what ought to

happen, about who these people are and ought to be.

As the play often takes as its subject a familiar story from mythology or history, which is told in such a way as to reveal new possibilities of meaning, so the hearing often begins with a set of preconceived ideas—in the parties, judge, and lawyers alike—about the facts and their significance, about the law and its bearing upon them; these are tested and complicated in argument and sometimes completely transformed. When the play and the hearing work well, they are both processes that carry us by the force of opposition from a position defined by our pre-existing expectations into quite different and often surprising terrain. This happens in *Cohen* itself: this is a case to the facts of which lots of people, including judges and lawyers, would have highly predictable responses, pro or con, and one of the functions of the opinion is to complicate these responses, perhaps beyond recognition, by the discipline of the body of thought and law developed under the First Amendment.

I shall not belabor this point of comparison, which seems plain enough as it stands, but wish to make a particular point about the way the law works in this respect. It is true that in *Cohen*, as usual in American law, the lawyers for the two sides create a drama of opposition that the Court will in turn address. But notice that Cohen himself is not a participant in this conversation. His original speech—the slogan on his jacket—is reported by others, but he himself has no opportunity to say what it should be said to mean in the language of the law. That is the task in the first instance of the lawyers, then of the courts. Unlike Orestes or Oedipus, Cohen is a real flesh-and-blood person, with his own ways of talking, his own vision of the meaning and perhaps the necessity of what he did, and none of this is present in the legal argument, especially on appeal.

The law thus provides a second language, into which the languages and experiences of

ordinary life must be translated. The people of the law will locate and define what happened in the real world in these terms, placing what Cohen himself actually said and did in a larger context, which will in turn do much to shape the kind of meaning that can now be claimed for Cohen's words. The law is in this way a cultural process, working on the raw material of life—the injury to the body or the psyche, the failed business, the broken marriage, the vulgar words in the courthouse—to convert it into something else, something of its own: the occasion for the assertion of a certain sort of meaning. It is a kind of translation.

One of the striking features of the opinion in *Cohen*, and one of its great merits, is that it acknowledges this fact about itself: the difference between ordinary language and legal language is not erased or elided, as it usually is, but made inescapably prominent. In addition to the usual dramatic opposition between the lawyers, there is thus another overt tension, between two registers of discourse and between the people who speak in these different ways: between Mr. Cohen, wearing his jacket with its blunt-spoken legend into the municipal courthouse, and Justice Harlan, speaking as he does in elaborate and sophisticated legal terms about that event. On one side, we have the crude and simple phrase, a gesture of contempt and defiance that seems to express the view that nothing else need be said, to claim that this is a wholly adequate response to the issue of policy it addresses, indeed the only proper response. On the other side, we have a mind of great fastidiousness and care, defining, by the way it works through the issues, a set of crucial cultural and social values: the values of learning, of balance and comprehensiveness of mind, of human intelligence, of depth of understanding. Nothing could seemingly be further from the mind exemplified in this elegant, complex, civilized composition than the kind of crude speech it protects.¹⁴ And by creating in his own voice a tone that respects ordinary canons of decency in expression, then incor-

porating this vulgarism within it, Justice Harlan performs, at the level of the text, just what he says the First Amendment requires of society in places like the courthouse: the toleration of what we normally exclude or suppress.

In this way, while protecting the speech Justice Harlan distances himself from it, defining himself and the Court as different from, indeed, opposed to, the values—the sense of self and other, the idea of public thinking and speaking—expressed by it. It is this distance that enables him credibly to say at one point that the tolerance of “cacophony” required by the First Amendment may be a sign of strength, not weakness, in the society that is capable of it. This is a message that he does not merely articulate but performs or enacts throughout the whole opinion, for he simultaneously protects Cohen's speech and exemplifies ways of thinking and talking that are at the other end of the spectrum. Do not imagine from this opinion that you might be well advised to use language like that on Mr. Cohen's jacket in addressing the Supreme Court, or that to display such a jacket in a courtroom might be immune from sanction.

It is important to notice in this First Amendment case that the kind of speech that the opinion exemplifies and values in its own performance is not really “free speech,” but the opposite of that, highly regulated and constrained: by the principle of judicial authority, which requires serious attention to earlier cases and to the tensions between them; by a conception of excellence in legal thought, which shapes the kind of attention Justice Harlan gives to those cases; and by canons of civilized and rational discourse, including grammar and syntax, which govern the forms of expression. It is, in fact, this very quality of Harlan's opinion that makes its protection of Cohen's slogan so significant and important: it is protecting something very different from itself, and in doing so it defines the kind of toleration the First Amendment has at its center. Yet when it does so it recognizes, almost

The author argues that Justice John Marshall Harlan's opinion in *Cohen* simultaneously protected the draft protester's speech and exemplified ways of thinking and talking that were at the other end of the spectrum in terms of eloquence and decorum.



of necessity, that this other utterance has a force and value which may be missing from the opinion itself; indeed, it almost necessarily suggests that there may be times when the right response to a political situation is not more reason, not more civilization, but the kind of verbal gesture one cannot quite imagine Justice Harlan, as he defines himself here, ever making.

For there are points in this opinion at which one might be less inclined to call Harlan's manner of speech "elegant" or "sophisticated" than "stuffy" or "stilted"—as, for example, when he says that we should remember that human speech "conveys not only ideas capable of relatively precise, detached

explication, but otherwise inexpressible emotions as well," and goes on to add that the Constitution should not be assumed to have little or no regard for this "emotive" function which "may often be the more important element of the overall message sought to be communicated."¹⁵ When I hear this, I at least have the feeling that I am in the presence of highly overformal speech, the workings of a mind that is at the moment constricted by its own commitments to a certain kind of thought. But this very fact has its dramatic and literary function, for it enacts for us what it might mean to insist, as California wants to do, that Cohen should be compelled to translate his utterance into more formal and generally ac-

ceptable speech—this would make him sound like me. Harlan is in effect saying, and it would bleed what he says of all its life and vigor.

We can see now that the other impulse I mentioned, the bringing on stage of that which is unrecognized or alien or perhaps taboo, is at work through the entire opinion. Harlan brings on this phrase, this moment, not only to protect it, but to establish a dramatic tension with it, a tension that validates it as well as tolerates it. One is reminded of Shakespeare's capacity to see the world from every point of view, in this sense to humanize every monster. Even Caliban, the subhuman creature who tries to rape Miranda and destroy Prospero, is given his moments of sympathy, and more than sympathy—of unique and beautiful expression.

Claiming Meaning for Experience

In addition to its way of imagining the distant and remote, and its way of working by dramatic opposition, Greek tragedy has a third feature, harder to define than the others but no less important, not only for Athens but in its consequences for the literary and dramatic imagination ever since. What I have in mind is a certain sort of speech in which a speaker looks back over his experience as a whole—and thus our experience too—seeking to find a meaning in it, to claim a meaning for it, and such a meaning as will enable him or her to shape his or her future speech and conduct in a coherent and valuable way.

Not all dramatic speech has this quality. Much of it consists of simple response to events, in the form of lamentation or the expression of joy or worry; some of it consists of denunciation, or manipulation, or planning, or the giving of orders—think of Creon speaking to Antigone—or the pursuit of clarification, as in *Oedipus*. All of these gestures can, of course, be ways of giving meaning to experience, but they have not quite the quality I seek to define, which includes a kind of summing

up, a self-consciousness, an effort to imagine the whole world and oneself and others within it, to see one's story as a whole and among other stories. It is the full performance of a gesture that is begun over and over in human experience, both in our own lives and on the stage, but rarely taken to completion.

Let me give two brief instances. In *Oedipus at Colonus*, the blind and aged man finds at last a home in the sanctuary of Colonus on the edge of Attica. The townspeople in the chorus are afraid of him and wish to drive him off; Creon, his brother-in-law, comes from Thebes to seize and bring him back to that city, to ensure that he will be buried there and thus confer on Thebes the benefits which an oracle has promised to the place that receives his body. Oedipus himself is filled with a sense of cost and loss, of his own status as an object of fear and taboo, but he also displays a remarkable serenity, an integrity of mind; and towards the end, in an argument with Creon, he surprisingly asserts his essential innocence. He looks back over his entire life and claims new meaning for it. He was, he says, the object of a divine decree from birth that he should do these unspeakable things—how, then, can it have been his fault? He did not know who it was he killed, or who it was he was marrying; and when he did kill he acted in self-defense. He has—and he knows it—violated the deepest of taboos and is by this fact eternally marked; but he also sees that in another and deeper sense he is innocent as well. The action of the play confirms this sense of his own deep innocence, in two ways: first, in Theseus' expulsion of Creon and acceptance of Oedipus into the territory of Athens; then, in Oedipus' own apotheosis, his conversion by divine power on his death into a kind of quasi-deity himself.

Or consider the *Ajax* of Sophocles. The story here takes place during the Trojan War, just after the death of Achilles. The armor of Achilles is given by the leaders, Agamemnon and Menelaus, not to Ajax, who is sure he de-



"Oh, Miserable am I" laments a blind Oedipus in this 1880 illustration. Like heroes of Greek tragedy, Supreme Court Justices struggle to claim that they can describe, explain, and justify their decisions in an appropriate way.

serves this mark of honor, but to Odysseus, in what Ajax regards as an act of fraud. Filled with fury and a sense of injury, Ajax sets forth at night to kill Odysseus and the two leaders, the only response this man of war and honor can possibly imagine. Athena sees him do this, and deludes him into thinking that a herd of sheep and goats are the enemies he seeks; he slaughters them, delighted at his revenge; but then he gradually returns to sanity, surrounded by the corpses of these animals, a laughingstock to the whole world, utterly humiliated. The course for him is plain, and he faces it clearly and with characteristic courage: "It's a contemptible thing to want to live forever . . . Let a man nobly live or nobly die."¹⁶ The meaning of his situation is that he should die and be done with it.

Tecmessa, the woman with whom he lives and by whom he has had his only son, pleads with him not to end his life, for the moment he dies she and their son will become

slaves of others, which will be horrible for themselves and a humiliation both to Ajax' parents, who are still alive, and to his own memory. Ajax at first rejects her claim, but he is in fact affected by what she says, and when he returns to the stage after a choral ode lamenting his decision, he speaks in a wholly different way, not from inside his misery of the moment but from outside, at an enormous distance, philosophical or religious in kind.

Strangely the long and countless
drift of time

Brings all things forth from dark-
ness into light,

Then covers them once more. Noth-
ing so marvelous

That man can say it surely will not
be—

Strong oath and iron intent come
crashing down.

My mood, which just before was
strong and rigid,

No dipped sword more so, now has
lost its edge—
My speech is womanish for this
woman's sake;
And pity touches me for my wife
and child...

So, he says, he will go to the shore of the sea
and purify himself, hiding his sword in the
sand.

From now on this will be my rule:
Give way
To Heaven and bow before the sons
of Atreus.
They are our rulers, they must be
obeyed.
I must give way, as all dread
strengths give way,
In turn and deference. Winter's
hard-packed snow
Cedes to the fruitful summer; stub-
born night
At last removes, for day's white
steeds to shine.
The dread blast of the gale slackens
and gives
Peace to the sounding sea; and
Sleep, strong jailer,
In time yields up his captive. Shall
not I
Learn place and wisdom?

This is an extraordinary speech. It represents
an enormous shift of mind and feeling, from a
self-centered despair to an acceptance of his
lot, which is in turn based at least in part on a
recognition of the claims and experience of
others. Ajax can now see Tecmessa, not
merely as a possession, but as a person with
whose experience he can sympathize. His vir-
tue has so far been to be without pity; now he
can pity. What is more, he now sees his pres-
ent defeat not as a single, unique, and humili-
ating event, but as part of the larger order and
process of the world, in which all dread and
powerful things give way in the end: winter,
and night, and storms, and sleep, and wakeful-

ness. We live amidst cycling emergences and
withdrawals, dominances and submissions, of
which this event is only one. His humiliation
is thus stripped of social and moral signifi-
cance and made a fact, a fact of nature, like
death itself.

This speech is, therefore, an answer to a
central question the play presents, which is
how one can possibly live in a world in which
life is so utterly subject to chance, even mali-
cious destruction. The answer is ultimately a
matter of voice and character, of imagination
and speech. Ajax lives in a world of uncer-
tainty and destruction; but he can see that and
say it, and in doing this can see himself, not as
a unique heroic ego, but as part of a set of pro-
cesses larger than he; and all this enables him
to accept his life, and its conditions.¹⁷

There is enacted in this speech an im-
pulse that is perhaps first made part of the
Western inheritance here in the tragic drama
of Greece: the impulse to stop, to sum up life
as a whole and to try to make sense of it, to
claim a meaning for it; to try to imagine the
world and oneself within it in such a way as to
make meaningful action possible—whether
that action is the kind of suicide upon which
Ajax first resolves, and later, perhaps still
under the destructive spell of Athena, com-
mits, or whether it is the kind of life in con-
nection with others that he, in this speech, for
a moment, imagines.

