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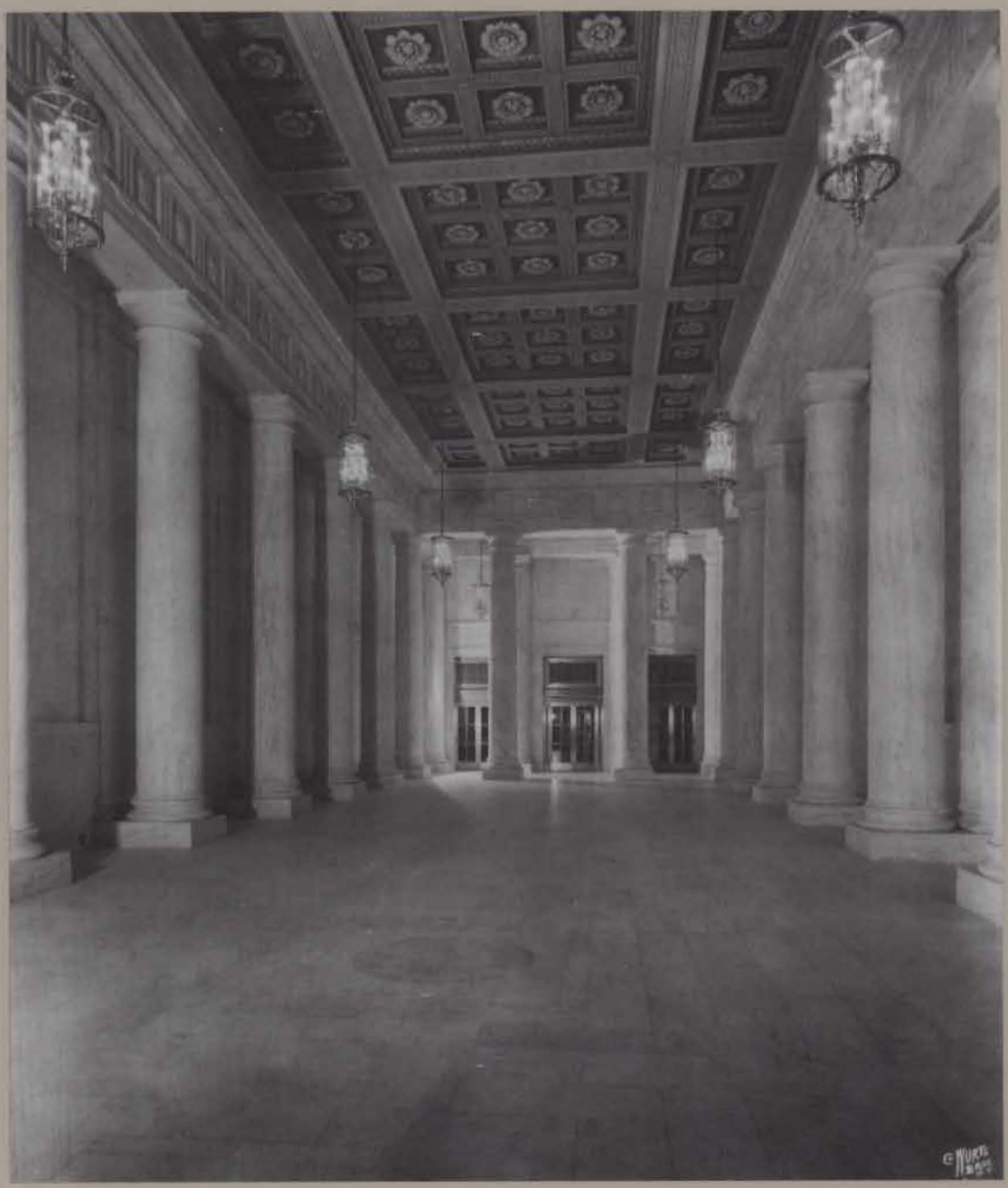

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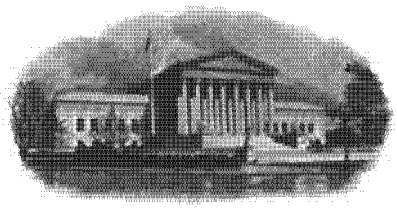

Supreme Court Historical Society

JOURNAL OF
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GENERAL STATEMENT

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

The Society seeks to accomplish its mission by supporting historical research, collecting antiques and artifacts relating to the Court's history, and publishing books and other materials 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 5,000 members whose financial support and volunteer participation in the Society's standing and ad hoc committees enables the organization to function. These committees report to an elected Board of Trustees and an Executive Committee, the latter of which is principally responsible for policy decisions and for supervising the Society's permanent staff.

Requests for additional information should be directed to the Society's headquarters at 224 East Capitol Street, NE, Washington, D.C. 20003, telephone (202) 543- 0400, or to the Society's website at www.supremecourthistory.org.

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Introduction

Melvin I. Urofsky

Readers of this issue will note that there are three articles devoted to a man who never sat on the Supreme Court, argued a case before the Justices, or was even a party to a suit that the high court decided. Nonetheless, Anthony Lewis played a very important role in the history of the Supreme Court, because he was the first reporter assigned to cover the Court on a full-time basis. The stories he filed over more than two decades about the Court for the *New York Times* not only made history, but also set a standard for all Court reporters. He is the only Court reporter to have won a Pulitzer Prize for his work; his classic book, **Gideon's Trumpet**, is not only a model of a case study, but after nearly four decades still widely used as a supplemental reading in college history classes.

Lewis retired from full-time writing two years ago, although he still contributes an occasional column. To mark that occasion, the American Legal History Society scheduled a session at its annual meeting about him. Since I knew all of the participants, I asked them—and they agreed—to make their papers available to the *Journal* for publication. For this I thank them, as I think the readers of the *Journal* will as well.

The other three articles came to us by a variety of means and touch upon different aspects of the Court's history. Harry Downs sent us his article about Justice William Cushing as part of a study he has been doing about Justices and slavery. James Van Orden wrote about Lillian Gobitas Klose for a book that I have edited on Americans who made constitutional history. He interviewed Mrs. Klose and wrote a good article, but it was much too long for the space limits I had in the book. However, my hat as editor of this journal is never far away, and I suggested that in addition to the piece he was supposed to write, he pen a lengthier one for the Journal, which he gladly consented to do. Finally, Peter Wallenstein and I ran into one another at a meeting, and I asked him what he was working on. Before he told me, he said "You probably want something for the *Journal*, don't you?" The answer, of course, was yes. The events he writes

about in Richmond, Virginia took place during the time when Anthony Lewis covered the Court.

All told, the pieces meet the *Journal*'s criteria of relating in a broad manner to the history of the Supreme Court and being well written by both new and established scholars and eclectic in nature. And that is the condition of writing on the Court today, as one can also tell by reading Grier Stephenson's "Judicial Bookshelf." Our readers ought to be aware that to give us the sketches and reviews of a half-dozen or so books, Grier must first go through the dozens of books that appear each year on various aspects of the Supreme Court and its history. It is a formidable task that he performs in addition to his regular duties as a teacher and scholar, and one for which we are most grateful.

As usual, enjoy!

"I'm really going to miss getting steamed at Anthony Lewis."

Unlikely Abolitionist: William Cushing and the Struggle Against Slavery

HARRY DOWNS*

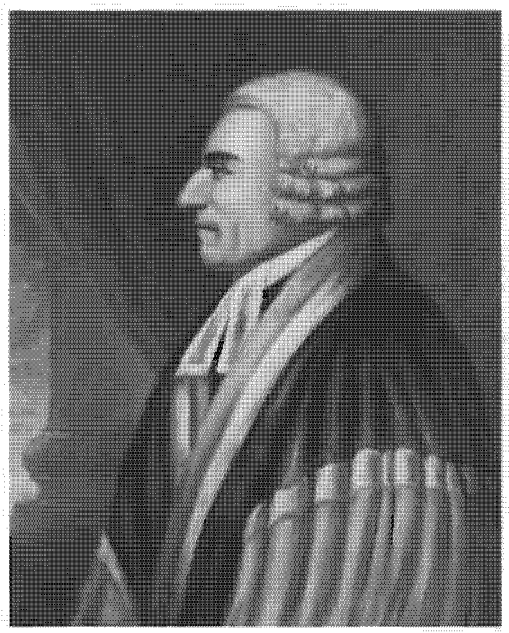
Introduction

One of the striking differences between the federal Union established under the Constitution and the Confederation of States established under the Articles of Confederation is the creation under Article III of a judicial power of the United States and of a Supreme Court to exercise that power. Acting pursuant to its power to determine the structure of that Court, Congress determined that the Court should consist of one Chief Justice and five Associate Justices. The six lawyers President Washington named to the Court[1] were leading members of the bar, yet none achieved lasting distinction by reason of his service on the Court. Chief Justice Jay, for example, is best remembered for the treaty with England which bears his name; and when he resigned in 1795 following his election as Governor of New York, local papers referred to his new office as "a promotion."[2]

William Cushing served far and away the longest of these original six: he persevered in his duties until his death in September 1810. Yet despite his having spent a half-century on the provincial, state, and federal benches, he is little known nor long remembered.

Cushing was born in Scituate, Massachusetts on March 1, 1732, the son of John and Mary Cotton Cushing. His family sometimes has been called the family of judges: both his father and his grandfather (also named John) were justices of the Royal Superior Court of Judicature, the highest court in the Massachusetts Bay Colony.

His family also held slaves. The very week William was born his father John paid Mary Thaxter £90 "for my Negro woman servant or slave named Phillis, to have and to hold ye sd negro woman servant or slave to him ye sd John Cushing his heirs executors and assigns forever."[3] When William was thirteen, his father purchased from Ruth Randall on May 26,



Associate Justice William Cushing (above) was born into a family of judges: both his father and grandfather had been justices of the Royal Superior Court of Judicature, the highest Court in the Massachusetts Bay Colony. Cushing's family owned slaves, but it is unclear whether his own personal servant, Prince Warden, was a slave or servant.

Cushing did not marry until 1774, when he was forty-two years old. Hannah Phillips Cushing (above) regularly accompanied him on circuit to ease his loneliness.

1745, "my negro man named Jonathan . . . to hold as a Servant for Life" for £120.[4] In later years, Cushing himself retained a personal servant, Prince Warden, whose status—servant or slave—was not entirely clear.

Cushing graduated from Harvard College shortly after his nineteenth birthday.[5] He spent a year as preceptor of the Roxbury Grammar School, read law in the office of Boston attorney Jeremy Gridley, and was admitted to the bar in February 1755. He immediately opened an office in Plymouth and for the next five years practiced before the provincial courts. He then moved his practice to the frontier town of Pownalborough (now Dresden) in the district of Maine, where, on October 1, 1760, King George II issued him his first judicial commission: judge of probate of Lincoln County. The following year, he was reappointed probate judge and also made a justice of the peace, and in 1762 he was called to the degree of barrister.[6]

Cushing was now past thirty years of age and an established member of the bar. He returned from Pownalborough to Scituate, purchased in fee simple the number one pew in Scituate's New Meeting House, and married Hannah Phillips of Middletown, Connecticut. He never again lived on the frontier, though as a justice on circuit he frequently visited various frontier courts.

In 1772 Governor Thomas Hutchinson appointed Cushing to succeed his father as a justice of the Superior Court of Judicature. The timing of the appointment propelled Cushing into the vortex of the controversy over payment of judicial salaries. The Townsend Act of 1767 had shifted payment of provincial governors' salaries from province to Crown, to protect them against risk of retaliation by the provincial assemblies. This had caused great discontent in Massachusetts, and the rumor that the Crown now proposed also to pay the salaries of the judges of the Superior Court generated intense protest.[7]

The controversy dragged on through 1773 and into 1774, at which time the provincial

assembly demanded that the judges declare themselves one way or the other on the issue. Cushing elected to take his salary from the assembly. This proved critical to his career, for he was the only one of all the royal judges in the province to be reappointed to the Superior Court of Judicature following the American Revolution.

The question of the administration of justice following the separation of the colony from the mother country raised the fundamental issue of how the courts should be constituted and by whom. A newly independent government referred back to the Charter of 1692 to find this authority. On October 28, 1775, the Great and General Court of the State of Massachusetts Bay,[8] purporting to act under the authority of that charter, appointed Cushing and four others to constitute a new Superior Court of Judicature for the State. Thereafter, and until his appointment to the Supreme Court, Cushing served first as a justice and then as chief justice of the Superior Court of Judicature and its successor court, the Supreme Judicial Court, established under the Massachusetts constitution of 1780.

Cushing played an active role in securing the adoption of the 1780 constitution. In 1777 and 1778, a legislative convention had drawn up a form of constitution that the people overwhelmingly rejected, primarily because the instrument had not been adopted by popular convention and did not contain a bill of rights. The General Court responded by authorizing a Convention for the Framing of a Constitution of Government for the State of Massachusetts Bay. Cushing served as one of Scituate's delegates to the convention in 1779 and 1780 and then helped secure its adoption by charging grand juries on the deficiencies of charter-based government and the merits of the new constitution.

In 1787, Cushing was named vice president of the state convention that considered and ratified the Federal Constitution. He supported adoption, was elected one of Massachusetts' ten presidential electors in the first general election held under the Constitution, and—following the election of Washington—was named one of the original five Associate Justices of the Supreme Court.

Cushing's duties as a Supreme Court Justice included sitting on circuit with one or another of the district judges for that circuit, often at remote locations. In one important respect, Cushing contrived frequently to ease the loneliness, if not the inconvenience, of riding circuit: Mrs. Cushing regularly accompanied him. Riding in a large black phaeton drawn by two black horses, and attended by his servant Prince Warden, Justice and Mrs. Cushing covered the miles together. Detailed accounts no longer exist, but from surviving bits of correspondence it is evident that they continued the arrangement throughout his career.

Cushing served as a member of the Court for almost twenty-one years. On March 4, 1793, he administered the oath of office to President Washington for his second term, Chief Justice Jay then being absent from the country; and on Wednesday, February 4, 1801 he administered to John Marshall the latter's oath of office as Chief Justice of the United States. Cushing's tenure on the Court ended with his death on September 13, 1810.

Cushing and Slavery

Rutland District
May 4, 1754
BILL OF SALE

Sold this day to Mr. James Caldwell of said District, the County of Worcester & Province of Massachusetts-Bay, a certain Negro man named Mingo, about twenty Years of Age, and also one Negro wench named Dinah, about 19 Years of Age, with child Quaco, about nine months old—all sound & well for the sum of One Hundred & Eight Pounds, lawful money, RECD. To my full satisfaction: which Negroes,

> I the subscriber, do warrant & defend against all claims whatsoever as witness my hand.
>
> In presence of: Zedekiah Stone
> JN. Morray Copy examined
> John Caldwell Attest.
> Jos Allen, Clerk[9]

Quark Walker thus stepped upon the pages of American history as a chattel, not a man.

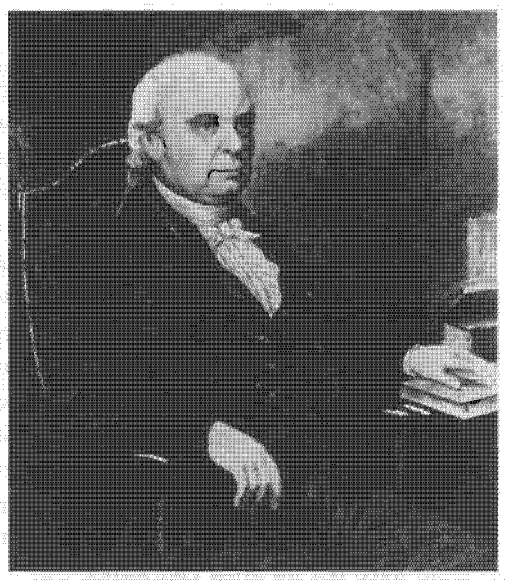
James Caldwell died intestate in 1763. Under Massachusetts law, his widow Isabell and his minor children divided his estate. By agreement between Mrs. Caldwell and John Murray, guardian for the Caldwells' minor children, Walker was included in the widow's portion. Isabell still owned Walker when she married Nathaniel Jennison and continued thereafter to hold him as her slave. Upon her death in 1773, Jennison claimed to succeed her as Walker's lawful owner. Walker claimed that James Caldwell had promised him his freedom upon his reaching maturity and that Isabell had repeated the promise following her husband's death. Jennison, however, either disbelieved the promise or declined to honor it, and the years rolled by with no change in Quark's status.

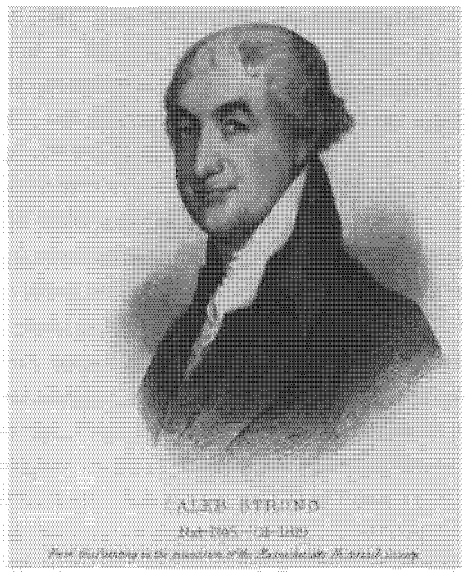
Sometime early in 1781, when Walker was about twenty-eight, he left Jennison's farm and went to work for James Caldwell's brothers, John (who had witnessed the bill of sale) and Seth. A few days later Jennison, accompanied by a group of his friends, came upon Walker alone, plowing the Caldwells' fields. Jennison and one of his friends set upon Walker, thrashed him soundly and locked him in an out-building until he could conveniently be removed to Jennison's farm, which lay nearby.

When Walker failed to return that evening, the Caldwells went looking for him. They located him, released him from confinement, brought him to their home, and protected him from Jennison. They also induced him to lodge with the local justice of the peace a complaint of trespass against Jennison for assault and battery. Thus commenced the series of actions, counterclaims, prosecutions, and pleas to the legislature that culminated in *Commonwealth v. Jennison*, a criminal prosecution against Jennison for his assault and battery of Walker.[10]

The justice of the peace declined to take jurisdiction over Walker's suit and referred the matter to the Worcester Court of Common Pleas for hearing at the June 1781 sitting. Meanwhile, Jennison shifted the focus of the action by refusing to join issue on Walker's plea of assault. Instead, he entered a so-called plea in bar that Walker was his slave.[11] This forced Walker to file a replication asserting that he was a free man and not Jennison's slave, for if Walker was Jennison's slave, Jennison's conduct arguably constituted justifiable restraint and discipline of an escaped slave. Jennison also counterattacked the Caldwells—whom he plainly perceived to be the chief source of his difficulty—by commencing a civil action against them for £1000 damages for having enticed away his servant, Walker.[12] Note the strategy behind Jennison's pleadings. His plea in bar to Walker's writ shifted attention away from his own actions and onto Walker's status. His writ against the Caldwells, however, asserted only that Walker was his servant. Thus he avoided in either case pleading to his assault upon Walker, the original point at issue. Jennison clearly was represented by able advocates in this apparently minor dispute over the right to the services of a black farm laborer.[13] Walker and the Caldwells likewise were well represented: their lawyers, Levi Lincoln and Caleb Strong, were two of the most eminent lawyers in the state.[14] Thus, the litigation was conducted skillfully on both sides.

Both matters, Walker's plea of trespass against Jennison and Jennison's plea of trespass on the case against the Caldwells, went to trial before the Worcester Court of Common Pleas during the first week of the June 1781 court term. The court consisted of a chief judge and two associate judges, none of whom was a lawyer, and a local jury. In *Walker v. Jennison*,





Eminent attorneys Levi Lincoln (left) and Caleb Strong (right) represented slave Quark Walker and farmer John Caldwell in their suit claiming that Caldwell's brother, James, had promised Walker his freedom upon reaching maturity. When James Caldwell's widow died in 1773, her second husband, Nathaniel Jennison, forced Walker to continue as his slave.

the jury returned a verdict that "the said Quark is a freeman, & not the proper Negro slave of the Defendant" and assessed damages of £50 for the assault and battery, plus costs. In *Jennison v. Caldwell* the jury "[found] the Defendants guilty in manner & form as the Plaintiff in his declaration has alleged" (that is, that the Caldwells had unlawfully solicited Walker to leave Jennison's service and employed him in their business, and had prevented Jennison from reclaiming him) and awarded Jennison £25 damages. The two decisions are not necessarily in conflict: Walker could have been bound to serve Jennison under a contract of service yet not have been his slave. Each counsel having secured a result favorable to his client, however, the controversy remained unresolved.

Both Jennison and the Caldwells noticed their appeals to the next Worcester Circuit of the Supreme Judicial Court, to be held in September. At that sitting a new jury would be called and the appeals would be tried *de novo*.[15]

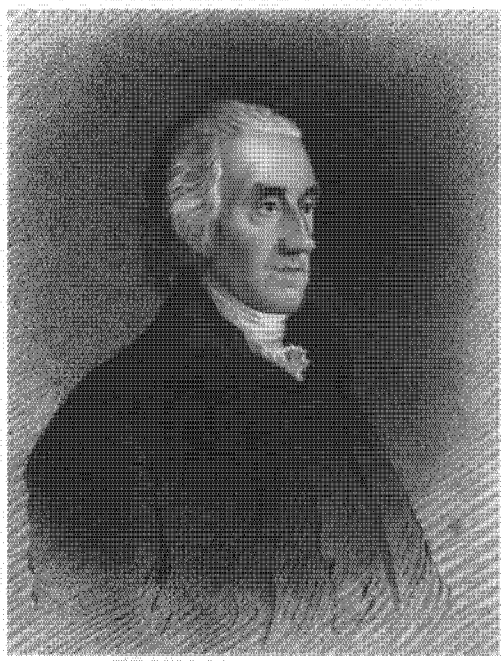
Jennison's appeal was defaulted, his skilled and experienced counsel unaccountably having failed to file with the appellate court certain common pleas papers that were readily available. The Caldwells, however, prosecuted their appeal vigorously. Whereas at trial Lincoln had urged the court to find that Walker had been manumitted by the actions of his former owners, on appeal he presented the much broader argument that slavery contravened both the law of nature and the law of God, that Walker therefore could not be Jennison's slave, and that, since Jennison's sole basis for claiming Walker's services was his assertion that he owned Walker as his slave, Walker likewise was not Jennison's servant.[16]

The order entered by the Circuit Court records the jury's verdict for the Caldwells, but offers no explanation:

> [A]nd now the parties appear, and the case, after a full hearing was committed to a Jury, sworn according to law to try the same; who returned their Verdict therein upon Oath, that is to say, "find the Appellants not guilty in manner and form as the appellee in his declaration has alledged [sic]."

At the same sitting, Robert Treat Paine, attorney general of the Commonwealth, secured an indictment against Jennison for beating and confining Walker. This case—*Commonwealth v. Jennison*—was tried before Chief Justice Cushing and the full bench in 1783. It is this criminal proceeding—the final chapter in the litany of litigation—that is the definitive Quark Walker case.

All four Supreme Judicial Court justices were present in Worcester for the April 1783 circuit court term at which Paine's indictment of Jennison at last came to trial. All three associate justices—Nathaniel Peaslee Sargent, David Sewall, and James Sullivan—had sat on *Caldwell v. Jennison* two years previously and had heard both Lincoln's argument that slavery violated natural law and the jury verdict reversing Jennison's damage award against the Caldwells. The attorney general thus might reasonably have expected them to question any defense by Jennison based on his right as Walker's owner to beat and imprison his slave.



Robert Treat Paine (pictured), Attorney General of the Commonwealth, secured an indictment against Jennison for beating and confining Walker after he ran away to work for John Caldwell.

His expectations regarding Cushing, however could not have been equally sanguine: not only had Cushing's parents been slave-owners, but Cushing himself had for years enjoyed the services of Prince Warden, his black coach-driver and personal attendant.[17] Worse yet, four years previously Paine had felt compelled to write that Warden "complains that you denied to give to him a manumission and that you still claim him as a slave & threaten to make those pay who employ him; he either is your slave or he is a freeman . . . therefore, unless you give him a proper manumission in the course of a week, an action will be carried to next court so that if he be yr slave you may have an opportunity to prove it."[18] Thus, Paine could have felt no great confidence that the Chief Justice would particularly be disposed to charge for the Commonwealth.[19]

According to Cushing's case notes,[20] Paine's prosecution re-plowed much of the ground covered two years previously in *Jennison v. Caldwell*.

> Some evidence was given on the part of the government tending to prove that the former master & mistress of Quaco had promised him his freedom on his attaining the age of 25 years which period had elapsed without his being actually liberated.[21]

Cushing then charged the jury that

> The defense set up in this case . . . is founded on the assumed proposition that slavery had been by law established in this province:[22] . . . . It is true . . . that slavery had been considered by some of the province laws as actually existing among us: but no where do we find it expressly established . . . . Sentiments more favorable to the natural rights of mankind . . . led the framers of our Constitution of Government—by which the people of this Commonwealth have solemnly bound themselves to each other—to

declare—*that all men are born free and equal*; and that *every subject*[23] *is entitled to liberty*[24] and to have it guarded by the laws as well as his life and property. In short, without resorting to implication in construing the Constitution, slavery is as effectually abolished as it can be by the granting of rights and privileges wholly incompatible and repugnant to its existence.

The Court are therefore fully of opinion that perpetual servitude can no longer be tolerated in our government; and that liberty can only be forfeited by some criminal conduct or relinquished by personal consent or contract.[25]

The whole course of this litigation suggests numerous interesting questions. Why did the Caldwells take such an interest in Walker? Why did Jennison permit his appeal to be defaulted, and for several years thereafter seek relief from the legislature? On what grounds, and pursuant to what charge, did the circuit court jury reverse Jennison's award of damages against the Caldwells? Why did Attorney General Paine secure an indictment against Jennison for an assault already resolved by civil proceedings—and pursue that indictment for two years? And why, after basing his plea to the legislature on Sprague's alleged negligent mismanagement of his appeal, did Jennison retain Sprague to defend him against this prosecution? All are beyond the scope of this paper.

Cushing's reliance on the Massachusetts constitution as positive law that his court might apply and enforce merits particular attention. Two centuries of Supreme Court adjudication have firmly established in our jurisprudence that a constitution is law, that as law it properly is subject to interpretation and enforcement by the courts, and that it is supreme law, superior both to traditional practices and to ordinary legislative enactments.[26] None of these propositions was settled law at that time. Tradition and usage treated constitutions as political documents for the governance of a polity, to be interpreted and implemented by the legislature, not as sets of rules that created rights and duties a court could enforce. Jefferson, for example, deemed the Virginia Constitution of 1776 to be on a par with other legislative measures and thus subject to legislative revision; and as he was a principal draftsman of that instrument, his views were accorded great weight.[27] Thus, Cushing's determination in 1783 that the Massachusetts constitution was law that his Court was empowered to interpret and enforce—and that it was supreme law against which a contrary prior practice could not survive—was both innovative and significant. One of the earliest assertions in American jurisprudence of these critical constitutional concepts and of the rule of law they imply, it anticipated *Marbury v. Madison* by twenty years.

Cushing's analysis is also noteworthy for its anticipation of one of Chief Justice Roger Taney's principal arguments in *Dred Scott*.[28] *Quark Walker* and *Dred Scott* both raised the question of whether the institution of slavery could be reconciled with declarations of universal rights. Cushing ruled that by recognizing in their constitution rights incompatible with slavery, the people of Massachusetts had abolished the institution. Taney stood Cushing's argument on its head. He acknowledged that the Declaration of Independence asserted that all men were created equal and had a natural right to liberty, and that slavery denied those rights. But whereas Cushing had ruled that the universality of the rights precluded further acceptance of the practice of slavery, Taney held that the survival of the practice denied the universality of the rights. The Framers were all men of honor. Some of them owned slaves, and all of them knew that the practice was an established institution in several of the states. They could not honorably have signed the Declaration and the Bill of Rights had they understood Negroes to be included among the universe of peoples to whom those rights pertained. Therefore, the Framers must

have intended that those rights not be extended to Africans.[29]

Shortly after resolving *Commonwealth v. Jennison*, Cushing became embroiled in another controversy arising out of the "peculiar institution" of slavery—this time with serious political ramifications. Two Massachusetts cruisers captured a British ship carrying slaves seized by British troops from several South Carolina plantations and took the prize to Boston. The slaves were interned on Governor's Island, where they were kept at state expense. The Massachusetts Board of War notified the South Carolina congressional delegates that the slaves were safe in Massachusetts, and upon petition of several of the owners the General Court passed a resolution allowing the slaves to be reclaimed, provided the owners reimbursed the state for its expense in feeding and keeping them. When one Hassford, an agent of the owners, appeared in Boston to claim the slaves, they refused to return with him. He then caused them to be arraigned before Justice of the Peace Thomas Craft on a charge of having deserted their masters and unlawfully refused to return to service. Craft committed the Negroes to jail and ordered them held for their proper masters.

On or about August 26, 1783, several attorneys who had learned of the slaves' confinement secured from the Supreme Judicial Court writs of *habeas corpus*,[30] following which evidence for and against their continued confinement was taken. Hassford presented nothing in favor of Craft's *mittimus* except the statement that the slaves had deserted their masters' service and refused to return. The court thereupon announced that there were no statutes authorizing a justice of the peace to commit persons to jail on these grounds and ordered the slaves released immediately. Thus, Hassford could neither compel the continued confinement of the slaves nor force them to return with him to their masters' service. Accordingly, he abandoned his mission, returned to South Carolina, and wrote a lengthy and bitter complaint to the state legislature detailing the failure of his mission.[31]

The matter soon came to the attention of South Carolina Governor Benjamin Guerard, who complained to Massachusetts Governor John Hancock that Massachusetts's policy of manumitting slaves encouraged South Carolina slaves to desert the service of their masters and flee northward. He characterized the action in the strongest terms as an affront to the sovereignty and independence of South Carolina.[32] Hancock thereupon submitted the matter to the justices of the Massachusetts Supreme Judicial Court for an advisory opinion[33] and turned the entire correspondence over to the legislature.

Cushing and Sargent prepared an opinion of the justices in the form of a letter to Governor Hancock dated December 20, 1783.

> Sir,
>
> ... After hearing council [sic] on both sides, for & agst the legality of ye Commitment (w^{ch} ye Course of law obliges the Court to decide upon) there appeared to be no law of this State, and we don't find there ever was one, warranting a commitment to prison by a Justice of peace in Such case ....[T]hey were consequently obliged to liberate them upon motion for that purpose.
>
> If a man has a right to the Service of another, who deserts his Service, undoubtedly, he has a right to take him up and carry him home to Service again; which has always been the case here, without any Sanction from the magistrate ....Whether any person had a right to the service of those Negroes, & might take them up, was clearly a question the Court had nothing to do with. A simple determination that a magistrate had done what he had no warrant by law to do, we are not sensible, is against any resolve or ordinance of Congress, or ye Confederation of ye United States....We are, with ye grt estm, yr Ex$^{cy's}$ most obet servts.[34]

The Governor of South Carolina complained to Massachusetts Governor John Hancock (left) that his state's policy of manumitting slaves encouraged South Carolina slaves to desert the service of their masters and flee northward—an affront to the sovereignty and independence of South Carolina. Shown above are slaves in Beaufort, South Carolina in a photograph taken in 1862.

The letter undertakes the difficult task of accommodating within the confederacy of thirteen sovereign states the conflict of laws between South Carolina, which recognized slavery and had an elaborate and fully developed slave code, and Massachusetts, the highest court of which had just determined that the state had abolished the institution. The first step was to define as narrowly as possible the question presented by Governor Guerard's letter: did Massachusetts law empower a justice of the peace to jail a person alleged to be an escaped slave? Cushing concluded it did not. A justice's powers were limited to those conferred by law. Massachusetts had neither a slave code nor a system of procedures for imprisoning escaped slaves. Therefore, the imprisonment of these slaves was *ultra vires* and unlawful.[35]

Cushing emphasized the limited effect of this ruling by opining further that Massachusetts law likewise would not interfere with a slaveowner's privately exercising his right of property in his slaves. This right did not require judicial enforcement: the master "has a right to take (his slave) up and carry him home to service again; which has always been the case here, without any Sanction from the magistrate."[36] Cushing's jurisprudence at this point seems internally inconsistent. In *Commonwealth v. Jennison*, he had instructed the jury that the Massachusetts constitution prohibited slavery and thus freed any slave in Massachusetts, and that Jennison's attempt to recover Quark Walker therefore constituted an assault. Here, however, he advised Governor Hancock that a South Carolina slaveowner might come into the commonwealth and recover his slave—the very act for which Jennison had been charged and convicted. How can this be?

The reconciliation lies in the relationship of sovereign states within the Confederation. Jennison and Walker were inhabitants of Massachusetts. Jennison claimed Walker as his personal property by inheritance from his wife. Massachusetts law did not recognize slavery, however, and Walker therefore could not be Jennison's property under Massachusetts law. Thus, Jennison had no right to recapture Walker when Walker left him. The owners of Jack Phillips and the other slaves taken in prize were inhabitants of South Carolina. The right of South Carolinians to own slaves in South Carolina derived from South Carolina law, which recognized and enforced the institution. Ownership of South Carolina property by South Carolinians, seized by act of war in South Carolina and submitted to prize court jurisdiction in Massachusetts, would under principles of comity be determined in accordance with South Carolina law. Therefore, those owners could recover their slaves in Massachusetts and required no magistrate's writ to do so.

Cushing's and Sargent's solution to Hancock's dilemma anticipated in many respects the accommodation reflected in the Fugitive Slave clauses of the Northwest Ordinance and the Constitution. The Confederation could endure half slave and half free so long as each half respected the laws of the other. Slavery was abolished in Massachusetts, but that abolition did not affect the status of South Carolina slaves who escaped or were taken from service imposed upon them in South Carolina pursuant to South Carolina law. Thus, a South Carolina master had a common-law right to recover his property—a right Justice Story subsequently asserted in *Prigg v. Pennsylvania*.[37] This was a purely private right, however: state officers lacked any warrant to deploy state power in support of the master.

The solution is also consistent with Chief Justice Shaw's decision in *Commonwealth v. Aves*.[38] Cushing's acknowledgment of a slaveowner's right to recover his escaped slave and take that slave out of the Commonwealth in no way implied any right to bring slaves into the state. Thus, the slaveowner's right was defensive or protective only.

Finally, the solution reflects Cushing's careful, pragmatic approach to his craft. Like Robert Bolt's Sir Thomas More, he perceived a society "planted thick with laws from coast to coast—man's laws, not God's," and believed that these laws protected the people against the arbitrary exercise of power.[39] Thus, the constitutional provision that abolished slavery in Massachusetts meant exactly that—no more, no less.

Conclusion

During his remaining years on the bench, Cushing never again officially opined on the issue of slavery. His participation in the struggle is therefore confined to his work as a state supreme court jurist. In *Commonwealth v. Jennison*, he instructed the jury that slavery had been abolished in Massachusetts, and in the process established his court's authority to treat the Massachusetts constitution as law and

to interpret and apply that law in the course of adjudicating cases.[40] In his advisory opinion to Governor Hancock, he sought to accommodate abolition in Massachusetts and the retention of slavery in other states within the Confederation. In the context of the property-oriented society in which he lived, his decisions were both liberal and prescient. The failure of other leaders to heed his wise example in no way detracts from the significance of his work.

*The author wishes to thank Randall Kennedy of Harvard Law School for his helpful comments on an earlier draft of this article.

ENDNOTES

[1]Chief Justice John Jay of New York and Associate Justices James Wilson of Pennsylvania, William Cushing of Massachusetts, John Blair, Jr. of Virginia, John Rutledge of South Carolina, and James Iredell of North Carolina (nominated to succeed Robert Harrison of Maryland, who returned his commission prior to the Court's initial session).

Two of the five, Rutledge and Cushing, were subsequently named Chief Justice in somewhat unusual circumstances: Rutledge because he served but was never confirmed; Cushing because he was confirmed but never served. Rutledge resigned in 1791 to become chief justice of South Carolina's highest court. On August 12, 1795, President Washington nominated him to succeed Jay. He served for four months as a recess appointee but was denied Senate confirmation. The President then appointed Cushing Chief Justice. His appointment was confirmed by the Senate and his commission duly issued, but after several days he declined the honor on grounds of ill health. The appointment then went to Oliver Ellsworth of Connecticut. See letter of Timothy Pickering, Department of State, to William Cushing (photostat) dated January 27, 1796, enclosing Cushing's commission as Chief Justice, William Cushing Scrapbook; and Cushing's response to the President dated February 2, 1796, begging his leave to remain an Associate Justice, Photostat Collection, Massachusetts Historical Society (hereafter "MHS") Boston, MA.

In 1800 Cushing was again considered for promotion to Chief Justice. Ellsworth resigned that autumn, presenting President Adams, who had lost his bid for re-election, with the opportunity of naming Ellsworth's successor. Adams turned once again to Jay, but it was widely believed that Jay would decline and that Cushing would then be nominated. Jay did decline, but Adams instead chose his Secretary of State, John Marshall, Thomas Jefferson's distant cousin and fellow Virginian. Jean Edward Smith, **John Marshall, Definer of a Nation** (New York: Henry Holt & Company, Inc., 1996), p. 10, (hereafter Smith, **John Marshall**).

[2] **One Documentary History of the Supreme Court of the United States**, 1789–1800 (1985), p. 759. Jay also had been the Federalist candidate in the previous election, but had been narrowly defeated.

[3]Sale of Phillis to John Cushing, March 6, 1732, Cushing Family Papers, MHS.