What is more, this kind of speech is, I
think, essential to the deepest contribution of
tragic drama, which is, as Hegel said, to give
dignity to human life by recognizing and en-
acting the possibility that the human mind—
the self or soul—can maintain its integrity
even, or especially, at the moment of its disso-
lution.¹⁸ It is such an act of character and
imagination that enables Oedipus to over-
come and transform what he has done; that
enables Prometheus, chained to the rock, to
maintain a moral and psychological superior-
ity to the Zeus who tortures him; and that en-
ables Ajax, for a moment at least, to accept

and live with the humiliation thrust upon him by fate and the gods. It is in the human capacity for speech of a certain kind that human dignity most deeply resides: speech that invokes what is distant and remote and brings it before the mind, where it can provide material and a point of view from which the culture, and the self, can be criticized; speech that moves, as the play and trial both do, by opposition and contrast into new perception and understanding; and speech, like that of Ajax or Oedipus, that seeks to sum up experience and claim a meaning for it.

To return once more to *Cohen*, I want now to suggest that in writing his opinion for the Court, as, in a sense, in any judicial opinion of any real quality, Justice Harlan is expressing very much the same impulse, in a different context, that we saw at work in Ajax and Oedipus: the desire to sum things up, to tell again the story of the past, to imagine the world and its people, all in ways that will make possible coherent speech, intelligible and appropriate action. For part of the duty of the Court is to say how this case should be talked about in the language the Court has made—in this instance, the language made in cases decided under the First Amendment. To do this, it must attend to the entire authoritative past created by the Court and do so with the duty of resolving so far as it can the tensions it discovers within it, with the aim of asserting, for the moment, that justice has been done. It must use this language to make a claim both to coherent speech and to appropriate action.

How does Justice Harlan, speaking for the Court in the *Cohen* case, attempt to do these things? Here is a brief outline of what might be called the argumentative structure of his opinion.

He begins a bit like a modernist painter sculpting out negative space by telling what, in his words, this case “does *not* present” (emphasis in original). First, he says this is a case in which the state seeks to punish, not conduct

that is associated with speech, but speech itself.¹⁹ Likewise, it does not involve a statute directed at the special need for decorous speech and conduct in the courthouse or its precincts, but one of general applicability. This means that no special deference is due any judgment of the legislature as to the proper control of speech in the halls of a courthouse, for no such judgment has been made.²⁰ And, despite the sexual vulgarity of the central term employed, this is not an obscenity case, for the expression is in no way erotic.²¹ Furthermore, the phrase in question does not qualify as the sort of expression the Court has termed “fighting words,” unprotected by the First Amendment, for it was not a direct personal insult. Nor is a prohibition of this phrase justified by the fact that it was forced upon “unwilling or unsuspecting viewers,” as a “captive audience”; to justify suppression on such grounds, the government must show that “substantial privacy interests are being invaded in an essentially intolerable manner,” which is not the case here.²²

Harlan thus runs through nearly the entire body of potentially relevant First Amendment law, only to put it aside on the grounds that it does not bear on the case before him. That is, he simultaneously admits the surface relevance of the arguments he states and denies their real force in this case. He is here addressing and resolving the sort of argumentative opposition between lawyers I referred to earlier, and it is important to say—although it would take too long for me to show that it is so—that none of the points he dismisses is without some merit, none of his own positions beyond argument. He recognizes what can be said the other way, but is, at the same time, exercising a power—the power of a language-shaper—to determine its scope and basis and reach.

All this is, for him, a kind of brush-clearing that opens up what he regards as the real issue in the case, which is whether California may “excise, as ‘offensive conduct,’ one par-

ticular scurrilous epithet from the public discourse." It cannot do so, he first says, on the theory advanced by the court below, namely that it is "inherently likely to cause a violent reaction," for that is simply not the case.²³ However, there is a second theory supporting the conviction, which in his view commands more respect and attention: namely, that the states may suppress this "unseemly expletive" in an effort to "maintain what they regard as a suitable level of discourse within the body politic."²⁴

He begins his examination of this question at a highly general level, reimagining as it were the first premises of the legal universe. First, he says, we must make this judgment with an understanding of the purpose of the constitutional right of free expression: "It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely in the hands of each of us, in the hope that such freedom will ultimately produce a more capable citizenry and more perfect polity, and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our system rests."²⁵ This is a lovely and economical statement, drawn from a more extended one, the famous dissent of Justice Brandeis in *Whitney v. California*,²⁶ to which Harlan makes reference. The result of this freedom, Harlan goes on to say, "may often appear to be verbal tumult, discord, and even offensive utterance."²⁷ But these are side effects of what a broader debate enables us to achieve, and "that the air may at times seem to be filled with verbal cacophony is, in this sense, not a sign of weakness, but of strength."²⁸

Then, in turning to the particulars of this case, Harlan makes two central points. First he says that the result contended for by the prosecution would confer "inherently boundless" powers on the state. For if this word can be excised from public speech, where is the power to stop? What he means is that there is

simply no principled way to distinguish between this particular term and others. This view rests on an important understanding of the nature of language, namely, that words cannot be sorted like peas or bolts, according to size or weight. They have a life that is more mysterious and multidimensional, more context-dependent, than such a view would allow.

Second—and central to the ultimate meaning of the case—Harlan says that to force a translation of Cohen's utterance into more socially presentable speech would strip it of much of its significance. For human speech, he says in a passage I quoted earlier, "conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well"; and we cannot believe that the Constitution has "little or no regard" for this "emotive function, which practically speaking, may often be the more important element of the overall message sought to be communicated."²⁹ And even if this is not true, he thinks that it would be too facile to assume that one "can forbid particular words without also running a substantial risk of suppressing ideas in the process."³⁰

Note the tension here. First Harlan says that speech does more than express "ideas," and that what he calls its emotional content is crucial to its value; then he returns to the topic of "ideas," saying that we cannot be confident that the suppression of vulgarity would not involve the suppression of "ideas," as though ideas are the important things after all. He thus reaffirms the distinction between ideas and feelings he has just criticized; but the earlier criticism—insisting on the value of emotive expression—continues to work, thus transforming his point from its rather crude statement about "ideas" to a crucial recognition that our language about language is itself inherently limited and constricting. What unites his two perceptions, despite the tensions between them, is his sense that we cannot be confident that we can know how the

meaning of language works, certainly not so confident that we can inflict surgery on an utterance without running the risk of destroying its life.

This is the most important part of the meaning of the Court's opinion: a sensitivity to the fact that meaning and form are inseparable. It is a familiar truth of literary criticism that the meaning of a poem or a play or a novel, or any other work of art, lies not in any restatement of it into other terms—in any message or idea—but in its performance, in the life and experience it creates for its audience or viewer. In adopting and performing this position in the law, Harlan takes an enormously significant step away from the view that the First Amendment should be held to protect only speech that contributes to the marketplace of "ideas," and especially of political ideas. Of course Cohen's own speech is deeply political; but the way the Court imagines and resolves his case makes the amendment reach much further, to the protection of art and perhaps—as one might wish to do in the case of Greek drama—to a dissolution of the simple distinction between political and nonpolitical, as the opinion dissolves the distinction between ideas and feelings.

There is thus this additional connection between the opinion in *Cohen v. California* and the Greek dramas with which we began, that *Cohen* provides a language and an authority for the protection of these plays and others like them. It is not only itself a drama; it is a way of thinking about drama.

In comparing the form of classic Greek tragedy and that of the Supreme Court opinion, my hope has been to begin to establish a somewhat clearer sense of the ways in which they work as institutions for the making of collective meaning. One idea is that increased understanding of these matters might lead to deeper criticism, and perhaps even to better performance of the judicial opinion. The three points of comparison made here, for example, can be seen to generate questions that can be

brought to the reading and criticism of any judicial opinion.

1) To what extent does this opinion bring into the circle of public awareness persons or events or other material that are normally repressed, ignored, or overlooked? Does it do this with the kind of particularity that will bring to the surface something new and problematic, and thus become the occasion for growth and change, both in our perceptions of the world and in the law?

2) Does it work in an explicit way by dramatic opposition and development (as opposed, for example, to the deductive application of theory)? In particular, how far does the Court recognize that its own language of description, argument, and conclusion has, as it were, a shadow version opposed to it, represented by the losing side? For the Court does its job, not just by reasoning to a result, but by recognizing the force and reality of other views, other ways of imagining and speaking. And does the Court find a way to create significant dramatic tensions within its own opinion, as Harlan does with respect to what I have called the two registers of discourse reflected here?

3) Does the Court find a way to sum up the law and claim a meaning for it, and, if so, with what kind and degree of coherence? In a First Amendment case, for example, we can ask whether the Court has a workable view of the aims and principles of that text, which in turn requires a view of the nature of human speech, and of language itself; whether it has a way of imagining the Constitution as a whole, and the roles of the various actors within it—legislatures, juries, other courts, it-

self; whether it offers, in short, a way of imagining this case and the law and the larger society that will enable it to reach a result which it can claim to be just, not only in some technical way, but truly just. And in all three dimensions of meaning we shall be interested not only in the Court's explicit statements or arguments, but, as I have tried to suggest with respect to Harlan's opinion in *Cohen v. California*, in the meaning of the performance enacted in the opinion itself.

* * * * *

I think that the desire for meaning of the kind that is reflected in the speeches of Oedipus and Ajax is the deepest impulse from which literature comes, and that it lies at the heart of our hopes when we approach a judicial opinion, especially a Supreme Court opinion. But the impulse is even more general than that, for we ourselves participate in it in our own lives and imaginations. Every human being shares the desire to find a way of describing and claiming meaning for his or her experience—at the most general level, a way of imagining the world, and herself (or himself) and others within it, that will make possible coherent speech and valuable action, even in the face of the deep uncertainties and injustices life necessarily presents.³¹ The process is never complete, for the future lines of the story we are telling are necessarily unknown to us; but we know that when they come they will certainly, like the murder of Agamemnon or the madness of Ajax, give new meaning to what is past. As we do this, we work against two deep fears: that the story we shall then be able to tell will have a meaning that is intolerable to us—or no meaning at all.

To discover shape and coherence and significance in a work of art—or law—presents us with an acute form of this problem, for it simultaneously stimulates the desire for meaning of the kind I mean and reminds us that our

experience, our story—like that of Agamemnon—is necessarily incomplete. In this way it is the function of art, and law too, to challenge life at its imaginative center.

To test out the depth and pervasiveness of the human desire to discover a way to claim meaning for one's experience, imagine for the moment that we could not claim meaning for our experience; that all our speech was reducible—as, indeed, certain strains of thought in our own world would reduce it—to something called information. Under these conditions, instead of what we call meaningful speech, we would send signals that communicated particular desires or aversions, expressed a willingness or a refusal to engage in a course of conduct, and so on. We could make offers, pay bills, get the car fixed, go to the hairdresser, buy a suit, order a dinner, arrange for sexual gratification, watch or play baseball, but we could not say what any of these things means to us. We could not justify our decisions, or explain our preferences, we could only act on them; we could not engage in the kind of conversation by which we discover who we are, what we desire, or should desire, what kind of life we live and want to live. Life could go on as a series of exchanges, and expression as a set of signals that make the exchanges possible. But such an existence would in the most important sense not be human, for it would omit the most deeply human form of speech, which is the effort to define our experience and claim a meaning for it. Description, explanation, justification: these are for us essential activities of mind and language.

As we have seen, the form we call the opinion of the Supreme Court—like the drama—is a cultural institution that works to teach the public: in part by bringing into the zone of collective attention that which is distant or remote, unseen and particular; in part by the way it works through dramatic opposition, with character poised against character, voice against voice; in part by the way it seeks to give meaning to the events thus examined,

locating them in a larger context and a larger story, running back in time and including, potentially, all the elements of its institutional memory. It does this in a language fashioned for the purpose, in which the Court—like Ajax or Oedipus—claims, or struggles to claim, that it can describe, explain, and justify its decision in an appropriate way, one that will make possible coherent speech and meaningful action in the future. And like the drama it has the potential, at least—in my view, realized in cases like *Cohen* and many others, though not all—to enhance our sense of the dignity of human life and experience, in resistance to those forces, in this and every age, that would trivialize these things.

In the judicial opinion and the drama alike, we are thus exposed to imaginations that, at their best, confront the deep uncertainties of the world, of language and the mind, but nonetheless create orders, in language, that run against those uncertainties. But in each—the speech of Ajax, the play that bears his name, the opinion in *Cohen*—the order is tentative, temporary, soon to be replaced by others, or redefined as the context that gives it meaning changes. In this way, both forms call upon us, as readers, to engage in our own versions of this fundamental activity of imagination and language: Become a maker of order yourself, they tell us, become one who claims meaning for our shared experience, or the possibility will be lost.

ENDNOTES

¹This paper was originally delivered as a lecture to the Supreme Court Historical Society, 13 December 2000.

²For a brief account, see the articles on *choregia* and Greek tragedy in *The Oxford Classical Dictionary*, 3rd ed., S. Hornblower and A. Spawforth, 1538–1542 (1996).

³The way this works practically is that the audience is first asked to imagine that the space before it, the theater, is of a different time and place, in this case Mycenae; then, by speech and song, events in places and times re-

mote from that one are also brought before the mind of the audience.

⁴Of course, there were other forms that did something like this, especially the *Odyssey*, one of the foundational texts of this culture, which invited the audience to imagine both the world of Odysseus and then, through his speeches about his travels, a world beyond that. But the drama does this in a much more immediate way, inviting the audience to believe that what they are seeing and hearing in real time, on this spring morning, are the events of long ago or far away. The *Odyssey* told of remote events; the drama acts them out.

⁵For an account of the ways in which such characters can nonetheless be seen to serve the needs of a male-dominated culture, see Helene Foley, *Female Acts in Greek Tragedy* (2001). On the place of women in the theater, see *Literature in the Greek and Roman Worlds*, O. Taplin, ed., 127–132 (2000).

⁶That it is through the judicial opinion that the Court does these things is too obvious, I think, for argument. Imagine, for a moment, that it had been forbidden to write opinions, that its judgments had to stand on their own, undefined and uninterpreted. This would destroy the possibility of law as we know it. Of course, a case matters in part because of its outcome, especially to the parties; but to the rest of us this outcome matters largely because of what it is made to mean, in the first instance by the Court that decides it, then by later Courts and commentators. The case does not have a meaning automatically, that is, but is given meaning through the opinion that describes, explains, and justifies the outcome. As a teacher once said to a writing class, "The facts do not speak for themselves. You have to speak for them." So too it is with the results reached by the Supreme Court. It is the opinion that gives significance. For elaboration of this point, see "What's an Opinion For?" in my *From Expectation to Experience: Essays on Law and Legal Education*, chapter 4 (2000).

⁷403 U.S. 15 (1971). One of the peculiarities of a First Amendment opinion is that it is speech about speech, which means that the Court is always exemplifying its own version of the activity it is protecting (or not protecting). This in turn holds out the possibility of a tension, productive or unproductive, between the speech of the citizen in question and that of the Court. For the Court may talk about speech one way, yet imply—or seem to imply—a very different sense of it, of its possibilities and dangers, in its own performance. That will in fact be true here.

⁸*Id.* at 16.

⁹*Id.* at 15. Notice, too, as I said earlier, that the imagined world in which this story is placed reaches far in space and time alike. In space, it reaches out to Los Angeles and the county jail, to bring what happens there into the circle of public attention that the Supreme Court defines.

And it reaches back in time, too, as we shall soon see, when the Court tries to explain its decision, as it must, in the terms and understandings established by earlier decisions. Everything the Court has ever done is of potential relevance; that inheritance must be examined, thought about, and reorganized into a system of thought that will give appropriate and tolerable meaning to the events before it.

¹⁰392 U.S. 514 (1968).

¹¹I say "might have" because, in the event, the Court backed away from the possibilities opened up in *Powell*. Nonetheless, that case had real force in focusing thought on the problem of criminal responsibility, and doing so in a highly constructive way.

¹²See Aristotle, *Poetics*, IV:10–17.

¹³See Robert P. Burns, *A Theory of the Trial* (1999); Milner Ball, "The Play's the Thing: An Unscientific Reflection on Courts Under the Rubric of Theater," 28 *Stanford Law Review* 81 (1975).

¹⁴I have spoken as though Cohen's gesture were simply a crude vulgarity, and the question were whether or not to tolerate it. This is, in a sense, of course true, but there are also respects in which his utterance was in its own way highly mannered. In a footnote, Justice Harlan explains that Cohen went into a courtroom where a trial was proceeding and, before he did so, took off his jacket and folded it up so that the slogan was not visible. Whatever his feelings may have been, from an objective point of view this was an act of respect for the courtroom and the judicial process. A policeman present suggested that the court hold him in contempt, but the judge sensibly refused. 403 U.S. 15, 19 n. 3 (1971).

¹⁵*Id.* at 26.

¹⁶All quotations from *Ajax* are from the translation by John Moore, in *Sophocles*, v. II, David Grene, ed. (1957).

¹⁷This is, at least, what it looks like when the speech is given, but shortly afterwards Ajax retires to the sea coast not to bury his sword, but to fall upon it, as a suicide. Is the speech quoted above, then, all deception, meant perhaps to placate for the moment Teemessa and the chorus of sailors from Salamis, his countrymen? So some take it, but that would be odd in a person as utterly direct and forthright as Ajax is throughout. Yet how is one, then, to explain the suicide? One possibility, and in my view a strong one, is that the suicide is the continuing work of Athena. (Soon a messenger will report the words of Calchas, the seer, that if Ajax can be kept safe within his tent for this one day, Athena will harass him no more [lines 758–759].) On this view, the speech is sincerely meant when given; its intention is undone by the force of Athena's curse. But this would reduce Ajax's suicide by making it in a sense involuntary. And who could imagine him actually submitting to Menelaus and Agamemnon?

A third reading is suggested by Bernard Knox, namely that the first part of the speech, quoted above, is actually a soliloquy in which Ajax truly articulates his vision of the world; but this is not a vision that he accepts, quite the reverse of that. The language about reverencing the Atreidae, for example, shows how impossible acquiescence would be. The speech in this way confirms his resolve to leave this impossible life. See Bernard Knox, *Word and Action: Essays on the Ancient Theater* 134–141 (1979). For other views, see C. M. Bowra, *Sophoclean Tragedy* 39–46 (1944) and R. P. Winnington-Ingram, *Sophocles: An Interpretation*, 46–55 (1980).

These are all plausible interpretations, none of them without difficulty, presenting choices for the director and actor. For my present purposes it is not necessary to try to resolve the tensions among them, for they all involve the speaker summarizing a way of imagining the whole world and himself within it, whether this is done directly, or with an intention to deceive, or as a way of discovering how impossible for him the truth he is discovering actually is. But I will say, for what it is worth, that the idea that this speech is straight deception, though shared by many, seems to me simply wrong.

¹⁸For an elaboration, see Michelle Gellrich, *Tragedy and Theory: The Problem of Conflict since Aristotle* (1988).

¹⁹This is not a self-evidently obvious proposition, for one might easily think the Constitution could draw a line between speech say on a street corner, or in a newspaper, and speech that takes the forms of slogans emblazoned on a jacket and displayed in a courthouse. But that is actually part of Harlan's point, for in those cases the state would be punishing the *manner* of speech, not its content or substance, which, if defined as a communication that opposes participation in the Vietnam War or the military draft, is immune from suppression. The question, then, is whether this is an appropriate time, place, or manner regulation.

²⁰What is more, there is no notice in this statute that the courthouse is a special place, governed by special rules. "No fair reading of the phrase, 'offensive conduct,' can be said sufficiently to inform the ordinary person that distinctions between certain locations are thereby created." 403 U.S. at 19.

²¹He puts this point as a question of fact: "It cannot be plausibly maintained that this vulgar allusion to the Selective Service System would conjure up such psychic stimulation in anyone likely to be confronted with Cohen's crudely defaced jacket." *Id.* at 20.

²²The phrase on Cohen's jacket is not comparable to "the raucous emissions of sound trucks" outside one's residence, for "those in the Los Angeles courthouse could avoid further bombardment of their sensibilities by sim-

ply averting their eyes." *Id.* at 21. Harlan concludes that this is no basis for suppression, especially where there is no evidence that "persons powerless to avoid appellant's conduct did in fact object to it" (*id.* at 22) and where the legislature has not focused attention on the issues presented by the captive auditor, but "indiscriminately sweeps within its prohibitions all 'offensive conduct' that 'disturbs any neighborhood or person'" (*id.*). Here Harlan does find a way to give force to objections that might have been made to the statute on its face, but he does so not in an abstract way but in the context defined by the particulars of this case. The statute may thus be valid in other cases, but not as applied to this conduct in this case—at least not without a showing of a legislative judgment made on the issues presented here.

²³*Id.* at 22–23. He makes this point—in the first instance, at least—as a question of fact, and finds the government's case wanting. "We have been shown no evidence that

substantial numbers of citizens are standing ready to strike out physically at whoever may assault their sensibilities" by such "execrations." There may be some people "with such lawless and violent proclivities," but that does not constitute a sufficient basis for the regulation of speech. To hold that it did would amount to the "self-defeating proposition" that to avoid censorship by a "hypothetical coterie of the violent and lawless" the state may impose that censorship itself. 403 U.S. at 23.

²⁴*Id.*

²⁵*Id.* at 24.

²⁶274 U.S. 357, 372 (1927).

²⁷*Id.* at 24–25.

²⁸*Id.* at 25.

²⁹*Id.* at 26.

³⁰*Id.*

³¹For a fuller explication of this theme, see my recent book, *The Edge of Meaning* (2001).

The Judicial Bookshelf¹

D. GRIER STEPHENSON, JR.

Almost anyone who can read would describe the Supreme Court of the United States as a legal body—an institution that says what the law is in the context of deciding cases. May the Court also be fairly described as a political institution? Even to pose the question raises eyebrows, because Americans commonly use the word “political” to refer to partisan politics—that persistent struggle between organized groups called political parties to control public offices, public resources, and the nation’s destiny. In this sense of the word, the federal courts are expected today to be “above politics,” meaning that judges are supposed to refrain from publicly taking sides in elections, from otherwise jumping into the arena of electoral combat,² or from deciding cases based on the popularity of the litigants.³ While democratic theory anticipates that elected officials will answer to the people, the rule of law envisions something different: an abiding and even-handed application by the judiciary of the Constitution and statutes shaped by the people and their representatives.

In a different sense of the word, however, Americans should not be uncomfortable with a Supreme Court that is “political.” As it resolves conflicts between litigants who disagree over the correct meaning of a clause in the Constitution or a provision in an act of Congress, the Court unavoidably affects the allocation of power. In this way, the Court has been political practically from the beginning. The Court is both “temple and forum.”⁴ Indeed, in the debates over ratification of the

Constitution, some critics opposed the new government because of the political power the Court would possess. Assuming judicial review, Robert Yates claimed that Supreme Court judges would “enlarge the exercise of their powers,” to “effect . . . an entire subversion of the legislative, executive and judicial powers of the individual states,” and “to mould the government, into almost any shape they please.”⁵ *Chisholm v. Georgia*’s⁶ holding in 1793 that states could be made party defen-

dants in federal courts seemed to confirm Yates's suspicions, especially since it flew in the face of assurances to the contrary given during the ratification debates. Yet Chief Justice John Marshall's opinion in *Marbury v. Madison*⁷ at first glance appeared to be a self-effacing refutation of Yates's warnings, because the Court shunned a power over public officials that Congress had proffered in the Judiciary Act of 1789.⁸ However, the theoretical underpinnings of *Marbury* soon suggested otherwise, pointing to an influential role for the Court. Thomas Jefferson realized as much when the resignation of Justice Alfred Moore gave the third president his first opportunity to name someone to the Supreme Court. "The importance of filling this vacancy with a Republican and a man of sufficient talents to be useful, is obvious," advised Treasury secretary Albert Gallatin in early 1804.⁹

The Court's political dimension became too plain to overlook. "It is not my desire to excite prejudice against the Supreme Court," South Carolinian Robert Hayne declared on the Senate floor in 1830. "I object only to the assumption of *political power* by the Supreme Court. . . ." ¹⁰ This truth that so troubled Hayne defined the Court's champions and critics. "There are two parties in the United States, most decidedly opposed to each other, as to the rights, powers, and province of the Judiciary," *Niles' Weekly Register* had already explained. "One party claims almost infallibility for the judges, and would hedge them round about in such a manner that they cannot be reached by popular opinion at all, and . . . the other would subject them to the vacillations of popular prejudice and seemingly require it of them to define and administer the law, and interpret the constitution, according to the real or apparent expediency of things."¹¹

The nature of the Court's political role in the intervening years has manifested itself in at least four respects. First, its decisions shape public policy by deciding what government—national, state, or local—may or may not do.



In 1830, Senator Robert Y. Hayne of South Carolina declared: "It is not my desire to excite prejudice against the Supreme Court. I object only to the assumption of political power by the Supreme Court." The nature of the Court's political role has been the subject of debate in many recent books.

Those rulings in turn may stimulate corrective or complementary actions by both Congress and other parts of the political system. Second, decisions clarify the boundaries of political authority, focusing less on *what* may be done than on *who* may do it or *how* it may be done. The Steel Seizure Case¹² of 1952, after all, turned not on whether government could cope with labor disruptions but on whether President Harry Truman had exceeded his authority and intruded into Congress's law-making domain. In addition, the Legislative Veto Case¹³ of 1983 did not question government's authority to deport a particular individual, but challenged the method by which Congress decreed deportation. Third, as has happened at least twelve times since 1800, the Court itself may become an issue in presidential elections because of unpopular rulings. Campaigns in the last quarter century would have surely been altogether different without the Supreme Court's 1973 abortion decision,¹⁴ for instance. Finally, the Justices may directly touch the electoral process itself, as seen not

only in the extraordinary circumstances of *Bush v. Gore*¹⁵ but routinely in cases on voting rights, legislative districting, and campaign contributions. Because they partly dictate the ground rules of politics, rulings that police the electoral process affect the contest for power in the most fundamental sense. Recent literature illustrates some of the richly textured contours of the Court's political dimensions.