[4]Sale of Jonathan to John Cushing, May 26, 1745, Cushing Family Papers, MHS. John had also purchased other slaves prior to William's birth: a "negro man called Jo" in 1715 (sale of Jo to John Cushing, June 2, 1715, Cushing Family Papers, MHS), and some years previously a "negro woman named and called Judith" (sale of Judith to John Cushing, January 27, 1701–02; William Cushing Papers, MHS). Either or both might still have been members of the Cushing household when William was born.

[5]He also received Master of Arts degrees from Harvard and Yale and, in 1785, an honorary Doctor of Laws degree from Harvard. Letter from E. H. Tomkins, secretary to the Secretary, Yale University, to Massachusetts Supreme Judicial Court Chief Justice Arthur P. Rugg, August 25, 1919, Cushing Scrapbook, vol. III, p. 134, William Cushing Papers, MHS; Harvard College Records (Cambridge, MA), vol. II, pp. 31, 52; Harvard University Corporation Records (Cambridge, MA), vol. III, pp. 234, 239.

[6]John D. Cushing, "A Revolutionary Conservative: The Public Life of William Cushing 1732–1810," PhD. dissertation, Clark University, Worcester, Massachusetts (1960) (hereafter cited as Cushing, "Life of William Cushing"); Arthur P. Rugg, "William Cushing," 30 *Yale L.J.* 128–144 (1920).

[7]Payment by the Crown did not mean payment from the royal purse. Rather, the Crown set the salaries and then funded them from taxes levied against the provincials. Thus the judges—like the Royal Governor—would be paid by the colonists but be beholden to the Crown.

[8]The Massachusetts legislature is called the Great and General Court, sometimes shortened to the General Court.

[9]*Caldwell v. Jennison* (1781), records of the Supreme Judicial Court, case no. 153693, Suffolk County Courthouse, Boston, MA. Note that in the Bill of Sale the child is named "Quaco," but that at various times he was called "Quak," "Quarco," "Quack," "Quacko," "Quarko," and "Quork." In the various court records his name is given as "Quark." The record is silent as to where and when he acquired the surname "Walker."

[10]*Ibid.*

[11]Jennison asserted that Isabell Caldwell, being possessed of Walker "as of her own proper negro slave," had married Jennison, whereupon Jennison became possessed of Walker "as of his own proper negro slave." He "prayed judgment of the court if the said Quark to his said

writ ought to be answered." *Quark Walker v. Nathaniel Jennison*, Worcester Inferior Court of Common Pleas (June 1781).

[12]*Nathaniel Jennison v. John Caldwell and Seth Caldwell*, Worcester Inferior Court of Common Pleas (June 1781).

[13]Jennison's attorneys were John Sprague (also sometimes called Judge Sprague) and William Stearns. Both were prominent advocates. At this time, Massachusetts still retained the practice of calling the most prominent and distinguished members of the bar to the degree of barrister.' This was formalized in 1782 by a statute authorizing the Supreme Judicial Court to confer this degree at its discretion. On February 17, 1784, the last occasion upon which this degree was granted, John Sprague was one of the attorneys so honored.

[14]Both Lincoln and Strong had been members of the state constitutional convention. Both were also called to the bar as barristers in 1784 together with Judge Sprague. Both went on to prominent political careers. Lincoln became, successively, a member of Congress, Attorney General of the United States under President Jefferson, and Lieutenant Governor of the Commonwealth. Strong served several terms as Governor.

In 1811, President Madison appointed Lincoln to succeed Cushing on the Supreme Court. Lincoln declined the appointment because he was going blind, and the seat was subsequently offered to Joseph Story.

[15]At that time, the justices of the Supreme Judicial Court sat as trial and intermediate appellate judges on circuit and as appellate judges in Boston.

[16]Emory Washburn, "The Extinction of Slavery in Massachusetts," **Massachusetts Historical Society Proceedings**, May 1857, pp. 188–203; also printed in 4 **M.H.S. Collections**, 4th Series (Boston, 1888), pp. 335–46. The timing of the paper suggests it was written during the *Dred Scott* controversy, specifically to refute Chief Justice Taney's majority opinion and to support Justice Curtis's dissent.

[17]There is no record of how Warden came into Justice Cushing's service. One writer suggests that Warden's parents had been Cushing family slaves, although their names are not mentioned in surviving family papers. Henry Flanders, **The Lives and Times of the Chief Justices of the Supreme Court of the United States**, second series, (Philadelphia, 1858), p. 38.

[18]R. T. Paine to Robert Luscombe, August 21, 1779, R. T. Paine Papers, MHS. There is no record of any contemporaneous court action and, since Warden remained in Cushing's service after *Commonwealth v. Jennison*, one must conclude that Cushing either manumitted him forthwith or satisfied the attorney general that he already had been freed. Whether Warden had been freed voluntarily or under pressure, however, Paine's most reasonable assumption would have been that Cushing was not opposed to slavery.

[19]Under Massachusetts practice, the Chief Justice delivered the Court's charge to the jury whenever he was present. Sargent charged the jury in *Jennison v. Caldwell* because Cushing was absent from the September 1781 Worcester term of the court.

[20]William Cushing, "Notes of Cases Decided in the Superior and Supreme Judicial Courts of Massachusetts from 1772 to 1789," Bound Manuscript Collection 2141, pp. 50–51, Harvard Law School Library, Cambridge, MA (hereafter cited as "Cushing Case Notes").

[21]Cushing's hearing notes contain sketchy references to this evidence. William Cushing Papers, MHS.

[22]Although the people of Massachusetts had declared their independence from Great Britain, organized a new state government, and taken up arms to preserve their freedom, Cushing used the colonial term "province."

[23]Here again Cushing used a colonial term, "subject."

[24]Constitution of the Commonwealth of Massachusetts (hereafter Massachusetts constitution), Part the First: "A Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts":

> Art. I. Equality and Natural Rights of All Men.
> All men are born free and equal and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties, that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.

Note the striking similarity to the Declaration of Independence and the Constitution of Virginia.

[25]"Cushing Case Notes" (emphasis in original).

[26]*Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177–78 (1803) (Marshall, C.J.): "[A written constitution forms] the fundamental and paramount law of the nation . . . . If an act of the legislature . . . be in opposition to the constitution . . . the constitution, and not such ordinary act, must govern the case . . . "; *Cooper v. Aaron*, 358 U.S. 1 (1958) (unanimous opinion signed by all nine Justices); *Baker v. Carr*, 369 U.S. 186 (1962); *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

[27]Smith, **John Marshall**, pp. 94–96; p. 560, n. 41.

[28]*Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

[29]*Dred Scott*, 60 U.S. (19 How.) at 404–21.

[30]One of the writs was for a man named Jack Phillips. The names of the others are no longer known.

[31]Cushing, **Life of William Cushing**.

[32]Massachusetts and South Carolina were then both signatories to the Articles of Confederation, adopted by "The United States of America in Congress Assembled" November 15, 1777 and completely ratified March 1, 1781. Article II of that instrument recited that "Each state retains its sovereignty, freedom and independence, and every Power, Jurisdiction and right, which is not by this

confederation expressly delegated to the Unites States in Congress assembled."

[33]The Massachusetts constitution provided for such opinions.

[34]Copy of "Letter to Govr Hancock, Decr 1783, respecting ye Liberation of certain Negroes in answer to certain Sneers of his Ex^cy of South Carolina" from William Cushing and Nathaniel Peaslee Sargent to John Hancock, December 20, 1783, William Cushing Papers, MHS (hereafter "Letter to Govr Hancock").

[35]A generation later, Massachusetts Chief Justice Lemuel Shaw followed the logic of Cushing and Sargent in the *Potterfield* and *Fitzgerald* cases. *Commonwealth v. Potterfield*, 1 W.L.J. (Mass.) 528 (1844) and 7 *Monthly Law Reporter* (Mass.) 256 (1844), concerned the brig *Carib*, which arrived in Boston in August 1844 bearing a slave passenger who had been placed on board in New Orleans for transportation to Cuba but had been denied entry. Shaw set him free on a writ of *habeas corpus*, on grounds that he was not a fugitive slave and therefore could not be held in custody under federal law and that Massachusetts law made no provision authorizing either his restraint or his forcible removal simply because he was a slave in Louisiana. In *Commonwealth v. Fitzgerald*, 7 *Monthly Law Reporter* (Mass.) 379 (1844), the Chief Justice dealt with the case of Robert T. Lucas, a slave owned by Edward Fitzgerald, purser on board the Navy frigate *United States*. A slave could not enlist, so Fitzgerald had secured Lucas's entry on the ship's muster roll as a landsman and had arranged to have Lucas's wages paid to himself. After two years at sea, the ship returned to Boston, where two members of the crew secured a writ of *habeas corpus*, thus causing Lucas to be brought before Shaw. Once again, Shaw ruled that the slave was not a fugitive and therefore could not be confined in Massachusetts. Paul Finkelman, **An Imperfect Union: Slavery, Federalism, and Comity** (University of North Carolina Press, Chapel Hill, 1981). Note the interesting parallels and contrasts between Cushing's rationale for denying state assistance to a slaveowner seeking to recover his slave and the United States Supreme Court's rationale nearly two hundred years later for prohibiting state assistance to a property owner seeking to enforce a restrictive deed covenant. *Shelly v. Kraemer*, 334 U.S. 1 (1948).

[36]"Letter to Govr Hancock."

[37]41 U.S. (16 Pet.) 539 (1842). For an excellent discussion of this opinion, see Paul Finkelman, "Prigg v. Pennsylvania: Understanding Justice Story's Proslavery Nationalism," 1 *Journal of Supreme Court History* 51–64 (1997).

[38]35 Mass. (18 Pick.) 193 (1836).

[39]Robert Bolt, **A Man For All Seasons** (New York: Random House, Vintage Book Division, 1990), p. 66.

[40]Letter, Jared Ingersoll to Charles Cushing, March 10, 1798, quoting "Judge Cushing and Mr. Sedgwick" for the proposition that "the question whether under the present Constitution of the different States slavery could be said to exist . . . had received a solemn decision in Massachusetts"; follow-up letter dated April 23; and response, Cushing to Ingersoll, May 1, providing a confused summary of the *Jennison* prosecution, all found in William Cushing Papers, MHS.

"Jehovah Will Provide": Lillian Gobitas and Freedom of Religion

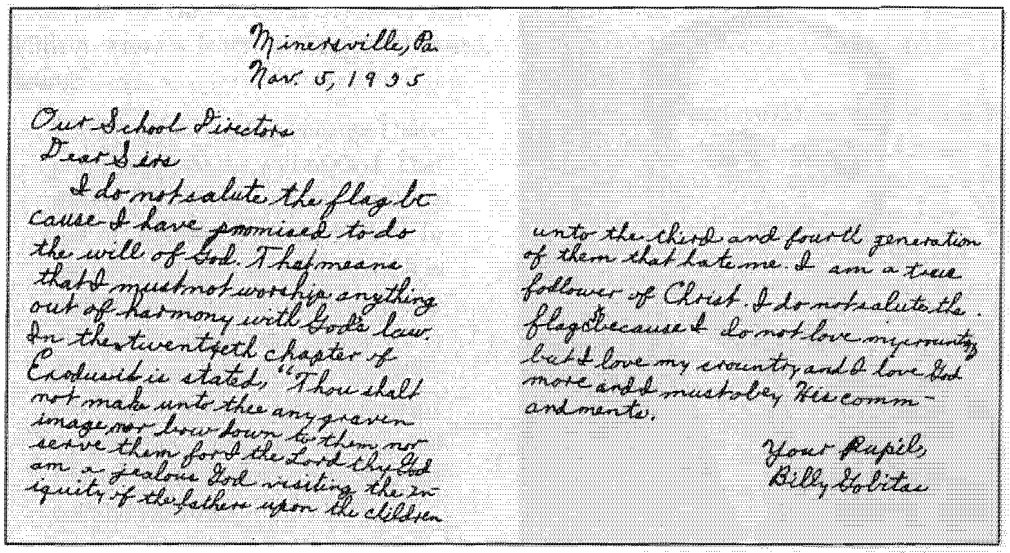
JAMES F. VAN ORDEN*

In 1935, twelve-year-old Lillian Gobitas and her siblings heard the words of Joseph Rutherford, the head of the Jehovah's Witness group the Watchtower Society, on the radio in their kitchen. He implored Witnesses to refuse to salute the American flag since it amounted to the worship of a false idol, which violated the law of God as set forth in the Bible.[1] Rutherford made reference to the courage of Witnesses in Germany who refused to salute Hitler in the face of the unbelievable oppressions of the Nazi regime and similarly called for American Witnesses to refuse to salute the flag. It was a message that struck a chord with Lillian Gobitas.

Drawing on Rutherford's speech, along with her exposure to Witness theology through her family and her own reading of the Bible, Lillian Gobitas and her ten-year-old brother, William, refused to salute the flag at their public school in Minersville, Pennsylvania because they believed their religion forbade such a demonstration. Their refusal led to their quick expulsions by the Minersville school board.[2]

They were not the first Witnesses to refuse to salute the flag and be effectively excused from public education. Irving Dillard writes, "The first flag-salute regulation appeared in Kansas in 1907, and three decades later it had been taken up in only 18 states. One hundred and twenty children were known to have refused for religious reasons to comply."[3] The Gobitas children were different from those objectors that had come before them, however, because they fought their expulsions all the way to the High Court.

At a very young age, Lillian Gobitas was drawn to the Jehovah's Witness teachings.[4] She later recollected: "Oh, that just really, really appealed to me even though I was eight years old . . . I really did go along with that in my heart, in my own heart."[5] One of the Witnesses' strongly held beliefs was that saluting the flag would lead to eternal damnation. In refusing, Lillian would be going against the grain of all of her classmates as they saluted the flag each morning. One can only imagine the immense peer pressure on a twelve-year-old child to conform. In fact, at first the Gobitas children did feel pressured into saluting:



Minersville, Pa.
Nov. 5, 1935

Our School Directors
Dear Sirs

I do not salute the flag because I have promised to do the will of God. That means that I must not worship anything out of harmony with God's law. In the twentieth chapter of Exodus it is stated, "Thou shalt not make unto thee any graven image, nor bow down to them nor serve them for I the Lord thy God am a jealous God visiting the iniquity of the fathers upon the children unto the third and fourth generation of them that hate me. I am a true follower of Christ. I do not salute the flag because I do not love my country but I love my country and I love God more and I must obey His commandments.

Your Pupil,
Billy Gobitas

These are my reasons for not saluting the flag.

1. The Lord clearly says in Exodus 20:3,5, that you should have no gods besides Him and that we should serve Him.
2. The constitution of United States is based upon religious freedom. According to the dictates of my conscience, based on the bible, I must give full allegience to Jehovah the Lord.
3. Jehovah is my god and the bible is my creed. I try my best to obey the Creator

Lillian Gobitas

Nov. 5, 1935

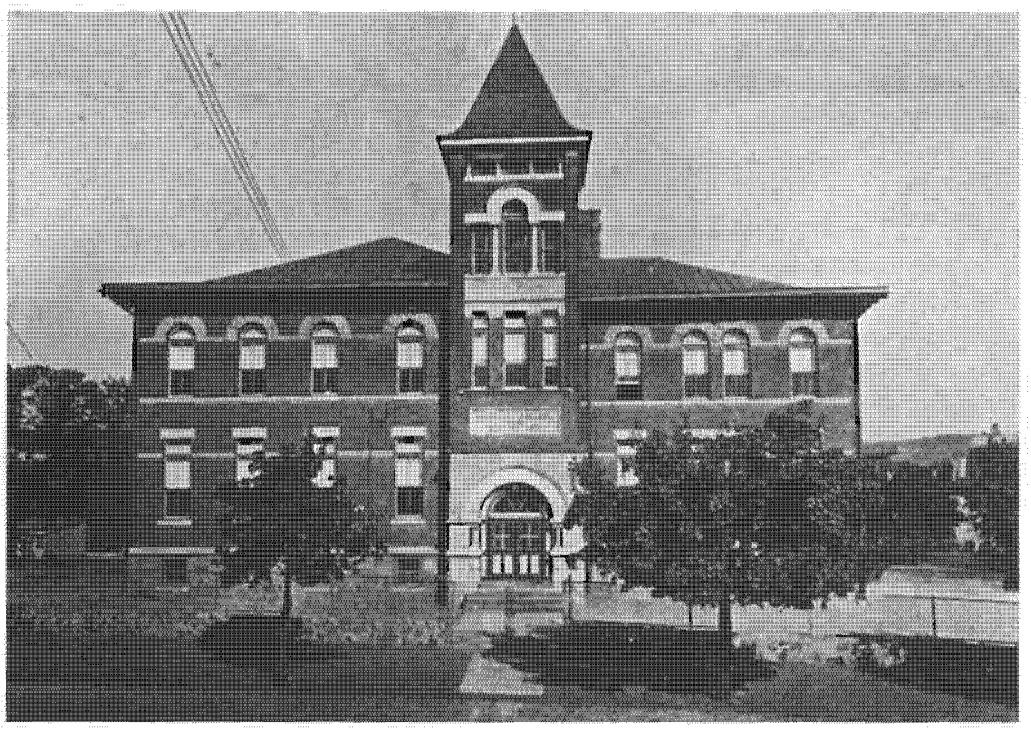
This handwritten note (above) by William Gobitas expressed the ten-year-old Jehovah's Witness's convictions to the school board. The reasons Lillian Gobitas, his twelve-year-old sister, refused to salute the flag are in the handwritten note at left.

> We really felt strongly that the flag was an emblem and that performing a ritual before an emblem would be a direct violation of the Second Commandment. But that doesn't mean that I went to school and stopped saluting. Oh, no! I was a real chicken. I would stop saluting and then when the teacher would look my way, oh, up went my hand and my lips moved, you know . . .[6]

However difficult, Lillian and her brother eventually found the courage to take the stand that they believed their faith required. William categorically refused to salute the flag on October 22, 1935. Lillian was inspired to follow her brother's lead the next day when she decided to remain seated during the pledge. This drew the unwanted attention of her peers: "Well everybody in class turned and looked. That part was the worst moment of all . . . [T]hen they kind of ignored me after that . . . But once I took my stand, I felt great."[7] There were immediate ramifications extending from the classroom to the schoolyard. Both she and her brother were promptly picked on. She recalled, "When I got to school each morning, a few boys would shout, 'Here comes Jehovah!' and shower me with pebbles."[8]

The Minersville school board held a hearing on the Witness's flag salute refusal two

Charles E. Roudabush (left), the superintendent of the Minersville School Board, expelled the Gobitas children for their refusal to participate in the flag salute ceremony at their school (below).



weeks after the Gobitas children's initial stand. William wrote a letter to the school board, stating:

> I do not salute the flag because I have promised to do the will of God. That means I must not worship anything out of harmony with God's law. In the twentieth chapter of Exodus, it is stated "Thou shalt not make unto thee any graven images nor bow down to them nor serve them." I do not salute the flag not because I do not love my country but I love my country and I love God more and must obey his commandments.[9]

But the superintendent of the school board, Charles Roudabush, was not at all sympathetic to the concerns of the Gobitas children, who he later stated in court proceedings had been "indoctrinated." Despite a plea by their father, Walter Gobitas, Lillian and William were expelled from school at the close of the hearing.

Walter decided to sue on behalf of his children and found legal aid in the Jehovah's Witness Watchtower Society. Rutherford, the group's president, secured initial victories for the Gobitas family in the district court and the Third Circuit Court of Appeals. Both courts concluded that the flag-salute rule infringed on the family's First Amendment right to free exercise of religion, as applied to the states through the Fourteenth Amendment. Judge Maris, who sat on both courts and whom Lillian recalls as "sweet," initially seemed to be their champion. He rejected Superintendent Roudabush's notion that the Gobitas children were indoctrinated by their parents. "He said," Lillian remembers, "from what I see of these children, . . . this is their perception . . . I really do think that we were not indoctrinated."[10] He also rejected the school board's argument that the salute was not a religious act and that the compulsory salute was necessary to protect national freedom. But the school board was unwilling to accept the ruling, and the Gobitas children were told they were still not welcome back in school pending an appeal to the U.S. Supreme Court.

That the Court would review the Gobitas case was not a foregone conclusion. Lillian recollects that, "One time I asked in the legal department, I said, 'I would like to know why our case was chosen.' They said, 'We don't know.' It was just a fluke that they happened to pick our case as a test case."[11] Moreover, Justice Felix Frankfurter would refer in his opinion to the fact that in previous flag salute cases the Court had denied certiorari because the lower courts had upheld the flag salute.[12] At least four Justices felt there was sufficient need now to consider the case since the rights of the individual had prevailed in the lower court. In effect, the lower court decisions pushed the Supreme Court to weigh in fully on the issue.

Lillian Gobitas traveled to hear the oral argument of her case (in which the family name was misspelled as "Gobitis") on April 25, 1940. She still remembers vividly:

> Mr. Joseph Rutherford, who was the president of the Watchtower Society . . . argued the case at the Supreme Court . . . It was packed first of all. Mostly Witnesses, I'm sure. And the nine judges heard another case before us. Some kind of corporate case and oh, there were interruptions, dropping pencils and paper and this and that and [the Justices were] interrupting the lawyers . . . Then, along came Joseph Rutherford and he argued [our case] from the Bible standpoint. And instead of all that shuffling and interruptions, there was not a sound. It was so awesome . . . [H]e compared the Witness children to the three Hebrews that bowed down before Nebuchadnezzar's image and were ready to be thrown into the fiery furnace. Biblical examples like that . . . Everyone just paid rapt attention and that surely included

> me . . . And so we thought after that because we had won in both courts, well, it's a shoo-in.[13]

This was not to be the case. Justice Frankfurter wrote for the nearly unanimous Court framing the question as one of national cohesion versus the religious rights of the Gobitas children. He ultimately sided with the school board, based on his belief that regulating the flag salute was within the purview of permissible state action. He argued that "the courtroom is not the arena for debating issues of educational policy . . . So to hold would in effect make us the school board for the country."[14] Frankfurter reasoned that Jehovah's Witnesses should not take their complaints to court, but instead should have turned to their elected officials. The decision came as quite a shock to the Gobitas family, as Lillian recalled:

> One day mother and I were working in the kitchen–we lived upstairs above the grocery store. Bill was down helping Dad downstairs and the news came on and they said, "In Washington today, it was decided by the Supreme Court that the compulsory flag salute was correct." And it was 8–1 against us. We couldn't believe it. We were not prepared for that. We just stood there in disbelief . . . .[15]

The motives behind Justice Frankfurter's opinion can be gleaned from a letter he wrote to Justice Harlan Fiske Stone, the lone dissenter, trying to persuade him to join the majority. The letter is dated May 27, 1940, around the time the German armies were moving westward in Europe, and American involvement was becoming increasingly likely. Frankfurter seemed to have these things in his mind as he wrote to his colleague on the Bench:

> For time and circumstances are surely not irrelevant considerations in resolving the conflicts that we have to resolve in this particular case . . . [C]ertainly it is relevant to make the adjustment that we have to make within the framework of present circumstances and those that are clearly ahead of us . . . After all, despite some of the jurisprudential "realists," a decision decides not merely the particular case . . .[16]

Lillian Gobitas did have sympathy for what the flag stood for, especially in a time of war: "This is a very sensitive thing, the flag salute, because when you think about how many people gave their lives for flag and country and here we were not saluting."[17] Lillian was not blind to the ultimate sacrifices that were made in the name of flag and country, but she still felt that she should be granted a faith-based exemption from saluting, since her religion required no less.

Justice Harlan seemed to agree. He alone refused to join Frankfurter's majority, instead taking the view that the Court must protect the rights of "insular and discrete" minorities against the actions of majorities as set forth in his Footnote Four in the 1938 *Carolene Products* decision.[18] "The Constitution," he wrote, "expresses more than the conviction of the people that democratic processes must be preserved at all costs. It is also an expression of faith and a command that freedom of mind and spirit must be preserved, which government must obey, if it is to adhere to that justice and moderation without which no free government can exist."[19] Stone believed that it was the role of the Court to protect the Lillian Gobitases of the nation against majority-enacted laws that impinged upon their rights. Constitutional democracy demanded that they not simply be sent to the polls.[20] Stone recognized that *legislative* protection of groups like the Witnesses did not offer them much recourse.

In fact, the Witnesses were now more exposed than ever. Lillian Gobitas described the time following her case as "open season on Jehovah's Witnesses."[21] Newspapers carried numerous accounts of fire bombings, beatings, and other acts of brutality against Witnesses

across the country. There were even threats of violence against the Gobitas family grocery store in Minersville, although they never materialized.

Three years later, in *West Virginia State Board of Education v. Barnette*, the Court reversed its decision against the Witnesses. Lillian Gobitas was again in attendance for the oral argument. This time, against the dissent of Justice Frankfurter, the Court found for the Witnesses by protecting their right not to salute the flag on free speech rather than religious freedom grounds. This remarkable about-face happened because Justices Hugo L. Black, William O. Douglas, and Frank Murphy now viewed their positions in the first case to have been wrong and because newly arrived Justices Robert H. Jackson and Wiley Rutledge also agreed that the Gobitases should have prevailed. In one of the most oft-cited statements ever made by a member of the Court, Justice Jackson wrote that "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[22]

Lillian Gobitas recalled a deep sense of joy when the Witnesses finally were victorious: "Oh, we both won in the end. It was our case either way . . . We were thrilled. Absolutely thrilled. And you know, things began to wind down. Believe it or not, everything cooled down. The mobbings stopped . . . It just wound down and everything got calm again. Kids went back to school."[23]

Minersville v. Gobitis: A Personal Legacy

Lillian Gobitas's legal struggle profoundly changed the course of her life. One might expect that the negative effects on the Gobitas family of losing their Supreme Court case would last a lifetime—a sad legacy of the faulty logic of the time. But a review of Lillian's life indicates the contrary.

After being homeschooled for a short time, the Gobitas children received a phone call from Paul Jones, who had read in the paper

This store, which was operated by the Gobitas family in Minersville at the time of the case, was avoided by some of their customers after a local church organized a boycott. "Business fell off quite a bit for several weeks and some of the customers never did come back," recalls Lillian Gobitas Klose.

about their expulsions and had decided to open a school on his farm about 30 miles away from Minersville for those Witness children who had taken a stand against the flag salute and were expelled. Lillian recalls fondly her time there:

> We were very welcome . . . About a hundred acres they had . . . . Upstairs had no electricity. Just the kitchen had electricity. They were so clean and so loving and so hard working. It was incredible . . . It was like "Little House on the Prairie," you know. It was all eight grades in one room. It was very pleasant.[24]

But there were differences between the education Lillian received at the Witness school on the Jones Farm and her public school:

> It was pretty much the same. It was standard. But I did miss the challenging class discussions . . . and more detailed class discussions. It didn't matter. The quality was alright. A lot was left to one's own self, which was a good thing for years to come. I learned to be self-taught in many things.[25]

After the *Barnette* reversal, the Gobitas children received a letter from the Minersville School Board in effect reinstating them, but to Lillian, it was too little, too late. By then she was twenty and had attended a local business college. She felt, "Let it be. We didn't think anything about the morality of it or the fairness of it. It didn't occur to us. We were too busy."[26] In short, she and her brother William had gone on with their lives.

Lillian's role in the case created other important opportunities. She wanted very much to work at the headquarters of the Watchtower Society in Brooklyn at a time when they "didn't take girls much at all."[27] Having been the plaintiff in the case made it possible for her to go and work there, at a place where she was surrounded by "giants of faith."[28] Lillian felt sure that her role in the case played a pivotal role in her hiring. She recalls, "[T]he president of the Watchtower at the time often said that that did lead him to consider me because so few girls were chosen."[29]

Lillian Gobitas went on to work at the World Headquarters of Jehovah's Witnesses in Brooklyn. She met her husband, Erwin Klose, while attending a religious conference in Germany. Klose had refused to serve in the German army because of his religious beliefs and had been imprisoned in a concentration camp.

Lillian's stay in New York led her to do missionary work in Europe, where she met the man she would later marry. She was first attracted to Erwin Klose because of his fine singing voice. He spoke no English and she spoke no German, but they formed an immediate bond. Erwin came to the United States and attended missionary school in Ithaca,

New York, where he learned English. He later crossed paths with Lillian again in Brooklyn. She attended missionary school as well, and studied German. As newlyweds they traveled to Vienna where Erwin was assigned to do missionary work. "We had a marvelous time," Lillian later recalled.[30]

The Historic World War II Context for the Gobitas-Klose Union[31]

Lillian Gobitas's refusal to salute the flag took on particular significance because of the time period during which it occurred. America was on the cusp of World War II, and patriotism was high. It was not the time to show disunity. As Lillian was embroiled in the flag-salute controversy, German Witnesses were taking a stand against the Nazi regime on the other side of the Atlantic Ocean. They rejected any worldly government, refused to serve in the German armed forces, and declined to gesture towards Hitler (the one-armed "Heil Hitler" salute), as doing so would be an act of worship of a false God. Those who took such a stand against the German state, including Lillian's future husband Erwin Klose, were persecuted, imprisoned, and forced into concentration camps. As Lillian recalled, "Erwin was in the concentration camp at the very same time that I was being expelled."[32] Like his wife, Klose remained true to his faith throughout his ordeal, although the hardship he suffered at the hands of the Nazis was far more severe than the inconvenience his wife endured.

Lillian tells her husband's story:

> His mother told me that when he was led off to the concentration camp, she said that she and her sister was watching from behind the curtain as they led him away and my husband said that he was silently crying actually. It was very frightening to be taken on a train.[33]

She remembers her husband saying about this ordeal, "Being brave doesn't mean you're not scared."[34]

Lillian enjoyed "a wonderful life" with her husband and their two children, who also had the courage to take a stand against the flag salute. Unlike their mother, they suffered no reprisals and were able to finish their public school educations—a direct legacy of her struggle before them.

Sixty years after the Supreme Court ruled on her case, Lillian was asked if she still had hard feelings for school Superintendent Charles Roudabush, who had held an unrelenting grudge against the Gobitas children so many years before. She replied:

> We always thought, "Who knows?" Because sometimes guards in the concentration camp would become Witnesses. They would see all that and it would move them to take a stand. So, you know, we thought... maybe some day, he will see the light, so to speak. We didn't have any personal vendetta against him.[35]

In short, in the face of oppression, Lillian Gobitas retained an unwavering commitment to Witness theology. Whether the oppression came at the hand of a school board or a prison guard, both wife and husband prayed for their oppressors' ultimate transformation to Witness ways.

On balance, Lillian Gobitas Klose's chance inclusion in the compulsory-flag-salute drama affected her life for the better. Were it not for the case, she would not have gone to work at the Headquarters, would not have gone to Europe, and would not have met her husband, another champion of the Witness faith. "Those things would not have happened otherwise," she believes. "It changed the course of our lives. I call it the storybook life."[36] Where the Minersville School Board, with the stamp of approval of the Supreme Court, had closed doors based on Lillian's religiously

based refusal to salute the flag, her faith and persistence led many new ones to open.

*The author's thanks go to Donald Grier Stephenson, Jr., who read a draft of this essay and made helpful comments.

ENDNOTES

[1]Specifically, *Exodus* 20: "Thou shalt not make unto thee any graven images nor bow down to them nor serve them."
[2]For a biographical discussion of the circumstances surrounding the case during the 1940s, *see* David Manwaring, **Render Unto Caesar: The Flag Salute Controversy** (1962) (hereafter cited as Manwaring).
[3]Irving Dillard, "The Flag Salute Cases," in John Garraty, ed., **Quarrels That Have Shaped the Constitution** (1987) at 226. *See also* Manwaring for additional information related to the history of the flag salute and religious refusals to participate, including Witnesses and other religious sects.
[4]For a detailed discussion of Lillian Gobitas's life, including her case, *see* Peter Irons, "We Live by Symbols" and "Here Comes Jehovah," in **The Courage of Their Convictions** (1988) at 15.
[5]James Van Orden, phone interview with Lillian Gobitas Klose, March 12, 2003 (hereafter cited as Van Orden).
[6]*Id.*
[7]*Id.*
[8]Lillian Gobitas Klose, "The Courage to Put God First," *Awake!*, July 22, 1993, at 14.
[9]Papers of William Gobitas, Library of Congress, Washington, D.C.
[10]Van Orden.
[11]*Id.*
[12]310 U.S. 586, 592 (1940).
[13]Van Orden.
[14]*Minersville School District v. Gobitis*, 310 U.S. 586, 598 (1940).
[15]Van Orden.
[16]Reprinted in Alpheus Mason and Donald Grier Stephenson, **American Constitutional Law: Introductory Essays and Selected Cases** (2002) at 562.
[17]Van Orden.
[18]*United States v. Carolene Products Co.*, 304 U.S. 144, 152, n.4 (1938).
[19]310 U.S. 586, 606–07 (1940) (dissenting opinion).
[20]It almost seems as if Stone prophetically sensed the ensuing backlash against Witnesses followed the announcement of the decision.
[21]Van Orden.
[22]*West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).
[23]Van Orden.
[24]*Id.*
[25]*Id.*
[26]*Id.*
[27]*Id.*
[28]*Id.*
[29]*Id.*
[30]*Id.*
[31]For a discussion of the persecution of Witnesses in America and Germany, *see generally* Shawn Francis Peters, **Judging Jehovah's Witnesses: Religious Persecution and the Dawn of the Rights Revolution** (2000).
[32]Van Orden.
[33]*Id.*
[34]*Id.*
[35]*Id.*
[36]*Id.*

To Sit or Not to Sit: The Supreme Court of the United States and the Civil Rights Movement in the Upper South

PETER WALLENSTEIN*

In the early 1960s, Ford T. Johnson Jr. was an undergraduate at Virginia Union University, a black college in Richmond, Virginia. So was his sister, Elizabeth. On Saturday, February 20, 1960, they and dozens of classmates headed downtown to participate in sit-ins directed at segregated seating arrangements at the eating venues in the department stores that lined Broad Street. What motivated the Johnsons and the other black students who participated in the sit-in that Saturday was a commitment to bring segregation to an end—beginning with the integration of downtown Richmond's lunch counters. Whether the racial discrimination imposed in those stores reflected the express mandates of state laws and city ordinances or the private decisions of various enterprises did not matter to the demonstrators. Even if integrated service had been within the law, management at lunch counters and other establishments, relying on trespass laws, would still have called upon public authorities to eject demonstrators seeking desegregation.

From that February in 1960 until passage of the Civil Rights Act of 1964, sit-ins took place across the South. Some led to desegregation without arrests, but in every former Confederate and border state, demonstrators were rounded up and arrested. Dozens of cases made their way to the Supreme Court of the United States, addressing such issues as equal protection, due process, property rights, and state action.

The Civil Rights Movement

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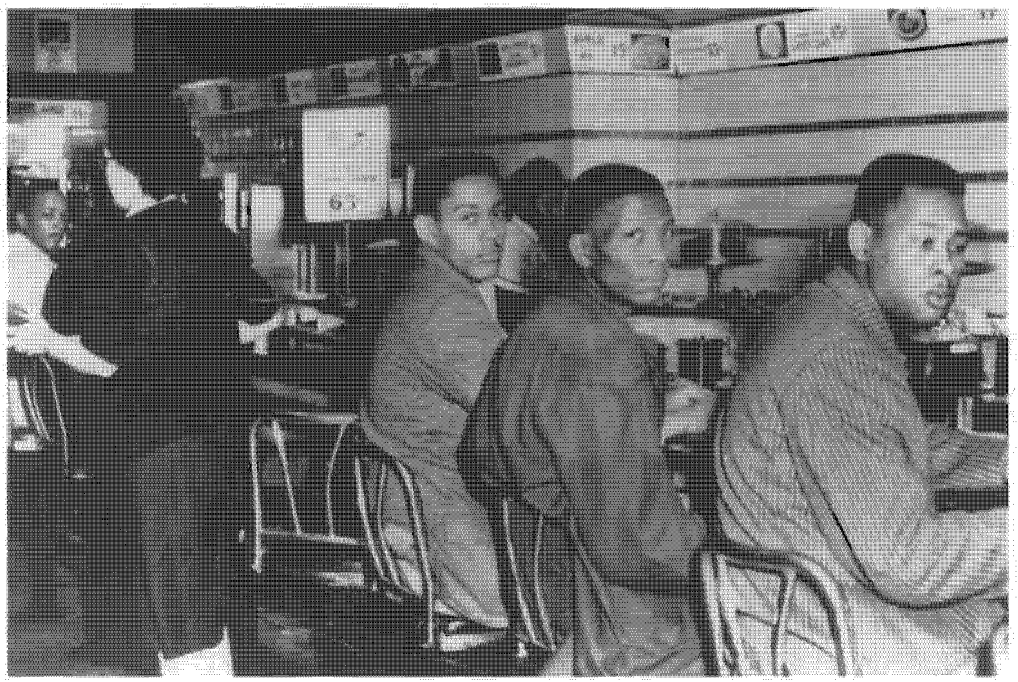


On February 1, 1960, a group of black students from North Carolina A & T College who were refused service at a luncheon counter reserved for white customers staged a sit-in strike at the Woolworth store in Greensboro, North Carolina. Ronald Martin, Robert Patterson, and Mark Martin are shown here seated at the lunch counter, as they remained throughout the day.

Alabama, the cradle of the Confederacy, where activists such as Rosa Parks and Dr. Martin Luther King Jr. operated and institutions and organizations such as Dexter Avenue Baptist Church and the Montgomery Improvement Association fought for change. By contrast, this study highlights an Upper South community, Richmond, Virginia, in the early 1960s.