It may be difficult to think about the Supreme Court in a political context without thinking about the New Deal. The New Deal not only transformed public policy, the executive and legislative branches, and public expectations about the role of government at all levels, but also redefined the political party system for at least a quarter century. And it changed the Supreme Court. The Court initially resisted much of President Franklin Roosevelt's reform legislation and incurred the President's wrath. After the election of 1936—which yielded, as one newspaper said, “a roar in which cheers for the Supreme Court were drowned out”¹⁶—the Bench became the target of the most audacious attack any president had ever launched against the judiciary. Though it failed of enactment, the Court-packing plan was like a political tsunami, upending the Court and constitutional law. Within a short period of time, the Court not only accepted what had hitherto been unacceptable and thereby discarded a half-century or more of jurisprudence, but shortly reoriented itself toward a new-found solicitude for nonproprietary civil liberties and civil rights. According to the University of Virginia's G. Edward White in *The Constitution and the New Deal*,¹⁷ this standard account of the effects of the “switch in time that saved nine”¹⁸ is more “tale”¹⁹ than truth.

Claiming charmingly and disarmingly at the outset only to “complicate”²⁰ the conviction that the New Deal was the central event in twentieth-century American constitutional development—a sort of judicial “High Noon”²¹—White actually aims higher. He

takes issue with virtually every prominent Supreme Court scholar of the past 65 years, including himself.²² “[T]he transformative status accorded to constitutional developments that took place in the New Deal period—the monolithic description of a ‘constitutional revolution’ centering around the Court-packing crisis—needs to be abandoned.”²³ The effect of making the New Deal “the epicenter of early twentieth-century constitutional change [has] result[ed] in the telescoping and distorting of developments in some doctrinal areas and the ignoring of developments in others. . . . The New Deal needs to be cabined in its own time.”²⁴ A second and related objective is a demonstration that the “durability” of this conviction “has been a function of the shared starting premises of its narrators rather than the historical accuracy of its conclusions.”²⁵

His conclusion with respect to the second objective is that the New Deal assumed “the status of a defining moment” because it “coincided with the period when a behavioralist theory of law, judging, and constitutional interpretation first became orthodoxy in American jurisprudence.”²⁶ According to behavioralist theory, judges, like presidents and legislators, are political actors who make decisions based on ends they want to achieve. The ideal of rule of law is thus more fiction than fact, in that the Constitution and statutes have little meaning apart from the interpretation grafted onto them by judges. The New Deal seemingly validated this theory because it witnessed “a defiant claim by a popular president that the Supreme Court was nothing but a group of nine old men” and a changed construction of the Constitution that “legitimated the welfare state.”²⁷ This view of history has had magnetic and continuing attraction because of a normative element, too: history is employed “as a weapon for progressive change.”²⁸ The theory refuses to take seriously the older and alternative perception of the Constitution as embodying fixed principles and of judges as guardians of those prin-



In G. Edward White's new book, *The Constitution and the New Deal*, the author seeks to diminish the notion that the New Deal period and the "monolithic description of a 'constitutional revolution' centering around the Court-packing crisis" were the epicenter of early twentieth-century constitutional change.

ciples. It is also responsible for the New Deal-inspired practice of the "canonization and demonization of judges"²⁹

It is pursuit of the first objective that consumes most of the volume. White has no quarrel with viewing the New Deal as "America's first twentieth-century effort to respond definitively to some . . . long-standing crises in social relations, politics, economics, and intellectual inquiry that stretched from at least the 1880s through the 1930s."³⁰ Rather, his quarrel is with the standard account, which he believes exaggerates the impact of the New Deal on the Court and constitutional interpretation. He seeks to demonstrate that exaggeration by exploring developments on three fronts: executive discretion in foreign relations, the emergence of government by agencies and the creation of administrative law, and the emer-

gence of free speech as a value worthy of judicial protection and its link to *bifurcated*, as opposed to *guardian*, review.

The distinction between two kinds of judicial review figures prominently in the book. Guardian review refers to the older approach in which Justices applied "essentialist"—that is, agreed-upon and widely taught—constitutional values and engaged in "boundary pricking,"³¹ placing a statute on one side of the line of acceptability or the other. Differences among Justices in outcomes resulted not from disagreement over values but in the boundary-pricking process. Bifurcated review, as explained by behavioralist theory, results in judicial deference to legislators in most circumstances, with heightened scrutiny reserved for policies that restrict certain preferred civil liberties and civil rights.³²

Each of the three fronts is significant, because the conventional account that White seeks to discredit actually credits the New Deal and the Court-packing plan with the changes that occurred. Rather than bursting forth in the 1930s, however, constitutional development driven by a modernity-inspired consciousness³³ had been underway for some time. The traditional account thus inaccurately compresses the changes (the effects) that occurred into a much briefer period and attributes them to the New Deal (the cause). With respect to the first front, for example, "by the 1920s . . . the constitutional jurisprudence of foreign relations was no longer a reflection of the essentialist conceptions of constitutional powers and limitations that had governed nineteenth-century foreign and domestic cases." By then, "jurisprudential space" existed for Justice George "Sutherland's extraconstitutional theory of national foreign relations power . . . to become entrenched. The result was the transformation of twentieth-century constitutional foreign relations jurisprudence."³⁴

With respect to the third front, bifurcated review did not fully take on its familiar shape until after World War II. Moreover, White maintains, it was not the product of the New Deal and the Court-packing plan, but the outgrowth of earlier decisions on free speech where heightened scrutiny had taken hold—and a result, one should add, of the arrival after 1936 of new faces on the Bench for whom bifurcated review had particular appeal. First, bifurcated review coped with the counter-majoritarian difficulty (the awkwardness of unelected judges' invalidating laws enacted by the people's elected representatives) by deferring broadly to legislators on economic matters (a posture likely to coincide in any event with the disposition of Roosevelt-appointed Justices). Second, it reserved judicial power for defense of (politically progressive) values deemed essential to the maintenance of a democratic political system.

*United States v. Carolene Products Co.*³⁵

is widely portrayed in the literature as the introduction of bifurcated review. In this otherwise unimportant case, which upheld a congressional ban on interstate shipment of "filled milk,"³⁶ Justice Harlan Fiske Stone wrote, "[R]egulatory legislation affecting *ordinary commercial transactions* is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character *as to preclude the assumption* that it rests upon some *rational basis* within the knowledge and experience of the legislators."³⁷ To this statement was attached footnote number four, the three paragraphs of which contained three corresponding ideas: that heightened scrutiny, not the general presumption of constitutionality, would nonetheless apply (1) where a statute stood counter to a "specific prohibition of the Constitution, such as those of the first ten amendments . . ."; (2) where a statute restricted "those political processes which can ordinarily be expected to bring about repeal of undesirable legislation . . ."; and (3) where a statute was directed at "particular religious . . . or national . . . or racial minorities. . . ." ³⁸

Most of the cases Stone cited within the footnote, however, were free speech cases dating from the 1920s and 1930s that related to the first and second paragraphs of the footnote but that had nothing to do with the New Deal or the Court-packing plan (or, for that matter, with the third paragraph of the footnote, which called for special protection for "discrete and insular minorities"). Moreover, White argues, the statement of deferential review toward all commercial regulations was hardly a widely shared assumption in 1938 but "remained a controversial one."³⁹ This may partially explain why this part of Stone's opinion failed to command a majority of the full Court. Justices Cardozo and Reed did not participate in the case at all; Justice Black expressly declined to join the section of the opinion containing the statement on deferential review and footnote four; Justice Butler only concurred in the result; and Justice

McReynolds dissented. That left only three (Chief Justice Hughes and Justices Brandeis and Roberts) who joined the opinion in its entirety. Four votes comprise a majority of seven, but not of nine.⁴⁰ Only one of Stone's points—enhanced review where legislation “affected a textually grounded, incorporated provision of the Constitution—was a common part of the discourse of constitutional jurisprudence in 1938.”⁴¹ Thus, the timing of the *Carolene Products* pronouncement—coming as it did in the year after the Court-packing plan—is, for White, insignificant.

Nonetheless, there is some risk in White's sweeping and contrarian venture. First, in attempting to play up important developments before and after the New Deal, the author may err in the other direction by understating the impact of the Court-packing scheme on the Court. Justice Owen J. Roberts told a congressional committee in 1954 that he had been “fully conscious of the tremendous strain and threat to the existing court” that the president's proposal posed.⁴² Second, in his efforts to decompress events, White may go too far. There was an abrupt change in Commerce Clause jurisprudence and in application of the Due Process Clause to commercial regulations in 1937. Indeed, by 1937, the Court possessed two options for its future decisions in these matters: it could make the wholesale change that it did, or it could have moved piecemeal in that direction, lowering the bar of constitutionality without dropping it to the ground altogether. Third, it is easy to forget that the Court-packing plan was also costly to FDR because it was one of the factors energizing an emerging conservative coalition in Congress that had all but been wiped out, or at least been driven into hiding, in 1936. Progress of the New Deal, as measured by passage of reform bills, had ground to a halt well before the nation went to war in December 1941.⁴³

Yet the weight of scholarship White challenges dwarfs any risk of overstatement or understatement here. Whether or not one accepts

White's critique, it will not be ignored. He has made a major contribution to intellectual, as well as judicial, history. The book is a compelling reminder that perception of the past is partly a function of starting assumptions, that accounts of events, when repeated again and again, have a way of losing sight of data that may not fit those assumptions, and that, in constitutional history as in the natural sciences, orthodoxies may seem less certain but may also be understood more clearly when subjected to reexamination.

Reexamination is the theme of *Brown v. Board of Education* by Brown University's James T. Patterson.⁴⁴ The book is the first in a new series entitled “Pivotal Moments in American History,” edited by historians David Hackett Fischer and James M. McPherson. Patterson's work sets a commendable standard for the volumes to come and is an appropriate choice to lead the series: surely, if any Supreme Court decision qualifies as “pivotal,” it would be *Brown v. Board of Education*.⁴⁵ The decision in *Brown* and associated cases affected the school systems of seventeen states and the District of Columbia,⁴⁶ where racial segregation was required by law, and those of four states where segregation was permitted by local option. Viewed more broadly, *Brown* undermined the legal foundations of the social structure of a great part of the nation.

Nicely augmented by maps, tables, graphs and a six-page bibliographical essay and adequately documented by 24 pages of notes, the book's 236 pages of text accomplish four goals. First is an account of the *Brown* litigation itself and its aftermath, with emphasis on the Court's decision in 1954 (*Brown I*), the fashioning of a decree the following year (*Brown II*),⁴⁷ and the emergence of massive resistance in some southern states to implementation of *Brown*. Except for those thoroughly familiar with American politics in the late 1950s and early 1960s, the pervasive and virulent hostility to the Court in many quarters and the degree of resistance depicted



In his book *Brown v. Board of Education*, James T. Patterson asserts that even with some resegregation, public schools in the states of the old Confederacy remain the most racially integrated in the nation, with public schools in the northeast and parts of the Midwest being the most racially segregated. Pictured are Denver, Colorado students being bused to their newly integrated school in the 1970s.

in chapter five ("Southern Whites Fight Back") may take a contemporary audience by surprise. The sulphurous public statements by even respectable persons in positions of leadership make most of the current Court's most vociferous critics seem gentle by comparison. Significant compliance with *Brown* began only in the wake of the Civil Rights Act of 1964 and the Elementary and Secondary Education Act of 1965, as well as restatements of *Brown* itself in decisions such as *Griffin v. School Board of Prince Edward County*, *Green v. School Board of New Kent County*, and *Swann v. Charlotte-Mecklenburg Board of Education*.⁴⁸ Throughout, there is attention paid, not only to the major legal and political personalities involved, but also to the many "ordinary people" who were litigants at a time when a stand in favor of racial equality could be both unpopular and downright dangerous.

Second, the book carries the narrative down to the very recent past, detailing the meandering path of Supreme Court decisions and related cultural developments from the 1970s⁴⁹ through the 1990s, including the phenomenon of "resegregation"⁵⁰ and even the protest by about 1000 persons outside the Supreme Court Building in 1998 concerning the scarcity of Supreme Court clerks of color.⁵¹ Third, the book tackles some hard questions,

such as an assessment of court-ordered busing, designed to achieve racial balance, alongside the flight to the suburbs, not only by whites but some nonwhites as well. Patterson's data highlight ironic results: even with some resegregation, public schools in the states of the old Confederacy remain the most racially integrated in the nation, with public schools in the northeast and parts of the Midwest being the most racially segregated. Even more daunting is exploration of the relationship between racial integration and academic achievement. For this, Patterson draws heavily on various studies, although, at the end, one is left with the sense that much more remains to be learned by way of cause and effect. Probing such matters in turn raises the equally difficult question, part normative and part empirical, concerning the propriety and effectiveness of courts in fomenting social change in a democracy.

What is not reexamined is the strategic relationship between efforts in the 1940s and 1950s on behalf of voting rights and struggles to end legally imposed racial segregation in public schools. As late as John Kennedy's presidency, the nomination of *Brown* counsel Thurgood Marshall to the Court of Appeals for the Second Circuit was contentious largely because African-Americans still lacked the vote,



Although *Smith v. Allwright* (1944) invalidated the all-white primary a decade before *Brown v. Board of Education* was handed down, racial discrimination persisted at the ballot box. However, as Patterson points out, the Legal Defense Fund redirected its efforts for civil rights toward school desegregation almost exclusively. Here, an African American votes in a primary election in Dunklin County, Missouri in 1942.

and hence political power, in many states despite Marshall-orchestrated courtroom victories in cases such as *Smith v. Allwright*.⁵² Although it had invalidated the "white primary"⁵³ a decade before *Brown* came down, *Allwright* and similar decisions did not come close to ending racial discrimination at the ballot box, as the need for voting rights legislation in the mid-1960s (two decades after *Allwright*) made clear. However, by the late 1940s, Marshall and the Legal Defense Fund had redirected the focus of the drive for civil rights to segregated schools almost exclusively. This decision represented a departure from the earlier policy that divided resources between securing the vote and combating the multifarious forms of segregation. This switch in strategy would seem to call for a reappraisal. The extent of opposition

that developed in the wake of *Brown* was probably wholly unanticipated. Nevertheless, had widespread racially unrestricted access to the polls been attained prior to *Brown*, implementation of *Brown* would probably have encountered less resistance. There would surely have been fewer elected officials digging in their heels and engaging in a thorough pillorying of *Brown* and the Supreme Court. There might have been no "Southern Manifesto" issued by 77 of the 105 Southern members of the House and 19 of 22 senators from the Southern states that promised to use "all lawful means to bring about a reversal of this [Brown] decision which is contrary to the Constitution. . . ."⁵⁴ The question is worth considering, and there seems to be a no more appropriate place for that consideration than a book reassessing the place of *Brown* in American life.

Finally, the author offers a reconsideration of just how pivotal *Brown* has been in the past 47 years. At one extreme is the accolade by J. Harvie Wilkinson III that *Brown* was essential to the civil rights revolution and its achievements: "Very little could have been accomplished in mid-century America without the Supreme Court. . . . *Brown* may be the most important political, social, and legal event in America's twentieth-century history."⁵⁵ At the other is the nearly tragic despondency reflected by the 1993 statement of Kenneth Clark (whose research in psychology loomed large in the *Brown* litigation) that *Brown* and related cases accomplished little: "I am forced to face the likely possibility that the United States will never rid itself of racism and reach true integration. I look back and shudder at how naive we all were in our belief in the steady progress racial minorities would make through programs of litigation and education . . . I am forced to recognize that my life has, in fact, been a series of glorious defeats."⁵⁶

As one might anticipate, Patterson's evaluation of the record falls between those of Wilkinson and Clark, although he is closer to the former than the latter. Changes in race relations since 1954, he says, "have been large."⁵⁷ As to *Brown's* own role in what happened, "[t]he answer to this question remains impossible to pin down. On the one hand, we can agree that the decision did not quickly transform race relations in public education." Also needing qualification are claims that *Brown* ignited the "militant civil rights movement of the 1960s." Because of other forces at work, that "seems in retrospect to have been highly likely by the 1960s," even without *Brown*. That said, *Brown* has had far more than a bit part in the story of race relations in the United States after World War II. It "took aim at the heart of constitutionally sanctioned Jim Crow—segregated public education." Patterson agrees with *Simple Justice* author Richard Kluger that *Brown* "enabled a 'reconsecration of American ideals'—ideals

of justice and equality that outshone contemporary goals [of] anticommunism and material prosperity." Patterson also credits *Brown* with helping to transform the Court itself into a more activist body in pursuit of politically liberal objectives. This in turn stimulated a "larger rights-consciousness" that continues to influence "American law and life."⁵⁸ He finds most satisfying the observation by Legal Defense Fund litigator Jack Greenberg: "Altogether, school desegregation has been a story of conspicuous achievements, flawed by marked failures, the causes of which lie beyond the capacity of lawyers to correct. Lawyers can do right, they can do good, but they have their limits. The rest of the job is up to society."⁵⁹

Measured by Patterson's assessment, few Supreme Court decisions are in the same league with *Brown*. Others, however, may be highly consequential and may roil the political process, even if they fall short of being described as pivotal or epochal. One such second-tier case is *Employment Division v. Smith*,⁶⁰ the subject of **Religious Freedom and Indian Rights** by Washington State University's Carolyn N. Long.⁶¹ Her book is the thirteenth volume to appear in the "Landmark Law Cases & American Society" series, edited by Peter Charles Hoffer and N. E. H. Hull.

Not only does the *Smith* decision stand as a landmark ruling on religious liberty, but it has also provoked a continuing tug-of-war between Congress and the Supreme Court over "the free exercise [of religion]" that the First Amendment protects. The decision has renewed debate over the degree to which constitutional interpretation is a shared enterprise, not a judicial monopoly. More narrowly considered, Long believes the case speaks also to the majority's treatment of the Native American population. "The Indian plays much the same role in our American society that the Jews played in Germany," she approvingly quotes Felix Cohen. "Like the miner's canary, the Indian marks the shift from fresh air to

poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities marks the rise and fall of our democratic faith."⁶²

This well-researched and carefully narrated study reconstructs events that ensued when Galen Black and Alfred Smith were fired in 1983 and 1984, respectively, from their jobs as counselors at the Douglas County (Oregon) Council on Alcohol and Drug Abuse Prevention and Treatment facility because they had ingested peyote in a sacrament of the Native American Church. Oregon law classified peyote as an illegal drug and provided no exception for religious use. When the state employment division denied their applications for unemployment compensation because they had been appropriately discharged for misconduct, Black and Smith eventually filed suit in state court claiming a violation of the Free Exercise Clause, insisting that their use of peyote was essential to the practice of their religion. Their case illustrates the observation that free exercise claimants

are ordinarily, if not always, adherents of more marginal religious groups. Mainstream faiths, with ample communicants and resources, typically fare better in the arena of majoritarian politics, as the third paragraph of Justice Stone's *Carolene Products* footnote four recognized. With particular attention to, and sympathy for, the plight and interests of the respondents, Long ably recounts the strategies, factors, and risks in play as the case moved toward the Supreme Court of the United States.

Black and Smith presented the constitutional problem of religiously based exemptions from religiously neutral laws of general application. In 1878, the Supreme Court had ruled that in such situations law trumped faith,⁶³ but in 1963 the Court held that faith could override law, unless government had a compelling interest in denying the faith-based exception.⁶⁴ When the Oregon Supreme Court ruled in favor of the claim advanced by Black and Smith in 1988, the state successfully petitioned the Supreme Court of the United States



In her new book *Religious Freedom and Indian Rights*, Carolyn N. Long examines *Employment Division v. Smith* (1990), the landmark ruling that denied religious liberty claims arising from the ritualistic use of peyote. Pictured is a Crow Indian shaking a traditional peyote rattle during a prayer ceremony.

for review.⁶⁵ In 1990, the High Court ruled against Black and Smith, construing the Free Exercise Clause as embodying only a nondiscrimination principle, limiting its protections to laws that targeted religious practice.⁶⁶

Within seven weeks, the Religious Freedom Restoration Act (RFRA), designed to reinstate the 1963 interpretation of the Free Exercise Clause, was introduced in the U.S. House of Representatives. Backed by an unusually eclectic coalition of both liberal and conservative interest groups,⁶⁷ it became law in November 1993. Congress reasoned that its enforcement powers under section five of the Fourteenth Amendment gave it the authority to define the "liberty" that the amendment protected from interference by the states. Congress's understanding of that liberty, however, contrasted sharply with the Court's, and a test of RFRA's constitutionality was soon underway.

A Texas church challenged application of a land use and historic preservation ordinance that prevented renovation and enlargement of a sanctuary to accommodate a growing parish. Under RFRA, the city would need compelling justification to block construction; otherwise the project could proceed, and all the while the ordinance could still validly apply to non-religious establishments such as a Blockbuster Video or a Wal-Mart. In 1997, the Supreme Court held in *City of Boerne v. Flores*⁶⁸ that Congress had exceeded its authority in subjecting states to RFRA because the statute changed the meaning of the Free Exercise Clause as set forth by the Court in *Smith*.

That decision, however, was not the end of the story of the checkered career of religiously based exemptions. Political responses to *City of Boerne* took two forms. First, according to Long, Congress considered various devices, such as reliance on the Commerce Clause, in a proposed Religious Liberty Protection Act. It passed the House of Representatives in July 1999 only to die in the Senate. The second response moved mainly at the state level to enact religious freedom acts⁶⁹ to

provide faith-based exemptions "to ensure broadest support for religious exercise." Short of promoting religion, these would seem to be constitutionally acceptable. The question in *Smith*, after all, had been whether such provisions were constitutionally *required*. Such measures succeeded in four states in 1998, and as the book went to press at the end of 1999 were pending in as many as nine others.⁷⁰ Then, at about the same time as Long's book went to press (this reviewer can report), Congress attempted again to provide national protection for religious practice by passing the Religion Land Use and Institutionalized Persons Act. More modest in scope than RFRA, it became law on September 22, 2000.⁷¹ As **Religious Freedom and Indian Rights** demonstrates, the Supreme Court may decide cases, but debate on the Constitution's meaning continues.

Individual Justices, not only judicial decisions, may also ignite political controversy. And controversy is part of the legacy of Justice William O. Douglas, whose career on the Bench of more than thirty-six years and six months has awarded him the Court's longevity title.⁷² Controversy around Douglas stemmed not merely from his votes and opinions that announced unpopular positions on behalf of unpopular litigants; other Justices have acted similarly without generating such lasting excitement. And it stemmed not only from his presidential ambitions.⁷³ Rather, controversy swirled around Douglas because "through the fifties, sixties and into the seventies, . . . Douglas . . . would speak out on every public issue that he considered vital to the national interest."⁷⁴ During most of the Vietnam War, Douglas was the one member of the Court prepared to accept claims that the war was an illegal undertaking because it had never been declared by Congress pursuant to Article One of the Constitution.

Moreover, controversy surrounding Douglas was compounded by his unconventional lifestyle and succession of wives. He became the only twentieth-century Justice to

be the subject of an investigation by the House of Representatives, preliminarily to possible impeachment proceedings.⁷⁵ Douglas was also a world traveler, the author of thirty books on legal and nonlegal topics, and an avid outdoorsman⁷⁶ and conservationist; he was an environmentalist long before it became fashionable to be "green."⁷⁷ The national historic park that preserves the C&O Canal along the Potomac River north of Washington, DC, is lasting testimony to his leadership and persistence.⁷⁸

For anyone first attracted to the study of the Supreme Court during the years of the Warren and very early Burger Courts, it may be difficult to think of Douglas as a figure from history. He was a fixture on the Bench for so long. Because many issues that Douglas engaged still absorb the Court, he seems nearly contemporary. But he can and should now be deemed a figure from history. He left the Bench more than a quarter century ago, and more than 100 volumes of the *United States Reports* have appeared since he last sat.⁷⁹ Roughly the same interval lies between the first year of Woodrow Wilson's presidency and FDR's appointment of Douglas to the Bench as between Douglas's retirement and the first year of George W. Bush's presidency. Most of the seniors graduating from college in 2001 were born a year before Douglas's death in 1980. One wonders if Douglas has receded in scholarly interest as well. More than two decades have elapsed since the most recent full-length biography of Douglas was published,⁸⁰ and a decade has passed since the last substantial book-length analysis of Douglas appeared.⁸¹

It is therefore both refreshing and gratifying to see publication of the imaginatively and beautifully titled *Nature's Justice*, edited by the University of Oregon's James O'Fallon.⁸² Rather than a collection of essays about Douglas, the book contains a selection of Douglas's own writings spanning nearly thirty years. *Nature's Justice* should thus serve as a reintroduction of this important

mid-twentieth century individual to the twenty-first century. "The writings collected here," O'Fallon explains, "exhibit the range and power of this most extraordinary man. Lawyer, administrator, judge, civil libertarian, conservationist, student of international affairs, but perhaps most persistently, son of the mountains, prairies, and streams of the Pacific Northwest. From the top of those mountains, one can see a very long way. Douglas saw farther, and deeper, than most."⁸³

O'Fallon's biographical essay of Douglas precedes the five parts in which he has divided the book: "At Home in the Mountains," "New Deal Judge," "Civil Libertarian," "Internationalist," and "Conservationist." Only five of the volume's twenty-two selections are judicial opinions: Douglas's opinions for the Court in *Terminiello v. Chicago* and *Griswold v. Connecticut* and his dissenting opinions in *Beauharnais v. Illinois* and *Dennis v. United States*⁸⁴ appear in the third part; his dissenting opinion from *Sierra Club v. Morton*⁸⁵ concludes the last part. All together, there are five excerpts from *Of Men and Mountains* (1950), which remains Douglas's first and doubtless his most successful attempt at autobiography. There are three from both *Go East, Young Man* (1974) and *The Court Years* (1980), and two from *My Wilderness* (1960). Key to understanding Douglas's views on the constitutional right to privacy is an excerpt ("The Right to Be Let Alone") from *The Right of the People* (1958),⁸⁶ which contains a synopsis of what he wrote seven years later in *Griswold*, including use of the word "penumbra."⁸⁷ The only notable omission is any selection from *We the Judges* (1956), which still stands as solid reflection by a sitting Justice on the judicial function itself.