On Monday, February 1, 1960, four young men, students at the North Carolina Agricultural and Technical College, staged a widely publicized sit-in at a Woolworth Store lunch counter in Greensboro.[1] Sit-ins had been occurring for some time throughout the South, and preparations were underway for a protest in Nashville, Tennessee.[2] But the Greensboro one was the first to capture the imagination of large numbers of Americans, particularly black southerners. The Greensboro lunch counter sit-in was replicated in towns and cities across the South, including Atlanta, Georgia and Tallahassee, Florida.[3]

Before the month of February was out, sit-ins had taken place in several communities in Virginia, too. At first the protesters focused, as the Greensboro students had, on the practice of white stores excluding African Americans from eating facilities. Soon student protesters targeted other places where whites but not blacks could have access and gained widespread support among black residents of their communities. As in the Deep South, racial segregation came under siege in the Upper South as well.

The Richmond Sit-ins Begin

The North Carolina sit-ins began on February 1. Black college students in Richmond did not take action for nearly three weeks after that, but they did not sit idle: they were carefully planning their own protest.[4] On Saturday, February 20, at about 9:00 a.m., approximately 200 students converged on downtown Richmond. The group went first

to the Woolworth's store, on Broad Street at Fifth. Ignoring the small counter at the back of the store set aside for black customers, they occupied the thirty-four seats in the section reserved for whites. Store officials quickly closed the white section. The students continued to sit, talking among themselves or reading. Meantime, when a small group entered Grant's Department Store, at Broad and Fourth, the manager closed the lunch counter even though the students had not attempted to sit there.[5]

About 9:30 a.m., a larger group went into nearby G. C. Murphy. They took all seventy-four seats in the whites-only section, and it too was closed. Questioned about the demonstration, students explained that they had come as individuals, though two, Charles M. Sherrod and Frank G. Pinkston, identified the others as classmates at Union. The two leaders took pains to characterize the demonstration as "spontaneous"—that is, not in any way sponsored by the university—but they conceded strong sympathy with similar demonstrations elsewhere. Richmond was just one of many offshoots of the original Greensboro protest.

At about 1:00 p.m., managers at Murphy's and Woolworth's both announced they were closing the stores, and the demonstrators left. Soon afterwards, the group moved into Thalhimers, at Sixth and Broad, and tried to take seats at all four eating places there. At the restaurant on the fourth floor, they had to wait in line, but they took seats at the soda fountain in the basement and at the lunch bars on the main floor and the mezzanine. All four places were immediately closed. Thalhimers

Department stores and drugstores throughout the South relied on trespass laws to keep blacks from eating at their lunch counters on the ground that they had the right to deny service to whomever they pleased. These men picketed a Woolworth's to protest its segregation policies.

personnel urged the demonstrators to leave the store, and after perhaps 45 minutes they did so. William B. Thalhimer Jr. announced that the store would remain open, but that the eating places would all remain closed for the rest of the day.

The group moved up Broad Street to People's Service Drug Store, where they took all the available seats at the counter. Service was halted as soon as they did so. The manager announced that the store would close for ten minutes, and when it opened it would be for prescription business only.

Asked whether the protests might end anytime soon, Charles Sherrod spoke for the students and indicated their willingness to meet with retail merchants in the downtown area. But he made clear that the group had no intentions of backing away from its objective: "Our aim is to end segregation, period."

The Thalhimers Thirty-four

On the morning of Monday, February 22, the demonstrators returned for a second day of lunch counter protests. This time there were perhaps 500. They did not sit at the lunch counters at Woolworth's or Murphy's—both places kept their eating places closed all day. But about thirty sat at the lunch counter at Grant's. The counter then closed. After one half hour, the students left, and the counter was reopened. Another group went to the lunch counter at People's. They also were refused service, and again the counter was closed for a time.[6]

Similarly, on April 14, 1960, a group of ministers, in cooperation with the Congress of Racial Equality, picketed a Woolworth store in New York City to protest segregation at the chain's lunch counters in its Southern branches.

Thirty-four Richmond, Virginia, students were arrested for trespassing at a sit-in at Thalhimers' segregated lunch counter on February 22, 1960. This student protester waved at photographers as he entered the police wagon.

Some groups went to Thalhimers. Seventy-five people attempted to enter the Richmond Room, a tearoom on the fourth floor. Others went to the lunch counter on the first floor. Refused service and asked to leave, they nonetheless remained, some of them holding textbooks and notebooks, a few holding small American flags. The lunch counter was closed for a while, though the Richmond Room remained open for white guests. Store officials called for city magistrates and again requested that the students leave.

At each of the two places—the tearoom and the lunch counter—seventeen arrests were made. As the *Richmond Times-Dispatch* reported, there might have been many more, but not all the students stayed. Dr. E. D. McCreary Jr., a theology professor, was among the Union faculty members who suggested that many students leave. He explained: "We're just advising the students to leave because we believe we have the case."

Those who left mostly walked over to the police lockup, on Sixth Street at Marshall, where they waited for their classmates to complete the process of being booked and then released on $50 bond. Each time some of the thirty-four students exited the lockup, the group clapped and cheered. The thirty-four included two people who had been involved for weeks in the planning—Charles Sherrod and Frank Pinkston—as well as twenty-two other men and ten women. Among them were Woodrow Benjamin Grant Jr., one of the original organizers; Raymond Blair Randolph Jr., a student from New Haven, Connecticut; and a sister and brother, nineteen-year-old Elizabeth Johnson and eighteen-year-old Ford Johnson Jr., the children of a Richmond dentist, Dr. Ford Tucker Johnson Sr.

After the initial sit-ins and the arrests, protesters launched a sustained boycott. Students returned the next day—Tuesday, February 23—a little before 11 a.m. But the numbers were smaller this time, and the eating facilities at all six places that had been targeted on Saturday and Monday—Grant's, Thalhimers, Woolworth, Sears, People's, and Murphy's—remained open. The protesters focused on Thalhimers, the scene of the arrests

the day before. Rather than sitting in again, they remained outside and picketed the store. They distributed leaflets urging black Richmonders not to enter the store and certainly not to buy there. It explained: "Thalhimers had our Negro youths arrested because they tried to exercise their constitutional rights to eat in a public place. Don't buy in this store!" Among the slogans on the pickets' placards was "Can't eat . . . Don't buy."[7]

The Thalhimers Thirty-four Go on Trial

The first contingent of the Thalhimers Thirty-four to go on trial—Marise L. Ellison, Gordon Coleman, Milton Johnson, and Frank Pinkston—faced Judge Harold C. Maurice in police court on Friday, March 11. Their lawyers were Oliver W. Hill, Martin A. Martin, and Clarence W. Newsome. The defendants and their attorneys tried to show that race had been the governing consideration behind the arrests. Judge Maurice sustained Commonwealth's Attorney James B. Wilkinson's objections and prevented any such testimony from being introduced. As the *Richmond Afro American*'s headline put it, "'Why?' Is Touchy."[8]

The principal witness against the four was Newman B. Hamblett, vice president and operating manager at the Thalhimers store. He testified that the students had been in the restaurant area on the fourth floor and that, after asking them to leave the store, he had authorized trespass warrants to be issued against them. He conceded that the store had been open at the time and that when the arrests took place, at least fifty other patrons had been on that floor. Martin asked, "Well, what was this particular person doing that was different from any other patron?" The prosecution objected. "What he was doing is irrelevant. He is not charged with disorderly conduct, only with trespassing. Testimony is that he was asked to leave the premises of a private corporation and he refused to do so, which makes him guilty of trespassing under the Virginia code. No reason for his being asked to leave is required." Judge Maurice sustained the objection.[9] Martin tried again. Was he doing "anything" in any way "disorderly"? "No." "Then why did you ask him to leave?" Objection. Sustained. "Did you ask any other person to leave?" Objection. Sustained. "Did you ask any white persons to leave?" Objection. Sustained. "Were all the persons you asked to leave colored?" Now the judge objected. "This is not a racial issue." At such a preposterous notion, as it seemed to

Civil rights attorney Oliver Hill represented the Thalhimers Thirty-four at trial. He argued that race was the governing consideration behind the arrests.

them, a number of African Americans in the courtroom laughed.

Unable to get answers on the record to these and similar questions, Martin argued that "the store was open for public business, and this man was a business invitee." He was only doing what other such business invitees were doing in the store, and "no one had any business inviting him out." Martin concluded the thought and established the point that he anticipated would be the basis for an appeal of his clients' convictions: "And just because he failed to leave, being ordered to without rhyme or reason, he was arrested. I maintain that this is a violation of his legal and constitutional rights, and that he is being denied equal protection of the law."

Martin's colleague Hill elaborated the argument and pointed toward another clause in the Fourteenth Amendment. "We are not attacking the constitutionality of the [Virginia] trespass statute. If someone goes into a store and does something that he should not do, something that affects the operation of the business, certainly the law is applicable." That, Hill contended, was not the situation here. "What action of this defendant," he wanted to know, "was different from the action of other customers there at the time? I submit that in denying us development of that situation, you are denying him due process."

Trials of the Thalhimers Thirty-four continued. Each time, the ritual unfolded much as the first rendition had, with the students' lawyers seeking to introduce race as the reason for the arrests and the judge upholding the prosecution's objections that the only reason relevant to the proceedings was that they had failed to leave the store when asked to do so. On Thursday, March 24, for example, seven students faced charges, among them Elizabeth Johnson and Ford T. Johnson Jr. These seven had been at the soda fountain and lunch counter on the first floor, not the restaurant or tearoom on the fourth floor.[10]

The Thalhimers Thirty-four appealed their convictions to the Virginia Supreme Court. Not for many months would they learn the results. In the meantime, sit-ins spread elsewhere, in Richmond and across other communities in Virginia. In nearby Petersburg, for example, in an action that began shortly after the Richmond sit-ins, the city library was the target. In April, Harmon Buskey Jr., a young military veteran and restaurant employee, led a series of actions in the east end of Richmond that quickly proved successful.[11]

At the Virginia Supreme Court

On April 24, 1961—a little over a year after the trials of the Thalhimers Thirty-four—the Virginia Supreme Court upheld the convictions of Raymond B. Randolph Jr., Ford T. Johnson Jr., and the other thirty-two people who had been arrested on February 22, 1960, for sitting in at the Thalhimers store in downtown Richmond. Proprietors could decide, "on purely personal grounds," whether to accept or reject customers. Writing for the court (and quoting with approval from a previous statement), Chief Justice John W. Eggleston declared it to be "well settled that, although the general public have an implied license to enter a retail store, the proprietor is at liberty to revoke this license at any time as to any individual, and to eject such individual from the store if he refuses to leave when requested to do so."[12]

The Virginia Supreme Court said about the Thalhimers Thirty-four, on one page of its opinion: "Because of their race they were refused service at these facilities." Yet on the next page, it said about Raymond Randolph in particular: "There is no evidence to support his contention that he was arrested because of his 'race or color.' On the contrary, the evidence shows that he was arrested because he remained upon the store premises after having been forbidden to do so by [Ben] Ames [the personnel manager], the duly authorized agent of the owner or custodian."[13] By refusing to leave when asked to, Randolph violated a state trespass statute. "It would, indeed," the court concluded, "be an anomalous

situation to say that the proprietor of a privately owned and operated business may lawfully use reasonable force to eject a trespasser from his premises and yet may not invoke judicial process to protect his rights." State action had in no way, therefore, been employed in violation of Randolph's constitutional rights under the Fourteenth Amendment. In refusing to serve him and then refusing to permit him to stay on the premises, Thalhimers had "violated none of his constitutional rights," and thus the lower court's judgment was "plainly right."[14] According to the Virginia Supreme Court, the Thalhimers Thirty-four remained guilty of trespass.

Within three months, on July 24, lawyers for the Thalhimers Thirty-four filed an appeal to the Supreme Court of the United States in which they contested the Virginia Supreme Court's ruling as inconsistent with the Fourteenth Amendment's restrictions on state action as regards freedom of expression, equal protection, and due process. The petitioners conceded the right to rely on trespass laws *to protect a person's home*, but Thalhimers department store, they insisted, could claim no such privilege:

> Thalhimer's, a public commercial establishment to which petitioners were invited, is the home of no one, and Thalhimer's, Inc. was not in this case exercising a mere "personal" choice but has invoked state power to help it obey the force of massive custom [of racial discrimination], which in its turn has long been supported by state law and policy. The "property" interest of Thalhimer's, Inc. is an exceedingly narrow one, for these petitioners, with the general public, were not so much "invited" as besought to come into Thalhimer's, so long as they abstained from the single forbidden fruit of equal treatment in a few restaurants; the "property" right actually at stake is the specific right to segregate, and no other. The cases were tried and affirmed on the theory that these sweeping differences in fact can make no difference in result—that the right to choose those who come or stay on one's property is . . . an absolute, yielding to no competing considerations.

Yet, declared the Thalhimers Thirty-four, "in this case the right of private property collides with the Fourteenth Amendment right not to be subjected to public racial discrimination."[15]

Sit-in Cases and the U.S. Supreme Court

The Supreme Court faced dozens of sit-in cases in the early 1960s. The first wave preceded the case of the Thalhimers Thirty-four. In *Garner v. Louisiana* and two other cases from Louisiana, decided in December 1961, the Supreme Court overturned all the convictions. Trespass was not at issue; property rights remained secure; a police officer had arrested the students without any request from the drugstore owner, who simply declined to serve them. Chief Justice Earl Warren wrote the opinion of the Court, holding that there was not enough evidence to convict the demonstrators.[16]

Though there were no dissents from Warren's opinion, the Court's apparent unanimity masked a divergence in perspectives that made the decisions in subsequent sit-in cases by no means certain. Justices William O. Douglas, Felix Frankfurter, and John Marshall Harlan concurred in the outcome, but each for a different reason and with a separate opinion. Justice Frankfurter saw no evidence of a crime, he said, for the protesters' "mere presence" could not justify a guilty verdict for "disturbing the peace."[17]

Justice Harlan wrote: "I agree that these convictions are unconstitutional, but not for the reasons given by the Court." In *Garner*, protesters had not been told by the proprietor

to leave, only that they would obtain service if they moved to blacks' customary part of the establishment. So they remained in the store, "with the implied consent of the management," and Harlan saw an issue of demonstrators' First Amendment freedom of political expression—provided they had the owner's consent to be there. He went on to note that a "peaceful demonstration on public streets, and on private property with the consent of the owner, was constitutionally protected as a form of expression."[18]

Justice Douglas thought that, given the degree of whites' commitment to segregation in Louisiana, the demonstrators surely threatened the peace by their peaceful action, so there was sufficient evidence to sustain the convictions. Yet he insisted that the protests had occurred in places of public accommodation; the sit-in participants had a right to be there to seek and get service; and the actions of the police in arresting them, and of the courts in convicting them, constituted state action in violation of the Equal Protection Clause of the Fourteenth Amendment. Where a business was operated "for public use," he said, "under a license from the government"—"a privilege that derives from the people"—a person, in this case a white citizen of Louisiana, "should not have under our Constitution the power to license it for the use of only one race. For there is the overriding constitutional requirement that all state power be exercised so as not to deny equal protection to any group."[19]

The early cases supplied straws in the wind, but no conclusive direction that the Court might follow in *Randolph v. Virginia*. Would the Court even take the case of the Thalhimers Thirty-four? If it did, how would it rule? Those questions remained hanging, for the answers did not come until much later—the ruling was not handed down until June 1963. In the meantime, participants in the civil rights movement in the Richmond area pushed ahead both in their civil rights activities and in their daily lives. For one of the Thalhimers Thirty-four in particular, those daily lives and civil rights activities came together when a mundane encounter with the law turned unexpectedly into a civil rights protest.

Courtroom Segregation—Where to Sit?

Black Virginians, like their counterparts across the South in the early 1960s, targeted racial segregation wherever they encountered it in public places—in public schools, on public transportation, and at lunch counters. In some cases, they took legal action against segregation. In other cases, they took direct action, were arrested, and ended up in court anyway.

In court, they often encountered segregation yet again in the racially separate seating arrangements that characterized many southern courtrooms. Then, if they challenged the legitimacy of such arrangements, they raised new questions of what the Constitution—particularly the Fourteenth Amendment—permitted or required in the administration of justice.

In the spring of 1962, Ford T. Johnson Jr. was in his final term at Virginia Union University and living at home in Richmond when he went for a drive one day in the family car. He was arrested by a police officer for driving with expired tags and without a driver's permit. He did not know, he later said, that the license tags had expired, or that the new tags were in the car waiting to be put on. His sister "razzed him" later that day, his father recalled many years afterward, for being arrested for not having something on his car that was sitting there in the car with him![20]

Johnson appeared in traffic court, at Eleventh Street and Broad, on the afternoon of April 27, 1962. Traffic court took place in the same building, even the same room, as police court—but in the afternoons rather than the mornings—so it was Johnson's second time in that room, two years after his trial as a member of the Thalhimers Thirty-four.[21]

Hoping to "get the thing over with," he later recalled, with as little fuss as possible, he took a seat near the back, on the window side

of the courtroom. "I just sat down," he says, "in the first available seat." But then "this entire situation occurred." He noticed that court officials seemed troubled about something, though he could not tell what. The bailiff came over and asked him to leave his seat and move to the other side of the courtroom. When Johnson did not immediately respond to this directive, the judge, Herman A. Cooper, himself took action and called him to the front of the courtroom.[22]

With that order, Johnson complied. Still unclear as to what he was doing that could be the cause of any concern, Johnson left his seat and went to the front of the courtroom. Judge Cooper then directed Johnson, as was later said, to "remove himself from in front of the bench and take a seat"—more specifically to take a seat in the section of the courtroom reserved for African Americans. Directed to the other side of the courtroom from where he had been, Johnson began to realize that he was being asked to do something that he could not, and would not, do. After all, Ford T. Johnson Jr. had been one of the Thalhimers Thirty-four. He was not primed to obey the order without putting up some kind of resistance, certainly without hesitating—which itself could be, and was, construed as an offense against the authority of the court. Johnson was removed from the courtroom for about fifteen minutes before being brought back for trial on the traffic violations and the contempt citation. He was "summarily convicted of contempt," as was later stated, on the charge that he "would not be seated, but insisted on standing in front of the judge's bench so that other cases could not be heard." Judge Cooper imposed a $10 fine, which he suspended.[23]

Johnson has always held that he did not know, when he stepped into the courtroom that day, that the seating would be segregated. In his previous appearance in the same courtroom two years earlier for his hearing on the Thalhimers sit-in, it had not been so. Moreover, while he understood the segregated ways of department stores and lunch counters, he said later, "it never occurred to me that the courtroom was segregated," too. In short, he observed, "There was no prior intent to go there and stage any demonstration" that day.[24]

But when he found out about the rules and was directed to follow them, he froze, he later explained, caught between two impulses, "two sets of pressures." One was an inclination to do as he had been told, an inclination reinforced by any black southerner's education in the etiquette of segregation. Another inclination, however, was to emancipate himself from that ingrained tendency to follow discriminatory rules. Johnson had "an interior propensity" according to which, especially "having been in court two years before," he "had clearly made the break from that world" of necessarily following the dictates of segregation.[25] He would not defy the court's authority by returning to the white section, but he could not submit to unrighteous authority and go take a seat in the black section. So he moved aside and then just stood.

Test Case?

The traffic violation could be handled in traffic court—Johnson was fined $20 and that was that—but the citation for contempt lived on. Before agreeing to pursue Johnson's case, the various National Association for the Advancement of Colored People (NAACP) lawyers in Richmond differed in their views as to whether this case would effectively serve as the vehicle for a constitutional challenge. They needed a "pure" case, one that raised the constitutional question directly. The contempt citation satisfied one condition. Dr. Johnson later remembered that, without that citation, "we would have had no leg to stand on." But was there anything about the encounter—anything about Johnson Jr.'s behavior, quite aside from his racial identity—that might have justified the citation? He had not raised his voice, or kicked a chair, or done anything of the sort to register a challenge to the judge's authority—except to refuse to sit in the "colored" section. And

yet, might the fact that he had folded his arms be construed in itself as an act of defiance? Attorney Roland D. Ealey later recalled that he had argued—successfully—that the case was clean enough and that, moreover, the Johnsons were willing litigants. The decision was made. Now was the time, and this was the case.[26]

Therefore, not long after Johnson Jr.'s adventure in traffic court, W. Lester Banks, executive secretary of the state NAACP, called the Johnson household to express an interest in young Johnson's case. For one thing, the elder Johnson, a dentist in Richmond, had been actively involved with the local NAACP chapter. For another, the practice of courtroom seating segregation had long rankled. The previous year, in fact, a delegation among the Richmond lawyers in an African American group, the Old Dominion Bar Association, had requested that both the traffic court and the police court do away with seating segregation. Moreover, the NAACP had been considering the issue of courtroom segregation as one that might serve to recruit new members. Banks wanted to pursue the possibility that this particular case might prove the test case to challenge such segregation.[27] Having obtained the Johnsons' consent, Ealey became one of Ford Johnson's attorneys in the case.

Johnson appealed his conviction to the hustings court of the City of Richmond. His lawyers contended that Johnson's conviction in traffic court had violated his rights under both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. Johnson, it was claimed, was being "punished for violation of a racial segregation rule."[28]

At the hustings court on Monday, June 18, witnesses all agreed that Johnson had not been making any commotion. L. B. Turner, the bailiff who had asked him to leave his seat, explained: "I asked him to move. He would not move so the judge told me to tell him to come forward. Then he refused to sit down where the judge directed, so the judge said to lock him up." As for Johnson, he testified that, yes, he had been told, more than once, to move to the other section and had failed to do so, but no, he had not continued to stand in front of the judge. Rather he had taken several steps away over "near the counsel table." The judge "told me again to sit down. I told him I preferred to stand. I stood there and crossed my arms, but it was not in any defiant manner."[29] The hustings court determined that "the sole issue" was one of "contempt, and not whether the Traffic Court . . . was segregated." Of course Johnson was guilty.[30]

Johnson and his attorneys did not give up. Next stop was the Virginia Supreme Court. In their notice of appeal to that court, Johnson's lawyers insisted that "there was no evidence of any misbehavior or disorderly conduct" by Johnson, that "he was requested to move his seat because of his race and color," and that "the real basis of the charge against him" was "his refusal to so move." In the petition for a writ of error, they again argued from both due process and equal protection that Johnson's Fourteenth Amendment rights were being violated. The state, relying in part on a recent federal court decision, *Wells v. Gilliam*, argued that Johnson's case had no merit.[31]

On October 5, 1962, using the same formulaic language it had employed in the sit-in case, the Virginia Supreme Court determined that the judgment of the hustings court about the contempt citation was "plainly right." Johnson's petition for review was denied and his conviction affirmed.[32] The stops in June and October left intact the outcome back in April. Courts could segregate their courtrooms, and people in those courtrooms had to obey the orders of court officers enforcing such segregation.

Would the U.S. Supreme Court agree to review the case? Johnson's attorneys hoped so. Advised that they planned such an appeal, the Virginia Supreme Court stayed the

enforcement of its ruling for three months, until January 3, 1963.

Johnson v. Virginia (1963)

On January 2, 1963, Roland Ealey filed an appeal for Ford Johnson. "This is a very plain and simple case of a criminal conviction based upon petitioner's refusal to obey a racial segregation rule in a city courtroom," he wrote in his petition for the nation's highest court to review the actions in the Virginia courts. Under the Fourteenth Amendment, Ealey argued, a state could not enforce racial segregation on government property. The action of the courts surely qualified as "state action" under the Fourteenth Amendment. "Indeed," he continued, "racial distinctions in courts of law are particularly inimical to the American ideal of equal justice for all which is embodied in the equal protection clause of the Fourteenth Amendment." Johnson's "refusal to take a seat in the Negro section of the courtroom was justified since petitioner had a right to sit in a public courtroom on a nonsegregated basis. Therefore, petitioner's conduct could not be determined to be contempt of court except by the application of an unconstitutional segregation principle."[33]

Justice William O. Douglas's clerk wanted to see the state decision summarily reversed. He saw the matter the way Johnson and his attorneys had—that the conviction clearly violated the Fourteenth Amendment. The order Johnson had refused to obey was "about as patently illegal as they come, and I can see no reason why the adm[inistration] of justice requires obedience to such an order." Before getting to the point of a summary reversal, however, the clerk advised that the Court first request a response from the state, and such a response was ordered on February 10.[34]

The state's response did not satisfy. As Justice Douglas's clerk—who offers what is probably a good example of the central tendency of thinking on the Court—summarized the state's argument, "Resp. goes through all the motions of saying how important it is to maintain courtroom decorum etc. And how the Ct. was clearly exercising valid power etc. Then when resp. gets to the guts of the problem he reasons like this: 1) the 14th amend. gives citizens no rights, 2) thus pet[itione]r did not have the right to sit where he wanted to in the ct. 3) if he could sit where he wanted to he could clap—justice would then go to pot. 4) the ct. was merely keeping petr from doing what he had no right to do. To me, at least, it is obvious that the 14th amend. gives a person the right not to be discriminated against by the state on the grd. of race. Resp. concedes that the ct. here was merely upholding an old tradition of segregated cts."[35]

The Justices did not all agree. Justice Potter Stewart wanted to deny the appeal, for Johnson's case "involves internal arrangements in the courtroom," he said, and did not merit consideration. His eight brethren, however, found Ealey's arguments compelling. On April 29, they announced their decision, which reversed the state courts and directed that Johnson recover $100 from the state of Virginia for his costs.[36] After reviewing the uncontested facts about Johnson's behavior the previous year, the Court declared: "It is clear from the totality of circumstances, and particularly the fact that the petitioner was peaceably seated in the section reserved for whites before being summoned to the bench, that the arrest and conviction rested entirely on the refusal to comply with the segregated seating requirements imposed in this particular courtroom." Then came the conclusion, stated in sweeping language: "Such a conviction cannot stand, for it is no longer open to question that a State may not constitutionally require segregation of public facilities." With more specific reference to the facts in Johnson's case, the Court asserted: "State-compelled segregation in a court of justice is a manifest violation of the State's duty to deny no one the equal protection of its laws."[37]

The *New York Times* announced the news—on page one, above the fold—the next day in a story by Anthony Lewis, "High Court

Bars Any Segregation in a Courtroom." The *Richmond Times-Dispatch* did much the same, though below the fold.[38]

The *Richmond Afro American* was jubilant. In addition to a news story, it published an editorial, "The Court Shows Its Impatience." The nation's High Court, the editorial observed, "took only three sentences to declare this ancient Dixie custom 'a manifest violation of the state's duty to deny no one the equal protection of the laws.'" The black voice of Virginia's capital city brought out what it saw as the larger implications of the Court's decision, which it termed "a welcome and a historic decision, advancing by another giant step the century-old struggle to wipe out the terrible wrongs perpetrated under the legal illusion of 'separate but equal.' The decision is certain to have a widespread impact on police and trial courts in the belt of Confederate states from Virginia to Texas. But more important than the abrupt ruling against this long injustice practiced in what are supposed to be chambers of impartial justice, was the court's one-sentence death knell pronounced on all enforced segregation of public facilities." The paper went on to note that, according to the Supreme Court, it was "no longer open to question that a state may not constitutionally require segregation of public facilities. This clearly means that the nation's highest court has not only frowned upon segregated seating in courtrooms, but is serving blunt notice that such quaint Southern customs as racially separate drinking fountains, restrooms, tax windows and even prison cells stand in violation of the Constitution."[39]

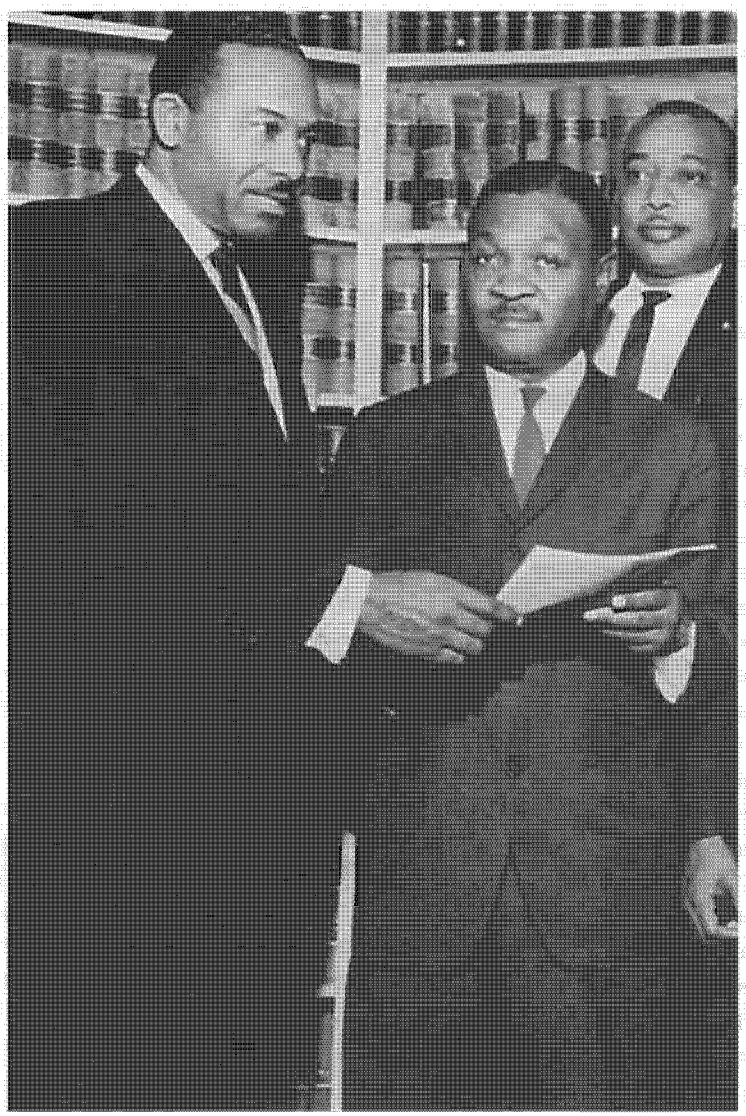
Black southerners could see that the tide of history had changed direction. What had been law for so very long no longer was. The editorial raised its voice another octave:

> That the court chose to hand down this sweeping decision buried in a bundle of orders was but one more indication of the high tribunal's growing irritation and impatience with the Southern refusal to accept as final its oft-pronounced new racial order of things. That impatience is likely to become shorter and shorter as these states continue their contemptuous practice of needless and endless appeals of cases where constitutional questions clearly are no longer at issue. This Dixie game of delay by appeal is rapidly running out its course. The facing up to stern reality inevitably must come. Surely even they must finally realize that the United States Constitution must have as much meaning in Mississippi as it does in Minnesota or it has no meaning at all.

The stakes were high, the paper was saying, and Ford Johnson's victory had brought a good day to black southerners everywhere. His resistance had led to a pronouncement by the Supreme Court of the United States that went far to undercut segregation in all government facilities. The rationale of *Plessy v. Ferguson* and "separate but equal" had been rebuffed yet again.[40] The logic of *Brown v. Board of Education*—about public facilities, racial segregation, and equal protection—continued to echo through time and space.[41]

Ford T. Johnson and *Johnson v. Virginia*

Johnson was not in the country when the Supreme Court's decision came down. In between the original citation for contempt in April and the decision in hustings court in June, he had graduated from Virginia Union University. The commencement speaker that year was historian John Hope Franklin. And a new program, inaugurated the year before, during John F. Kennedy's first year in the White House, drew Johnson overseas to Africa. On the same day in 1961 that the Virginia Supreme Court upheld Johnson's conviction for the Thalhimers sit-in, Peace Corps director R. Sargent Shriver said, while in Accra, Ghana, that he was finding so much demand for Peace



Ford T. Johnson Jr. was away in Africa in the Peace Corps when the Supreme Court announced its decision in the courtroom segregation case. In this photo, attorney Roland Ealey (second from left) hands the plaintiff's father, Dr. Ford T. Johnson Sr. (left), a copy of the court's decree.

Corps volunteers that the agency might not be able to meet the demand.[42]

Two years later, on the job with the Peace Corps, in Ghana, Johnson was called by his supervisor and asked whether he knew that he was on the front page of the *New York Times*. Johnson guessed that the case of the Thalhimers Thirty-four had finally been decided, and evidently they had won their appeal to the nation's highest court.[43] As it happened, the Court had not yet decided that case. What had been decided was not the case of the man who had insisted on sitting in a whites-only cafeteria, but the case of the man who had refused to sit as directed in a segregated courtroom. Either way, Ford Johnson had declined to obey the dictates of the practice of segregated seating. Either way, many months later, the Supreme Court of the United States was telling him he had had a constitutional right to do as he had done.

In going to Ghana, Johnson had been, in part, buying time before making a final decision as to whether to enroll in dental school. Not only was his father a dentist, but he himself "got caught up in the Sputnik thing," so he

studied math and science. But his father had said something to the effect that, to be a dentist, he "had to learn all the bones before he could focus on the teeth," and increasingly Johnson Jr. just knew that neither science nor medicine was what he wanted to do. The news about the Supreme Court and the *New York Times* made something click that changed his career course. Instead of going to medical school, he applied to law school, and it was in law school that he enrolled upon his return to the States.[44]

The time came when, as a student at Harvard Law School, he was asked in class by a professor to review the case of *Johnson v. Virginia*. The reported decision was brief and revealed little detail in fact or argument. Johnson's account went beyond the material available there—he was "bringing in some facts that were not apparent from the record," he later recounted. "Tell us, Mr. Johnson," he was asked, "how do you know these other things about the case? Because, he replied, I am that Mr. Johnson."[45] Years later, he still recalled that moment in law school with particular satisfaction. That was "the high point," he says, of the entire experience in what his father proudly remembers as "the case that desegregated the nation's courtrooms."[46]

Randolph v. Virginia (1963)

On May 20, 1963, three weeks after the decision in *Johnson v. Virginia*, the Supreme Court announced its decisions in a number of other civil rights cases. *Peterson v. City of Greenville* proved to be the key case in a cluster of sit-in decisions handed down that spring.

On August 9, 1960, ten young African Americans had entered the S. H. Kress chain store in Greenville, South Carolina and taken seats at the lunch counter. Police were called, the lunch counter was declared closed, and the ten were asked to leave. When they kept their seats, they were arrested. Subsequently tried and convicted of violating a state trespass statute, they had taken their appeal to the Supreme Court of the United States. There it was held that the Fourteenth Amendment rights of the ten had been violated. On account of their race, the authority of the state had been called upon to arrest them and remove them from the lunch counter. Thus, said the Supreme Court, they had been denied the equal protection of the laws.[47]

On May 20, the day the *Peterson* decision was handed down, the Court also issued rulings in a variety of similar cases in places like Birmingham, New Orleans, and Durham, North Carolina. Another—*Wright v. Georgia*—related to six young black men who had been "convicted of breach of the peace for peacefully playing basketball in a public park in Savannah, Georgia, on the early afternoon of Monday, January 23, 1961," a park "owned and operated by the city for recreational purposes" and "customarily used only by whites."[48]

Each of the cases had local attorneys as well as national NAACP lawyers. Once the organization had decided to participate in the litigation, the participation was vigorous and coordinated. In the case of the Thalhimers Thirty-four, *Randolph v. Virginia*, the local attorneys were—as they had been from the beginning—Martin A. Martin and Clarence A. Newsome. They were assisted by national NAACP lawyers Jack Greenberg and James M. Nabritt III, who, along with Constance Baker Motley, had participated in *Wright v. Georgia* as well as in *Peterson v. City of Greenville*.[49]

The various decisions in Peterson and the other cases elicited widely varying responses. Once again, the *Richmond Afro American* was jubilant. By contrast, the *Richmond Times-Dispatch* saw an ominous trend.[50]

On June 10, 1963, six weeks after the Supreme Court announced its decision in *Johnson v. Virginia*, and three weeks after *Peterson*, it did the same in *Randolph v. Virginia*. As with *Johnson v. Virginia*, the opinion was unsigned, and it was even shorter. In effect, the Court threw out the convictions of the Thalhimers Thirty-four: "The petition for writ of certiorari is granted, the judgments are vacated and the case is remanded to the Supreme

Court of Appeals of Virginia for reconsideration in light of *Peterson v. City of Greenville*." In Richmond, the decision in *Randolph v. Virginia* came as less of a surprise than it might have had it come earlier and accompanied the cluster of cases that included *Peterson*.[51]

What Was a "Crime" Becomes a "Right"

Johnson's actions in early 1960 were deliberate and collective, and led to both changes in the ways Thalhimers (and other department stores as well as drugstores) did business and changes in how the U.S. Constitution was interpreted by the Supreme Court of the United States. Johnson's actions two years later, in the spring of 1962, were more spontaneous and more individual, but they, too, led to changes, both in the ways the Richmond city traffic court did its business and in the way the Constitution was interpreted by the Court. As Johnson later put the matter, his courtroom case was "just one piece of the puzzle" as black southerners went about the business of "desegregating a whole range of things."[52]

On the one hand, in no decision did the Court squarely face the central issues or declare a right to protest against segregation. On the other, in none of the cases that came out of the events of 1960 through 1962, or even 1963 and 1964, did it uphold the prosecutions of sit-in demonstrators. Of course, nobody involved in the demonstrations could have been certain what the result would be, whether in terms of criminal prosecution or changes in segregation practices.

By mid-1963, Johnson's cases before the U.S. Supreme Court had been decided. Meanwhile, protest actions in Richmond and elsewhere had continued. The summer of 1963 brought yet another form of protest when many Virginians, white as well as black, went to the nation's capital, one hundred miles north of Richmond. There they presented a human petition on August 28 in the form of the huge "March on Washington for Jobs and Freedom." The march gave a big push toward passage of the Civil Rights Act of 1964, which, in turn, largely ended the practices that had led to the sit-ins in the first place.[53]

By mid-1963, then, much had changed since February 1960, when Johnson and his sister headed off to begin a sit-in at a whites-only cafeteria in a downtown department store. Within another year, even more had changed, and the 1964 Civil Rights Act had become law.