The tenures of Douglas and William H. Rehnquist overlapped barely four years. Although considerable ideological distance separated them,⁸⁸ they were friends. The latter is apparent in a new edition of the Chief Justice's book, *The Supreme Court*,⁸⁹ first published in 1987. As with the original edition,



University of Oregon professor James O'Fallon has edited a collection of writings by William O. Douglas (above) titled *Nature's Justice*. O'Fallon describes Douglas as a "... son of the mountains, prairies, and streams of the Pacific Northwest. From the top of those mountains, one can see a very long way. Douglas saw farther, and deeper, than most."

The Supreme Court is part a history of the High Court (through the end of the Warren years), part a treasure of anecdotes, and part an explanation of how the tribunal functions. And, to a degree, it is also a personal memoir.

The first chapter tells of Rehnquist's arrival in Washington in early 1952 to become a law clerk to Justice Robert H. Jackson. Two chapters describe, from a law clerk's perspective, the famous Steel Seizure Case, with its repri-

mand to President Truman.⁹⁰ Rehnquist concludes that public opinion "played an appreciable part in causing the . . . Case to be decided the way it was," noting generally that Justices "are not able to . . . isolate themselves from public opinion" and that "it would probably be unwise to try."⁹¹ It is apparent throughout that Rehnquist loves history, that he can spot humor in history as well as truth in humor, and that he knows how to tell a good story.

Douglas, for example, "was very much of a maverick throughout his life," Rehnquist recalls. "[A]t the Court conferences we sometimes had the impression that he was disappointed to have other people agree with his views in a particular case, because he would therefore be unable to write a stinging dissent." He possessed "a brilliant legal mind, but by the time I came to know him as a colleague I think he was somewhat bored with the routine functions of the Court." While the other Justices made an effort to complete work before the first of July, "Douglas went us one better; he was a very rapid worker and would invariably have his duties all done sometime in early June. Then, without notification to anyone, he would simply leave Washington for . . . Goose Prairie, Washington. . . . There was no phone at the Goose Prairie home, and if Bill wanted to check in with the Court he would go to a pay phone nearby . . . ; but there was no way for any of us to communicate directly with him. I remember his once telling Lewis Powell that had he only seen the latter's dissent in a case that was handed down in the later part of June he would have joined the dissent rather than the majority opinion."⁹² Yet Douglas's maverick style was costly. His "influence waned rather than waxed in the course of those years. . . . [T]he attention that he had once devoted to the Court's work spread out to include other interests. He had the intellectual ability to allow him to do the Court's work on a part-time basis, but his reputation suffered."⁹³

Rehnquist is frank about the Court's po-

litical dimension, as one would expect from someone who endured two stormy confirmation battles, in 1971 and 1986, in the Senate. Of Roosevelt's Court-packing plan, "[s]upporters . . . were fond of saying that they had lost the battle but they ultimately won the war. . . . It is perhaps more accurate to say that had [FDR] only exercised a little more patience, he could have shaped the character of the Supreme Court in the way that most strong presidents have tried to shape it, without attempting to restructure the institution itself."⁹⁴ Indeed, Rehnquist believes that the 1937 experience may have given the word "pack" its "highly pejorative connotation" in connection with the Supreme Court. "It need not have such a connotation when used in this context. . . . Thus, a president who sets out to pack the Court does nothing more than seek to appoint people . . . who are sympathetic to his political or philosophical principles. There is no reason in the world why a president should not do this."⁹⁵

These and other points would be interesting in any author's book, but they are particularly noteworthy in this one. They may provide clues into Rehnquist's thinking about the judicial function. This is a rare opportunity. No other person has written books specifically about the Court and its Justices while holding the nation's highest judicial office—and this is Rehnquist's fourth.⁹⁶ John Marshall's biography of George Washington explained Federalist principles of government.⁹⁷ William Howard Taft authored a book about the president and published a volume of essays on government before President Harding named him to the Court.⁹⁸ As Chief Justice, Taft expounded in at least one book on the nature of American constitutional government.⁹⁹ The lectures of Charles Evans Hughes on the Court¹⁰⁰ remain a classic over seven decades after publication, yet the book appeared twelve years after his resignation as Associate Justice and two years before his appointment as Chief. Chief Justice Stone left an abundance of papers to scholars, but no book.

Chief Justice Warren's short volume on democratic government appeared after his retirement, as did his memoirs.¹⁰¹ Chief Justice Burger made a large number of addresses (many of them published as articles), but authored no book on the Court in general. Thus, as with the first edition of Rehnquist's book in 1987 (*The Supreme Court: How It Was, How It Is*), *Grand Inquests* (1992), and *All the Laws but One* (1998), this new and enlarged edition of the first-named is of instant interest because of its author.

Rehnquist's book and the others considered in this essay point to the special place, blending both law and politics, that the Supreme Court has long had in the American political system. The Court is truly both temple and forum. A century prior to Justice Douglas's retirement, President Ulysses Grant cast about for a new Chief Justice. "The Supreme Court of the United States is a unique institution," commented the *Times* of London as it watched the process unfold. "No other country possesses a tribunal endowed with such transcendent authority."¹⁰² That observation remains true and assures continued attention to the Third Branch.

THE BOOKS SURVEYED IN THIS ARTICLE ARE LISTED ALPHABETICALLY BY AUTHOR BELOW

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ENDNOTES

¹The author thanks James F. Van Orden, who read a draft of this essay and made helpful comments.

²By contrast, in states with elected judiciaries, judges are frequently thrust into partisan combat by necessity.

³However, nineteenth-century American history offers some examples of the first two tactics. Even in the twentieth century, Justice Charles Evans Hughes left the Bench to run for president in 1916, and, as noted in more detail below, Justice William O. Douglas had presidential aspirations in the 1940s and early 1950s.

⁴Alpheus Thomas Mason, "The Supreme Court: Temple and Forum," 48 *Yale Review* 524 (1959).

⁵Yates, a New York judge, was one of that state's three delegates to the convention. Unhappy with the direction of the proceedings, he and fellow delegate (and Albany mayor) John Lansing left the convention on July 10, 1787. During the debates over ratification, Yates published his criticisms of the proposed Constitution in a series of letters in the *New York Journal and Weekly Register*. Three dealing with the judicial power appeared in January, February, and March of 1788; they were reprinted as an appendix to Edward S. Corwin, *Court Over Constitution* 231-262 (1938). The phrases quoted here come from pages 238 and 243. Yates's essays prompted Alexander Hamilton (the only New York delegate to sign the Constitution) to respond in *The Federalist*, especially in no. 78.

⁶2 U.S. (2 Dallas) 419 (1793).

⁷5 U.S. (1 Cranch) 137 (1803).

⁸Letter from James F. Van Orden to the author, October 3, 2000.

⁹Quoted in Charles Warren, *The Supreme Court in United States History*, vol. 1, 287 (rev. ed. 1926).

¹⁰Quoted in *id.*, vol. 1, 723 (emphasis added).

¹¹*Niles' Weekly Register*, June 22, 1822, 266; quoted in

Donald Grier Stephenson, Jr., *Campaigns and the Court: The U.S. Supreme Court in Presidential Elections* 68 (1999).

¹²*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

¹³*Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983).

¹⁴*Roe v. Wade*, 410 U.S. 113 (1973).

¹⁵531 U.S. 98 (2000).

¹⁶Quoted in Alpheus Thomas Mason and Donald Grier Stephenson, Jr., *American Constitutional Law: Introductory Essays and Selected Cases* 241 (12th ed., 1999).

¹⁷G. Edward White, *The Constitution and the New Deal* (2000) (hereafter cited as White).

¹⁸White's sleuthing leads him to the conclusion that Princeton's Edward S. Corwin was the source of that often-quoted phrase. It appears in a letter Corwin wrote to U.S. Attorney General Homer S. Cummings on May 19, 1937, soon after the "switch." White, 319, n. 4.

¹⁹*Id.*, 19. White refers to the standard account throughout as the "Court-packing tale."

²⁰*Id.*, 1.

²¹For Court aficionados who may never have seen this one, the reference is to Fred Zinnemann's classic western film of 1952, for which Gary Cooper received an Oscar. Cooper plays Will Kane, a just-married small-town sheriff who is about to retire and start a new life with his bride (Grace Kelly). The future is placed in doubt, however, when Kane learns that Frank Miller and other gunslingers are to arrive on the train at high noon to settle an old score. When deputies and townspeople desert him, Kane stands alone in the showdown with Miller and his henchmen.

²²White, 315–316, n. 4. In particular, White refers to his *The American Judicial Tradition* 177–178 (1st ed., 1976).

²³White, 310.

²⁴*Id.*, 9, 312.

²⁵*Id.*, 1.

²⁶*Id.*, 308–309.

²⁷*Id.*, 309.

²⁸*Id.*, 25.

²⁹*Id.*, 269. The phrase is the title of chapter nine. White does not speak to the relevance that "the new institutionalism" might offer for understanding judicial decisionmaking during this period. It is a third approach that emphasizes the influence of institutional factors, apart from personal preferences and legal principles, on legal development. See Lee Epstein and Jack Knight, *The Choices Justices Make* (1998); Cornell W. Clayton and Howard Gillman, eds., *Supreme Court Decision-Making: New Institutional Approaches* (1999).

³⁰White, 6.

³¹*Id.*, 36.

³²*Id.*, 129.

³³The "emergence of modernity in the twentieth century" manifested itself in an "attitude that elevates human agency, as distinguished from potent external forces, to a position of causal primacy in the universe, and thus takes for granted that humans are capable of controlling their environment and shaping their collective destinies." *Id.*, 5.

³⁴*Id.*, 61. Sutherland's views, which he had been advocating for over two decades, found primary expression in his opinion for the Court in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

³⁵304 U.S. 144 (1938).

³⁶"Filled milk" was ordinary milk from which the butterfat had been removed, with palm oil or a similar fat substituted in its place.

³⁷304 U.S. at 152 (emphasis added).

³⁸*Id.*, at 152–153, n. 4.

³⁹White, 162.

⁴⁰*Id.*, 351, n. 107.

⁴¹*Id.*, 163.

⁴²Quoted in Mason and Stephenson, *American Constitutional Law* 52.

⁴³James T. Patterson, *Congressional Conservatism and the New Deal* 165, 325–337 (1967).

⁴⁴James T. Patterson, *Brown v. Board of Education* (2001) (hereafter cited as Patterson).

⁴⁵347 U.S. 483 (1954).

⁴⁶*Bolling v. Sharpe*, 347 U.S. 497 (1954).

⁴⁷349 U.S. 294 (1955).

⁴⁸377 U.S. 218 (1964); 391 U.S. 430 (1968); 402 U.S. 1 (1971).

⁴⁹Contrary to the statement in Patterson, 206, it was Justice Lewis Powell, not Justice Harry Blackmun, who "espoused" the argument "for racial diversity in higher education" as a justification for affirmative action in *Regents v. Bakke*, 438 U.S. 265 (1978). Compare Powell's opinion, 438 U.S. at 311–324, with Blackmun's, 438 U.S. at 402–408.

⁵⁰See, for example, *Board of Education of Oklahoma City v. Dowell*, 498 U.S. 237 (1991), and *Freeman v. Pitts*, 503 U.S. 467 (1992).

⁵¹Patterson, 211.

⁵²321 U.S. 649 (1944).

⁵³By barring blacks from voting in Democratic primaries in states where the Republican party was practically nonexistent, this device effectively disfranchised blacks in local, state, and congressional elections.

⁵⁴"Declaration of Constitutional Principles issued by 19 Senators and 77 Representatives of the Congress," *New York Times*, March 12, 1956, p. 19.

⁵⁵J. Harvie Wilkinson III, *From Brown to Bakke: The*

Supreme Court and School Integration 1954–1978 3, 6 (1979). Since 1984, Wilkinson has been a judge on the United States Court of Appeals for the Fourth Circuit. He became chief judge in 1996.

⁵⁶Quoted in Patterson, xxix.

⁵⁷*Id.*, 220.

⁵⁸*Id.*, 221–222. Richard Kluger's **Simple Justice** was published in 1976. See D. G. Stephenson, Book Review, 13 *Houston Law Review* 1081 (1976).

⁵⁹Patterson, 223, quoting Jack Greenberg, **Crusaders in the Courts** 401. Greenberg's book was reviewed in "The Judicial Bookshelf" in the *Journal of Supreme Court History* (1994), 158–160.

⁶⁰494 U.S. 872 (1990). As explained in endnote 65 below, the case is sometimes referred to as *Smith II*.

⁶¹Carolyn N. Long, **Religious Freedom and Indian Rights** (2000) (hereafter cited as Long).

⁶²*Id.*, 3.

⁶³*Reynolds v. United States*, 98 U.S. 145 (1879).

⁶⁴*Sherbert v. Verner*, 374 U.S. 398 (1963).

⁶⁵*Employment Division v. Smith* (Smith I), 494 U.S. 872 (1990). This was actually the case's second trip to the High Court. In *Employment Division v. Smith* (Smith I), 485 U.S. 660 (1988), the Court sidestepped a ruling on the merits by remanding the case to the Oregon Supreme Court for a ruling on the legality of peyote within the state.