Black southerners participated in sit-ins across the South, and, in every state, some participants were arrested. Yet in every sit-in case that came before the Supreme Court of the United States, the nation's highest court overturned all convictions. Moreover, the sit-ins helped bring about civil rights legislation that challenged segregation and therefore curtailed the need for future sit-ins. In *Hamm v. City of Rock Hill*, a sit-in case from South Carolina decided in December 1964, a narrow majority on the Court ruled that convictions had to be thrown out if they could not have been secured had the new civil rights legislation existed at the time of the arrests. Writing for the majority, Justice Tom C. Clark observed that the 1964 Civil Rights Act had substituted "a right for a crime."[54]

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ENDNOTES

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[2]Gretchen Cassell Eick, **Dissent in Wichita: The Civil Rights Movement in the Midwest, 1954–72** (Urbana: University of Illinois Press, 2001), ch. 1; August Meier and Elliott Rudwick, "The Origins of Nonviolent Direct Action in Afro-American Protest: A Note on Historical

Discontinuities," in their **Along the Color Line: Explorations in the Black Experience** (Urbana: University of Illinois Press, 1976), ch. 14.

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[4]Detail concerning the planning stages can be found in James R. Clyburn, "Richmond: The Organization of a Movement," graduate research paper, Department of History, Virginia Tech, April 1992, summarized in Peter Wallenstein and James R. Clyburn, "Virginia Sit-ins, 1960: The Civil Rights Movement in the Urban Upper South," *Virginia Social Science Journal* 38 (2003), 18–22. Background and further context for the Thalhimers sit-ins and subsequent boycott can be found in Lewis A. Randolph and Gayle T. Tate, **Rights for a Season: The Politics of Race, Class, and Gender in Richmond, Virginia** (Knoxville: University of Tennessee Press, 2003), especially 166–67, 171, 180–90, 203.

[5]Tom Howard, "Sit-Downs at Counters Begin Here," *Richmond Times-Dispatch*, 21 Feb. 1960: 1, 5.

[6]"34 Are Arrested in Sitdowns Here," *Richmond Times-Dispatch*, 23 Feb. 1960: 1, 4.

[7]Al Coates, "Store Is Picketed; Negroes Ask Boycott," *Richmond Times-Dispatch*, 24 Feb. 1960: 1, 3.

[8]"Judge Says 'This Is No Race Issue,'" *Richmond Afro American*, 12 March 1960: 1.

[9]"Va. U. Students to Appeal Fines," *Richmond Afro American*, 12 March 1960: 19.

[10]"6 VUU Students Fined $20 Each," *Richmond Afro American*, 19 March 1960: 1, 16; "34 Va. U. Students Now Look to Appeals Hearing," *Richmond Afro American*, 26 March 1960: 6. Aside from the nine people already named in the narrative, the Thalhimers Thirty-four included Leroy M. Bray Jr., Gloria Collins, Robert B. Dalton, Joseph E. Ellison Jr., Wendell T. Foster Jr., A. Franklin, Donald Goode, Albert Van Graves Jr., George Wendell Harris Jr., Yvonne Hickman, Joana Hinton, Carolyn Horne, Richard C. Jackson Jr., Celia E. Jones Clarence A. Jones Jr., John Jones McCall, Larry Pridgen, Ceotis L. Pryor, Samuel Shaw, Virginia Simms, Ronald Smith, Barbara Thornton, Randolph Allen Tobias, Patricia Washington, and Lois B. White.

[11]Regarding Petersburg, see Wallenstein and Clyburn, "Virginia Sit-ins," 24–26, and Oscar R. Williams III, "The Civil Rights Movement in Richmond and Petersburg, Virginia, During 1960," M.A. thesis, Virginia State University, 1990. On Harmon Buskey, see Wallenstein and Clyburn, "Virginia Sit-ins," 27, and Randolph and Tate, **Rights for a Season**, 33–34, 186–87. For other actions in Virginia in 1960, see Wallenstein and Clyburn, "Virginia Sit-ins," 27–29.

[12]*Randolph v. Commonwealth*, 202 Va. 661, 665 (1961); "Sit-in Case Conviction Is Upheld," *Richmond Times-Dispatch*, 25 April 1961: 1, 3; "Va. Supreme Court Upholds Student Trespass Sentences," *Richmond Afro American*, 29 April 1961: 1–2.

[13]*Randolph v. Commonwealth*, 202 Va. at 663, 664.

[14]*Ibid.* at 666; "Sit-in Case Conviction Is Upheld," 3; "34 Students in Sit-Ins Plan Appeal," *Richmond Times-Dispatch*, 26 April 1961: 8.

[15]Petition for Writ of Certiorari to the Supreme Court of Appeals of Virginia, 12-13. Key to the controversy over the meaning of "state action" in support of segregation was *Shelley v. Kraemer*, 334 U.S. 1 (1948), in which the Court ruled that when citizens relied on courts to enforce restrictive covenants that denied residential access to African Americans or people of other racial groups, the agreement lost its character as a private agreement and fell under the Fourteenth Amendment's ban on state action that denied equal protection of the law.

[16]*Garner v. Louisiana*, 368 U.S. 157 (1961). See also Loren Miller, **The Petitioners: The Story of the Supreme Court of the United States and the Negro** (Cleveland: World Publishing Company, 1966), 392–98; Derrick A. Bell Jr., **Race, Racism and American Law** (2nd. ed.; Boston: Little, Brown, 1980), 279–89; Bernard Schwartz, **Super Chief: Earl Warren and His Supreme Court—A Judicial Biography** (New York: New York University Press, 1983), 402–04.

[17]*Garner v. Louisiana*, 174, 176.

[18]*Ibid.*, 185, 199, 207.

[19]*Ibid.*, 184–85.

[20]Interview with Ford T. Johnson Sr., 14 May 1990; interview with Ford T. Johnson Jr., 9 Jan. 1992.

[21]"Student in Contempt About Court Seats," *Richmond Afro American*, 5 May 1962: 1–2.

[22]Interview with Johnson Jr. Similar accounts of the episode can be found in "Student in Contempt About Court Seats," 2, and *Johnson v. Virginia*, 373 U.S. 61 (1963).

[23]Interview with Johnson Jr.; Brief for Respondent in Opposition to the Petition for Writ of Certiorari to the Supreme Court of Appeals of Virginia, 2; "To Appeal Court Segregation Case," *Richmond Afro American*, 23 June 1962: 1.

[24]Interview with Johnson Jr.; "Appeals Case Involving Court Seats," *Richmond Afro American*, 12 May 1962: 1–2.

[25]Interview with Johnson Jr.

[26]Interview with Roland D. Ealey, Richmond, Va., 22 March 1991; interviews with Johnson Sr. and Johnson Jr.

[27]"Student in Contempt About Court Seats," 2; interview with Johnson Sr.

[28]"Student in Contempt About Court Seats"; Petition for Writ of Certiorari to the Supreme Court of Appeals of Virginia, 4.

[29]"To Appeal Court Segregation Case," 1–2.

[30] *Ibid.*

[31] Petition for Writ of Certiorari, 4; *Wells v. Gilliam*, 196 F. Supp. 792 (E.D.VA 1961).

[32] Virginia Supreme Court Order Book, vol. 50 (5 June 1961–2 June 1963), 464 (Library of Virginia).

[33] Petition for Writ of Certiorari, 6, 7, 8.

[34] William O. Douglas Papers, Box 1282, Library of Congress, Washington, D.C.

[35] *Ibid.*

[36] *Ibid.*; *Johnson v. Virginia*, 373 U.S. 61 (1963).

[37] *Johnson v. Virginia*, 373 U.S. at 62.

[38] Anthony Lewis, "High Court Bars Any Segregation in a Courtroom," *New York Times*, 30 April 1963: 1, 22; "Courtroom Segregation Held Unconstitutional," *Richmond Times-Dispatch*, 30 April 1963: 1, 3.

[39] "The Court Shows Its Impatience," *Richmond Afro American*, 11 May 1963: 12.

[40] 163 U.S. 537 (1896).

[41] U.S. 483 (1954).

[42] "Peace Corps in Great Demand," *Richmond Times-Dispatch*, 25 April 1961: 1; "Reports from the Peace Corps" (including one from Ford T. Johnson Jr.), *The Panther* (Virginia Union campus newspaper; commencement edition), 3 June 1963: 3.

[43] Interview with Johnson Jr. That he would have soon heard anyway—his proud parents promptly shipped off the news and the newspaper—is clear from "Airogram to Africa Notifies Youth of Courtroom Victory," *Richmond Afro American*, 11 May 1963: 1.

[44] Interview with Johnson Jr.

[45] Both Johnson Sr. and, later, Johnson Jr. told me this story.

[46] Interview with Johnson Jr.; interview with Johnson Sr.

[47] *Peterson v. City of Greenville*, 373 U.S. 244 (1963). See also Miller, **The Petitioners**, 398–403; Bell, **Race, Racism and American Law**, 289–96; Schwartz, **Super Chief**, 479–86.

[48] *Wright v. Georgia*, 373 U.S. 284, 285 (1963).

[49] Jack Greenberg, **Crusaders in the Courts: How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution** (New York: Basic Books, 1994), 270–79, 306–11. See also Constance Baker Motley, **Equal Justice Under Law: An Autobiography** (New York: Farrar, Straus and Giroux, 1998), 130–32, 148–49, 196, 198–200.

[50] Dan Day, "Arrests Illegal," *Richmond Afro American*, 25 May 1963: 1, 5; "High Court Rejects Laws Against Peaceful Sit-Ins," *Richmond Times-Dispatch*, 21 May 1963: 1, 3; James Latimer, "Two Implications Are Seen in Supreme Court Action," *Richmond Times-Dispatch*, 21 May 1963; Arthur Krock, "The Court's Segregation Ruling," *New York Times*, reprinted in *Richmond Times-Dispatch*, 21 May 1963: 18; "Private Rights Endangered" (editorial), *Richmond Times-Dispatch*, 22 May 1963: 16.

[51] *Randolph v. Virginia*, 374 U.S. 97 (1963); "State Sit-In Convictions Are Reversed," *Richmond Times-Dispatch*, 11 June 1963: 1, 4; "Sit-in Convictions Reversed; Cases Sent Back to Virginia," *Richmond Afro American*, 22 June 1963: 9.

[52] Interview with Johnson Jr.

[53] Wallenstein, **Blue Laws and Black Codes**, 137–38; Robert Mann, **The Walls of Jericho: Lyndon Johnson, Hubert Humphrey, Richard Russell, and the Struggle for Civil Rights** (New York: Harcourt Brace, 1996), 370–73.

[54] *Hamm v. City of Rock Hill*, 379 U.S. 306, 315 (1964). Regarding one of the last of the 1960s sit-in cases, *Bell v. Maryland*, 378 U.S. 226 (1964), see Peter Irons, **The Courage of Their Convictions: Sixteen Americans Who Fought Their Way to the Supreme Court** (New York: Free Press, 1988), ch. 6. *Johnson v. Virginia* was cited in that case, at 249 and 287, as well as in another of the late sit-in cases, *Brown v. Louisiana*, 383 U.S. 131, 138, 147 (1966).

History in Journalism and Journalism in History: Anthony Lewis and the Watergate Crisis

PNINA LAHAV*

Let me plunge right into a Lewis column to convey his marvelous craft in weaving the past into a contemporary moment. This one is from July 8, 1974. The column is about the oral argument before the Supreme Court in the Executive Privilege case, which was to enter the constitutional canon as *United States v. Nixon*.[1] Lewis writes as both eyewitness and commentator. He begins with constitutional history by invoking the legendary case of *Marbury v. Madison*:

> It seemed at times like a constitutional casebook come to life. *Marbury v. Madison* was not only cited but, for a moment, debated. What exactly had Chief Justice Marshall done in 1803 when he held that the Supreme Court was the ultimate interpreter of the Constitution? Had [P]resident Jefferson won or lost . . . ?

Lewis then tells us who came to watch and listen: "College students had lined up overnight to be there for what they were sure would be a remembered moment. There also were H. R. Haldeman and five members of the House Judiciary Committee that is conducting the impeachment inquiry."[2] This composition gives us a telescopic view of America: representatives of the people, the White House, and the Congress all present in the courtroom. One hears the trumpet heralding a historic moment.

Lewis then locates the historic moment in physical space: "The massive Supreme Court building has had its architectural critics; Justice Louis Brandeis, who refused to move into his room when it was finished in 1935, said the Justices would be 'nine black beetles in the temple of Karnak.' But today, the courtroom's monumental friezes and red velvet and ceiling of red and blue and gold seemed appropriate." The majestic architecture of the Supreme Court, Lewis implies, is essential for the extraordinary act of regicide underlying the battle for the rule of law. The Justices, he also implies, are not merely "black beetles in the

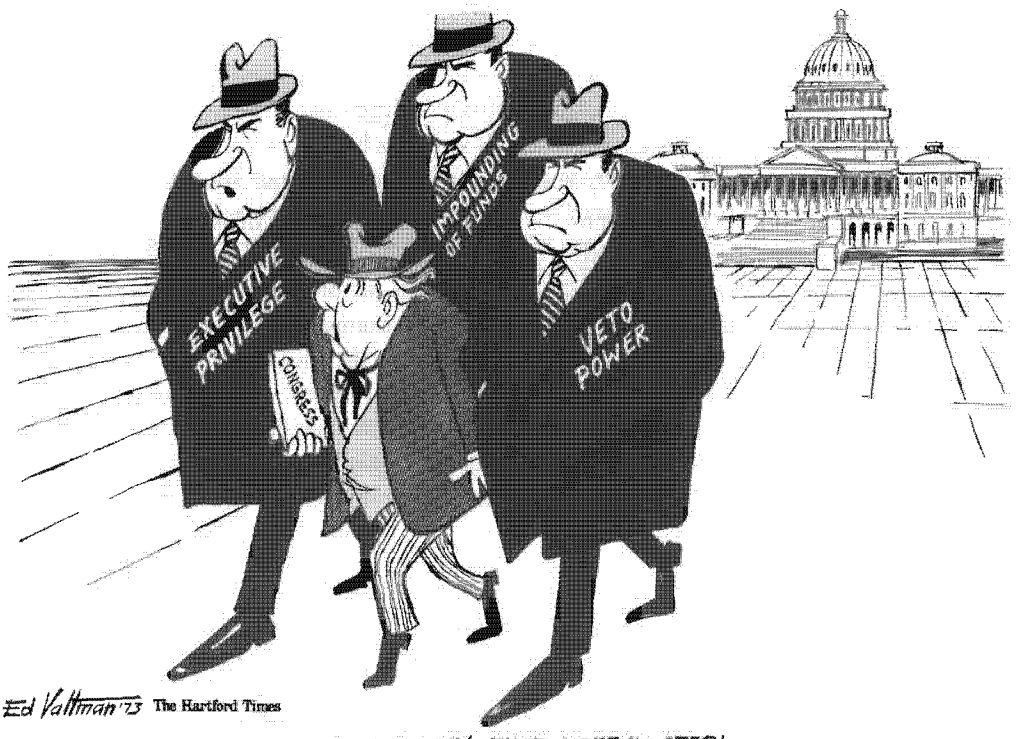
New York Times reporter Anthony Lewis (above) covered *United States v. Nixon*, the historic executive privilege case that came before the Supreme Court in 1974.

Temple," but men who hold the President's fate in their hands. It is appropriate that they deliver their monumental decision from a marble palace.[3]

Lewis offers one more piece of the mosaic before filling us in on the legal issues at stake: the style of those on the grand stage, performing the act of applying constitutional law to the facts at hand. The participants, he says, were:

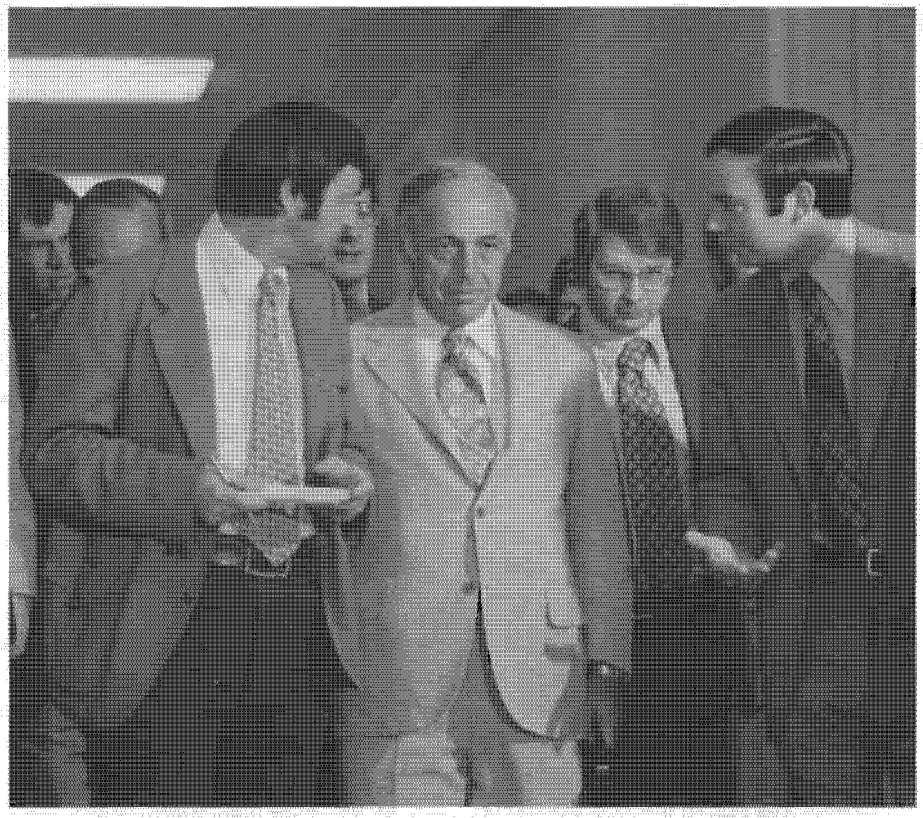
> informal, sometimes even folksy. The special prosecutor, Leon Jaworski, spoke in a soft Texas twang as he urged the Justices to exert their power as Chief Justice Marshall had. James D. St. Clair, for the President, had a casual air that removed any edge from his hard counsel that judicial power stopped at the White House.

At this historic moment, when the eyes of the nation—indeed, the world—are on the legal process in Washington, Lewis lets us know that the legal professionals are also ordinary Americans and that they behave accordingly. They are folksy and down-to-earth. In other



'DON'T PUT UP ANY RESISTANCE! JUST KEEP IN STEP'

After Nixon extended the principle of executive privilege by refusing to allow his staff to testify before Congressional committees—notably the Watergate Committee—many feared an erosion of Congress's powers at the expense of an increase in presidential powers.



James D. St. Clair (second from left), President Nixon's lawyer, was photographed arriving for a closed session of the House Judiciary Committee on June 4, 1973. St. Clair argued Nixon's executive privilege case before the Supreme Court four days later.

words, Lewis removes mystifying legalese to reveal a human and accessible core to the reader. The motifs of the rule of law and of democracy are thereby subtly connected. Lewis the eyewitness emphasizes the point by quoting another eyewitness:

> "I thought it would be different," one person who had never been at a Supreme Court argument remarked afterward. "I thought they would, well, talk Latin or something. It was so . . . ordinary."

Having set the stage, Lewis presents the legal issue before the Court in all its grave extraordinariness. He tells us:

> [T]he issues were not ordinary or casual. They were issues of final power in the American system, summarized in one question: Who is to decide whether a President must obey a subpoena, the courts or the President himself?

Lewis now weaves in the master narrative of American constitutional law. He tells us that Special Prosecutor Leon Jaworski was urging the Court "to follow Marshall's advice in the *Marbury* case," and highlights the now-canonical phrase, "[I]t is emphatically the province and duty of the judicial department to say what the law is." As expected, the phrase did find its way into the Court's opinion.[4]

Lewis then quickly moves from normative analysis to process. The columnist as eyewitness deploys his historical knowledge to put the process before the Court in the context of past and present, tradition and modernity. Three paragraphs earlier, he reminded us that the Court's residence is palatial by contrast to its humble origins; he now tells us that

argument before the Court is not what it used to be in the golden age of the patriarchs. Efficiency and bureaucratization have changed the institution of oral argument. Lewis writes:

> In the days of Marshall, arguments were spacious events. Daniel Webster went on for days . . . [Today] the time was short—just three hours and two minutes for the whole argument—and the Justices cut into that with volleys of questions.

The contemporary Court, indeed, is bureaucratic and at the same time seems to recognize the value of efficiency, but Lewis is careful to boost his readers' confidence that this Court is as capable as the historic Court of the great John Marshall. The Justices, Lewis tells us, "had all evidently read the briefs thoroughly and were primed."[5] In other words, this is a historic moment, and a monumental decision is about to be made. But we need not worry. The "priestly tribe"[6] is ready and able to rise to the occasion. The rule of law is in good professional hands.

The issues are grave and grim. The air is heavy, and Lewis provides some relief with a humorous anecdote from a moment during oral argument:

> Once Justice Douglas, who has been a Justice 35 years, longer than any other person, said he could not remember any case in which the Court had set aside a grand jury's decision to name someone a co-conspirator—as Mr. St. Clair had asked it to do.
>
> [And] Mr. St. Clair snapped back: "And up to today you have never had a President of the United States named as a co-conspirator either, sir."
>
> Justice Douglas replied: "That is very true." The audience, drawing a perhaps unintended irony from the comment, laughed.

Laughter makes the ominous moment less scary—it introduces some lightness into the matter. But what should we make of the "perhaps unintended irony?" One can detect a subtle double entendre. Lewis is careful not to slight either the participants or President Nixon, but you do not have to be a literary critic to read between the lines his contention that America is facing the shocking reality of its President and Commander-in-Chief implicated in criminal behavior.[7]

Lewis's essays are limited to 750 words, and it is now time to end this column. For his conclusion, Lewis chooses a quote from oral argument. The quote hints at what he believes to be the correct result, the one he hopes will follow:

> Then, toward the end, Mr. Jaworski's assistant, Philip A. Lacovara, asked the Court to uphold Judge John J. Sirica's decision against the President "fully, explicitly, decisively . . ." Mr. Lacovara paused to search for a word, found it and added: "Definitively." The audience recognized it as the word the White House once used—but no longer—to describe the kind of decision President Nixon would obey.

The quote gives the drama the aura of a morality tale and, without saying so explicitly, reminds us that the grand vision of America is that of a polity where the government is one of laws, not of men.[8]

To my mind, this column is a splendid example of the various uses of history in Lewis's work. He is an eyewitness to an historical moment who self-consciously communicates his impressions and his judgment. He skillfully conveys the moment's solemnity. At the same time, he emphasizes the popular stake in the conflict, as well as its humorous angle. He focuses the reader on the most important legal issue—who will decide whether the law should be obeyed—as he weaves the current case into the great saga of the American struggle for the rule of law. He ends with a call to the Justices to avoid vagueness and waffling. He merely quotes the special prosecutor's plea to

the Justices, but he clearly agrees that this is the desired course. The moment requires the Supreme Court to be explicit, to tell the President "definitively" that the law must be obeyed.

One way Lewis contributes to legal history is by providing eyewitness accounts. As I have shown, Lewis is an eyewitness sensitive to historic moments and able to draw on the master narrative of American history to give the events he is covering color and meaning, even grandeur.

He also contributes to history as a chronicler of events. Reading through Lewis's columns gives one a sense of how intensely the law interacts with society. The Watergate period was particularly rich in constitutional issues, and Lewis is an able spotter and instant interpreter of their significance and meaning. Anyone wishing to get the full menu of the Watergate cuisine should start with Lewis. One may think that chronicling is a simple task, and that any reading of the *Washington Post* or the *New York Times* would yield the same results. But Lewis has an advantage as he shows the great need for discretion and expertise in the work of a chronicler. A reading of his columns yields not only a list of the various legal issues pending at the time, but also interesting preliminary analysis of the problems raised by these issues as they were understood at the time. As chronicler, Lewis operates like the Oxford English Dictionary: he not only suggests the meaning of the issues and the context in which they arise, but also leads the reader backward and forward through their ramifications. If one recalls that Lewis has been autonomous in his choice of subjects, then one must concede that he has put his "editorial privilege" into very good use. The rich canvas of issues he places before us is astounding. Here is a very partial list:

- Congressional oversight and the investigation of the Watergate Scandals.[9]
- The office of the special prosecutor—its constitutionality and desirability.[10]
- The Saturday Night Massacre.[11]
- The appropriate sequence of investigations: whether the special prosecutor should go first and whether Congress should put its own investigation on ice until he is done.[12]
- The crisis over executive privilege and its culmination in the Supreme Court opinion in the matter of the President's tapes.[13]
- Executive privilege in the context of the congressional hearings.[14]
- The constitutionality and practicality of the option of impeachment.[15]
- The constitutionality of resignation.[16]
- The question of the war powers and the management of a secret war in Cambodia.[17]
- The CIA and covert operations abroad.[18]
- The CIA and domestic intelligence.[19]
- The "Plumbers' Unit" in the White House; the "Plumbers' Unit" and the Daniel Ellsberg case.[20]
- Legal ethics during a constitutional crisis.[21]
- The scandals surrounding Vice President Spiro Agnew.[22]
- The meaning of the 25th Amendment.[23]
- The pardon of Richard Nixon.[24]
- The status of the Presidential Papers.[25]

It is conventional wisdom that most journalistic work is doomed to oblivion. Even historians who delight in spending time with old newspapers would agree that some of the stuff is boring and best forgotten. Certainly not all of Lewis's columns are memorable. But his work done during the Watergate era is different. For here we have a highly intelligent and well-disciplined mind participating in the national discourse on crucial events that are at once legal and political. He offers commentary, refuses to shy from technical intricacies, and reminds the reader of the grand vision of American constitutionalism. It is this combination that turns his work into fascinating reading, even thirty years after the events, with Watergate already one distant crisis among the many that have afflicted the country in the last few decades.

Let me return to the Executive Privilege case for a moment. The case was decided on July 24, 1974. As we know, it provided for the

emergence of a smoking gun, which, days later, brought about the first resignation of a president of the United States. On July 28, 1974, Lewis offered an analysis of *United States v. Nixon*.[26] Focusing on the text of the opinion, rather than on the result, he asked whether the holding should be read very narrowly. Does *United States v. Nixon* qualify the privilege only where a need for information arises in the course of a criminal trial? How would the privilege affect a presidential refusal to share information with Congress about such matters as an impeachment inquiry or the secret bombing of Cambodia? In the context of Watergate, this was an astute question, since Congress at that very moment was flexing its constitutional muscle vis-à-vis the President in matters of foreign policy as well as in relation to the impeachment inquiry. Lewis offered two arguments in favor of expanding the holding of *United States v. Nixon* to include political information requested by Congress. First, he pointed out, Chief Justice Burger's unanimous opinion "did not use the broad phrase 'executive privilege,' the doctrine that has been advanced to keep facts and policies secret, but instead kept referring to 'the privilege of confidentiality of Presidential communications.'" Second,

> just as the Supreme Court said judicial need for ordinary evidence had to be weighted against claimed need for Presidential confidentiality of conversation, so Congress asserts its need for security information against any Presidential claim of secrecy. It is a balancing process again.[27]

Lewis concluded by pragmatically highlighting the play of principle and power in this matter, invoking history:

> In principle, then, Presidential privilege may always have to yield to the stronger interest of another branch of Government. In practice, of course, the issues between President and Congress are often settled by power. A President yields only when some committee is determined enough to threaten an appropriation or an appointment. The arguments over privilege will doubtless go on in that untidy way, mixing principle and uncertain history and power.[28]

In trying to make sense of the Watergate crisis, Lewis kept drawing on history, English as well as American. Take his column on the event commonly known as the Saturday Night Massacre. In that column, Lewis recounts the telephone conversation between White House Chief of Staff General Alexander Haig, and the Justice Department's William Ruckelhaus. When Ruckelhaus refused to fire Archibald Cox, Haig retorted, "Your Commander-in-Chief has given you an order." Lewis writes: "There it was, naked: the belief that the President reigns and rules, that loyalty runs to his person rather than to law and institutions." Lewis then sheds historical light on the concept: "It is precisely the concept of power against which Americans rebelled in 1776, and that they designed the Constitution to bar forever in this country. It is in fact a form of power that no English monarch has exercised since George the Third." Later he brings an historical perspective to Nixon's determination to get rid of Cox: "So obsessive had that aim become in Mr. Nixon's mind that it was like the cry of Henry the Second about Thomas à Becket: 'Who will free me from this turbulent priest?'" Lewis moves from Henry the Second back to twentieth-century America: "Eventually someone was found to wield the dagger. His name was Robert Bork, but it will count no more in history than the forgotten names of Becket's murderers."[29]

Well, not quite. Bork's name is far from forgotten, and it is safe to assume that he did secure a place for himself, at least in the history of judicial nominations. As Philippa Strum shows, Lewis confronted Bork again in the

1980s, when Bork fought to be appointed a Supreme Court Justice.[30] With historical hindsight, one may observe that history does not always repeat itself. Or maybe the analogy between Bork and Becket's assassins, produced in the heat of anguish and frustration, was inapt. This may be a good example of the difference between using history to interpret the present and using history to predict the future. Prophecy, we are reminded again, is a very risky business.

Lewis concludes his column on the Saturday Night Massacre with another historical anecdote, this time alluding to the notorious Munich agreement:

> [B]efore long, someone in Richard Nixon's shrinking palace guard will surely tell him that he must listen as the country sends him the same cry that went across the floor of the House of Commons to Neville Chamberlain in 1940: "In the name of God, go."

Historical anecdotes are a preferred way for Lewis to make current events intelligible and accessible. He has plenty of them, from both the distant past and the more recent decades when he himself worked in Washington. Often, his anecdotes are subtle and poignant, giving a special flavor to his commentary. Take his column on Nixon's 1970 directive to launch a domestic intelligence program, a directive brought to public attention two years later, in 1973.[31] The proposal, says Lewis, "shows how vulnerable we are to the doctrine that those in power may violate the law in the name of what they consider 'national security.'" The column opens with an anecdote taken from oral argument before the district court in the *Steel Seizure Case*.[32] Lewis tells the story:

> [T]he trial judge, David A. Pine, put a question to the Government counsel, Holmes Baldridge: "If the President directs [someone] to take you into custody, right now, and have you executed in the morning, you say there is no power by which the court may intervene?" Mr. Baldridge had some difficulty with that question, and the judge gave him overnight to think it over. The next day Judge Pine changed to what he termed an easier question: "If the President ordered Mr. Baldridge's home seized, would the courts be powerless because the President had "declared an emergency"? "I do not believe that any President would exercise such unusual power," Mr. Baldridge said, "unless in his opinion there was a grave and extreme national emergency existing."

Lewis tells us that Pine rejected this position, and explains the relevance of the dialogue: "[T]he danger of a President governing by decree in the name of national security—is with us now in much more alarming form."[33]

The 1950s were evidently Lewis's formative period, and he uses his rich personal archive in order to make sense of what he sees in the 1970s. He also situates contemporaries or near-contemporaries in the nation's history, connecting the dots between past and present. In his column analyzing Nixon's maneuvers to withhold information from the House Judiciary Committee, Lewis reminds us of one of the most dramatic moments in the now famous Army-McCarthy hearings: "It was on June 9, 1954 [almost twenty years earlier] when the Army's lawyer, Joseph N. Welch, asked [Senator McCarthy], 'Have you no sense of decency, sir, at long last? Have you left no sense of decency?'" Lewis then tells us that during that emotional speech Welch referred to his young assistant "Jim St. Clair, who sits on my right." Lewis was implying that James St. Clair, an old-fashioned lawyer who insisted on separating law from politics in the impending litigation concerning the tapes, should repeat the same question. He should ask his client, President Nixon, the same question that his old

boss did of Senator McCarthy: "Have you left no sense of decency?" One may also argue that it is Lewis himself who asks the question—of St. Clair.[34]

St. Clair was the subject of a full Lewis column, entitled "Dangerous Arrogance," in which Lewis discussed the issue of legal ethics in the context of the impeachment proceedings. What were St. Clair's responsibilities as the president's attorney? Lewis began by quoting St. Clair's statement that he represented "the Office of the Presidency." This, he said, was a noble vision. "One saw a lawyer thumbing through the Federalist Papers or communing with the shades of Madison and Hamilton in order to define the constitutional interests of the American Presidency." But in fact, said Lewis, St. Clair was representing Richard Nixon—a special interest—confusing Nixon's interests with those of the American presidency. According to Lewis, St. Clair's tactics to rescue Nixon were "those of an aggressive and increasingly desperate defense in a criminal courtroom."[35]

Lewis provides a list of the tactics[36] and proceeds to condemn St. Clair: "For Mr. St. Clair to pretend that he is playing that high a role is worse than misleading. It is a piece of dangerous arrogance. For it commits James St. Clair's reputation to the fallacious proposition that the interest of the Presidency and the interest of Richard Nixon are the same." Lewis then provides two propositions, each of which could be extensively analyzed and debated. First, he says, attorneys representing the Office of the Presidency carry a special responsibility, above and beyond the responsibility of the ordinary lawyer: "A lawyer's concern for history and institutions ought if anything to be more acute when he is representing the President of the United States." Second, even an ordinary lawyer should observe "ethical limits on what he is supposed to do for the client," and "[s]ome think James St. Clair has crossed the line." St. Clair claims that he is cooperating with the investigation when "in fact the White House has withheld critical evidence from both the Special Prosecutor and the House."[37]

Lewis ends with an historical anecdote connecting legal ethics and one of America's most revered presidents. Abraham Lincoln was once hired by "a man who claimed he hadn't been paid some money owed him. At the trial the other side produced a receipt showing that the debt had been paid. Lincoln was back in his hotel when word came that the judge wanted him in court. He said: 'Tell the judge that I can't come: 'I have to wash my hands.'"[38]

Ten days later, Lewis continued his exploration of the issue of lawyers in politics. The column "And You Are a Lawyer?" began with a description of John Dean's testimony in criminal court:

> Mr. Dean was led through his admitted crimes. Had he coached Jeb Stuart Magruder to give false Watergate testimony? He had.
>
> "You suborned perjurious testimony from Mr. Magruder?"
>
> "Yes, I did."
>
> "And you are a lawyer?"
>
> "That is correct."

Lewis then goes beyond the particular case to its meaning for American political culture:

> [T]he larger framework is inescapably there, and it was brought forcefully to mind by counsel's tone of indignation at the idea that a lawyer could have done what John Dean did. For of course he was not the only lawyer in the Nixon Administration who betrayed his profession. The record of the lawyers around Richard Nixon is one of the most appalling aspects of his Presidency. There has been nothing like it in the history of our Government or our bar.

Lewis proceeds to catalogue the activities of lawyers surrounding Nixon:

> The Vice President . . . resigned as an admitted felon . . . Mr. Nixon's personal lawyer . . . pleaded guilty to a felony . . . G. Gordon Liddy, counsel of Mr. Nixon's re-election committee . . . is in prison for the Watergate break-in. L. Patrick Gray 3rd, Mr. Nixon's choice for the sensitive position of F.B.I director, quit in disgrace after admitting that he had destroyed Watergate evidence.

Lewis then lists ethical violations that do not necessarily amount to criminal conduct:

> Mr. Colson prepared "enemies' lists" at the White House and suggested the idea of a punitive tax audit. Mr. Ehrlichman approached a judge about the job of F.B.I. director while he was trying the case of Daniel Ellsberg. Mr. Mitchell sent an aide up to warn some Supreme Court Justices secretly that there would be grave consequences if they decided against his position in a pending case.

And then Lewis comes to the punchline:

> What view of the law does such behavior bespeak?. . . That is the view that law is an expression of power alone, without moral tradition or values, to be manipulated at will. It is the view of the cynic.

Lewis ends by addressing a question to Richard Nixon: "And you are a lawyer?"[39]

One important aspect of Lewis's work that emerges from reading a large volume of that work is its constructive and healing quality. The period of Watergate was particularly trying for Americans, and Lewis was one of the more vocal and vociferous critics of the Nixon administration. One senses, however, that he was careful not to be a prophet of doom. For example, his two columns on professional responsibility and ethics were followed by one in which he tried to restore the place of the legal profession in American political culture. Entitled "A Learned Profession," the column begins by exposing the attempts of President Nixon and his domestic advisor, John Ehrlichman, to influence the outcome in the Daniel Ellsberg case by suggesting to trial judge William Matthew Byrne, Jr. that he could have a position as director of the F.B.I. "It is always easy to attack lawyers," Lewis writes, "and much of the public today probably thinks of them as a selfish, obscurantist, insensitive lot, without principle, on sale to the highest bidder. Easy, but I think mistaken." Lewis then emphasizes the significance of the legal profession in the United States:

> But American lawyers, more than others in the world, also act as public conscience, as instruments of social change, as defenders of the weak and the abused. They must, or our society will fail. The responsibility follows from the extraordinary role given to law and the courts in the American constitutional system.

This responsibility, he says, exists in both theory and practice. Against the backdrop of corruption in the Watergate lawyers, other legal professionals have showed courage and integrity:

> Just consider some of the things done recently by lower Federal courts around the country. They have entertained and decided whole new categories of environmental lawsuits. They have found the President's impounding of appropriated funds unlawful in many cases. One has held the bombing of Cambodia unlawful.

Those judges—"many of them Republican," Lewis notes—have done so "because it is the tradition of American law to expand the rights of the individual in response to abuses of official power." Harking back to 1934, Lewis ends with a quote from Justice Harlan F. Stone: "To whom, if not to the lawyer, may we look for

guidance in solving the problems of a sorely stricken social order?"[40]

This same philosophy—that law is more than the mere expression of expediency and power—led Lewis to criticize Nixon's secret bombing of Cambodia. The column, "Law and the President," was published one month after his columns about the corruption infecting the lawyers who surrounded the President. Lewis begins by quoting the justification offered by the State Department's spokesman, William H. Sullivan, when asked about the constitutional authority to bomb Cambodia: "For now I'd just say the justification is the re-election of President Nixon." Lewis terms this a justification appropriate to the Bolshevik worldview.[41] He calls the bombing of Cambodia "the most extreme example so far of all American Presidents claim of absolute power to make war." Here, he observes, there is not even a "colorable basis in specific Congressional authorization or prior treaty commitment." He then focuses on Elliott Richardson, then Secretary of Defense. Richardson rationalized the bombing of Cambodia, claiming it was done "at the request of the Cambodian government." Legally, Lewis observed, the explanation was "pathetic stuff." "[N]o foreign government's request can by itself add to an American President's war-making power." But Lewis had still harsher words for Richardson, who a few months earlier had gotten high marks for resigning rather than firing Cox during the Saturday Night Massacre. Always aware of personal history, Lewis reminds his readers that Richardson was Justice Frankfurter's clerk: "Does he ever consider the standards that would be brought to this kind of problem by Felix Frankfurter, or by Frankfurter's exemplar of integrity in public service, Henry Stimson?" Richardson prided himself on carrying the torch of conservatism, and Lewis uses the conservative card as he sets up the appropriate standard of behavior under the rule of law. At the end of his column, he ties together Frankfurter, conservatism, and the Founding Fathers:

> The point about Frankfurter and Stimson is that they were conservatives in a constitutional sense. They put respect for the institutions of American government ahead of causes they favored, ahead of their own power. Surely conservatives today, the ones distressed by the Watergate scandal, should care all the more about a President's making war without a showing of legal justification.

This, he admonishes Richardson, is the message emanating from the moment of founding: "But those who founded the United States wanted its very character to lie in the principle that law limits the authority of every American, up to the highest."[42]

Lewis did not invoke Frankfurter here for tactical reasons alone. As Scot Powe observes in this issue,[43] Lewis had been strongly influenced by Frankfurter's approach to the American Constitutional system. When Frankfurter's quintessential rival, Justice William O. Douglas, exercised his judicial power in August 1973, to halt the bombing of Cambodia, Lewis disapproved despite his strong stand that the bombing was unconstitutional and wrong.[44] "However much one credits him for courage and sincerity of feeling," said Lewis, "his opinion was utterly unpersuasive." Lewis stuck to his philosophy that the appropriate institution to confront the President was Congress. Congress should assert its constitutional war-making powers, and the Court should stay out of the controversy. Yet in a separate column reflecting on the bill of impeachment emerging out of the House Judiciary Committee, Lewis went further to accept the decision not to add the bombing of Cambodia—which, in his opinion, was utterly illegal—to the reasons for impeachment:

> "Even those most critical of the secret Cambodian bombing . . . may have found reason, in the debates, to accept that those wrongs were not

proper grounds for impeachment." On Cambodia, the decisive argument was made succinctly by Representative John Seiberling of Ohio. He detested the war and the bombing . . . but "we should not use our impeachment power" when "other Presidents have taken the same sort of action and . . . Congress bears a very deep measure of responsibility."[45]

About six months after Nixon's resignation from office, his top aides—Haldeman, Ehrlichman, and John Mitchell—stood before Judge John J. Sirica awaiting their sentence. In his column on this occasion, Lewis reflected on the historical meaning of the Watergate saga. Lawlessness did not begin with the Nixon administration. It had roots in previous administrations, "at least as far back as Franklin Roosevelt's administration." To the historical eye, he said, a historical thread could be discerned: "That is the worship of Presidents." Lewis quoted Haldeman's attorney, who urged the Court to take into consideration the fact that "[w]hat Bob Haldeman did, he did not for himself but for the President of the United States." That, Lewis observed, was the gist of the problem:

> Loyalty to Presidents started to become an overriding virtue years before the Nixon White House. As more and more power was centered in a mythic Presidency, the practice of doing things for the President developed—doing them without considering whether they were right or wrong. The worst did not happen while there remained strong centers of independent judgment, legal and moral, in the White House and

"I'VE DECIDED NOT TO TELL YOU ABOUT THE ALLEGED SHIPWRECK"

This July 1973 cartoon appeared the day after former Attorney General John N. Mitchell testified before the Senate Watergate Committee that Nixon knew nothing about the Watergate crimes until well after his re-election. Although Mitchell admitted taking part in the cover-up, he denied authorizing the break-ins at the Democratic National Headquarters.

> outside. But the dangerous habit of President-worship had set in, and it produced disaster when a willful President and his manipulative entourage found weakness in the Justice and other Departments.

Lewis was confident that Americans were "relearning an old piece of wisdom. Those who manage the delicate institutions of government have a special responsibility to respect the law." He ended his column with a 1928 quote from Justice Brandeis:

> "In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously . . . If the government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."[46]

The engine that drove Lewis's outrage as the events of Watergate unfolded is captured in this column: his fear that the government of laws will degenerate into a government of men; that self-interest will trump the public interest; and that blind loyalty to the leader will replace sober reflection and deliberation. His columns make it clear that he was hard-headed enough to understand that in the real world, the rule of law is always mitigated by the constraints of political contingency.[47] They also make clear that he believed the mediating principle between the two should always be a certain notion of decency coupled with civility. Lewis's work is more than a mere reflection of what would later be called Eastern "establishment" values. It is true (as Powe, this issue, observes)[48], that Lewis's intellectual roots can be found in the Harvard Law School and its heroes—Brandeis, Frankfurter, Cox. But a close reading of his work reveals a deeper theme—a genuine belief that politics and the rule of law should be bound by a thread of decency. These are themes that one finds in the early Lewis and which are repeated in his later work (as shown by Strum, this issue),[49] and even in his most recent articles, such as the one on President George W. Bush in a fairly recent issue of the *New York Review of Books*.[50]

Philosopher Sidney Morgenbesser is reported to have said during a discussion about John Rawls' theory of justice that "the urgent problem was not the just society but the decent society."[51] Anthony Lewis's columns, books, and articles—in law reviews and elsewhere—deplore the absence of basic decency in most of the activities he chose to focus on during his long career. Lewis's work celebrates the occasional triumphs of decency in the affairs of state, but most of his energy is spent decrying its absence in public affairs. Within this context, his reliance on history appears to be a part of his firm—almost religious—belief that the phenomenon of the American state is fundamentally about the quest for decency. Certainly his adoration of Thomas Jefferson as the embodiment of all that is good in America forms a part of this basic approach.[52] And if in glorifying the Founding Fathers he, like many of the best and the brightest, falls into mystification and myth-making, we should excuse the excess as a reflection of his firm belief that decency can triumph—and that it has periodically triumphed in the course of American history. Indeed, he has made selective use of history, relying mainly on lessons that emphasize the need for decency in public affairs. It may be that he has intuited that history provides a more accessible compass than abstract legal reasoning.

One may find Lewis's own testimony about the fuel that makes him run in his column celebrating his college graduating class of 1948, written as the events of Watergate were unfolding. The occasion was the 25th reunion of his Harvard College class. The column is interesting because it does not appear to be self-conscious or self-serving. Lewis observes that his class "never was a radical class as a whole and it is not now." However anyone perceives Lewis's work, it cannot be characterized as radical. He continues his description of the class:

"[A]sked to list the country's most serious problems, we [sic] put 'breakdown of morality' first and 'lack of social justice' eighth." Lewis then suggests that courageous and passionate leadership could help America out of its predicament, but that one appropriate candidate for leadership, Robert Kennedy, had been assassinated. Kennedy happened to have been a member of the class of 1948. Lewis talks about Kennedy's worldview, yet one gets the feeling that projection is at work. Lewis seems to identify with Kennedy as he lists the late senator's values:

> [H]e struck people, accurately, as someone who cared about individual human beings. He cared for the embittered as he did for the despised and rejected. As he experienced the reality of human sorrow, he did not build a wall against it; he learned. He made mistakes. Lots of them, but he could bear the pain of changing.

These words capture Lewis himself. Maybe he would be too modest to ever write this about himself, but it seems to me that this is why his work has remained so readable and so relevant. He firmly believes in—one may even say propagandizes about—the idea of the rule of law. And he uses a whole panoply of historical methods to illustrate this point. For him, the idea of the rule of law is not that any law, however arbitrary and cruel, must prevail, but rather that law should be rooted in the notion of basic decency—that which is generally known as the substantive idea of the rule of law.[53]

No better proof may be offered than the way he ends the column about his graduating class: instead of the customary historical anecdote, we get poetry. Lewis offers what he says were the most moving words quoted in the class reunion: "And most touchingly, the familiar words of John Donne: 'Any man's death diminishes me, because I am involved in mankind.'"[54]

*This article is based on a presentation delivered in November 2002 at the American Legal History Society in a panel dedicated to the work of Anthony Lewis. I wish to thank Liliana Ibara for her skillful assistance on this essay.

ENDNOTES

[1] *New York Times*, July 9, 1974, "Echoes of History Heard In a Pillared Courtroom" (hereafter "Echoes of History"); *United States v. Nixon*, 418 U.S. 683 (1974).
[2] "Echoes of History."
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] This phrase is borrowed from Barbara A. Perry, **The Priestly Tribe: The Supreme Court Image in the American Mind**, 1999.
[7] "Echoes of History."
[8] *Id.*
[9] *New York Times*, Nov. 26, 1973, "Living With Illusion."
[10] *New York Times*, Nov. 5, 1973, "The Special Prosecutor"; *New York Times*, Nov. 12, 1973, "Light in the Dark."
[11] *New York Times*, Oct. 18, 1973, "The Pressure On Cox"; *New York Times*, Oct. 22, 1973, "The End Begins" (hereafter "The End Begins").
[12] *New York Times*, Sun., Oct. 6, 1974, "The Trip to the Hill Has Symbolic Value"; *New York Times*, June 4, 1973, "Rush to Judgment."
[13] *New York Times*, Sun., July 28, 1974, "What the Supreme Court Said . . . And What It Meant" (hereafter "What the Supreme Court Said").
[14] *New York Times*, Jan. 21, 1974, "Grand Inquest of The Nation."
[15] *New York Times*, Jan. 14, 1974, "An Impeachment Dilemma."
[16] *New York Times*, Sun., Apr. 7, 1974, "Resigning Is Not Easy for Nixon Either" (hereafter "Resigning Is Not Easy"); *New York Times*, Sun., May 12, 1974, "Resignation Has Its Problems, Too"; *New York Times*, Sun., Aug. 11, 1974, "The Resignation Proved Impeachment Works."
[17] *New York Times*, Apr. 19, 1973, "Law and the President."
[18] See, e.g., *New York Times*, Jan. 10, 1974, "Don't Look Now."
[19] *New York Times*, July 10, 1975, "The Teller of Truth," about Seymour M. Hersh and the Rockefeller Report on Operation CHAOS; *New York Times*, July 14, 1975, "Lying in State I"; *New York Times*, July 17, 1975, "Lying in State II."
[20] *New York Times*, Jan. 28, 1974, "Crime and Punishment."
[21] See, e.g., endnotes 34, 38.

[22] *New York Times*, Sept. 27, 1973, "The Earthquake"; *New York Times*, Oct. 11, 1973, "The Dam Cracks."

[23] "Resigning Is Not Easy"; Sun. *New York Times*, Sept. 30, 1973, "The 25th Amendment and Its Unanswered Questions."

[24] *New York Times*, Sun., Sept. 15, 1974, "Mercy Was Satisfied, But the Constitution Requires Justice"; *New York Times*, Sept. 8, 1975, "The Pardoner's Tale."

[25] *New York Times*, Sun., Sept 29, 1974, "The President's Papers, But Everybody's Business."

[26] "What the Supreme Court Said." See also his analysis the day following the release of the opinion, *New York Times*, July 25, 1974, *"United States v. Nixon."*

[27] Yet in "What the Supreme Court Said," Lewis cautioned: "It is just as important to understand what the Supreme Court did not do. It lent no comfort to the notion that the courts can be a vehicle for supplying evidence to the impeachment process—or that the House Judiciary Committee should make this decision the occasion for another long delay to seek further evidence."

[28] "What the Supreme Court Said."

[29] "The End Begins."

[30] Ethan Bronner, **Battle for Justice: How the Bork Nomination Shook America** (W.W. Norton, New York, 1989). See Philippa Strum's discussion of Lewis's columns about Bork's nomination, "The Journalist as Historian: Anthony Lewis, Civil Liberties, and the Supreme Court," in this issue of the *Journal of Supreme Court History* (hereafter "The Journalist as Historian").

[31] *New York Times*, June 11, 1973, "In the Name of Security."

[32] *Youngstown Sheet & Tube Co. v. Sawyer*, 103 F. Supp. 569 (1952), aff'd 72 S. Ct. 863 (1952).

[33] *Id.*

[34] *New York Times*, Feb. 21, 1974, "Law and Politics."

[35] *New York Times*, March 18, 1974, "Dangerous Arrogance" (hereafter "Dangerous Arrogance").

[36] "1. Try to narrow the law; 2. Limit the evidence; 3. Soft-soap the jury; 4. Attack the prosecutors." "Dangerous Arrogance."

[37] *Id.*

[38] *Id.*

[39] *New York Times*, March 28, 1974, "And You Are a Lawyer?"

[40] *New York Times*," Aug. 9, 1973, "A Learned Profession."

[41] *New York Times*, April 19, 1973, "Law and the President." Again, he does this through an anecdote. A Russian was denied an exit visa and tried to understand what the legal grounds for the denial were. "He asked the men of the interior ministry whether there was anything in the Soviet Constitution restricting the right to emigrate. No. Could they show him any law that did so? No. What then? 'We have our internal regulations.'"

[42] *Id.*

[43] See L. A. Powe, "Writing the First Draft of History: Anthony Lewis as Supreme Court Correspondent," this issue of the *Journal of Supreme Court History* (hereafter "Writing the First Draft").

[44] *New York Times*, Aug. 6, 1973, "Because It Is There." On July 25, 1973, Judge Orrin Judd of the federal district court in Brooklyn held the bombing unconstitutional. A Court of Appeals stayed the decision. Justice Douglas removed the stay. Subsequently, the Supreme Court overruled Douglas.

[45] *New York Times*, Aug. 1, 1974, "Watchman in the Night."

[46] *New York Times*, Feb. 23, 1975, "The Sentences: A Message On True Law and Order."

[47] See e.g., text accompanying endnote 28.

[48] "Writing the First Draft," this issue.

[49] "The Journalist as Historian," this issue.

[50] "Respect for the rule of law has been an essential element from the beginning in the survival and success of this vast, disputatious country—and a reason for other people's admiration of American society. But George W. Bush, whatever his qualities, seems to have no feeling for the law." "Bush and Iraq," *New York Review of Books*, Nov. 7, 2002, p. 5.

[51] Avishai Margalit, **The Decent Society** (Harvard University Press, Cambridge, MA, 1996), p. ix. Margalit writes that his entire book was inspired by Morgenbesser's comment.

[52] See, e.g., *New York Times*, "Happy Birthday," July 5, 1973: Jefferson "was such an extraordinary embodiment of the qualities that once characterized the leaders of the United States and made possible our independence: disdain for wealth and show, respect for learning, faith in the ultimate power of reason if left unfettered by myth or privilege."

[53] *New York Times*, June 14, 1973, "The Class of 1948."

[54] *Id.*

Writing the First Draft of History: Anthony Lewis as Supreme Court Correspondent

L. A. POWE, JR.*

The legendary Washington Bureau Chief and columnist of *The New York Times*, James Reston, with a push from Felix Frankfurter, decided that the paper of record would have its own correspondent specializing in the Supreme Court.[1] With his eye for excellent young talent,[2] Reston chose Anthony Lewis, already a Pulitzer-Prize winner before his thirtieth birthday,[3] and sent him to Harvard for the 1956–57 academic year as a Nieman Fellow to study law.

The choice of man and training were prescient. In less than a decade Lewis established the gold standard for the job. His 1963 Pulitzer Prize for coverage of the Court generally and the initial reapportionment case, *Baker v. Carr*,[4] in particular, was the first of only two times a Supreme Court correspondent has claimed the honor.[5]

Besides Lewis's obvious abilities, another reason for his success was his access to the constitutional law faculty of the Harvard Law School at a time when it identified itself, as did the *Times*, with New Deal liberalism as understood politically and as practiced by the Supreme Court.[6] To an extent Lewis was an accomplished younger peer, and he, too, had published in the *Harvard Law Review*—an article on legislative apportionment laying the groundwork for his subsequent reporting.[7]

With exceptions largely triggered by oral exchanges between Frankfurter and one of the liberal Justices,[8] Lewis's articles are crisp, factual, sometimes evaluative, reporting. In placing Lewis in context one must begin with an acknowledgement that accurate summations of the Court's work will not offer a larger perspective on legal events.[9] Lewis was the pioneer, the first reporter to see Supreme Court decisions, not just as a won-loss, but instead as part of a continuing constitutional process where reasons and reasoning mattered. Frankfurter was genuinely impressed, telling Reston, "I can't believe what the young man has achieved. There aren't two justices of the Court who have such a grasp on these cases."[10]

Lewis was influential because he was able, because he was connected, and because he wrote for the *Times* at a time when it perceived

When federal employee Abraham Chasanow (right) was dismissed from his job at the Navy in 1955 after being unfairly accused of being a security risk, Anthony Lewis—then a reporter for the *Washington Daily News*—wrote a series of articles highlighting the injustice. Lewis won a Pulitzer Prize for national reporting and Chasanow was reinstated after the Navy admitted its error. Above, Assistant Secretary for Air James Smith congratulates Chasanow as his wife looks on.

itself a part of the national government[11] and was a must-read for those in Washington.[12] To see Lewis at his best (and most influential), one must look to the occasions when he was allowed to use all his talents in describing what the Court (and its Justices) did and what it meant. These came when he wrote for the Sunday edition, either "The Week in Review" or the *Magazine*, where he could analyze as well as report.[13] These were both first drafts of history and explanations by one part of the Establishment of another part of the Establishment to other parts of the Establishment. Lewis's belief, undoubtedly reinforced by his Harvard sources, that the Court was a great institution would eventually become a standard belief among the *Times'* elite readership.

Reapportionment

The "Week in Review" article on *Baker v. Carr* is as fine a piece of news analysis of a decision and its impact as one can find. Its Pulitzer Prize was richly deserved. It accurately calls (through unnamed others) the decision "historic" and "momentous." It gets the gist of Justice Brennan's equal protection holding perfectly: an apportionment scheme "could be so arbitrary as to violate the Constitution" but the "Justices did not say how bad districts would have to be before they would be deemed unconstitutional." Looking backward, Lewis explains why there are badly apportioned districts. Americans have moved, and much of the movement has been away from rural areas.

Lewis, who had exceptional access to the constitutional law faculty at Harvard Law School, greatly admired Justice Felix Frankfurter. Pictured is a photo Justice Frankfurter gave Lewis on November 14, 1961 with the inscription "For Tony Lewis, for whom judicial law is not the manipulation of symbols, tho his ardor naturally exceeds law's reach, but the rational process for meeting society's needs through courts, with all the good wishes of his friend Felix Frankfurter."

Yet some state constitutions mandate geographical districting, so legislatures could not accommodate the population movement. But "a more widespread reason is a simple refusal to redistrict."[14] Legislators were reluctant to vote themselves out of a job.[15] They needed a push to do the right thing and only the Court had the leverage.[16]

Looking forward, Lewis accurately noted that *Baker v. Carr* would affect the House of Representatives because malapportionment in state legislatures "is duplicated to a degree" in the House. Many experts thought the Democrats would be the big winners, but Lewis did not believe this would prove accurate since the suburbs were Republican and they too had grown. Finally, Lewis predicted the Court would proceed slowly in the area.[17]

The prediction about the House of Representatives was one anyone could have made. Not so, with the Republicans doing as well as the Democrats. At a time when everyone was concentrating on urban problems and the way malapportioned legislatures hurt the cities, there was a widespread assumption that reapportionment would be a boon to the

Lewis won a second Pulitzer Prize in 1963 for national reporting for his coverage of the Supreme Court—the only time a Supreme Court reporter has claimed that honor. The landmark reapportionment case *Baker v. Carr* was handed down that year, leading to widespread repercussions in how states were allowed to apportion their legislatures. Pictured is a 1967 cartoon of a frustrated Florida politician being told by a judge that his state's legislative apportionment law was unconstitutional.

Democrats. Lewis was by far the wiser. Suburbs were as big losers as cities to malapportionment, and Republicans no less than Democrats would be beneficiaries of subsequent apportionment.[18]

Lewis was sure that "the Supreme Court will move slowly and carefully" in the area. Thus he debunked the idea that the outcome "would ensure more or less equal population" districts. "That is surely a misreading of the opinions."[19] It may have been a misreading of Justice Tom Clark and Justice Potter Stewart's opinions, but it was not a bad prediction. Equal population districts would be required by *Wesberry v. Sanders*[20] for House of Representatives and *Reynolds v. Sims*[21] for both houses of state legislatures. What Lewis could not see was that within a week Frankfurter would have the strokes that would end his career and that when Justice Arthur Goldberg became the fifth vote "slowly and carefully" were outmoded ideas. Indeed, after *Wesberry* Lewis aptly noted: "It is a new Court."[22]

When the Court decided *Wesberry*, Lewis emphasized Justice John M. Harlan's dissent to underscore how far-reaching the majority decision was. More accurately than he might have realized, he concluded that the case "signifies a more expansive view, on the part of the Justices, of the Supreme Court's role in the American government structure." Lewis also discussed (and largely dismissed) the now-retired Frankfurter's abiding fear, echoed in Harlan's dissent, that Congress "might bitterly resent" the Court's intrusion.[23] "These fears were not borne out, at least in the immediate reaction to this week's decision. Most Congressmen who spoke out had no quarrel with the idea that

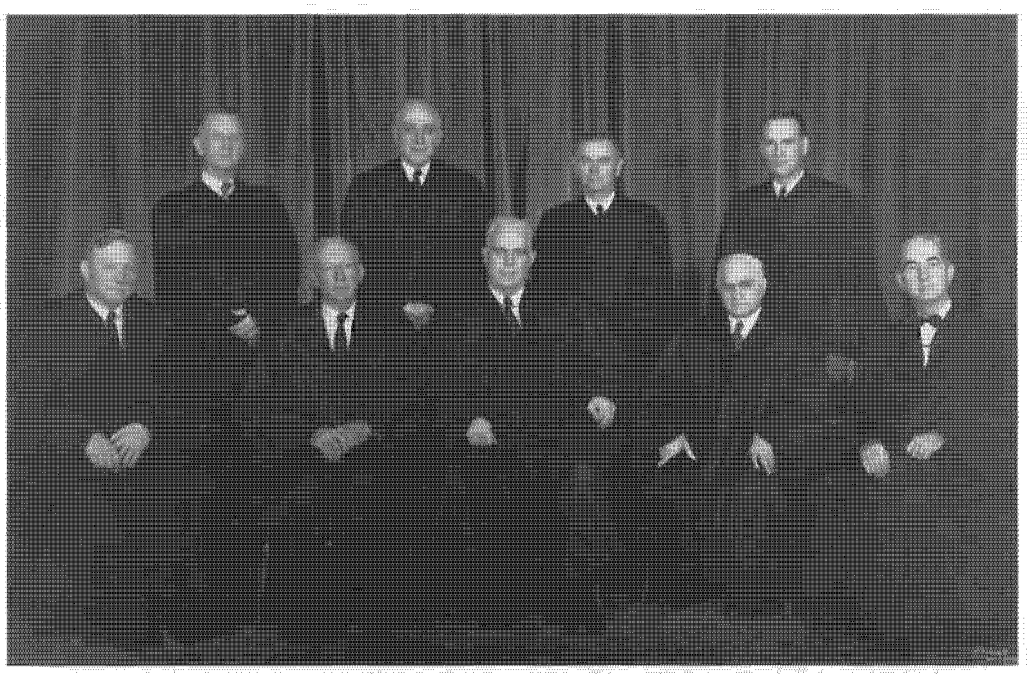
grossly unequal districts are intolerable." Once again Lewis noted that existing apportionment "was not being cured by the political arm of government—indeed probably could not be." Since Lewis had already labeled the situation a "disease," who could complain when the Court mandated a cure?[24]

National Moral Values

How does one explain *Brown v. Board of Education*,[25] *Baker v. Carr*, and *Mapp v. Ohio*[26]? Contemporaneously, Alpheus Thomas Mason would have cited footnote four of *Carolene Products*,[27] and the heightened duty of the Court to enforce the specifics of the Bill of Rights, to police access to the political process, and to protect discrete and insular minorities from laws disadvantaging them.[28] Subsequently most law professors would have agreed.[29] Writing for the Sunday *Magazine*, Lewis offered a profoundly different take. Acting against the third degree, against illegally seized evidence, the preventing of indigents from filing appeals, the Court was "reflecting a national moral sentiment" as the "national conscience [] is injured by any state's misbehavior."[30] Lewis held similar views on segregation. "Once again no complicated motive need be sought. The Supreme Court was reflecting a national moral consensus on segregation—perhaps anticipating a feeling that had not yet fully taken shape."[31] Legislative apportionment was also "a moral explosion waiting to be set off."[32]

All three of these examples thus had a national moral judgment behind them. Further, and importantly, in each case, if the Court did not act, nothing would be done (or so Lewis believed).

A confession is necessary here. I read this article about thirty years ago and was unimpressed. After all, the Warren Court was (I believed) a footnote four Court, and Lewis either hadn't seen it or expressed it poorly with his "national moral values" conclusions. Then, sometime in the late 1980s, I started to take a



Lewis argued in his columns that the decisions of the Warren court (pictured) on segregation and other issues had a national moral judgment behind them.

dim view of footnote four's explanatory power. This change of mind eventually came out in my work on the Warren Court with the conclusion that the Court is best understood as a functioning part of Kennedy-Johnson liberalism.[33] That is, the Warren Court reflected mainstream, majoritarian values and imposed them on society's outliers: the South, rural America, and urban areas dominated by the pre-Vatican II Catholic hierarchy. I never reread Lewis's piece (until preparing this article) and thus I never gave it the credit it so richly deserves. At a time when Alexander Bickel was offering his countermajoritarian difficulty,[34] Lewis had the insight that the Court was behaving in a majoritarian way.

Lewis's analysis, nevertheless, needs some qualifications. *Mapp* wasn't about the third degree; it wasn't about indigents not having a transcript[35] or counsel at trial.[36] It was about suppressing relevant evidence that the police seized without probable cause. In other words, it was about a clearly guilty defendant who had a procedurally fair chance to prove his innocence. As *Escobedo*[37] and *Miranda*[38] would show, much of the public was not keen on coddling criminals. *Mapp* thus reflected no national moral consensus. It did, however, reflect the views of liberal elites—Northern, urban, agnostic, Eurocentric—at a time they were coming into their own power, and those liberal elites rather easily assumed only the backward would hold different views.

Although *Brown* was always popular nationally when tested in a Gallup Poll, its problem was that white Southerners cared about segregation vastly more than their northern counterparts and the intensity of feeling mattered.[39] It took Martin Luther King and Birmingham to put civil rights on northern television sets and therefore the northern agenda.[40] The result was to match the view that segregation was wrong with the determination to do something about it.[41]

Lewis was exactly right on *Baker v. Carr*. Robert McCloskey noted that the Court had hit upon a latent consensus.[42] The overwhelming majority believed in majority rule.

There are two more points to make with respect to the article both go to when it was written. First in retrospect, it is not clear at all that segregation could only have been ended judicially.[43] The Civil Rights Act and the Voting Rights Act had far more impact than judicial decisions. Writing before King and Bull Conner in their respective ways mobilized northern resolve, Lewis did not see the possibility that direct action could lead to legislation and victory. If that is a failing, it is hardly his alone.[44]

Second, the Court may not have been implementing national moral values. Lewis's article was published a week before *Engel v. Vitale*[45] came down. There has never been a "national moral consensus" to ban prayer in public schools, and the backlash against *Engel* was immediate and overwhelming.[46] Lewis noticed the criticism and properly attributed much of it to Southern hostility to the Court generally. But he recognized it was more than that, and stated that the opinion in *Engel* "deeply disturbed some law professors and close Washington students of the Court."[47] Perhaps the Court should have avoided the issue by either denying review or putting it off on a lack of standing. A year later, after *Schempp*,[48] Lewis noted that the opinion was better than *Engel* and that to a "remarkable degree" the American people had come to see that the Court was right. Here he cited "major church groups" vocally supporting *Engel* and preparing their flocks for *Schempp*.[49]

As with the other areas, when Lewis thought he saw the national conscience, he was actually seeing the conscience of well-educated, liberally minded people like himself, like those of his co-workers at the *Times*—and like the Justices of the Supreme Court.[50] That said, he saw, as others did not (and have not), the majoritarian underpinnings of the Warren Court because people like himself were controlling the national government.

HUAC and McCarthyism

While *Engel* came down after the national moral consensus article, a large number of domestic security cases had been decided by the Warren Court and Lewis did not mention a one. There is a reason; by 1962 the law was quite unattractive and bore an unfortunate resemblance to the law in 1951 (two years before Warren took the center chair).[51]

When Lewis won his first Pulitzer Prize, Senator Joseph McCarthy had already been condemned by the Senate. By the time of McCarthy's death in 1957, the Court was actively dismantling the domestic security program piece by piece.[52] Then, in the Eighty-Fifth Congress, there was an extraordinary backlash at the Court,[53] and the Justices, in a series of 5–4 votes, reversed course. What makes this reversal interesting is that it was occasioned largely by Frankfurter switching sides.[54] Thus it put two things Lewis knew very well in conflict: the injustices of McCarthyism and the Harvard Law School faculty (who not only worshipped Frankfurter, but had contempt for Hugo L. Black and William O. Douglas, who were both dissenters from the changed course).[55]

The most important cases, because they were the most egregious factually and produced an intense jurisprudential debate,[56] involved the House UnAmerican Activities Committee (HUAC) and its practice of exposing as many communists and unrepentant ex-communists as it could. Essentially, HUAC acted as a mini-court, enumerating communists one at a time, where the punishment, meted out by others, was loss of employment and social ostracism. Those who would not cooperate were cited for contempt of Congress. The posture of the cases reaching the Court was that of a conviction for contempt of Congress by a witness who refused to answer questions but did not take the Fifth Amendment either.[57]

In 1957 Chief Justice Warren had delivered a verbal assault on everything about HUAC in *Watkins v. United States*.[58] If Warren's opinion was taken at rhetorical value, then HUAC was finished. But two years later, in the next HUAC case, *Barenblatt v. United States*,[59] the new 5–4 line-up walked away from *Watkins*' implications. Lewis looked back at *Watkins* to note there were two readings of the case: "Many persons, including a large number in Congress, read the *Watkins* decision as a tight rein on Congressional investigations. Others saw it as a carefully limited procedural ruling and they were proved right today."[60] "Close observers"—who I suspect were the "others"—called *Barenblatt* "one of the most important decisions in recent years because it indicated an unwillingness to restrain the substantive powers of Congress."[61]

For purposes of First Amendment jurisprudence, *Barenblatt* is the explicit introduction of balancing as the appropriate judicial methodology for decision-making. It produced a vigorous debate on the Court between Harlan and Black and off the Court between Harvard's Harlan-Frankfurter supporters and those identified with Yale (and Black and Douglas). Lewis could not anticipate this debate, and he did not discuss Harlan's view of balancing beyond noting that Harlan suggested Congress could not inquire into the contents of a college lecture. He did quote Black's attack on balancing, but no where did Lewis note that Harlan had not found anything to balance on Barenblatt's side.

Lewis began a follow-up "Week in Review" article by quoting Thomas Jefferson and his manual of parliamentary practice on the issue of upholding the power to punish citizens for contempt. "On the one hand were the Government's essential 'powers of self-preservation,' on the other the citizen's right to judicial charge and trial for any misdeeds. He concluded: 'Which of these doctrines will prevail time will decide.'" Seemingly forgetting what "close observers" had told him on Monday about the Court's unwillingness to restrain HUAC, Lewis wrote that *Barenblatt* did not offer a "clear guide" to which doctrine would prevail. He suggested that there would

be both substantive and procedural supervision of HUAC: "And even though Justice Harlan said a court could not examine the motives of a committee to see whether its object was simply exposure of a witness, not legislation, there may still be occasions for finding that a committee deliberately and improperly sought to take over the job of the courts."[62]

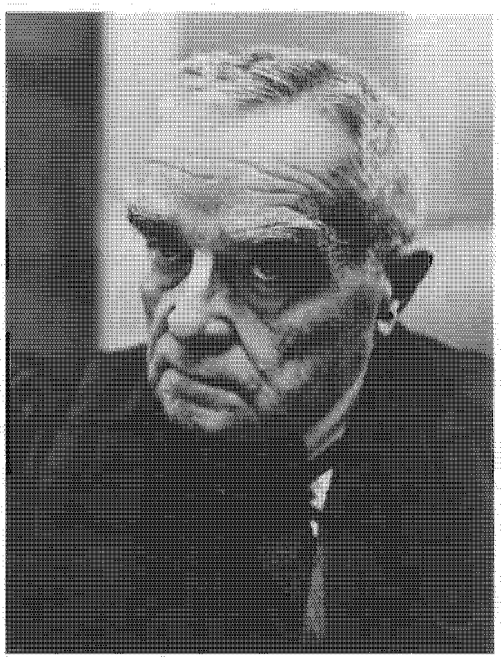
Lewis should have stuck with his close observers rather than his increasing respect for the Court. *Barenblatt* was the green light and two 1961 cases showed why.[63] Both involved well-known opponents of HUAC who protested HUAC hearings to be held in the South (where they feared HUAC would imply ties between communists and civil rights activists). One was subpoenaed after he wrote members of Congress asking that HUAC be prevented from holding the hearings. The other was subpoened when he arrived in Atlanta to protest the hearings. Both were asked whether they were communists. As HUAC expected, both refused to answer, and both were found in contempt. What made their cases different from all the prior cases was that always before there had been some evidence linking the witnesses to communism; here there was none, only that the witness opposed HUAC. The inference was unmistakable: HUAC was using its power to punish those protesting its behavior.[64] Justice Stewart, for the prevailing 5–4 majority, found their cases indistinguishable from *Barenblatt*. The government's interest in self-preservation outweighed their interest in not answering the question about communist affiliations.

Lewis quite accurately concluded that the "significance of the decisions is that a firm and consistent, albeit narrow, majority of the Supreme Court refused to put tight legal or constitutional limitations on Congressional investigating committees." What Lewis did not state, perhaps because he had not figured it out (and certainly his Harvard sources would have disputed it) was that as a practical matter there was no balancing at all, but rather an automatic victory for government.

Judicial Qualifications

Brown plus two blows to state domestic security programs, *Nelson*[65] and *Slochower*,[66] initiated a debate about the competence of the Justices and the need for prior judicial experience as a prerequisite for elevation to the Supreme Court.[67] After what he deemed was his huge mistake in putting Earl Warren on the Court, President Eisenhower made prior judicial service a requirement. He added one further qualification: "We must never appoint a man who doesn't have the recognition of the American Bar Association."[68]

The debate over prior judicial experience petered out as the crisis of the 1950s passed and segregationists and national security conservatives lost their clout. Distinguished nominations of outstanding lawyers like Byron White, Abe Fortas,[69] and Lewis Powell seemed to



In response to a debate during the 1950s over whether Supreme Court nominees should have prior judicial experience, Lewis pointed out that such a requirement narrows the pool and historically would have ruled out John Marshall, Joseph Story, Roger B. Taney, Samuel Miller, Joseph P. Bradley, Charles Evans Hughes, and Louis D. Brandeis. He also noted that widely praised judges such as Learned Hand (above) do not always get selected.

answer which side won. Yet the victory for competence widely understood was illusory. Powell's appointment, over thirty years ago, was the last time a President nominated someone other than a sitting judge to the Court. What matters today is whether someone endorses *Roe v. Wade*[70] and what better way is there to know than to see how an individual treated abortion while judging on a lower court? Inadvertently, we have adopted Eisenhower's crabbed view.