⁶⁶The vote was 6 to 3 in favor of the state, although the Court split 5 to 4 on the question of the meaning of the Free Exercise Clause. Justice O'Connor concurred in the result, holding that the denial of unemployment benefits could be sustained under principle announced in *Sherbert v. Verner*. However, the Court remained thoroughly prepared to protect religious practice against laws targeting religion, even after *Smith*. This became clear when *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), struck down an ordinance outlawing the killing of animals as part of a religious ritual. The ordinance prohibited almost nothing *except* religious practice and so amounted, in Justice Kennedy's words, to a "religious gerrymander."

⁶⁷However, the People for the American Way is *not*, as Long writes, an organization "from the right." See Long, 203.

⁶⁸521 U.S. 507 (1997).

⁶⁹Long, 270.

⁷⁰*Id.*, 271.

⁷¹Pub. Law No. 106-274, 114 Stat. 803.

⁷²Douglas took the judicial oath on April 17, 1939, and retired on November 12, 1975, following a stroke on New Year's Eve, 1974. Douglas had surpassed the previous record holder, Justice Stephen J. Field, who took the judicial oath on May 20, 1863, and resigned on December 1, 1897. Field served barely long enough to exceed the

length of Chief Justice John Marshall's tenure. See Clare Cushman, **The Supreme Court Justices: Illustrated Biographies, 1789–1993** 531–534 (1993). Born in 1898, Douglas was named Sterling Professor of Law at Yale University at age 32, chairman of the Securities and Exchange Commission at 38, and Associate Justice of the Supreme Court at 40.

⁷³Douglas was seriously considered for vice president in 1944 (had he been chosen, he would have become president in 1945), craved the Democratic presidential nomination in 1948, was offered the vice presidential spot by President Harry Truman in 1948, and did not renounce presidential ambitions before 1951. Douglas probably turned down Truman's 1948 invitation because he, like many others, thought Truman would lose the election.

⁷⁴James F. Simon, **Independent Journey: The Life of William O. Douglas** 275 (1980) (hereafter cited as Simon, *Independent Journey*).

⁷⁵Representative Gerald Ford, who as president would name Douglas's successor in late 1975, led the drive for the Justice's impeachment. U.S. House of Representatives. Committee on the Judiciary. *Associate Justice William O. Douglas*. Final Report by the Special Subcommittee on H. Res. 920, pursuant to H. Res. 93, a resolution authorizing the committee on the judiciary to conduct studies and investigations relating to certain matters within its jurisdiction. 91st Congress, 2nd session, 1970.

⁷⁶One anecdote about Douglas suggests that Washington state, where he retreated in the summer months, held more attraction for him than his work in Washington, DC. In the spring of 1957, Douglas delivered the North Lectures at Franklin and Marshall College, later published as **The Right of the People** (1958). During his visit to the campus, college president Dr. Theodore Distler escorted Douglas to the constitutional law class taught by an assistant professor of political science named John Vanderzell. Vanderzell, now retired, recalls arriving at class that day prepared with a list of questions about the Court and constitutional law to pose to the Justice. Douglas's answer to each one was a cryptic "yep" or "nope." Within a few minutes Professor Vanderzell had exhausted his list of questions without having drawn a single complete sentence from the mouth of the visiting Justice. Fortunately, President Distler asked Douglas about hiking in the Northwest. Douglas jumped onto the question and talked without interruption—about hiking—for the remaining forty minutes of class.

⁷⁷In the words of scholar and Douglas acquaintance and sometime collaborator Walter F. Murphy, "Douglas's personality fit no stereotypes, or perhaps it fit too many. He was, as Sidney Davis, his closest friend, put it, 'an introverted and private man who led an active and public life, a peaceful man who lived with conflict, and a quiet man who would not hold his silence.' Douglas was the

dour Scot as well as the witty Celt; a workaholic on the Court, a relaxed, luxuriating hiker and fisherman at play; a meticulous craftsman writing on the law of securities or monopolies, a careless composer of judicial opinions for public consumption; a shrewd participant in domestic politics; a simplistic, moralistic commentator on international relations." Murphy, "The Constitution and the Legacy of Justice William O. Douglas," in D. Grier Stephenson, Jr., ed., *An Essential Safeguard: Essays on the United States Supreme Court and Its Justices* 104 (1991) (citation omitted).

⁷⁸The last of the photographs inserted between pages 216 and 217 in Simon's *Independent Journey* shows Cathy Douglas unveiling a bust of her husband, depicted appropriately in a hiker's open-collared shirt, alongside the C&O Canal in 1977.

⁷⁹The last case in which Douglas participated appeared in volume 422 of the *Reports*. As of mid-2001, the volume count has passed the 530 mark.

⁸⁰Simon, *Independent Journey*.

⁸¹Stephen Wasby, ed., "He Shall Not Pass This Way Again": *The Legacy of Justice William O. Douglas* (1990); see also Howard Ball and Phillip J. Cooper, *Of Power and Right: Hugo Black, William O. Douglas, and America's Constitutional Revolution* (1992).

⁸²James O'Fallon, ed., *Nature's Justice* (2000) (hereafter cited as O'Fallon).

⁸³*Id.*, 18.

⁸⁴337 U.S. 1 (1949); 381 U.S. 479 (1965); 341 U.S. 494 (1952) (dissenting opinion); 343 U.S. 250 (1952) (dissenting opinion). *Griswold*, the birth control case from Connecticut, announced a constitutional right to privacy. The other three are free speech cases.

⁸⁵405 U.S. 727 (1972). Douglas wrote: "The critical question of 'standing' would be simplified and also put

neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated . . . in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers. . . . [C]oncern for protecting nature's equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation." *Id.*, at 741-742 (dissenting opinion).

⁸⁶See endnote 75 above.

⁸⁷O'Fallon, 211.

⁸⁸Henry J. Abraham, *Justices, Presidents, and Senators* 270-271 (1999).

⁸⁹William H. Rehnquist, *The Supreme Court* (new edition, 2001). The Chief Justice refers to Douglas's summer home in Goose Prairie, Washington, as a place "where my wife, Nan, and I once spent several delightful days as guests of Bill and his wife, Cathy." *Id.*, 226.

⁹⁰*Id.*, 151-192.

⁹¹*Id.*, 192.

⁹²*Id.*, 225-226.

⁹³*Id.*, 137.

⁹⁴*Id.*, 133.

⁹⁵*Id.*, 209.

⁹⁶This count considers the two editions of *The Supreme Court* as two books.

⁹⁷*The Life of George Washington*, 5 vols. (1804-1807).

⁹⁸*Our Chief Magistrate and His Powers* (1916); *Popular Government* (1913).

⁹⁹*Liberty Under Law* (1922).

¹⁰⁰*The Supreme Court of the United States* (1928).

¹⁰¹*A Republic, If You Can Keep It* (1972); *The Memoirs of Earl Warren* (1977).

¹⁰²Editorial, January 21, 1874. Quoted in Charles Fairman, *Reconstruction and Reunion 1864-88, Part Two* 61, n. 187 (1987).

Review of Edward A. Purcell, Jr., *Brandeis and the Progressive Constitution: Erie, the Judicial Power, and the Politics of Federal Courts in Twentieth-Century America*¹

MELVIN I. UROFSKY

One of my strongest memories of law school remains the first class in "Federal Courts." The teacher began by asking if anyone could explain the holding in *Erie Railroad Co. v. Tompkins* (1938).² Several students raised their hands, and the answer was soon forthcoming. Federal courts were bound by the decisional rules of the state courts in the states in which they were located; there is no federal common law. "Very good," the teacher said. "If you know that, why are you taking this course?"

Then he asked if anyone could tell him the holding of a case decided that same day, and also written by Justice Louis D. Brandeis, *Hinderlider v. La Plata River & Cherry Creek Ditch Co.* (1938).³ We all looked around. This was not a case anyone of us had ever heard of, nor had it been mentioned in either the Con Law or Civil Procedure courses we had taken. "That case," our professor went on, "holds that there is a federal common law. And *that* is why you are taking this course." And so, for the next fourteen weeks, we tried to learn when federal courts had jurisdiction, what decisional rules they had to follow, and when *Erie* applied and when it did not, although at

that time (the early 1980s) there seemed to be very little explanation in the various court decisions we read as to *Erie's* applicability.

Now comes before us Edward A. Purcell, Jr., professor of law at the New York Law School, whose book has justifiably been awarded the Supreme Court Historical Society's Erwin A. Griswold Award. There are very few books I read, even ones I admire greatly, which inspire me after I am finished to say, "I wish I had written that book." But this is one of them, and scholars of the Court, of federal jurisdiction, and of Brandeis will be forever in Purcell's debt. Almost from the day it came down, *Erie* has been one of those

"great" cases that have puzzled lawyers, law professors, and judges—one might even say, especially judges. While Brandeis, with the exception of his classic concurrence in *Whitney v. California* (1927),⁴ is not known for his eloquent style, for the most part his opinions are straightforward and—in what was one of the cardinal rules of his jurisprudence—limited to the specific issue on which the case hinged. His *Erie* opinion, however, is often muddled, covers several grounds, and has a section of constitutional justification that for decades even Brandeis's champions ignored, considering it irrelevant and indeed embarrassing. What Purcell has done, *mirabile dictu*, is show that Brandeis knew exactly what he was doing, that the reasoning in the case makes excellent sense, and that the long-ignored constitutional section is not only understandable, but is at the heart of Brandeis's argument.

In case any of the lawyers in our readership have forgotten their own "Federal Courts" course or are a little rusty on their constitutional history, here is a brief review. In 1812, the Marshall Court in *United States v. Hudson and Goodwin*⁵ declared that federal common law jurisdiction did not exist in the new nation. As the country's economy expanded and firms began doing business in two or more states, entrepreneurs began demanding legal consistency across state lines. The rules of the market did not vary significantly from state to state; why, then, should business have to work with a multitude of often conflicting legal rules? Justice Joseph P. Story, who had never accepted the holding of *Hudson and Goodwin*, sympathized with this complaint, and through much of his career sought to achieve a uniformity of decisional rules in federal courts. In 1825 he managed to get Congress to pass a limited version of a federal criminal code. But his greatest triumph came in 1842 in *Swift v. Tyson*,⁶ when he interpreted Section 34 of the Judiciary Act of 1789, which required federal courts in trials at common law to follow the decisional rules

of "the laws of the several states," to mean that federal courts need only be bound by the "laws" of the states. They were free to ignore decisional rules, which were often part of state common law, and to create a separate federal common law when hearing commercial questions.

Since both the laws and the common law of states varied greatly, this meant that commercial litigants could look around for a federal court whose rules would be most receptive to their arguments. Despite the supposed barrier that the Constitution had erected to limit federal court jurisdiction, it was not very hard, especially with judges sympathetic to business interests, to meet the diversity of citizenship criteria. As a result, state laws and mores could be ignored. One of the most notorious abuses of this practice came when a Kentucky taxicab firm went across the state line, reincorporated in Tennessee, and then went into federal court to secure an injunction against a Kentucky competitor that had followed Kentucky law.⁷ The Supreme Court upheld the lower federal court, leading Holmes, joined by Brandeis, to enter a vigorous dissent in which Holmes termed the *Swift* decision "an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinions should make us hesitate to correct."⁸

Most stories of what happened next merely indicate that Brandeis then went on a crusade to overturn "Old *Swift*," and achieved his goal ten years later in *Erie*. In fact, as Purcell shows so well, the drive to undo the *Swift* holding antedated Brandeis's appointment to the Court, and was carried on in both the Congress and in academia in the decade between the taxicab case and *Erie*.

* * * * *

Purcell begins his story proper, not with the taxicab case, but with Justice David J. Brewer and his notions of judicial primacy within the framework of the Constitution.



In *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.* (1928), the Supreme Court permitted a Kentucky taxicab company to reincorporate in Tennessee in order to secure an injunction against a Kentucky competitor that followed Kentucky law. Since both the laws and the common law of states varied greatly, commercial litigants could look around for a federal court whose rules would be most receptive to their arguments.

Most of us are familiar with the traditional tale of how courts in the late nineteenth and early twentieth century allegedly defended business interests against Populist and Progressive reforms. We now know, of course, that the story is far more complicated than that. But, by focusing on the reform cases, Purcell suggests that we miss the biggest story of the time, namely that “the most pervasive and enduring achievement of that Court was not political, social or economic. It was institutional. The Court strengthened the power of the federal courts—albeit somewhat erratically and incompletely—to establish the primacy of the national judiciary in American government.”⁹ Brewer proved to have been the chief architect of the achievement, and it was he, building on the base Story laid down in *Swift*, who elevated the importance of federal common law, and in doing so gave fed-

eral courts primacy, not only over state courts and legislatures, but also to some extent over Congress as well.