Lewis made the liberal Establishment case against prior experience (one that holds good today). First, prior judicial experience narrows the pool, and historically would have eliminated John Marshall, Joseph Story, Roger B. Taney, Samuel Miller, Joseph P. Bradley, Charles Evans Hughes, and Louis D. Brandeis.[71] Second, even going with prior experience, Presidents don't always select "the most praised" judges, citing Learned Hand and Calvert Magruder.[72] Lewis even downplayed Justices Holmes and Cardozo, suggesting that it was not prior judicial experiences that made them great, but the fact that they were Holmes and Cardozo.[73]

To back his conclusion about the irrelevance of prior judicial experience, Lewis brought forward Frankfurter, who claimed "the correlation between prior judicial experience and fitness for the function of the Supreme Court is zero."[74] Lewis added that this was also the conclusion of "many of the leading analysts of the Court's work, past and present."[75]

Instead of prior experience and the ABA seal of approval,[76] Lewis claimed there was a need for broader qualities: "a largeness of view—an understanding of the politics and social institutions which the Court often helps to shape."[77] Lewis then added the ability to write, to reason, and an intelligence that permits the change of mind.[78] He closed with Learned Hand: The proper qualities for the Court are "skepticism, tolerance, discrimination, urbanity, some—but not too much—reserve toward change, insistence upon proportion, and, above all, humility before the vast unknown."[79] They were on the mark; those sure beat whether or not one loves *Roe v. Wade*.[80]

Judicial Portraits

Lewis's piece on the desired qualities for a Justice set the stage for warm pieces about both Felix Frankfurter and Hugo L. Black when each reached his seventy-fifth birthday.[81] Neither had prior judicial experience.[82] Although Lewis is positive about both Justices, hints both large and small point to Frankfurter as by far the more important of the two. The Supreme Court Justices Lewis mentions in the Frankfurter piece are Frankfurter's "heroes" Holmes and Brandeis. Black's jurisprudence is explained to the reader by contrasting it with Frankfurter's. Frankfurter weighs the interests at issue; Black "search[es] for certainty, for simplicity."[83]

Although the key descriptive paragraph shows that both are truly impressive men, well worth knowing, Frankfurter's reads slightly better:

> "Justice Frankfurter is no ivory-tower intellectual. He is a cultivated man, an eighteenth-century man in the range of his interests. He reads everything—the most obscure newspaper stories, philosophy, science, complete reports of the high courts of Britain, Canada, Australia. He corresponds with people all over the world. Among his friends have been John Dewey, Thomas Mann, Al Smith, Alexander Wolcott, Albert Einstein, Alfred North Whitehead, Chaim Weizmann, Franklin Roosevelt."[84]
>
> [Black] "is described as a particularly gracious and generous host—to, among others, colleagues whose judicial views he deplores. He will spend an evening with them discussing, not law, but world affairs and personalities and politics and books. Perhaps especially books, because

> Justice Black is an extraordinary reader. Lacking much formal education, he decided to make up for it by reading. He has read all of Jefferson, Plutarch, Locke, all the great original works of history and philosophy, classical and modern."[85]

The article on Black makes its case that he was "one of the most remarkable figures in the history of the Supreme Court."[86] The Frankfurter article makes a bigger claim that comes by quoting Learned Hand: "I regard him at the moment as the most important single figure in our whole judicial system."[87] Black was the dissenter for civil liberties; "[I]n the history of the Supreme Court there has been no more zealous, no more single-minded advocate of individual liberty than Justice Black."[88] Frankfurter is important because he is exactly what a judge should be. Indeed, Lewis credits the behind-the-scenes Frankfurter with the two *Brown* decisions.[89] Essentially Lewis adopted the then-prevailing view at the Harvard Law School that Frankfurter was a shining light of Western jurisprudence.

No one, save perhaps the remaining Frankfurter clerks, would take that view seriously now.[90] Whether it is Frankfurter's diaries, various revelations of his extensive extrajudicial activity, his formalistic and thin view of democracy or his elevation of some constitutional provisions—Establishment and the Fourth Amendment—and systematic denigration of others—free speech and free exercise—no one rushes to be like Frankfurter.[91] The Harvard Law School of the 1950s thought Frankfurter had discovered universal truths, but he hadn't. Of all Lewis's pieces, none competes with the Frankfurter article as so retrospectively wide of the mark.[92] Perhaps none better captures the period either.

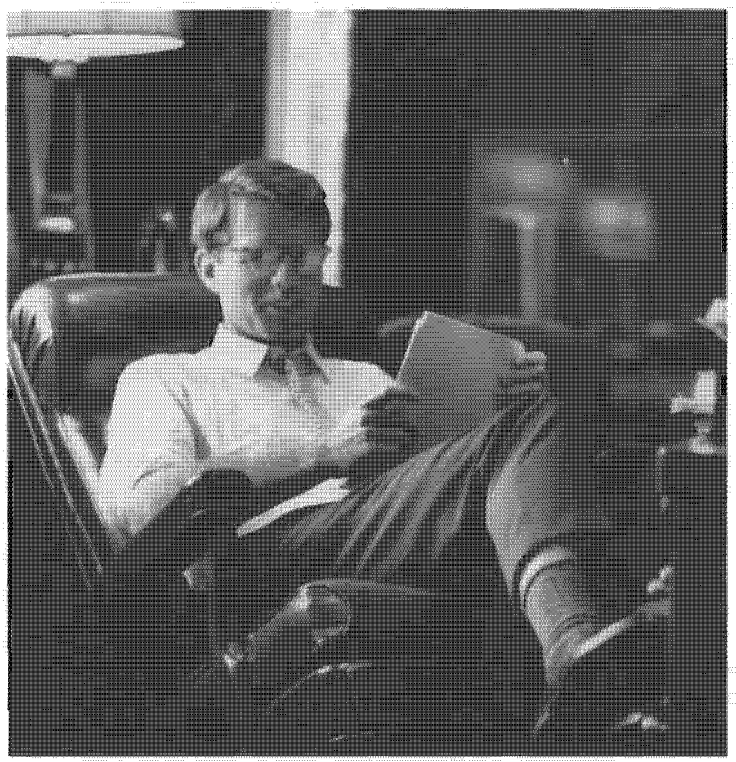
What could have proven interesting would have been a piece on Frankfurter written after his switch in the domestic security area, his dissent in *Mapp*, and his dissent in *Baker*. This was a very early piece by Lewis, one that subsequent votes and more experience might have caused him to question.

By contrast the Black piece holds up (although those who remember Frank Murphy would properly note that he, not Black, was the most zealous advocate of individual liberty of the era). Lewis's portrait of Black needs updating because Black's long-career had yet one more tumultuous decade to run, and appraising the career of someone who overstayed his time involves some keen judgments. At his seventy-fifth year, however, Lewis's Black is accurate and shows why Black was important even if it may slight the thought process behind Black's search for surface simplicity.[93] Together the two imply that the country was well-served by its two most senior Justices.[94]

Conclusion

The qualities of a good reporter are everywhere shown in Lewis's work. First and foremost, he was never blind to what all can see. There are no examples of where, even from a distance of decades, one can say, "that was silly." Second, he could describe the Court, its members, and its cases with accuracy and sophistication. He took law seriously, perhaps too much so.[95] Third, he periodically could see what others (even those with more training) could not. The political evenhandness between Republicans and Democrats of *Baker v. Carr* and the majoritarian nature of the Warren Court generally are terrific calls.

The two times he failed most are in his predictions about the Court's likely follow-up to *Baker v. Carr* and in his gushing over Frankfurter. The latter fault is hardly his; it was instead that of an entire generation of Court-watchers and the people with whom he associated. Indeed, as a period piece the article is wonderful for historians because it so perfectly captures the Harvard Law School worldview. The switch from *Baker v. Carr* to *Reynolds v. Sims* was a revolution—as Lewis noted that very day (although not for readers of the *Times*)[96]—triggered by Frankfurter's



The New York Times wrote another unfriendly editorial — and I just called you in to tell you I have this investigative report here in my hand — Anyway when I heard you were leaving the Supreme Court and the Department of Justice I knew there was no future for me — When you become P.M. call me —
Bob Kennedy

Attorney General Robert Kennedy wrote this joking inscription to Anthony Lewis in 1965 when the reporter left his Supreme Court beat to write editorials. "The New York Times wrote another unfriendly editorial—and I just called you in to tell you I have this investigative report in my hand—Anyway when I heard you were leaving the Supreme Court and the Department of Justice I knew there was no future for me—When you become P.M. call me—Bob Kennedy."

strokes and the choice of Goldberg as his replacement.

That was but one of many deep changes—summer race riots, student protests, Vietnam—that would change the meaning of liberalism and help shake the *Times* from its perception that it was a part of the national government.[97]

Lewis was a reporter, not a seer, and he reflected rather than transcended the dominant opinions of the era. But his platform allowed him to influence those opinions. His Sunday articles—not to mention his book on *Gideon v. Wainwright*[98]—are celebratory. They are about good, learned men grappling with the great problems in our society, implementing our national moral consensus, and righting injustices.[99] Perhaps unconsciously, Lewis was assisting in the creation of the cult of the Court that became a staple of modern liberalism.[100] Along with showing how to do the job well, that may have been his biggest legacy.

*I would like to thank Tom Krattenmaker, H.W. Perry, and David Rabban for their helpful comments on earlier drafts. I also made some changes based on Lewis's comments on the previous draft.

ENDNOTES

[1]Gay Talese, **The Kingdom and the Power** 350 (1966).
[2]Harrison Salisbury, **Without Fear or Favor** 411 (1980).
[3]Lewis won the 1955 Pulitzer for national reporting based on stories about the Navy Department's dismissal of

Abraham Chasanow as a security risk. As a result of Lewis's stories, Chasanow was reinstated and the Navy acknowledged it had committed a grave injustice. At the time Lewis was a reporter for the *Washington Daily News*.

[4]369 U.S. 186 (1962).

[5]Linda Greenhouse claimed the other Pulitzer in 1998.

[6]The Harvard faculty was also able to offer whatever Frankfurter wished to pass on (assuming he did not wish to do so himself). I know Lewis tried to get some law clerks as sources, but I do not know if he ever succeeded. Getting a Justice would be easier.

[7]*Legislative Apportionment and the Federal* Courts, 71 *Harv. L. Rev.* 1057 (1958).

[8]*Perez v. Brownwell*, 356 U.S. 44 (1958) and *Trop v. Dulles*, 356 U.S. 86 (1958) (involuntary expatriation): "The Justices put their deep philosophic differences on vivid display Monday, in their written opinions and even more in their oral comments. Their remarks in the courtroom verged on the bitter, even waspish." April 1, 1958 at 17; *Dick v. New York Life Ins. Co.*, 359 U.S. 437 (1959) (reinstating a jury verdict for a widow): Warren "reviewed in human, almost folksy terms, the issues in the case" while Frankfurter "read his colleagues a lecture on the need to conserve the Court's time and energy by avoiding trivial cases." May 19, 1959 at 1.

[9]On the other hand, writing accurate summaries has proven difficult for any number of others.

[10]James Reston, **Deadline** 204 (1991).

[11]"Once during the early Kennedy years when the Administration was at the height of its arrogance, particularly in its image making, Reston decided that Ted Sorenson [President Kennedy's chief of staff] had been bullying his new and not yet entirely established man at the White House, Tom Wicker. So he picked up the phone and he called Sorensen and rather gently suggested that it would probably not be a good idea to push Wicker around. 'We got here before you got here, Ted,' he reminded Sorensen, and we will be here when you are gone." David Halberstam, **The Powers that Be** 221 (1979).

[12]Reston "believed that *The Times alone* had the audience that moved America. The President of the United States read it every morning, and so did the Congress, and so did seventy embassies in Washington, including the Russians. More than half the college presidents in the United States read *The Times*, and more than 2,000 copies were sold each day at Harvard, more than 1,000 at Yale, 700 at Chicago, 350 at Berkeley. These were the people that Reston wished to influence—the Establishment of today, the Establishment of tomorrow: he was the Establishment columnist, and he could be that only on *The Times*." Talese, **Kingdom and Power** at 346 (emphasis in original).

[13]Those that appeared in the *Magazine* are chapters in a *New York Times* book, **The Supreme Court under Earl Warren** (Leonard Levy ed. 1972). I have cited them by their date in the *Magazine*, but to their pages in the book. For reasons appearing in footnote 11 *supra*, I have limited the discussion to Lewis's writings that appeared in the *Times*.

[14]All the quotes come from April 1, 1962 at E3.

[15]Lewis had made the same point in "Legislative Apportionment," 71 *Harv. L. Rev.* at 1091.

[16]In *id.* at 1096 Lewis quoted Robert Jackson, **The Struggle for Judicial Supremacy** 285 (1941): "[W]hen the channels of opinion and of peaceful persuasion are corrupted or clogged, these political correctives can no longer be relied on, and the democratic system is threatened at its most vital point. In that event the Court, by intervening, restores the processes of democratic government; it does not disrupt them . . ."

[17]*Id.*

[18]The Democrats, in fact, got the initial advantage, but that was because so many states redistricted in 1965 after the Democratic landslide.

[19]April 1, 1962 at E3. I cannot help but believe that Solicitor General Archibald Cox was aiding Lewis. The comment reflects exactly what Cox argued as amicus in the next round of cases. Lucas A. Powe, Jr., **The Warren Court and American Politics** 246 (2000).

[20]376 U.S. 1 (1964).

[21]377 U.S. 533 (1964).

[22]February 23, 1964 at E6.

[23]Lewis had already concluded that Frankfurter's fears were overstated. "Legislative Apportionment," 71 *Harv. L. Rev.* 1057.

[24]All quotes are from February 23, 1964 at E6. He had previously used the disease and cure imagery in *Legislative Apportionment*, 71 *Harv. L. Rev.* at 1097.

[25]347 U.S. 497 (1954); 349 U.S. 254 (1955).

[26]*Mapp v. Ohio*, 367 U.S. 643 (1961).

[27]*United States v. Carolene Products*, 304 U.S. 144, 152 n. 4 (1938).

[28]Alpheus Thomas Mason, **The Supreme Court from Taft to Warren** (1958) (2nd ed. 1968). Interestingly enough, although Mason was the McCormick Professor of Jurisprudence at Princeton and John Hart Ely, who became the premier exponent of footnote four, took an undergraduate course from Mason's successor, Walter F. Murphy, Ely was apparently unaware of Mason's work. Walter Murphy, *Constitutional Interpretation*, 8 **Reviews in American History** 7, 13 n. 3 (1981).

[29]Powe, **The Warren Court** at 214.

[30]"Historic Change in the Supreme Court," June 17, 1962 at 73, 75, 76.

[31]*Id.* at 77.

[32]*Id.* at 78.

[33]Powe, **The Warren Court** at 494: The Warren Court "represents the purest strain of Kennedy-Johnson liberalism . . . demand[ing that] national liberal values be adopted in outlying areas of the United States and that the rural dominance of state legislatures, which it believed were

precluding necessary solutions to urban problems, be broken. In the criminal procedure area, it took the lead as the branch of government most familiar with the problems and most capable of supervising the solutions. The Court's belated welfare decisions were an assault on both national and local bureaucracies, but in moving toward constitutionalization, the Court was several years behind the Great Society in creating new rights."

[34]Alexander M. Bickel, **The Least Dangerous Branch** (1962).

[35]*Griffin v. Illinois*, 351 U.S. 12 (1956).

[36]The piece pointed out that the Court had agreed to review the issue the next Term.

[37]*Escobedo v. Illinois*, 378 U.S. 478 (1964).

[38]*Miranda v. Arizona*, 384 U.S. 436 (1966).

[39]Powe, **The Warren Court** at 37.

[40]*Id.* at 225.

[41]*Id.* at 226: "By July [1963], over 50 percent of the respondents [to Gallup] [would][] name civil rights [as the most important issue facing the country]. Burke Marshall, head of the Civil Rights Division, stated that 'the Negro and his problems were still pretty much invisible to the country until mass demonstrations of the Birmingham type.' *Brown v. Board of Education* had brought out the worst in the American South, and King had learned how to reflect that southern behavior to the American North to bring out the best in the country."

[42]Robert G. McClosky, "Foreward: The Reapportionment Case," 76 *Harvard Law Review* 54, 58–59 (1962).

[43]Gerald N. Rosenberg, **The Hollow Hope** (1991).

[44]Two generations of law professors, with access to far more data, continue it.

[45]370 U.S. 421 (1962).

[46]Until *Roe v. Wade*, 410 U.S. 113 (1973) no decision prompted such an outpouring of angry mail. Powe, **The Warren Court** at 187.

[47]July 1, 1962 at E10.

[48]*Abingdon School District v. Schempp*, 374 U.S. 203 (1963).

[49]June 23, 1963 at E4.

[50]The born-again Christians of the South were invisible elsewhere, and Lewis was hardly alone in seeing liberal Protestant (and Jewish) views as those of all but a handful of Americans. Consider Philip Kurland's lumping of those who opposed Engel together with segregationists and Birchers. "Foreward: Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government," 78 *Harvard Law Review* 143, 176 (1964): "The Court has been most fortunate in the enemies that it has made, for it is difficult not to help resist attacks from racists, from the John Birch Society and its ilk, and from religious zealots who insist that the Court adhere to truth as they know it."

[51]Powe, **The Warren Court** at 154–55.

[52]*Id.* at 92–99.

[53]*Id.* at 127–34; Walter F. Murphy, **Congress and the Court** (1962).

[54]Powe, **The Warren Court** at 141–42.

[55]L. A. Powe, Jr., "Justice Douglas After Fifty Years: The First Amendment, McCarthyism, and Rights," 6 *Constitutional Commentary* 267, 278–79 (1989).

[56]The most focused exchange was Laurent B. Frantz, "The First Amendment in the Balance," 71 *Yale Law Journal* 1424 (1961) (against balancing) and Wallace Mendelson, "On the Meaning of the First Amendment: Absolutes in the Balance," 50 *California Law Review* 821 (1962) with a response, Frantz, "Is the First Amendment Law?" 51 *California Law Review* 729 (1963).

[57]The reason for not taking the Fifth was to avoid the label "Fifth Amendment Communist."

[58]354 U.S. 178 (1957).

[59]360 U.S. 109 (1959).

[60]June 9, 1959 at 1 and 35.

[61]*Id.* at 35.

[62]All quotes are from June 14, 1959 at E7.

[63]*Braden v. United States*, 365 U.S. 431 (1961); *Wilkinson v. United States*, 365 U.S. 399 (1961).

[64]Powe, **The Warren Court** at 147.

[65]*Pennsylvania v. Nelson*, 350 U.S. 497 (1956) (state sedition laws protecting the United States preempted by the Smith Act).

[66]*Slochower v. Board of Education*, 350 U.S. 551 (1956) (cannot fire a public employee merely because he took the Fifth Amendment on a question about past communist activity).

[67]Powe, **The Warren Court** at 85–88, 99–102.

[68]"What Qualities for the Court?" October 6, 1957 at 114, 116–17. Eisenhower also mentioned a need for younger Justices.

[69]The first, not the second, time. Powe, **The Warren Court** at 212, 469–75.

[70]410 U.S. 113 (1973).

[71]Those were his examples, probably given to him by Frankfurter. **Qualities** at 116. We could add Hugo L. Black, William O. Douglas, Robert H. Jackson, Earl Warren, and Powell.

[72]*Id.*

[73]Cardozo was a great state court jurist, but his Supreme Court career was simply a liberal vote. Lewis's sources could not step back and realize that Cardozo should have been left in New York.

[74]*Id.* at 115. The choices were Frankfurterian conventional wisdom. Today, many, if not most, law professors could not identify Magruder, the charming, intelligent, First Circuit jurist. Hand, by contrast, remains an icon. Yet Gerald Gunther's massive biography, **Learned Hand** (1994), demonstrates, albeit unintentionally, that the nation was well served by leaving Hand on the court that matched his talents.

[75]*Id.*

[76]Lewis was not much impressed with ceding a veto to the ABA, which he aptly labeled a private organization, not representing all lawyers, and "which has often spoken for a particular point of view." *Id.* at 117.

[77]*Id.* If he had spent less time with judges and law professors he would have added intellectual movements and recognized the reciprocity by adding: "and which shape the Court."

[78]On the latter he naturally cited Robert H. Jackson, who also should have been cited for having the best writing style of any Justice.

[79]**Qualities** at 119.

[80]They also read like the anti-Bork.

[81]"An Appreciation of Justice Frankfurter," November 10, 1957 at 120; "Justice Black at 75: Still the Dissenter," February 26, 1961 at 128.

[82]No one believes Black's year as a lowly police court judge in Birmingham at the very beginning of his legal career counts. Roger Newman, **Hugo Black** 29–30 (1994); Powe, **The Warren Court** at 87.

[83]Black at 132.

[84]Frankfurter at 125.

[85]Black at 134.

[86]*Id.* at 128.

[87]Frankfurter at 127.

[88]Black at 129.

[89]Frankfurter at 123.

[90]The prevailing view now is well expressed in Melvin I. Urofsky, **Felix Frankfurter** x, xii–xiii (1991): "Instead of being the herald of a new jurisprudential age, Frankfurter fought a valiant but ultimately ineffective rearguard action to divert the court from what he considered a disastrous path. A quarter-century after his death, his opinions are all but ignored by both the courts and academia . . . I, too, began my work thinking of Frankfurter as a great man; the more I learned, the less I cared for him. My middle point might better be described as 'guarded respect,' and that judgment informs this study."

[91]It has been twenty years since Michael E. Parrish published **Felix Frankfurter and His Times: The Reform Years** (1982). That promised to be the first volume on a man who "for over fifty years . . . enlivened our politics and enriched our legal culture." *Id.* at 4. So far it also is the last volume. Parish's volume came out one year after publication of H.N. Hirsch, **The Enigma of Felix Frankfurter** (1981). That psycho-biography paints such a hostile portrait of Frankfurter that the reader almost sympathizes with him because no one could be so horrible.

[92]As **The Warren Court and American Politics** (2000) should make obvious, I am not going to be the one to lead a Frankfurter revival. Nevertheless, a man who was held in such high esteem by so many accomplished and intelligent people has *something* about him that is not being reflected in Frankfurter's current academic standing. Could it be that he, like William O. Douglas (the man he engaged in a reciprocal hate relationship with), was miscast as a Justice? Just as Douglas should have remained in the executive branch, perhaps Frankfurter should have remained an academic-advisor.

[93]See Roger K. Newman's excellent biography, **Hugo Black** at 325: "Black could take deep and complicated concepts and clothe them in easy, graceful, direct, almost simple language that was concise, clear and crafted perfectly to his purpose." He wanted his opinions to be understandable to "people in barber shops." The opinions that would satisfy that Harvard Law School faculty would not be so understandable to those without legal training.

[94]There were no portraits of Earl Warren on his seventy-fifth year nor any acknowledgement that Douglas had reached his quarter-century mark as a Justice. Neither were deemed that important at the Harvard Law School. More understandable were the omissions of John M. Harlan and William J. Brennan, Jr. Harlan was deemed Frankfurter-lite until much later, while Brennan was only coming into his own as Lewis was moving on. Powe, **The Warren Court** at 143, 303. Lewis (at a time Fred Graham was the *Times'* Supreme Court correspondent) did a piece on Warren after the latter announced his retirement. "A Man Born to Act, Not to Muse," *New York Times Magazine*, June 30, 1968 at 151.

[95]In an earlier draft relying on Ed Cray, **Chief Justice** 312 (1997) I credited Lewis with persuading Warren to abandon "Decision Monday" and spread the opinions throughout the week. Lewis demurs. "One statement of yours puzzles me—that I persuaded Warren to spread out opinions. I am quite sure I did not do that." Email to author, November 3, 2002.

[96]Powe, **The Warren Court** at 252: In the Courtroom Lewis passed a note to Solicitor General Archibald Cox asking "how it felt to be present at the second American Constitutional Convention?"

[97]The *Washington Post*, too, would move. One need only look at Ben Bradlee's transformation from lapdog to watchdog.

[98]372 U.S. 335 (1963). **Gideon's Trumpet** (1964). I have discussed **Gideon's Trumpet** elsewhere and am not as celebratory of the process (nor am I as sure that Gideon was innocent). Powe, **The Warren Court** at 379–86.

[99]Domestic security, where there was no consensus, was the exception—at least until Goldberg.

[100]Mark Tushnet, "The Politics of Constitutional Law," 79 *Texas Law Review* 163, 187 (2000): "[I]n the Great Society, liberals thought, we had to have a Great Court."

The Journalist as Historian: Anthony Lewis, Civil Liberties, and the Supreme Court

PHILIPPA STRUM*

The genesis of the column that Anthony Lewis wrote for *The New York Times* between 1969 and 2001 was a red face—not Lewis's, but that of Arthur Ochs Sulzberger. The *Times*' publisher offered Lewis the column as a consolation prize after outgoing executive editor James Reston mistakenly informed Lewis that the job of deputy to A. M. Rosenthal, the new executive editor, was open and that Lewis was a logical candidate.[1]

Content with the job of chief of the *Times*' London bureau to which he had moved after years of reporting about the Supreme Court, Lewis was nonetheless aware that a column would give him a freedom that he lacked as a reporter. He of course knew that reporting is scarcely value-free; journalists choose what to report and how to report it. Good reporters, however, make an honest attempt to keep their values out of their writing; in contrast, columnists are not only free to put them in but encouraged to do so. Moving from the news section to the op-ed page would enable him to write about things he considered important, whether or not the editors thought them newsworthy; and he could, if he chose, protect the Supreme Court when it came under strong criticism.[2]

That was an important consideration, given Lewis's long love affair with the nation's highest tribunal. He acknowledged it in 1990, more than two decades after he began producing the column. "I confess to being a romantic about the Supreme Court," he wrote. He had suggested the reason for the romance some years earlier:

> By the standards of the world Americans enjoy extraordinary freedom. We do, I believe, in good part because of the institution of the Supreme Court. Through the strains of our turbulent history the Court has given concrete meaning to the Constitution's promises of liberty, its

Arthur Ochs Sulzberger (above), the publisher of *The New York Times*, offered Anthony Lewis a column as a consolation prize after outgoing executive editor James Reston misinformed Lewis that he was a candidate for the job of deputy editor to A. M. Rosenthal, the new executive editor.

provisions against concentrated official power.[3]

The genesis of the romanticism, then—if indeed it was romanticism, rather than realism—was Lewis's view of the Court as the primary guardian of the liberties he saw embodied in the Constitution. The Court's role in interpreting the Constitution "has given hope to the powerless; it has nurtured faith in the American system." The job was one that could not be left to a legislature, for such a body "tends to deal with power rather than principle," and "the rights of minorities are too important to be trusted to the passions of passing majorities." He recalled Felix Frankfurter, one of the people most frequently quoted in the columns, "warn[ing] against relying on judges to save our freedoms. But," Lewis asked, "in the modern state, with power tilted toward the executive, where else are we to look?"[4]

His love affair with the Court did not, however, blind him to its lapses. He lambasted the Court when he disagreed with it. Indeed, through the 1980s and early 1990s, he excoriated the Court as "statist" in its willingness to endorse the increasing power exercised by the executive branch. He could be caustic in discussing decisions he saw as gravely mistaken, which was his view of *Wards Cove Packing Co. v. Atonio* and other Equal Protection Clause holdings of the late 1980s. Yet he was consistent in his assertion that the Supreme Court, "the unique American contribution to the art of democratic government . . . has held a diverse continental country together by nourishing the gradual change in institutions needed for survival" and that the Justices, "in the process of expounding the Constitution, have done a fair job of helping to keep this country stable and free." "The courts have hardly been consistent defenders of individual liberty," he conceded, "but the United States would surely have been much less free without them. Judges have been especially important in protecting the rights of what Chief Justice Harlan Stone called 'discrete and insular minorities.'"[5]

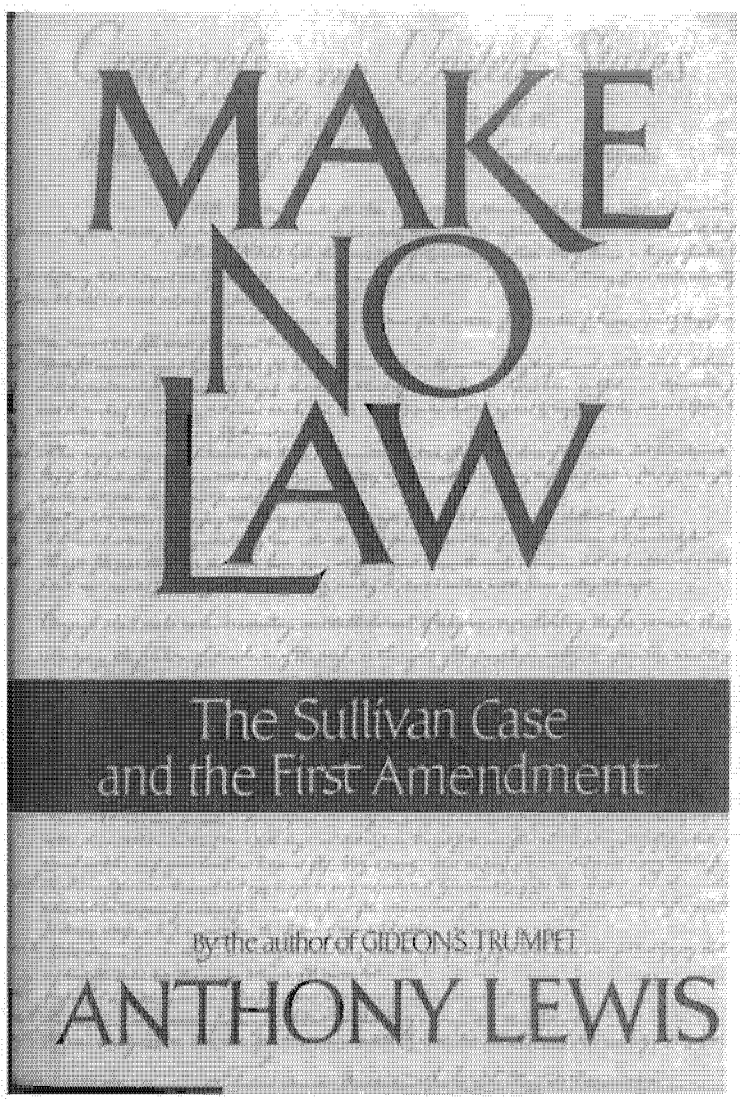
Love of one's subject may not be a necessary requirement for an historian; there are, after all, historians of fascism whose democratic credentials have never been in doubt. And some might argue that love of one's subject is an impediment to the objectivity that they see as the true hallmark of historiography. This essay assumes, however, that Lewis's love of the Court was directly related to his passion for civil liberties, and that the strength of his feelings in no way impeded his ability to bring his journalistic skills to the teaching of history.

What follows, then, is a brief overview of that thesis as demonstrated in Lewis's columns on two subjects—racial equality and free speech—and the role of the Supreme Court in furthering both. He wrote, of course, about many civil liberties issues—privacy, abortion, the press, criminal due process, and capital punishment among them—as well as a plethora of other public policy matters. The choice of only two areas, mandated by

the limits of this essay, is admittedly arbitrary. It should be noted, however, that two of Lewis's three books—**Portrait of a Decade** and **Make No Law**—are about race and speech, respectively.[6] Lewis's discussions of the subjects in his columns exemplify his ability to place public policy disputes in general and civil liberties questions in particular in a historical context. If one function of an historian is to report and reflect upon the past and bring it into the service of the present, it is accurate to describe Lewis as belonging to that hallowed breed. If one function of a journalist is to report upon the present and place it in a context that renders it more comprehensible than the bare facts suggest, then he was the best of journalists. The combination, as seen in his columns, was extraordinary.

Racial Equality

By the time Lewis began his column, he had made himself known as an advocate of racial equality, both through his reporting and in **Portrait of a Decade**. He turned to that theme repeatedly in the columns, beginning in the



Lewis wrote three books about the Supreme Court: *Gideon's Trumpet* (1964), *Portrait of a Decade* (1964), and *Make No Law: The Sullivan Case and the First Amendment* (1991).

In a 1991 column, Lewis traced the history of the *Brown v. Board* decision and praised Thurgood Marshall (right) and the NAACP Legal Defense and Education Fund for their litigation strategy. "History," he wrote, "spurred by the courage of lawyers and litigants, found the true meaning of 'equal protection' [in *Brown*]."

early 1970s and continuing into the twenty-first century. In 1991, more than two decades after the column was introduced, Lewis went to an advance screening of ABC's two-part series on the cases that made up *Brown v. Board of Education*. "At the end," he wrote, "I was in tears, as were some others who saw advanced screenings. That testifies to the power of the film—and of the events it describes. They transformed this country in a way unmatched at any other time or place."[7]

The tears reflected his passion for racial justice, but a calm rehearsal of the relevant history was not far behind. Lewis discussed the Court's interpretation of the Equal Protection Clause in *Plessy v. Ferguson* and the arguments used by the first Justice Harlan in dissenting from it. He went on to discuss the litigation strategy fashioned by Thurgood Marshall and the National Association for the Advancement of Colored People Legal Defense and Education Fund—what they were trying to do and how they built the litigation. "History," Lewis concluded, "spurred by the courage of lawyers and litigants, found the true meaning of 'equal protection.'"[8]

The phrase "true meaning of 'equal protection'" merits pause. The Fourteenth Amendment has meant different things at different historical moments, which Lewis, of course, knew. Does his use of the word "true" suggest that he saw at least one part of the Constitution as unchanging?

The answer, given Lewis's own words, is no. Like most civil libertarians—for such his columns proved him to be—Lewis rejected the idea of original intent in favor of something more reminiscent of sociological jurisprudence. He spoke of "the miracle of the American Constitution: a written document whose unchanging words allow, indeed invite, change." "One of the astonishing things about the American Constitution is its freshness, its contemporary relevance, in every age," Lewis said elsewhere. "We constantly rediscover the meaning of its great general principles in concrete new circumstances." "[T]here is no certainty in the Constitution, and there never has been . . . Through all its history, the meaning of the Constitution has been subject to ferocious argument, and to change." "[O]ur constitution lives because judges apply its eternal principles in the light of accumulated experience and wisdom. It is not being but becoming."[9] His judicial heroes included Oliver Wendell Holmes, Jr., Louis D. Brandeis, Felix Frankfurter, and William J. Brennan, all of whom taught that the Constitution was a living entity in constant need of reinterpretation.[10]

How, then, did *Brown* embody the true meaning of equal protection? Lewis supplied the answer when he wrote, "What produced the great change of constitutional interpretation in 1954 was a change in circumstances, in our understanding of race in the human condition."[11] In other words, the Court's new interpretation was "true" in the light of what the country had learned about race in the years between *Plessy* and *Brown*. It reflected the new values that had developed as a result. What Lewis could do for his readers was trace the reasons for the change.

He returned to the subject on the twenty-fifth anniversary of *Brown*, commenting that "[i]t is hard to remember, now, what this country was like before May 17, 1954," and then detailing exactly what it was like for the sake of those readers who either had forgotten or had never known. Five years earlier, he had traced some of the same history, outlining the way the speeches made by Presidents Kennedy and Johnson on racial equality were linked to the Court's decision in *Brown*. He reminded his readers of that history periodically, writing his last column about it in 2000.[12]

Lewis continued to report on the constantly developing nature of race relations in this country and the ever more difficult questions that arose. Reading through his columns is a history lesson of its own, for one finds there all the twists and turns of racial relations between 1969 and the beginning of the twenty-first century. Back in 1969, in fact, reporting on the oral argument in *Alexander v. Holmes* and Mississippi's last-ditch attempts to avoid school desegregation, Lewis told his readers, "The court has made amply clear that the time for 'deliberate speed' has passed in ending the separate school systems so long maintained by law in the South." Less than five years later, he reflected that in the years since *Brown*, "[W]e have been bruised by experience . . . [W]e understand that the issues of race and poverty are much more complicated, more intractable, than we imagined . . . The issues have become so hard that there are good arguments on all sides."[13]

One of the most contested issues was affirmative action. Its rise, the public's growing discomfort with it, the nation's failure to design a meaningful alternative—all are in the columns. Lewis documented the history but made clear which side he was on. While he recognized the legitimacy of the competing values that were involved, he also thought that "The votes in Congress [at the end of the 1960s], the retreats and confusions in the administration, the evidences of public feeling, all indicate a desire to wish our racial troubles away . . . [O]ne senses . . . a weariness with blacks and their protests and with racial justice as a cause." He saw the recommendation of "benign neglect" in Daniel Patrick Moynihan's **The Negro Family** as stemming from a desire for "a pause in the verbal hysterics over race" that could be used to "work at the problems" of the black community. He worried,

however, that "others would use the time not to work at the problems but to forget them . . . At least black people might see it that way . . . the blacks would think that any period of neglect was intended to be not benign but hostile. And they would be right."[14]

Affirmative action, about which Lewis felt strongly, became a recurring theme. His columns on the subject were passionate in their advocacy, journalistic in their tracing of the twists and turns affirmative action took each year, and historical in their placing of the dispute beyond the immediate context. When *De Funis v. Odegaard* was argued in the Supreme Court, Lewis told his readers, "It has been realized, slowly, that there is a certain unreality in telling people who have been the victims of discrimination for centuries that they may now compete at the same starting line for jobs or education." The column then presented a rigorously fair summary of the amicus briefs and philosophical arguments on both sides of the case and noted, "There are also tough intellectual issues . . . And there are practical considerations of great difficulty."[15]

Lewis returned to the matter of affirmative action three years later, shortly before the oral argument in *Regents of the University of California v. Bakke*. A series of columns reflected his willingness to listen to both sides, place their arguments in historical context, and present his own firmly held conclusions, educating his readers in the process. "The idea of quotas troubles Americans for good historical reasons," he conceded. "Anyone who hopes for a color-blind society may be troubled" by affirmative action plans involving quotas. But, relying on an amicus brief and a recent survey of law-school deans, he warned that law schools would be almost entirely white were it not for affirmative action. He recounted the story of the traditionally discriminatory construction industry in Massachusetts and the changes that had been brought in it through affirmative action. "The reality is that it takes heroic measures to end the exclusion of blacks from certain areas of American life." The issue in *Bakke*, he instructed, "is not a quota in the old, malign sense—a number used by the majority to keep down a minority. Here a majority is helping minorities, for both beneficent and self-interested reasons," the latter being the harmfulness of "the existence of two nations" in U.S. society.[16]

A column reporting on the various opinions in *Bakke* followed the Court's decision. A subsequent column analyzed the opinions, noting that the Nixon appointees on the Court had not voted together and speculating about the internal politics that might have affected the tone of the opinions—a succinct lesson in the workings of the Court. Yet another column described *Bakke* as "a decision allowing most existing social policy in the field to continue." Acknowledging that the result could be "to leave things in a vague, middling state," Lewis returned to the difficulty of the issue: "[N]o one who sat in the courtroom and heard the Justices could doubt the depth of the philosophical conflicts involved."[17]

The conflicts did not abate as the years went on, and the turmoil was reflected in Lewis's columns over the next decade. After the Court struck down in *Richmond v. Croson* a municipal affirmative-action set-aside in the Richmond, Virginia construction industry, holding that the set-aside was not directly tied to evidence of past discrimination, Lewis argued that the decision did not negate all affirmative action plans and that the need for some was still apparent.

> The United States is a country with a bitter legacy of racial discrimination. All around us we see the reality of that legacy, dividing our cities, embittering lives . . . The remedies must be careful and fair, but they cannot yet exclude consciousness of what brought us to this point: race.[18]

"Enlarging the black professional and middle class is one widely agreed aim" for overcoming "the devastating effects of racial discrimination," Lewis argued; "special efforts

for minorities may be an essential step to that end during a transition period." But whether he agreed with the decision in *Croson* or not, he took the time to remind his readers of another feature of the case:

> The whole argument was a testament to that most amazing feature of the American system, the reliance on judges to decide great social issues.

It was a "feature" of which he heartily approved, even when, reviewing decisions from time to time, he thought the Court got it all wrong.[19]

Lewis's championing of affirmative action reflected his distress at the damage he believed racial inequality was doing to the country. Column after column explained his view and filled in the history. When *Hopwood v. State of Texas* ended affirmative action at the University of Texas, he spelled out his concern in detail:

> One achievement of American society over the last decade has been the growth of a substantial black professional class: role models to young black men and women, and to the rest of us. That was possible only because universities, recognizing blacks' inherited burden of discrimination and their own need for greater diversity, sought more black students . . .
>
> This country is going to become more diverse, not less. Unless universities are allowed to look at the reality of students from bad ghetto schools and consider their capacity for growth—consider them as individuals—it is going to be an America even more divided, even more susceptible to racial discontent and demagogy.[20]

A decade later the country had made little progress in solving the problem.

> Race is the most daunting problem facing American society. A black underclass lives in appalling conditions, poorer and sicker than the rest of us, dying younger. Ghetto crime and violence, preying especially on blacks, degrade the life of our cities . . . American society has to do all it can, as soon as it can, to give young black men and women other dreams and other chances—give them the education and the motivation to go up and out.[21]

Earlier, writing about President Bush's veto of the 1991 civil rights bill, Lewis had offered a condensed version of the relevant history. It was history, Lewis said, that contradicted Bush's assertion that the bill would lead businesses to use quotas in hiring.

> In 1971, in the Griggs case, the Supreme Court held unanimously that the Civil Rights Act of 1964 prohibited not only intentional discrimination in hiring but practices that had the effect of hurting women and minorities. Businesses operated under that standard for 18 years without using quotas.
>
> Then last year, in the Wards Cove case, a 5-to-4 majority of the Supreme Court . . . said employees who sued over a practice that tended to exclude women or minorities had the burden of proving that the practice was not related to job requirements . . .
>
> The vetoed legislation would have put the burden back on employers to prove that a practice with a discriminatory effect was necessary for business reasons.

In a rare moment of public exasperation with the other side, Lewis castigated Bush rather than Bush's action: "Race is the most divisive issue in this country. No responsible president would try to block moves to ameliorate the tension." He wrote in the same vein when California gave up affirmative action in its institutions of higher education:

> In the life of Americans, race is a profound factor. Blacks may be bright or

> dull, rich or poor, but their experience in life has been different from whites' . . .
>
> Now it turns out that regents who voted for what they called "merit" admissions had leaned on the University of California at Los Angeles to admit the children of friends . . .
>
> In other words, we have affirmative action for the privileged. But not for the race that was enslaved for 200 years and abused for another 100 and more.[22]

Lewis was normally highly respectful of persons, of the American political system, and of the relationship between persons and that system. He assumed that reasonable people could disagree. Strongly held opinions were no excuse for incivility. He was completely opposed to Robert Bork's nomination to the Supreme Court, for example, and wrote a series of columns explaining why, but in them he described Bork as "this intelligent and engaging man," a "kind and intelligent person, understanding the difficulties of the judicial function"—who nonetheless held views that made him ill-suited for the nation's highest tribunal. He generally disagreed with Chief Justice William H. Rehnquist, but he could write that Rehnquist was "amply qualified" for the Bench "in terms of intellect and legal skills" and that his views did not make him an ogre. "To the contrary: the language of the Constitution is so open that different judges may honestly read it in very different ways." Wary of Justice Antonin Scalia's views, Lewis nonetheless praised "the zest and the craftsmanship that he brings to the job of judging," his "tough mind grappling with the hard issues." But in the heat of what was clearly his anger at the veto of the 1991 civil rights bill and a setback for racial equality, Lewis fumed, "Something is missing in George Bush. An empathy gene, if there were such a thing."[23]

One may or may not agree with Lewis's defense of affirmative action, but it seems fair to suggest that there was no other columnist in the country, writing in a daily newspaper, who supplied readers with as detailed a legal history of it.

* * * * *

A number of Lewis's themes came together in a series of articles about the situation that culminated in the Bob Jones University case. The dispute became the occasion for Lewis to demonstrate his strong antiracist beliefs and his support for the Supreme Court as an institution. It also provided an example of the way his columns would become a resource for future political and legal historians.

Bob Jones University did not permit interracial dating or marriage or the advocacy of interracial dating or marriage. It enjoyed tax-exempt status until the Internal Revenue Service declared in the 1970s that recent court rulings required it to revoke the status of educational institutions that were racially discriminatory and therefore operating contrary to public policy. In 1976, the IRS applied the new regulation to Bob Jones and revoked the university's tax-exempt status.

The matter drew public attention when, in 1982, President Ronald Reagan announced that the government had a legal obligation to restore the tax-exempt status of discriminatory schools and colleges because Congress had never passed a law denying such status. Lewis's response was, again, strongly worded:

> Presidents say a good many foolish things, and I have heard them for 30 years. But I do not think I have heard anything more preposterous, lame, cynical or outrageous than what Ronald Reagan had to say about "the law" and racist schools.
>
> "The Internal Revenue Service had actually formed a social law and was enforcing that social law," Mr. Reagan said.

That was far from accurate, Lewis declared, drawing on the historical record to put the presidential pronouncement into political perspective. The IRS had framed the rule during the

Nixon years in the light of a number of court decisions. To Lewis, the IRS had simply followed the law. The Republican party platform of 1980, however, had called for an end to tax rules "against independent schools." Senator Strom Thurmond, a trustee of Bob Jones, had pressed Reagan hard for reversal. Lewis was indignant:

> What the President is actually doing is this: taking a long-settled area of the law, reversing it by executive fiat and then inviting Congress to restore the status quo . . . The lawlessness of the whole affair is breathtaking. A President on his own motion upsets a decade of law . . . [I]s it really "conservative" to play fast and loose with the law?[24]

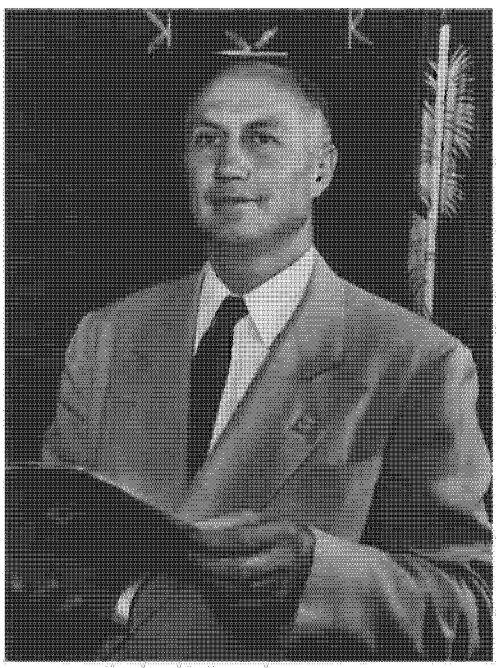
When Reagan acted, the Bob Jones case and a companion case were already scheduled for argument before the Supreme Court. Lewis returned to the matter a few days later, noting that the reaction of the Justice Department had been to pull the brief it had prepared for the two cases. The brief had argued that the denial of tax exemptions to racially discriminatory schools had been supported by Congress and detailed that history, now summarized briefly by Lewis. As he reported in yet another column, the Department told the Court immediately after Reagan's speech that as the schools would soon have their exemptions from the rule, the cases were moot.[25]

The Court disagreed, and ordered the cases to be heard. Oral argument took place in a climate of strong criticism of Reagan's new rule from the legal community. As Lewis had noted, "What is needed now is some face-saving device that will return the whole question to . . . the courts." Now he commented,

> Listening to the Supreme Court argument on tax exemptions for discriminatory private schools, I thought to myself that the Court nowadays performs a function seldom mentioned by scholars of the judicial process: it provides a convenient way for politicians to escape responsibility for awkward decisions.

Discussing the arguments made by both sides in the Court, Lewis reminded his readers of the political history. It was not a bad thing for the Court to be able to dig politicians out of the hole they had dug for themselves, he suggested, because "[s]ome issues are better explored in the more subtle and morally spacious terms open to judges." But, he added, "it would be nice if politicians who dearly love the Supreme Court to take awkward issues off their hands would stop denouncing the Court for 'judicial activism.'"[26]

The Supreme Court held, in an 8–1 decision written by Chief Justice Warren Burger, that "[R]acial discrimination in education violates a most fundamental national policy, as well as rights of individuals . . . Given the stress



Lewis was incensed when Senator Strom Thurmond (above), a trustee of Bob Jones University, pressed President Reagan hard for a reversal of the IRS's decision to revoke the university's tax-exempt status. The Court eventually ruled that taxpayers need not support a university having racially discriminatory policies.

and anguish of the history of efforts to escape from the shackles of the 'separate but equal' doctrine . . . it cannot be said that educational institutions that, for whatever reasons, practice racial discrimination . . . should be encouraged by having all taxpayers share in their support by way of special tax status." "It is a long time since an Administration has suffered such a defeat in the Supreme Court," Lewis wrote. "It was a humiliation." But how, he asked, "could a President at this stage in our history play with the issue for political reasons?"[27]

Lewis was equally angry through the late 1980s and 1990s at what he saw as the Court's move away from the modern constitutional mandate for racial equality. "The legal effort to bring more blacks into the mainstream of politics and education is being derailed," he warned. He put a large share of the blame on the Court, which "has plainly done a bad job of reading and applying civil rights laws in recent years . . . [A] majority of the Court has approached laws giving remedies to victims of discrimination in a reluctant spirit . . . To speak of a reluctance to enforce civil rights laws may indeed be a polite understatement." When the Court refused to grant certiorari in *Hopwood*, he warned of the repercussions:

> Black Americans may be excused if they see a certain hypocrisy in the sudden zeal for equal protection on behalf of whites. But whites should worry, too. At the end of the last century the North wearied of the effort to protect blacks in the South and sold them down the river. That sorry deal has haunted the country ever since.[28]

It was in part the effect of racial inequality on the country that disturbed Lewis. As he wrote repeatedly in similar formulations, "One of this country's acute problems, by anyone's reckoning, is the existence of a black underclass: underemployed, locked into deteriorating neighborhoods and bad schools. The whole society's health depends on breaking the cycle of deprivation. It is a matter not only of justice but of the majority's urgent self-interest."[29]

The good of the entire country was at stake, and Lewis cared passionately about that, but much of his passion was for those most hurt by racism. That was not accidental. In the early 1950s, when Lewis was a young reporter for the *Washington Daily News*, he was permitted to suggest the topics of his articles. He found himself writing over and over again about the Red Scare and its impact on the individuals hurt by the country's McCarthyism. That led him to realize, he said later, that he had an "instinctive identification with the underdog"—that one of his primary concerns was "ending unfairness and cruelty."[30] Writing a laudatory column about Justice Harry A. Blackmun, he quoted former law clerk Harold Koh: "He decided to give his voice to the excluded, the powerless." A similar concern for the underdog, Lewis acknowledged, permeated his columns.[31]

So did his interest in writing about history. While he would not describe himself as an historian, he was well aware that "this is a country without historical memory, on the whole." Knowing that, "I tried very hard to write about Madison, the founding fathers." How extraordinary: a columnist for a major U.S. newspaper teaching his readers about their 200-year-old history and the political philosophy that illuminated it. But Lewis was determined to place current events in the context of the past.[32]

That goal was particularly evident in his columns about speech.

Freedom of Speech

The two Supreme Court Justices most quoted in Lewis's columns were Holmes and Brandeis. While he referred to their views of the judicial function and to Brandeis's pronouncements on privacy and on unchecked power, it was their approach to speech to which he returned repeatedly. Given that emphasis, it is not surprising that he called upon Madison and Jefferson as well.

Lewis as journalist/historian is perhaps best exemplified by his articles about speech. In an essay published in *The New York Times Magazine* in 1991, for example, he traced the slow growth of the First Amendment in American jurisprudence, telling the story of the Sedition Act of 1798, the reactions of Madison and Jefferson, the relative unimportance of the Amendment to U.S. jurisprudence during the nineteenth century, and the hostility of the Supreme Court to speech claims during World War I. He contrasted the country during World War I with events fifty years later: "Think of the Debs case in comparison with what happened during the Vietnam War, when hundreds of thousands of Americans opposed the war and none went to prison for mere words." The reason, he asserted, was that an "extraordinary process had taken place, starting just a few months after the Debs decision in 1919." He detailed the transformation by quoting from Holmes and Brandeis in *Abrams v. United States*, *United States v. Schwimmer*, and *Whitney v. California*.[33]

"History came full cycle in 1964, when the Supreme Court returned to Madison's spacious vision of the First Amendment" in *New York Times v. Sullivan*, Lewis continued. "The system worked as Madison thought it should" during the days of the civil rights movement, with "an informed public shaping government policy." Lewis discussed decisions such as *Bond v. Floyd* and *Brandenburg v. Ohio* from that era and took the story forward with *Collin v. Smith* (Skokie), Jerry Falwell's libel suit against *Hustler* magazine, and the flag-burning cases. "But," he noted, "history is seldom a nice progressive curve upward, and the modern history of First Amendment interpretation has hardly been that. There have been many dark passages," including the Palmer raids and the McCarthy era. Sadly, "the Supreme Court did very little to hold these outrages up to the light of the First Amendment," in support of which Lewis cited *Dennis v. United States*.[34]

"Cited" is perhaps misleading in this context. Lewis used case names relatively rarely in his columns and longer *New York Times* articles, and spared his readers numerical citations. That, of course, is one of the things that guaranteed his columns a broad readership and that enabled him to fulfill the role of journalist as historian—or, perhaps, historian as journalist.

Continuing with a theme that he emphasized repeatedly in his writing, Lewis commented that the Supreme Court "has been at its worst in dealing with the growth of secret government . . . [G]rowing secrecy has taken us away from the Madisonian vision of a Government accountable to the sovereign public." *Snepp v. United States*, the *Pentagon Papers* case, and *Rust v. Sullivan* were examples. "Speaking truth to power is never going to be easy," he concluded, "not even after 200 years."[35]

Lewis was tireless in teaching the history of the Supreme Court and free-speech law. He frequently went back to Holmes in *Abrams* and Brandeis in *Whitney*, and sometimes to Harlan in *Cohens v. California*. When the Skokie case was in the public eye, he discussed it in the context of *Near v. Minnesota* and Brandeis' insistence during oral argument in that case that even untrue speech had to be allowed in a democratic society. Pairing the *Near* case of 1931 with the Pentagon Papers case of 1971, he commented,

> We can see now, I think, that they were not so much victories for the press as for a political experiment, the one begun in 1776 . . . The American public, to play its constitutional role, must be informed . . .
>
> At the heart of the First Amendment—really of the entire Constitution—is an open relationship between governors and the governed. It is still an experiment: a dangerous one. But it is our system.[36]

Lewis worked hard to explain why "it is our system." He rehearsed once again the

reasons for Holmes' change of attitude toward speech between the *Schenck* and *Abrams* cases. Holmes' dissent in *Abrams,* which Lewis described as the beginning of "what could be called a return to Madison's and Jefferson's view of the First Amendment," was drawn upon once more when Lewis discussed the attempt to outlaw flag-burning. "In truth, the idea of free speech is neither 'liberal' nor 'conservative.' It is, rather, American . . . [I]t is a profoundly important part of what the world sees as the distinctively American vision of a free and self-confident society." The column began by quoting Jefferson's First Inaugural ("[T]he safety with which error of opinion may be tolerated where reason is left free to combat it"). A subsequent column continued the lesson:

> Over the last 50 years the Madisonian view of the First Amendment has been fully accepted by the Supreme Court. The flag decisions last year and this year were only the latest in a long line of cases protecting expression obnoxious to the majority.[37]

Reviewing the prosecutions of 1970s radicals and telling the tale of government spying—the COINTELPRO program and other surveillance activities of the Federal Bureau of Investigation, the Central Intelligence Agency, and the Internal Revenue Service—Lewis compared them once again with the climate that prevailed during World War I and the McCarthy era. "What lessons may the country have learned from the way questions of free speech and dissent were handled in the 1970s?" he asked rhetorically, and answered, "One evident lesson is that a strong society can allow critical speech in times of stress." Noting that Presidents Johnson and Nixon had told aides that critics of the war in Vietnam were being supported from abroad, he drew the obvious lesson for the 1980s and beyond.[38]

Each major speech issue that arose during the column's life was explained. In the 1990s, Lewis placed the Supreme Court's decision in *Rust v. Sullivan* in the context not only of the abortion debate but of the federal money that "now goes to thousands of universities in this country, to museums, to scientific laboratories—and our tradition of free speech will be mutilated if that money can be accompanied by censorship." He called the late-twentieth-century drive for political correctness at universities "a serious threat to the American tradition of uninhibited speech. It is a threat from the political far left, unlike the usual right-wing attempts at suppression in our history, but similar in its fear and intolerance." Discussing congressional statutes of the same era that sought to limit speech on the Internet, Lewis noted, "The very essence of the on-line world is freedom" but "[t]he effect of the provision [to outlaw "indecent" words]—no doubt the intended effect—will therefore be to reduce all users of cyberspace to the level of children."[39]

His strong defense of free speech did not make him an absolutist. He regretted the Supreme Court's decision in *Buckley v. Valeo*, striking down the expenditure provisions of the 1974 Campaign Reform Act, and chided, "In other words, the American system is absolutely powerless to prevent a Rockefeller from spending $4 million in family money to elect himself governor . . . Does that make any sense? Does it make any constitutional sense? I think the American Constitution is not so simple-minded . . . [O]f course money is a lot more than 'speech.' We know that money talks; but that is the problem, not the answer." When, in 2000, the Court upheld a Missouri law limiting contributions to candidates in state elections, he wrote, "The Supreme Court is aware of realities now. It is not in a First Amendment ivory tower, indifferent to the consequences of absolutism." Speech, Lewis declared, was viewed by Frankfurter, as by Jefferson and Madison, as "a social necessity—a way of informing public decisions in a democracy and of preventing despotic government," not as a license for John D. Rockefeller to spend "$2 million of his own

[money] to become Governor of West Virginia; H. John Heinz 3d, $2.2 million to be Senator from Pennsylvania."[40]

It was his very insistence on the social utility of speech that led him to wonder aloud whether there ought to be limits on speech that was destructive, however fervent an admirer he was of the decisions in *Skokie* and *Brandenburg*. He reflected on the way the Oklahoma City bombing "has made us think again about hateful speech and how to deal with it." He was well aware that "few other societies, even the most democratic, would permit such murderous talk. We do, and we should not change, but we ought to worry about it." The reason was that "[a]nyone who thinks such words have had no effect is ignorant of political history." He worried about "anti-abortion fanatics" who preached that abortion is murder but eschewed responsibility when doctors were killed, or the way a Rush Limbaugh labeled feminists "feminazis." "In a climate of calculated hate for The Other," he asked, "how can we expect to have the civil discourse that is the mechanism of Madisonian democracy?" As he had every reason to know, "[w]ords matter."[41]

Conclusion

Anthony Lewis's columns were those of a journalist, an historian, and an advocate. They reflected an integrity of both thought and the writer's craft. He was neither cynical nor gullible; although critical, he was neither whiney nor unfair; he was unfailingly respectful of his readers and, almost always, of the people about whom he wrote. The proverbial Martian could do worse in its first few days on Earth than read through Lewis's columns (of which the roughly 300 on civil liberties are only a small part) in order to gain a picture of what happened to U.S. social history and public policy in the last few decades of the twentieth century.

Lewis tried to teach the importance of the Constitution, which he credited with continuing to make the United States possible. The language he employed to describe it melded religion and history with a sense of a dynamic society that was constantly in the process of transforming itself:

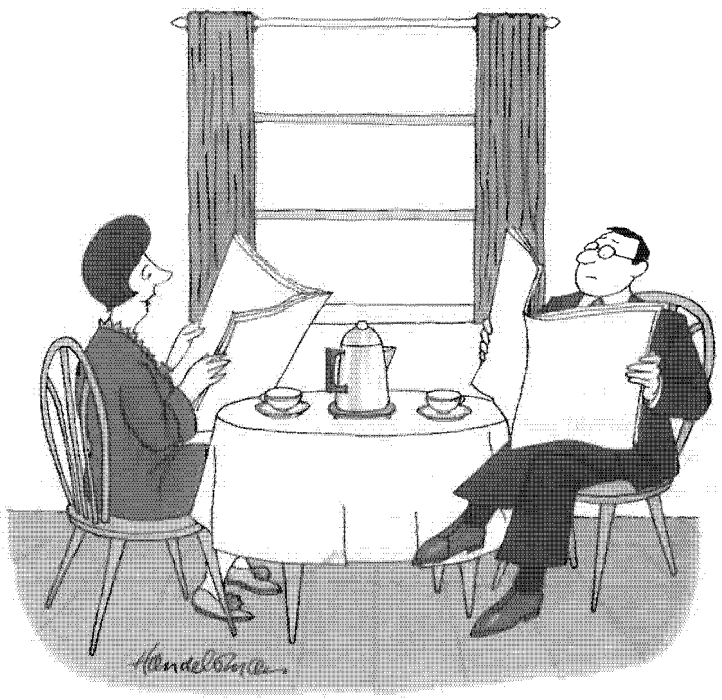
> It is our rock and our redeemer, the civil religion of a society that has no state church. It is a unifying symbol as powerful in our diverse Republic as the queen in a monarchy. It is history: roots for a country with little sense of the past. For a restless people, it is the prime source of stability, of certainty.[42]

Within the Constitution, the Bill of Rights was central. Its enactment was "an astonishing gesture of political belief" by a "people struggling for existence, trying against the odds to create a nation," who nonetheless refused to ratify the Constitution "unless it was amended to protect individuals from official power." And they were correct; the Bill of Rights has "played so large a part in [the] survival" of the U.S. political system. To write about that system was to write about rights, for "more than any other society we have a rights culture. Prick an American, and he reaches for his constitutional rights."[43]

And the Supreme Court was crucial to the survival of a meaningful Bill of Rights. "The *Gideon* case shows us that the rights listed in the American Constitution in such spacious terms—fairness, equality, freedom—are not self-executing. They have to be fought for in every generation."[44]

Is it naive to assert that Lewis was no less a historian for his participation in that fight? He saw the Supreme Court as an ally:

> [T]his is a better country because the Supreme Court has condemned racial discrimination, protected privacy and said that legislative elections must follow the rule of one person, one vote. We are glad that the Court, in such bold decisions, interpreted the Constitution generously to protect individual liberty.[45]



"I think I'll be wicked today and skip Anthony Lewis."

In *The New York Times* columns he wrote from 1969 to 1991, Lewis tried to educate the public about the importance of the Constitution, especially the Bill of Rights, and to make Americans think about moral issues. This 1970s cartoon from *The New Yorker* pokes fun at the column's educational benefits.

"Without constraints on government, and the effective enforcement of those constraints by judges," he wrote on the 200th anniversary of the Bill of Rights, "I am convinced that the Framers' experiment in self-government would long ago have failed... Without the civilizing hand of law, America might have been shattered many times by sectarian conflict. Without the guarantees of free speech and a free press, it would not be the extraordinarily open society it is." He knew that the Justices could be wrong. When they wrestled with the question of the right to die, he commented,

> Turning to judges on such profound questions does present risks. But on the whole our courts, in the process of expounding the Constitution, have done a fair job of helping to keep this country stable and free. And the judges have made the rest of us think about moral issues.[46]

Lewis, too, "made the rest of us think about moral issues." In his final column, he said that "In the end I believe that faith in reason will prevail. But it will not happen automatically. Freedom under law is hard work. If rulers cannot be trusted with arbitrary power, it is up to citizens to raise their voices at injustice."[47]

Lewis clearly interpreted his job description to include raising his voice. He utilized his columns to explain the events of the day to his fellow citizens, as a journalist should, putting them in a context that simultaneously made history come alive and created a historical record for the future. At one point he expressed frustration at Bill Clinton's failure to lead the country and wrote, "Mr. Clinton has failed as an educator. He has utterly failed to articulate the reasons why Americans should care about civil liberties: the reasons of history and of our deepest values."[48]

Lewis did not make that mistake.

*My thanks to Danielle Tarantolo and Aidan Smith for their assistance in sorting through the hundreds of columns Lewis produced over more than three decades; to Jill Norgren and Danielle Tarantolo for their fine editorial advice; and to Anthony Lewis's staff for providing me with copies of his columns.

ENDNOTES

[1]Author's telephone interview with Anthony Lewis, October 15, 2002 (hereafter Interview).

[2]Interview. Lewis received a B.A. from Harvard University in 1948. He received his first Pulitzer Prize in 1955 for a series of articles in the *Washington Daily News* about the dismissal of a Navy employee as a security risk. Lewis then moved to *The New York Times* and spent a year in its Washington bureau. After a year's study as a Nieman Fellow at the Harvard Law School (1956–1957), he began covering the Supreme Court for the *Times*, and was awarded his second Pulitzer Prize in 1963 for that reporting. He became chief of the *Times*' London Bureau in 1964.

[3]Romantic: "Reading The Text," Aug. 3, 1990. Court and history: "The Court: Rehnquist," June 23, 1986. All articles cited are from *The New York Times* unless otherwise indicated.

[4]Powerless: "What Is at Stake," Sept. 13, 1987. Power rather than principle: "Guardians of Liberty," Feb. 27, 1972. Passing majorities: "Tyranny of a Majority," June 13, 1977. Frankfurter: "Hail the State!," July 9, 1984.

[5]Statist: *see, e.g.*, "Hail the State!," July 9, 1984; "A Royalist Court," Sept. 9, 1991; "How Freedom Died," Nov. 22, 1991; "If Madison Were Here," Dec. 13, 1991; "Court Against Congress," May 7, 1992; "Whatever the King Wants," June 21, 1992. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). Unique contribution: "Supreme Court: Does Anyone Care?," Mar. 9, 1970. Stable and free: "Conscience and the Court," June 29, 1990. Stone: "Tyranny of a Majority," June 13, 1977, referring to Justice Stone's opinion in *U.S. v. Carolene Products Co.*, 304 U.S. 144 (1938).

[6]**Portrait of a Decade: The Second American Revolution** (Random House, 1964); **Make No Law: The Sullivan Case and the First Amendment** (Random House, 1991). The book for which he is best known, however, is **Gideon's Trumpet** (Random House, 1964).

[7]Racial equality: *see, e.g.*, "Neglect—Benign or Hostile?" Mar. 2, 1970; "Hail and Farewell," Dec. 15, 2001; and the columns noted below. *Brown v. Board of Education*, 347 U.S. 483 (1954). The ABC series was called "Separate But Equal." In tears: "'Seeds of Race Hate,'" Apr. 8, 1991.

[8]*Plessy v. Ferguson*, 163 U. S. 537 (1896); Harlan at 552. "'Seeds of Race Hate,'" Apr. 8, 1991.

[9]Miracle: "Gideon: An Epitaph," Feb. 12, 1972. New circumstances: "Spirit of Good Will," Jan. 3, 1985. Change: "An Ingenious Structure," *New York Times Magazine*, Sept. 13, 1987. Becoming: "Freedom to Disagree," Dec. 31, 1987.

[10]Brennan: *see, e.g.*, "Robust and Uninhibited," Oct. 18, 1976; "Bowing to Racism," Apr. 28, 1987; "Mr. Justice Brennan," July 24, 1990.

[11]"An Ingenious Structure, *New York Times Magazine*, Sept. 13, 1987.

[12]Had never known: "The System Worked," May 17, 1979. Decision in *Brown*: "A Time to Celebrate," May 13, 1974. Last column: "'Imposing on Them a Badge of Inferiority,'" Jan. 22, 2000.

[13]"Of Justices and Their Presidents," *Herald Tribune*, Oct. 25–26, 1969. *Alexander v. Holmes*, 396 U.S. 19 (1969).

[14]"Neglect—Benign or Hostile?," referring to Daniel Patrick Moynihan, **The Negro Family: The Case for National Action** (U.S. Department of Labor, 1965). The report was controversial in part because of its portrait of African-American families as dysfunctional and in part because its call for benign neglect was interpreted by some as reflecting a hostility to government policies designed to further racial equality. As indicated above, Lewis appeared to share that assessment.

[15]"The Legality of Racial Quotas," Mar. 2, 1974. *De Funis v. Odegaard*, 416 U.S. 312 (1974).

[16]*Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). Historical reasons and existence of two nations: "The Bakke Brief," Sept. 8, 1977. Troubled by quotas and construction industry: "The Stakes in Bakke." Amicus brief: "A White Enclave?," Feb. 17, 1977.

[17]Various opinions: "A Solomonic Decision," June 29, 1978. Internal politics: "In the Storm Center," July 3, 1978. Philosophical conflicts: "'Bakke' May Change a Lot While Changing No Law," July 2, 1978.

[18]"A Time for Healing," Apr. 6, 1989. *Richmond v. Croson*, 488 U.S. 469 (1989).

[19]Transition period: "No Rush to Judgment," Sept. 22, 1977. Reliance on judges: "The Bakke Argument," Oct. 13, 1977.

[20]"Whiter Than White," May 23, 1997; *see also* "Violins in the Wings," Nov. 28, 1997. *Hopwood v. State of Texas*, 78 F.3d 932 (5th Cir.), cert. denied, 518 U.S. 1033 (1996).

[21]"Zealotry Gone Mad," Dec. 17, 1990.

[22]"Who Is George Bush?," Oct. 26, 1990. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). Most divisive: "Politics and Decency," Apr. 15, 1991. 200 years: "Handcuffs on Learning," Mar. 22, 1996.

[23]Bork: "Question of Judgment," Sept. 27, 1987; "The Larger Message," Oct. 8, 1987. Rehnquist: "The Court: Rehnquist," June 23, 1986; "Reagan and the Court," Oct. 9, 1980. Scalia: "The Court: Scalia," June 26, 1986. Empathy gene: "Politics and Decency," Apr. 15, 1991.

[24]"Shucks, It's Only The Law," Jan. 21, 1982.
[25]Summarized briefly: "Out of the Pickle," Feb. 8, 1982. Cases moot: "School Tax Rumbles," Feb. 15, 1982.
[26]"Passing the Buck," Oct. 14, 1982.
[27]"The Court Says No," May 26, 1983. *Bob Jones University v. United States*, 461 U.S. 574 (1983).
[28]Derailed; sorry deal: "Down the River," July 5, 1996. Understatement: "Winners and Losers," Oct. 28, 1991.
[29]"The Party of Lincoln," Nov. 7, 1985.
[30]Interview.
[31]Blackmun: "The Blackmun Legacy," Apr. 8, 1994. Lewis: Interview.
[32]Interview.
[33]"Staving Off the Silencers," *New York Times Magazine*, Dec. 1, 1991, citing *Debs v. United States*, 249 U.S. 211 (1919); *Abrams v. United States*, 250 U.S. 616, 624 (1919); *Whitney v. California*, 274 U.S. 357, 372 (1927); *United States v. Schwimmer*, 279 U.S. 644, 653 (1929).
[34]"Staving Off the Silencers," citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Bond v. Floyd*, 385 U.S. 116 (1966); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Collin v. Smith*, 447 F. Supp. 676 (N.D. Ill. 1978), 578 F.2d 1197 (7th Cir. 1978); *Hustler Magazine, Inc. v. Jerry Falwell*, 485 U.S. 46 (1988); *Texas v. Johnson*, 491 U.S. 397 (1989); *United States v. Eichman*, 496 U.S. 310 (1990); *Dennis v. United States*, 341 US 494 (1951).
[35]"Staving Off the Silencers," citing *Snepp v. United States*, 444 U.S. 507 (1980); *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Rust v. Sullivan*, 500 U.S. 173 (1991).
[36]Holmes, Brandeis, Harlan: *see, e.g.*, "'Thought That We Hate,'" Apr. 13, 1978; "Free Speech and Provocation Can Be Hard to Separate," Nov. 11, 1979; "Freedom To Disagree," Dec. 31, 1987, drawing on Richard Polenberg, **Fighting Faiths: The Abrams Case, the Supreme Court, and Free Speech** (Viking, 1987); "Bork On Free Speech," Sept. 3, 1987; "A Glorious Fourth," July 3, 1990; "The Poet Judge," Mar. 8, 1991. *Near v. Minnesota*, 283 U.S. 697 (1931). Our system: "Freedom of the Press," June 7, 1981.
[37]Holmes: "Freedom To Disagree," Dec. 31, 1987, discussing *United States v. Schenck*, 249 U.S. 47 (1919) and *Abrams v. United States*, 250 U.S. 616, 624 (1919). Jefferson: "What Is America?," June 29, 1989. Flag decisions: "A Glorious Fourth," July 3, 1990.
[38]"Dohrn Got Probation, But What of the Others?," Jan. 18, 1981.
[39]Censorship: "How Freedom Died," Nov. 22, 1991. *See also* "Paying the Piper," May 31, 1991. Lewis applauded both gender equality and reproductive freedom, while both respectfully recognizing the strong feelings of those opposed to abortion and condemning some of the actions of antiabortionists who did not respect the feelings of those on the other side. *See, e.g.*, "A Singular Issue," Nov. 16, 1978; "The Righteous Fanatics," Sept. 27, 1984; "The Cost of Fanaticism," Mar. 16, 1990. In his final column, he referred to "the move toward equality for women" as the second "unfinished but extraordinary" revolution to have taken place in his lifetime, the first being the move toward ending racial discrimination. "Hail and Farewell," Dec. 15, 2001. Political correctness: "Liberty and Hypocrisy," May 27, 1991. *See also* "Time to Grow Up," Oct. 14, 1994. Internet: "Fear of Freedom," Dec. 25, 1995.
[40]Buckley: "The Court on Politics," Feb. 5, 1976. *Buckley v. Valeo*, 424 U.S. 1 (1976). *See also* "Money and Politics," Nov. 8, 1976. Ivory tower: "The Court Sees Reality," Jan. 29, 2000, discussing *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000). Rockefeller and Heinz: "Free Speech: Never Total, Once Again Expanding," Feb. 8, 1976; "Money and Politics," Nov. 8, 1976.
[41]"Words Matter," May 5, 1995.
[42]"An Ingenious Structure," *New York Times Magazine*, Sept. 13, 1987.
[43]"If Madison Were Here," Dec. 13, 1991. As indicated above, Lewis was well aware of the Constitution's lapses in the areas of race and gender.
[44]"One Small Step," Nov. 15, 1984, referring to *Gideon v. Wainwright*, 372 U.S. 335 (1963).
[45]"The Larger Message," Oct. 8, 1987.
[46]Open society: "If Madison Were Here." Moral issues: "Conscience and the Court," June 29, 1990, referring to *Cruzan v. Director*, 497 U.S. 261 (1990).
[47]"Hail and Farewell," Dec. 15, 2001.
[48]"Stand Up For Liberty," Apr. 15, 1996.

The Judicial Bookshelf

D. GRIER STEPHENSON, JR.

"In law, also, men make a difference,"[1] counseled Felix Frankfurter the year before his appointment to the Supreme Court. Frankfurter highlighted one of the three critical components of judicial decision-making in constitutional law: alongside the text of the Constitution itself and the cases that pose various questions for decision are the women and men who answer those questions. Those answers, as Frankfurter believed, are invariably influenced by the values Justices bring with them to the Bench. Yet he was expressing no newfound truth, but an awareness that had been apparent for a long time. "Impressed with a conviction that the true administration of justice is the firmest pillar of good government," President George Washington wrote future Attorney General Edmund Randolph in 1789, "I have considered the first arrangement of the judicial department as essential to the happiness of our country and the stability of its political system." To be sure, the Court's role in the political system was unclear, but Washington realized the impact the Court might have in the young Republic. This required, he told Randolph, "the selection of the fittest characters to expound the laws and dispense justice."[2] And as he filled the six seats Congress had authorized for the Supreme Court, the first President made sure that each nominee was a strong supporter of the new Constitution.

Yet a President's influence on the Court and a Justice's influence on the law are in part a function of judicial tenure: an appointee's length of service. A Bench with stable or nearly stable membership over at least several years multiplies the opportunities its members collectively have "to say what the law is"[3] and magnifies the legacies of the Presidents who put them there—even when appointees turn out to be "surprises" in one way or another. In contrast, a brief tenure cuts short a Justice's opportunity to "make a difference," just as it limits the influence of the appointing President, yet creates an opportunity for the same or a later President to try again to shape the Bench. This commonsense observation appears in even sharper relief when one compares the Court's most recent decade with its first.

On April 6, 1994, Justice Harry A. Blackmun announced his forthcoming retirement. Although twenty Justices since 1789 had served longer than his twenty-four years, at age 85 only two were older at the time they left the Court.[4] On May 13, President Bill

The only period of stability that exceeds the past decade's, in which there has been no new appointment to the Court since 1994, was the eleven-year stretch between the arrival of Justice Joseph Story (left) on February 3, 1812 and the death of Justice Brockholst Livingston (right) on March 18, 1823.