Granted, Brewer did not build this edifice from straw. During the latter part of the nineteenth century, federal courts had increasingly ignored state court decisional rules and struck down state laws they believed threatened property rights. Brewer gave this movement an intellectual coherence. His work came to fruition in *Ex parte Young* in 1908.¹⁰ In that “crowning achievement,” the Court upheld the ruling of a lower federal court enjoining the attorney general of Minnesota from enforcing the state’s rate regulations against a railroad. According to Purcell, the case reshaped federal law in four distinct areas. First, it authorized federal injunctions against threatened state criminal prosecutions and created the constitutional rationale for avoid-

ing the limits imposed by the Eleventh Amendment. Second, it extended federal judicial authority by creating, "in effect, a judge-made cause of action for injunctive relief." Third, a claim made under the Fourteenth Amendment could now be heard in federal courts, without any allegation that state agents had in fact committed any type of common law tort. Finally, it created a new constitutional cause of action, and in doing so circumvented the strictures of the "well-pleaded complaint" rule, under which federal courts could only hear cases in which plaintiffs—and plaintiffs alone—had to present properly pleaded federal claims.¹⁴

The activist nature of this decision could not be hidden, and in fact the Court did not even try. What had been accomplished was breathtaking. Story had basically intended to avoid the morass of conflicting state commercial law and thus provide relief for the growing number of interstate business organizations, in essence giving federal courts primacy over state courts in a particular area. Brewer and his colleagues went much further. Under *Young*, federal courts had primacy, not only over state courts in all areas, but over state legislatures as well, even in matters that had traditionally been left to state government. Moreover, where courts normally had to wait for a case or controversy to arise, *Young* provided a mechanism where courts, with minimal help from aggrieved parties, could initiate actions on their own. Most important, *Young* gave federal courts the power to define their own jurisdiction, thus giving them primacy over the Congress to whom the Constitution had supposedly assigned responsibility for fixing the limits of federal court powers. This last issue, which was the least understood during the Progressive Era, is, as we shall see, at the heart of Brandeis's constitutional arguments in *Erie*.

To see how this jurisprudence played out, Purcell directs us to two cases, *Kansas v. Colorado* (1908)¹² and *In re Debs* (1895).¹³ In the first case, Kansas filed suit in the Supreme Court to stop Colorado from diverting waters

of the Arkansas River before they flowed into Kansas. Both states claimed common law doctrines of riparian rights, but Colorado put forward a version that it and other arid western states preferred. The Court thus had to decide which substantive common law applied to the suit. What might have been a minor case suddenly took on major importance when the Roosevelt administration intervened to protect its program to reclaim western lands through the construction of dams and irrigation systems. The attorney general asked the Court to reject the claims of both states, and instead to base its decision on "a new law of waters on interstate streams," a law that would be national in scope and grounded in the Constitution.

Writing for a bare five-member majority, Brewer rejected the federal government's arguments. In one spectacular bit of reasoning, he noted that Article III gave the courts "all the judicial power which the new Nation was capable of exercising," but that it set strict limits on the powers of Congress. Since the Constitution reserved many powers to the states, when a conflict arose between or among those powers, only the judiciary had the necessary constitutional authority to intervene. As Purcell notes:

Kansas v. Colorado was a breathtaking performance, the work of a constitutional virtuoso—indeed of a constitutional framer. In a single opinion Brewer denied the power of the national legislative and executive branches, elevated the federal judiciary to a position of constitutional primacy over both Congress and the states, and carved out an important area of conflict where the Court's interstate common law would reign free and unchecked.¹⁴

While Brewer was undoubtedly right that riparian rights on interstate waters had to be defined by a national power, he arrogated that power to the courts, and did so through the re-



In *Kansas v. Colorado* (1908), Kansas filed suit in the Supreme Court to stop Colorado from diverting waters of the Arkansas River (pictured) before they flowed into Kansas. Both states claimed common law doctrines of riparian rights, but Colorado put forward a version that it and other arid western states preferred. The Court thus had to decide which substantive common law applied to the suit, a decision that took on major significance when the Roosevelt administration intervened to protect its program to reclaim western lands through the construction of dams and irrigation systems.

markable conceit of finding a great well of judicial power in the Tenth Amendment.

The *Debs* case involved the first important use of an injunction in a labor dispute. In 1894, the employees of the Pullman Company in Chicago went out on strike, and Eugene V. Debs led the members of the American Railway Union out on a sympathy strike to support them. The strike soon spread and erupted into violence, and the federal government, over the objections of Illinois governor John Peter Altgeld, sent troops in to restore order and protect the mails. A lower federal court then issued an injunction, based on the Sherman Antitrust Act, against the continuance of the

strike as an obstruction of interstate commerce, and when Debs refused to call off the strike he was jailed for contempt.

When Debs appealed his contempt conviction as well as the use of the injunction to the Supreme Court, Brewer refused to invoke the Sherman Act but instead used the opportunity to decide the case "on the broader ground." He explored the powers of the federal government relating to interstate commerce, not only to specific acts, but also to what may have been one of the first references to a "dormant" commerce power. While acknowledging that Congress had power to legislate in this area, he asked whether, in the ab-



Unlike its decision in *Kansas*, the Supreme Court's decision in *In re Debs* gave power to Congress—unless it went unexercised, in which case that power devolved to the courts. The *Debs* case involved the first important use of an injunction in a labor dispute—a strike by Pullman Palace Car Co. employees. Pictured is the 15th U.S. Infantry Company C, which President Grover Cleveland called in to help break up the railroad strike, posing beside a special Rock Island Railroad Patrol train.

sence of congressional action, the federal government was powerless to prevent the blocking of interstate commerce. Clearly that could not be so, and therefore if Congress did not act, then the courts could.

In *Debs*, Congress had power, but if unexercised it devolved to the courts; in *Kansas*, Congress had no power, and the Supreme Court “had it all.” It is this accretion of power to the courts, not just the relatively simple doctrine of *Swift*, that Brandeis and others attacked.

Of course, corporate interests and the corporate bar welcomed this accretion of power to the federal courts. Although they argued that federal courts protected them from “local prejudice” and had fairer juries drawn

from a more diverse pool, in fact businessmen recognized that federal judges, far more than state judges, shared their view of property rights and laissez-faire. The judiciary stood as a barrier between them and the demands of reformers at both the state and national levels, and under *Swift*—as augmented and interpreted by Brewer—federal courts could in essence ignore, not only state decisions, but in many instances state law as well, and could develop their own probusiness common law.

The attack on judicial power came from a variety of sources. Reformers, both Populists and Progressives, saw the courts as enemies of reform. States’ rights proponents—and these were not limited to the South—also opposed yet another augmentation of federal authority

at the expense of the states. The most sustained attack came from the intellectuals, led by Oliver Wendell Holmes, Jr., and later by law professors such as Felix Frankfurter of Harvard. Throughout the Progressive Era, reformers in Congress tried to get through bills limiting diversity jurisdiction, but to no avail, although the effort began anew in the 1920s after the taxicab case and Holmes's biting dissent. The first real victory of reformers came in 1931, when Congress enacted the Norris-LaGuardia Act restricting the power of federal courts to issue injunctions in labor disputes. By then, the Depression had dissolved the public's faith in large corporations, and had replaced it with anger against big business's antilabor policies. But the public in general, while understanding the problem with labor injunctions, really had no comprehension of the *Swift* doctrine, and conservative members of Congress opposed any dilution of judicial power, which they saw as a bulwark, not just for business, but against wild-eyed reformers as well. If change were to come, then, it would have to come from within. Louis D. Brandeis, now in his eighties, undertook that task as his last great challenge on the Bench.

* * * * *

In my opinion, Purcell's research and analysis of the Brandeis opinion in *Erie* is a minor classic. It is not, I am pleased to report, the dry-as-dust parsing that often passes for legal analysis. Rather, this writing and thought draws upon a large number of sources, including hitherto unused Court papers of the Justices, a keen professional understanding of the legal and constitutional issues involved, and a sure grasp of the historical context in which Brandeis managed to bring a majority over to his view. Instead of summarizing Purcell's argument, let me urge all of you to, first, go back and read the article Purcell wrote in the last issue of this *Journal*,¹⁵ and then read his book.

I do, however, want to talk about the con-

stitutional part of the Brandeis opinion and Purcell's analysis of it, because it clears up many misconceptions about what Brandeis actually meant and said.

Brandeis had long wanted, not only to overrule *Swift*, but also to undo what he saw as the overreaching federal judicial power that Brewer had created. When *Erie* came along, he had his chance, and, like Brewer, he would not allow such an opportunity go by. The constitutional crisis of 1937 had changed the dynamics of the Court, both internally and vis-à-vis Congress. Moreover, the replacement of Willis Van Devanter and George Sutherland by Hugo Black and Stanley Reed gave Brandeis a potential majority. In addition, Benjamin Cardozo's absence due to illness supported Brandeis's cause; had Cardozo been present, he would no doubt have argued for a continued narrowing of *Swift* rather than for its outright reversal. There is no question that Brandeis the Progressive had his agenda, and he surely recognized by 1938 that, after twenty-two Terms on the Court, he had little time left. (In fact, he resigned the following February.)

Ever the teacher, Brandeis spent half of his *Erie* opinion detailing the mischievous results of *Swift*. Where Holmes, in the taxicab case, had objected primarily on intellectual grounds to the notions of a general common law, Brandeis the reformer pinpointed the abuses he believed had flowed from the case, although he did so in as neutral a tone as possible. The Four Horsemen had been severely criticized for writing their personal opinions into law; as passionately as Brandeis believed that *Swift* needed to be overruled, he tried very hard to avoid making it sound as if this were *his* agenda and not that of the Court.

The heart of Brandeis's opinion, however, lay in its constitutional architecture. Because its greatest impact involved forum-shopping and choice of law issues, most commentators have focused on those aspects and have ignored the constitutional arguments. When Brandeis termed *Swift* an "unconstitu-

tional" decision, many people did not understand what that meant; Purcell's book has a fascinating section on how law professors and judges—especially Felix Frankfurter—ignored Brandeis's constitutional argument because they did not understand it. What Purcell does, and brilliantly, is explicate that argument, and in order to do that, he creates the entire context of constitutional development that followed from Brewer's opinions in *Kansas v. Colorado* and *In re Debs*.

To Brandeis, the Constitution set up not only a separation of powers but a balance of powers as well, and it was clear to him (as it is to most modern scholars) that the Framers had intended that Congress should be the prime agency of government. This did not mean that Congress overshadowed or could dominate the other two branches, but that, in the delegation of powers, the Framers intended Congress to have the lion's share as well as the initiative in setting policy. While in some areas the Court's authority correlated to that of the other two branches, and while it ruled supreme within its designated domain, it could never assume primacy within the government ahead of Congress. Building upon Story's opinion, Brewer had done just that; the Court had extended its power to make itself the prime branch of government, against the clear intentions of the Founders, as well as the very wording of the Constitution itself.

Why, then, if this is such an important concept, did Brandeis's followers on the Bench as well as his advocates in the academy miss the point? Part of the fault belongs to Brandeis, who wrote what is for him an uncharacteristically obtuse opinion, one in which he violated several of the laws of constitutional adjudication he set out so clearly in *Ashwander v. TVA* (1936).¹⁶ Because the results fulfilled Progressive aspirations, and because judges, in applying *Erie*, had to concern themselves with the practicalities of choice-of-law rules, people either ignored the constitutional aspects or dismissed them as irrelevant. What Purcell shows so clearly and

so forcefully is that the constitutional argument is not irrelevant: it is at the heart of the decision.

There is much more to the book, but Purcell's rendering of what happened to *Erie* after the war, the role of Henry M. Hart, Jr., in defining federal court jurisdiction, and how subsequent Courts—including those of Earl Warren, Warren Burger, and William H. Rehnquist—have used the case would require a separate review. However, as can be seen from these comments, Purcell's book is not only about *Erie*; it is also about the jurisprudential and historical events that shaped that case, as well as the results in the six decades since Brandeis wrote it. Anyone interested in federal court jurisdiction *should* read this book; anyone interested in the Supreme Court and how it interacts with the larger society *must* read it.

ENDNOTES

¹Edward A. Purcell, Jr., *Brandeis and the Progressive Constitution: Erie, the Judicial Power, and the Politics of the Federal Courts in Twentieth-Century America*. New Haven, CT: Yale University Press, 2000. x + 417 pp. Hereafter Purcell, *Brandeis and the Progressive Constitution*.

²304 U.S. 64 (1938).

³304 U.S. 92 (1938).

⁴274 U.S. 357, 373 (1927).

⁵7 Cr. 32 (1812).

⁶16 Pet. 1 (1842).

⁷*Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518 (1928).

⁸*Id.* at 408.

⁹Purcell, *Brandeis and the Progressive Constitution*, 39.

¹⁰209 U.S. 123 (1908).

¹¹Purcell, *Brandeis and the Progressive Constitution*, 42–43.

¹²206 U.S. 46 (1907) at 65.

¹³158 U.S. 564 (1895).

¹⁴Purcell, *Brandeis and the Progressive Constitution*, 59.

¹⁵Edward A. Purcell, Jr., "Brandeis, *Erie*, and the New Deal 'Constitutional Revolution,'" *Journal of Supreme Court History* 26, no. 3 (2001): 257–278.

¹⁶297 U.S. 288 (1936).

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