Clinton revealed his choice for Blackmun's seat: Boston's Judge Stephen Gerald Breyer, 55, of the U.S. Court of Appeals for the First Circuit. Hearings in the Senate convened on July 12 and lasted four days, with confirmation, 87–9, following on July 29. On August 3, the Chief Justice administered both the constitutional and judicial oaths to the 108th Justice at the Rehnquists' vacation home in Greensboro, Vermont.

As of this writing, a few months shy of a decade later, Justice Breyer still retains the title as the most junior member of a Bench that was configured by five Presidents. The years 1994–2004 thus constitute a unique and remarkable continuity in the history of the Supreme Court. Since 1869, when Congress set the Court's roster at the current complement of nine, there has been no other period of similar length without the departure of a Justice. The next longest period without change fell between Justice John Paul Stevens's arrival on December 19, 1975, and Justice Potter Stewart's retirement on July 3, 1981 (followed by Justice Sandra Day O'Connor's swearing in on September 25, 1981). Indeed, over the whole sweep of Supreme Court history, the only period of stability exceeding the past decade's is the eleven-year stretch between Justice Joseph Story's arrival on February 3, 1812 and Justice Henry Brockholst Livingston's death on March 18, 1823.

This stability stands in sharp contrast to the instability of the Court's first decade. After President Washington initially filled the six seats,[5] he made five additional appointments before the end of his second term in March 1797.[6] Prior to his appointment of Chief Justice John Marshall in 1801, President John Adams made two appointments. Thus, the years between the appointment of the first six and Marshall's arrival, exclusive, witnessed a total of seven changes in Court personnel. Longevity of service was in short supply. Only four Justices named during this period (William Cushing, William Paterson, Samuel

Chase, and Bushrod Washington) served the equivalent of at least two presidential terms beyond the administrations of the Presidents who selected them.

Alongside this judicial revolving door, moreover, one sees just how close the Court came to being a very different Bench in another way. It is often observed, as Frankfurter did in 1938,[7] that constitutional cases in the first quarter of the nineteenth century would hardly have been decided the same way had Chief Justice Ellsworth's resignation in October 1800 been postponed until after Thomas Jefferson became President. The third President might have picked Spencer Roane for the center chair, by 1801 already in his sixth year as a judge on the Virginia Court of Appeals; Jefferson most certainly would not have selected his cousin John Marshall.[8] Yet amid all the judicial instability of the decade, Ellsworth's departure in the fall of 1800 would have been even more significant had Jefferson managed to capture the presidency in 1796, thus getting a head start on the "Revolution of 1800."[9] After all, Adams won with a margin of only three electoral votes, in a contest that proved far closer than either Adams or Jefferson had anticipated.[10] Thus, in terms of its potential effect on the Supreme Court, the often overlooked presidential election of 1796 stands out as one of the most significant might-have-beens in American judicial history.

The contrasting experience with an unusually stable Bench in the last decade is an obvious reminder that retirements in the near term are practically inevitable. That looming prospect makes publication of **Supreme Court Justices in the Post-Bork Era**[11] all the more timely. Authored by Central Michigan University political scientist Joyce Baugh, the book revisits the nation's last experience with a compressed train of Supreme Court retirements, nominations, and confirmation proceedings. The goal is to see what lessons can be learned and to suggest what can be expected for the future.

Juxtaposed against the Court's steady composition since 1994, the years 1986–1994 witnessed abundant turnover, and, in some instances, turmoil. Within those eight years were the retirements of Chief Justice Warren Burger (1986) and Justices Lewis F. Powell (1987), William J. Brennan (1990), Thurgood Marshall (1991), and Byron White (1993), as well as Blackmun. Their departures opened the way for Justice William H. Rehnquist's appointment as Chief Justice (1986) and the arrivals of Justices Antonin Scalia (1986), Anthony M. Kennedy (1988), David H. Souter (1990), Clarence Thomas (1991), and Ruth Bader Ginsburg (1993), as well as Breyer. Thus, within no more than eight years, three Presidents were able to remake two-thirds of the Bench.

Justice Powell's retirement in particular generated a political maelstrom after President Ronald Reagan nominated Judge Robert Bork of the U.S. Court of Appeals for the District of Columbia Circuit to replace him. Given the hot-button constitutional questions that seemed to hang in the balance and the nominee's lengthy "paper trail" that revealed his views about them, supporters and opponents alike stood their ground on the expectation that, "in law, also, men make a difference."[12] Bork's became only the fifth Supreme Court nomination in the twentieth century to be rejected by the Senate, under circumstances that were unprecedented. The confirmation battle was even more vitriolic than the one Louis Brandeis had undergone in 1916 after President Woodrow Wilson named him to replace Justice Joseph R. Lamar. Never before had there been such grassroots efforts, complete with television ads, to defeat a judicial nominee. Furthermore, hearings before the Senate Judiciary Committee were both exhaustive and exhausting, lasting a record-setting twelve days, with Bork testifying and being questioned on five of them. Finally, when Bork's opponents prevailed on October 23, 1987, the 42–58 vote against him was the most lopsided

Judge Robert Bork (above) was the fifth Supreme Court nominee in the twentieth century to be rejected by the Senate. His confirmation battle was even more vitriolic than the one Louis D. Brandeis underwent in 1916.

Senate rejection of a Supreme Court nominee in history.

In the wake of the Bork debacle, some Court observers claimed "that the Bork episode [had] changed the process forever."[13] The process had seemingly become politicized to an unparalleled degree. As a result, in filling vacancies in the future, Presidents would presumably be faced with two equally unacceptable scenarios. In situations where Presidents selected ideological soulmates, there would be no going back to a time when rancorous proceedings were the rare exception rather than the rule; instead, confirmation proceedings would remain overtly and permanently confrontational. Alternatively, Presidents would have to forego otherwise desirable nominees and move circuitously in selecting nominees, to avoid the tumult of the first.

The effects of the Bork affair on Supreme Court appointments form the subject of Baugh's study. As the latest book-length addition to the literature on the confirmation process,[14] her study benefits from the perspective that time and distance from events can lend. At the outset, she rejects the contention that the Bork nomination was unusual because it was controversial and became politicized. She begins with John Maltese's thesis that the nomination was unusual because of the ways in which the political dimension manifested itself. "[W]hat is different about today's appointment process," he wrote in 1995, "is not its politicization but the range of players in the process and the techniques of politicization that they use."

> Today's confirmation battles are no longer government affairs between the president and the Senate; they are public affairs, open to a broad range of players. Thus, overt lobbying, public opinion polls, advertising campaigns, focus groups, and public appeals have all become a routine part of the process.[15]

Baugh then presents two hypotheses for testing in the post-Bork era that began after Justice Kennedy's confirmation on February 3, 1988.[16] The first deals with the degree to which subsequent nominations have indeed been "public affairs"; the second addresses the kind of nominees Presidents since Reagan have selected.

> First, Supreme Court nominations in the future would be marked by a significant increase in both media attention and interest group participation. Second,... presidents would be more likely to appoint either "stealth" nominees—that is, individuals who share their ideological perspectives but lack a "paper trail" of controversial writings and speeches—or judicial moderates who would be less likely to evoke serious opposition from those on either side of the political and ideological spectrum.[17]

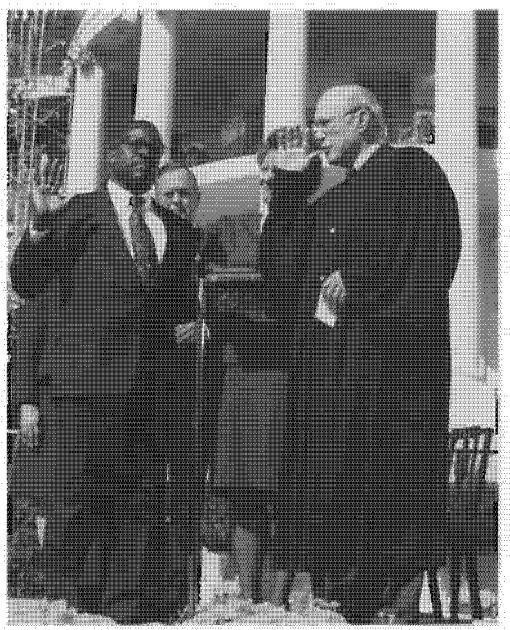
The book unfolds through six chapters. The first is the shortest and is a condensed review of the struggle in the Senate over the Bork nomination. The next four chapters are article-length studies of the appointments of Justices Souter, Thomas, Ginsburg, and Breyer, combined with an overview of the constitutional jurisprudence each has thus far displayed on the Bench. These four chapters are the true meat of the book. Except for Thomas, who has already been the subject of several books,[18] Baugh's are among the most detailed and thoughtful studies of these Justices in the literature. The final chapter presents and compares the findings of the previous four.

Many who followed closely the four appointments after 1988 will agree with Baugh's assessment that the changes that were supposed to have been grafted onto the confirmation process by the Bork affair have been overstated. No doubt all will agree that "each nomination is a unique event, with the outcome determined by factors specific to that nomination."[19]

The Souter and Thomas nominations commanded more attention by the news media than did the Ginsburg and Breyer nominations. In Baugh's view, the emphasis on Souter stemmed from two facts. First, he was replacing a Justice who for some time had been the intellectual leader of the liberal wing on the Court; second, because Souter had been a judge on the U.S. Court of Appeals for only a few months prior to his nomination to the High Court, little was known about his views on federal constitutional questions. Thus, journalists spent much of the time between the announcement of his nomination and commencement of the hearings trying to learn as much about him as possible. The dearth of information even led Senator Howell Heflin of Alabama to tag Souter as the "stealth candidate"—perhaps being the first to apply "stealth" to a Supreme Court nominee. On national television, Justice Thurgood Marshall harrumphed, "Never heard of him."[20]

Attention in the media and among civil rights organizations focused on Thomas both because of the person he would replace and because his views on some issues were known: many believed him to be the ideological mirror of Thurgood Marshall. With Souter, President George H. W. Bush strove for a confirmable nominee by picking someone whose positions were relatively unknown; with Thomas, he did the opposite. Those circumstances were then confounded by the accusation of sexual harassment that drew the nominee back to the Senate Judiciary Committee for a second round of hearings and led to a media circus. The major networks tend not to provide live coverage of hearings of judicial nominees—"I don't see the sound bites that allow for coverage,"[21] explained one CBS news producer—but they did in Thomas's case. What followed the nomination's referral back to committee was a television spectacle that left few satisfied: twenty-eight hours of additional hearings marked by lurid details, bitter charges and countercharges, and equally bitter denials and counter-denials. Likened by some to a morality play or a psychodrama, the acrimonious hearings drew a larger viewing audience than the National League and American League playoffs going on at the same time. The Senate's vote to confirm, 52–48, on October 15, 1991 was one of the closest ever for a successful Supreme Court nominee. Only the second-try approval of Stanley Matthews by a vote of 24–23 in 1881 generated a higher percentage of negative votes.

The nomination of Ginsburg received more attention than Breyer's, Baugh believes, both because hers was President Bill Clinton's first and because, ideologically, more was at stake. She would replace retiring Justice Byron White who had taken a more conservative position on questions such as abortion and church-state issues. Replacing Blackmun, Breyer's views, to the extent that they aligned with his predecessor's, would have little change on the balance within the Court. But for Baugh,



The Senate's 52–48 vote to confirm Clarence Thomas (pictured at left being sworn in by Justice White in 1991) was one of the closest ever for a successful Supreme Court nominee. Stanley Mathews (right) was confirmed 24–23 in 1881 on the second try—an even closer call.

another factor at play in dampening media interest in both situations was the fact that Ginsburg and Breyer were widely perceived as "moderate" and pragmatic liberals, not ideologues.[22]

Thus, the post-Bork/Kennedy nominations have consisted of one relatively unknown nominee, one nominee thought to be ideologically conservative at the time of his nomination, and two who were liberal but not passionately so. And, due to varying circumstances, each received different quantities of media and interest group attention. Baugh's advice to any President submitting a Supreme Court nomination in the future is to avoid a candidate who appears to be strongly ideological, particularly if that individual would tilt the voting balance on the Bench in one direction or the other. In such situations, the odds for confirmation go down sharply. "[T]he safest strategy seems to be the one adopted by President Clinton—selecting well-respected judicial moderates."[23]

That may be so, but three factors that have intensified since 1994 should be factored into any presidential-advice equation as well. First, the broadcast television networks that, until recently, most Americans watched for news now have serious rivals in cable news channels, of which there are at least five. The latter feature non-stop news coverage where the news cycle is not from day to day but a ravenous one of hour by hour. That reality, coupled with the plethora of talk-radio programs, complicates the job of anyone trying to determine in advance how a nomination will "play" in the media. There are simply more video options available now than when Bork and Thomas went before the Senate. Second, the vast possibilities of the Internet, in terms of electrifying the grassroots and of multiplying news sources, are more apparent now than in the early 1990s.[24] Third, during the past three years the filibuster has become a formidable weapon in deciding the fate of judicial nominees in ways not seen since 1968. It was then that Justice Abe Fortas asked that his name be withdrawn after a filibuster blocked an up or down vote on his nomination as Chief Justice. No President should now or in the future

underestimate the influence of any of these factors, singly or in combination, on confirmation politics.

When Frankfurter made his observation in 1938 about the influence of particular individuals, as opposed to others, on the development of American constitutional law, he cited several examples in addition to the obvious one about Spencer Roane and John Marshall. "The evolution of finance capital in the United States, and therefore of American history after the Reconstruction period, would hardly have been the same if the views of men like Mr. Justice Miller and Mr. Justice Harlan had dominated the decisions of the Court from the Civil War to Theodore Roosevelt's administration."[25]

That era includes most of the twenty-two years between 1888 and 1910 when Melville Weston Fuller was Chief Justice—the period chronicled in **The Fuller Court**[26] by James W. Ely, Jr., of Vanderbilt University School of Law. Ely's is one of the latest volumes to appear in the Supreme Court Handbooks series that is published by ABC-CLIO under Peter Renstrom's general editorship. Each of the series entries to date has examined a single Court period as demarcated by the succession of Chief Justices,[27] with each volume adhering to a common format consisting of two parts. Part one consists of four substantive chapters that examine: (1) the particular Court in the context of its times, including the circumstances surrounding the appointment of each Justice who served with that Chief Justice; (2) the individual Justices in terms of their backgrounds and jurisprudential thought; (3) the significant decisions rendered by that Court; and, (4) the legacy and impact of that Court. Part two, which in **The Fuller Court** consumes about one-third of the pages, includes a variety of reference materials and documents that relate to personalities, policies, and events addressed in part one.

While of obvious value to the academic community and the legal profession, **The Fuller Court**, like other books in the series, is intended to reach a wider and more general audience as well. This goal beneficially distinguishes the Supreme Court Handbooks series from two others. The tomes published so far in the Holmes Devise *History of the Supreme Court of the United States* are truly treasures for the expert but are hardly written for the novice and pose a navigational challenge to the generalist.[28] The more recently conceived series on the Chief Justiceships of the United States Supreme Court[29] is more accessible—and more modest in scope—than the Holmes Devise series, and seems more comprehensive than the Handbooks series in terms of the number of legal issues addressed. The latter, in contrast, features a sharper focus on constitutional issues and institutional matters, plus a greater emphasis on individuals, context, and impact.

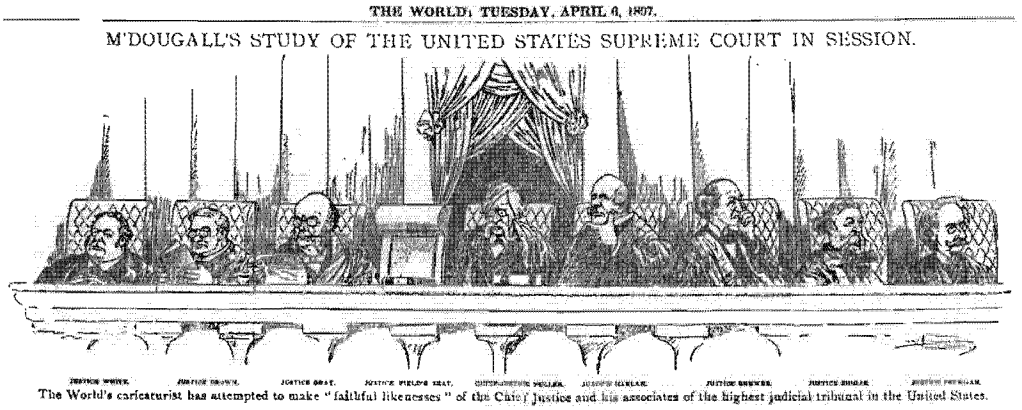
Fuller's Chief Justiceship ranks third in length, behind John Marshall's thirty-four years and Roger B. Taney's twenty-eight. At its beginning, Fuller's most senior colleagues were Samuel F. Miller and Stephen J. Field, both appointed by Lincoln, and Joseph P. Bradley and John Marshall Harlan, appointed by Grant and Hayes, respectively. At the time of Fuller's death in Maine on July 4, 1910, the Fuller Court included Joseph McKenna, who would sit until 1925, and Oliver Wendell Holmes, Jr., who retired in 1932. Thus, the judicial tenures of Fuller Court Justices spanned a remarkable seventy years, from Lincoln's first term until the last year of the Hoover presidency.

The Fuller Court was remarkable in another sense as well. As Ely shows, its twenty-two years witnessed changes of considerable magnitude in the nation. By 1910, there was no doubt that the United States had developed a truly national economy, tied together by the railroads, telegraphs, and telephones, and had become a power in international affairs. From the 1890s onward, Congress began to exercise its commerce and taxing powers in new ways and to a greater extent than ever before. State regulatory legislation continued to swell, continuing a trend from the mid-1800s.

What was the Fuller Court's response to these developments? The conventional view has sided with Populist and Progressive (and later New Deal) critics who have taken the Fuller Bench to the scholarly woodshed for a thrashing. In their view, the Court under Fuller was an antiregulatory tool of corporate interests, hostile to ordinary people. In contrast, Ely aligns himself more closely with revisionists who have offered a more balanced account. He definitely rejects Owen M. Fiss's summation from Fiss's Holmes Devise volume: "By all accounts, the Court over which Melville Weston Fuller presided . . . ranks among the worst."[30] Instead, Ely concludes that the Fuller Bench "built upon a constitutional tradition that assigned a high value to property rights, private economic ordering, and limited government." The Bench "represented not a sharp break with the past but a flowering of time-honored themes of constitutionalism."[31]

The operative word in the previous sentence is "flowering." According to the traditional, prerevisionist account, the Fuller Court was far less hesitant to invalidate legislation than was the Waite Court that preceded it (1874–1888). On the surface, the statistics with respect to acts of Congress are actually not dissimilar. The Waite Bench invalidated all or part of national statutes in eight cases within its fourteen years, and the Fuller Bench did so in fourteen cases in its twenty-two years. But viewed qualitatively, there is a difference. Even the Waite Court's hostility to most Reconstruction-era civil-rights legislation[32] pales alongside the Fuller Court's decisions in cases such as *Pollock v. Farmers' Loan & Trust Co.*,[33] which disallowed the income tax that Congress had enacted in 1894, thus literally calling into question the power to govern. In this sense *Pollock* was on a par with the Chase Court's ruling in *Hepburn v. Griswold*,[34] the first round in the legal-tender litigation that, for a short time, restricted Congress's choice of means to finance a war. Or at least Justice Harlan seemed to think so in terms of the risk that the 1895 decision posed for the nation: it "strikes at the very foundations of national authority, in that it denies to the general government a power which is, or may become, vital to the very existence and preservation of the Union in a national emergency . . . ."[35]

Also among the Fuller Court's fourteen negations was *Adair v. United States*,[36] which struck down the Erdman Act of 1898. That law was the federal government's first significant attempt to use its commerce power on a broad scale in support of the rights of labor. The law prohibited yellow-dog contracts, by which workers agreed not to join unions as a


THE WORLD, TUESDAY, APRIL 6, 1897.

M'DOUGALL'S STUDY OF THE UNITED STATES SUPREME COURT IN SESSION.

The World's caricaturist has attempted to make "faithful likenesses" of the Chief Justice and his associates of the highest judicial tribunal in the United States.

James W. Ely's new book, *The Fuller Court* (caricatured above in 1897), is written to appeal beyond scholarly circles to reach a general audience.

condition of employment, as well as the firing or blacklisting of employees for union activity. Not counted among the fourteen because it emasculated but did not invalidate a statute was *United States v. E. C. Knight Co.*,[37] sometimes called the *Sugar Trust Case*. Relying on an exceedingly narrow interpretation of the commerce power, a majority of five confined the constitutionally acceptable application of the Sherman Anti-Trust Act of 1890 to monopolies involving "commerce," as distinct from "manufacturing." The Court placed the refining of sugar in the latter category and so pushed monopolies in the sugar business, and arguably all similar enterprises, beyond the statute's reach.

With respect to state legislation, again, the statistics are comparable: sixty-six invalidations in fourteen years for the Waite Court, and ninety-one invalidations in twenty-two years for the Fuller Court.[38] Qualitatively, however, there is a difference. What the Waite Bench did not do that the Fuller Court did was to deploy the Due Process Clause of the Fourteenth Amendment against state enactments. *Chicago, Milwaukee & St. Paul Railroad Co. v. Minnesota*[39] held that the reasonableness of rates could not be left by the legislature to be determined by a state commission but had to be subject to judicial review. That decision turned the Waite Court's ruling in *Munn v. Illinois*[40] on its head: *Munn* had insisted that reasonableness was a legislative, not a judicial, question. Then *Smyth v. Ames*[41] built on the Minnesota rate case. Writing for a unanimous Bench, Harlan not only invalidated a set of rates promulgated by Nebraska, but, in the process of holding that regulated industries were entitled to a fair return, laid out a formula by which that return was to be determined. At about the same time, in *Allgeyer v. Louisiana*,[42] the Fuller Court also found embedded in the Fourteenth Amendment a right not previously recognized by the Court: liberty of contract. Employee and employer now enjoyed a constitutionally protected right to bargain individually over the terms of labor, free of undue interference by the government. The implications of this new right were vast and were soon realized in *Lochner v. New York*[43] when Fuller and four other members of his Court struck down a New York statute limiting the hours of labor in bakeries. Justice Rufus Peckham's opinion for the majority asserted that it would be the Court's task to ascertain what restrictions on liberty of contract were reasonable and which ones were not. Thus, even though the Court under Fuller upheld the vast majority of challenged regulations, the *Lochner* ruling cast a long shadow of doubt for many years over the constitutionality of any governmental regulation of the workplace.

Based on Ely's account, the reader might be lead to this conclusion about what took place: The Court under Fuller maintained the credibility of the checks and balances so central to the separation of powers that undergirds the Constitution. That is, as the regulatory role of Congress and state legislatures expanded, so did the Court's oversight function. The growth of power in one place (the legislature) seemed to call for a corresponding growth elsewhere (the judiciary) to avoid the danger of majority rule run amok. If occasionally the Fuller Court seemed to wield the sword of judicial review too severely, then one could probably also take the Waite Court to task for being too trusting of majority rule. In any event, Ely's latest contribution to the literature is a call to reconsider what in fact was an important Court in an important period of American history.

It was not the Fuller Court but the Waite Court that first confronted the meaning of the Free Exercise Clause of the First Amendment,[44] a constitutional provision that, especially in the past sixty-four years, has been a staple on the Court's docket. The guarantee of religious freedom is the subject of **The *Yoder* Case** by University of Wisconsin-Madison historian Shawn Francis Peters.[45] As the title indicates, the book focuses on the Supreme Court's landmark decision in *Wisconsin v. Yoder*,[46] which came down slightly over three

decades ago. The case pitted a state's compulsory school-attendance law against a claim by two Old Order Amish families and one Conservative Amish Mennonite family in New Glarus, Wisconsin, that their children not be required to attend school beyond the age of 14, as was the tradition in their faiths. The case study is one of the latest additions to the Landmark Law Cases and American Society series published by the University Press of Kansas under the general editorship of Peter Charles Hoffer and N. E. H. Hull. The series counts an already impressive list of nearly two dozen titles.

Readers will find that Peters actually provides three books in one. For those whose knowledge of the beliefs and culture of the Amish and similar plain sects extends no further than the motion picture "Witness,"[47] **The *Yoder* Case** will be enlightening on that ground alone. The separatist posture and largely agrarian way of life of the Amish stem from St. Paul's biblical directive to Christians: "Do not be conformed to this world,"[48] an admonition that they take literally. "As the modern world zooms past," writes Peters, "Amish drivers guide the buggies slowly but steadily through the countryside. They remain unhurried."[49]

Then there are the details of the development of the case itself that even those already familiar with *Yoder* may not know. In 1968, Amish living in New Glarus, Wisconsin, decided to withdraw their children from public school and to establish a school system of their own. The transfer of several dozen Amish youngsters out of the public school system, however, would cost the local district thousands of dollars in state aid. So, according to

The decision by Amish families in New Glarus, Wisconsin to withdraw their children from public school and establish a school system of their own in 1968 is the subject of historian Shawn Francis Peters' new book, *The* Yoder *Case*.

Peters, the superintendent asked the families to delay their departures until after the start of the school year, when enrollment figures were reported to Madison. "The Amish, however, were too scrupulous to participate in this bit of trickery. They balked, and the local public school system lost almost $20,000 in state funding."[50] Local authorities then "retaliated" by having Jonas Yoder, Wallace Miller, and Adin Yutzy charged with violating a Wisconsin law, first enacted in 1889, that, after 1903 amendments, mandated school attendance until age 16.[51]

Yet defending themselves was not an easy decision for the fathers, who, like most Amish, believed that "going to law" is at odds with the pacifist tenets of their faith. Nonetheless, they placed their dispute with local officials in the hands of a Pennsylvania attorney named William Bentley Ball who had been attracted to their case. A name partner in a law firm in Harrisburg, a Roman Catholic, and an experienced advocate in religious freedom cases,[52] Ball shepherded their case through the Wisconsin courts, finally achieving a well-nigh-unanimous victory in the Supreme Court.[53] The victory proved to be a mixed blessing, however, creating tensions among a people who shun notoriety and possibly contributing to the decline of the Amish settlement at New Glarus. "For me," commented Mr. Yoder at one point in the litigation, "I wish it would be somebody else's name on this [case]."[54]

Finally, at a greater level of generality, but central to the outcome of the case, Peters surveys the Supreme Court's checkered pattern of decisions in free-exercise cases. These cases typically pose a question that has never been definitively resolved: does the Free Exercise Clause embody merely a nondiscrimination principle that protects believers from hostile legislation *because of* their religion, or does it also elevate religious practice to a preferred status? The first position encompasses a narrow protection; and the second position envisions a far broader one, calling for a faith-based exemption when a law requires believers to do something that their faith forbids or forbids them from doing something that their faith requires. The argument under the second interpretation is that faith should trump law unless the government has a compelling interest in overriding the religious interest.

This conflict lay at the heart of the Court's first construction of the Free Exercise Clause in *Reynolds v. United States*,[55] which upheld application of an antipolygamy statute to a Mormon in the Utah Territory whose religion included the practice of polygamy. Chief Justice Waite emphasized the sovereignty of the individual over religious belief but the sovereignty of the state over conduct, a distinction that prevailed for over eight decades. "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties, or subversive of good order."[56]

The first occasion in which the Supreme Court, resting its decision squarely on the Free Exercise Clause, ordered a faith-based exemption to an otherwise valid policy came in *Sherbert v. Verner*.[57] South Carolina law denied unemployment compensation to someone available for work who refused to accept a job. Adell Sherbert, a Seventh-Day Adventist, refused to work on Saturday, lost her job because of her refusal, but was otherwise available for work. No one claimed that South Carolina had targeted members of this particular church for persecution, but as applied to her, the policy required her to choose between a job and religious disobedience, on the one hand, and no compensation and religious obedience, on the other. A majority of the Justices found the law unconstitutional *as applied to Adell Sherbert*, because it unduly burdened her faith. And it was *Sherbert* that provided the doctrinal underpinnings for *Yoder*.

Yoder, as applied by lower courts, in turn "left an indelible mark on such areas as parents' rights, home schooling, and state regulation of religious schools" but, Peters explains, "the core of its constitutional legacy did not prove to be especially durable."[58] Indeed,

free-exercise victories after *Yoder* were few. Then, in 1990, five Justices took a step that seemed to confine *Sherbert* and *Yoder* to their specific factual situations. *Employment Division v. Smith* ruled against two drug counselors who were fired from their jobs after they ingested peyote, a hallucinogen, as part of a ritual of the Native American Church.[59] Oregon officials had denied them unemployment compensation because their loss of employment resulted from "misconduct." Under state law, peyote was a controlled substance, and its use was forbidden, even for religious purposes. Even though the two ex-counselors cited scientific and anthropological evidence that the sacramental use of peyote was an ancient practice and was not harmful, the High Court concluded that when action based on religious belief runs afoul of a valid law of general application—even when, as here, the litigants had not been criminally charged—the latter prevails. Law trumped faith.[60]

As Peters relates, to counter *Smith* Congress in 1993 passed the Religious Freedom Restoration Act (RFRA). Resting on Congress's enforcement powers under Section 5 of the Fourteenth Amendment, the RFRA sought to restore *Sherbert* fully in situations in which laws of general application, such as a school-attendance statute, conflicted with religious liberty. A battle over constitutional turf was underway. In *City of Boerne v. Flores*,[61] the Court ruled that Congress's noble intentions exceeded its authority. *Smith*, not the RFRA, embodied the meaning of the Free Exercise Clause.[62]

Freedom of speech barely engaged either the Waite or Fuller courts, but the free-speech clause in the First Amendment[63] has been responsible for a steady stream of cases on the Supreme Court's docket for the last six decades. That duality—near invisibility for free speech as a federal judicial question over much of the nation's history alongside its contemporary Term-by-Term prominence—is one of the insights to be gleaned from **Freedom of Speech** by Princeton University political scientist Ken I. Kersch.[64] Although formally aimed at readers who are relatively new to the subject, **Freedom of Speech** should appeal to seasoned scholars as well because of its fresh approach and wide-ranging references to key events and ideas over the past half-millennium. Novices and experts alike will appreciate Kersch's emphasis on the political and intellectual movements and contexts that have shaped freedom of expression in the United States.[65]

With a major purpose of the book being "to underline that things were not always as they are today," Kersch acknowledges that the "right to say and print 'whatever we likes' holds a special place in the American heart, so special a place that we might call it the quintessentially American freedom."[66] But having a "special place in the American heart" for many years did not mean that freedom of speech had a special place in the heart of the federal judiciary. Instead, for much of our history—with the prominent exception of the Sedition Act trials in U.S. circuit courts between 1798 and 1800[67]—"law and policy [respecting the freedom of speech] were set primarily by state and local courts and even more by social norms, legislation, and the political process."[68] Contrast that state of affairs with the America that readers know today: "What is permissible and impermissible speech today is determined less by the ebb and flow of political competition than by rulings from unelected judges in the federal courts." To be sure, the cases that judges decide have bubbled up from social controversies. But those cases are decided, not by prevailing social norms, but by judges wielding constitutional law. "Accordingly, now more than at any other time in our history, the parameters of permissible speech are defined by the U.S. Supreme Court."[69]

That much becomes apparent in chapter three ("The Twentieth Century"),[70] which recounts how the Supreme Court's involvement with free speech has proceeded broadly through two stages. In the first stage, the

The 1969 *Brandenburg v. Ohio* decision transformed the clear-and-present-danger test into the incitement test and became the modern underpinning for freedom of speech. The case involved the avocation of racial strife during a Ku Klux Klan rally in violation of an Ohio criminal syndicalism statute.

Court was consumed with application of one or more "tests" that enjoyed favor at one time or another and that took into account the threat that the speaker posed. By 1925, two such tests had emerged: the clear-and-present-danger test, which promised greater judicial protection for speech, and the bad-tendency test, which was highly deferential to legislative discretion. Each emerged from post–World War I cases involving wartime national security legislation. Much later, in *Brandenburg v. Ohio*,[71] the clear-and-present-danger test evolved into the incitement test. More permissive for expression than the clear-and-present-danger test, the incitement test emphasized the premise of the immediacy of lawless action. Never commanding a majority of the Bench was an extremely permissive approach advocated by a few Justices such as Hugo Black. From this absolute approach, once expression was deemed to fall within the purview of the First Amendment—a significant qualification—all government restrictions on speech were forbidden.[72] On this view, the threat posed by the speaker was irrelevant.

The second stage commenced roughly after *Brandenburg*. Rather than emphasizing "the free speech tests of the past," the second stage has reflected "a variety of categorical legal distinctions."[73] One of these categorical distinctions considers free-speech cases not so much from the perspective of the danger the speaker poses as from that of the danger that a law poses to those engaged in legitimate speech. For instance, the overbreadth doctrine may be applicable when a law sweeps too broadly, reaching not only speech or speech-related behavior that might constitutionally be proscribed but protected speech as well. Such laws may also be struck down because they have a "chilling" effect: at the margin, they may deter people from engaging in expression that the Constitution allows. For similar reasons, the Court may apply the vagueness doctrine.

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Due process requires that individuals have fair warning of prohibited conduct. A vague statute blurs the line between legal and illegal behavior and therefore may chill speech by causing people to censor themselves.[74]

Another perspective on which the Court can rely probes the impact of a regulation on speech. Initially, the Court will determine whether government has restricted the content of a speaker's message—that is, whether a regulation discriminates against a certain point of view. If so, the Court applies strict scrutiny. For the statute to survive, government must demonstrate a compelling interest in the restriction and demonstrate that the interest can be achieved in no other way. Because strict scrutiny is so demanding, in almost every such instance the regulation will be struck down. *Ward v. Rock Against Racism*,[75] which challenged a New York City regulation mandating use of the city's sound system and technicians as a means to control volume at the bandstand in Central Park, offered a three-part test to determine whether a regulation is, in fact, viewpoint-neutral. First, the regulation must concern where or how something is said, not what is said. Second, its adoption must not have been based on disagreement with any particular message. Third, government's interests in having the regulation must be unrelated to the viewpoint of any speaker.

If a law passes the viewpoint-neutrality test, it may nonetheless adversely affect the flow and distribution of a message (the *how*), even though the law does not target a particular message (the *what*). In such situations, the Court applies a lower standard of review, balancing the impact on speech against the importance of the regulation. "[A] regulation of the time, place, or manner of protected speech," wrote Justice Kennedy in *Ward*, "must be narrowly tailored to serve the government's legitimate content-neutral interests but . . . it need not be the least restrictive or least intrusive means of doing so." The standard "is satisfied 'so long as [the] regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" Such regulations are more easily upheld when there are "ample alternative channels of communication" left open to the speaker.[76] The Court adopts a similar approach in distinguishing speech from conduct in situations in which regulations impede symbolic or communicative action.

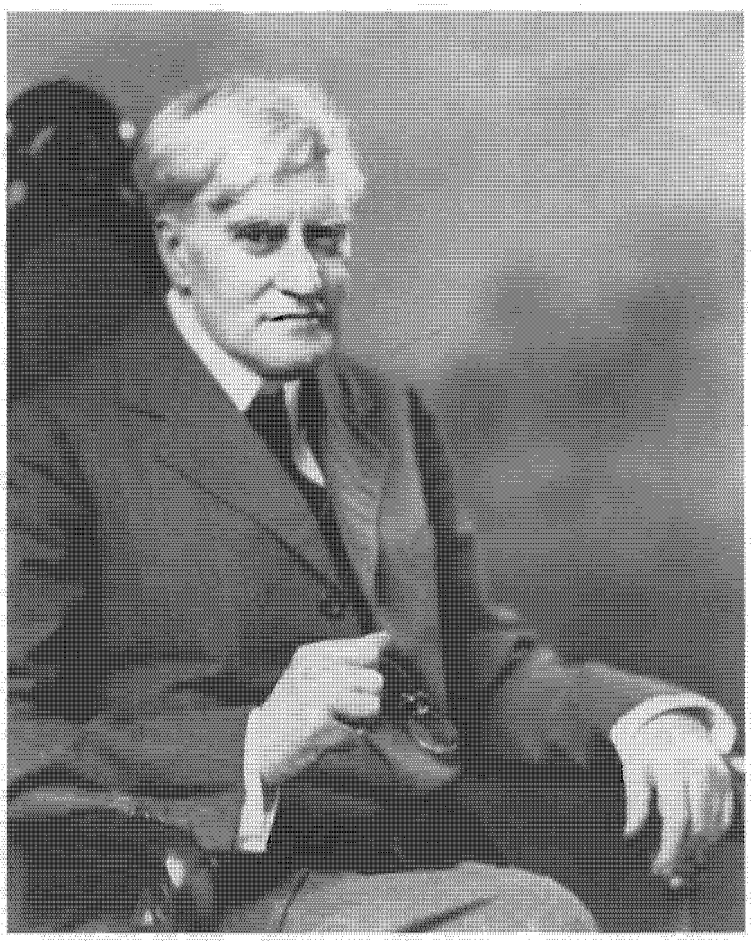
What is the future of freedom of speech in the United States? Certainly, Kersch believes, there will be no shortage of speech-centered questions that will continue to tax the collective intellect and wisdom of the Supreme Court. But will there be changes in the way the Court views freedom of speech? The meandering doctrinal path that the Court has followed over the past six or so decades suggests that there will. "[A]ll sorts of events and pressures are operating that call into question the accustomed tests and categories." Categories change "through the continual interaction of principles and imperatives . . . . And they change most in periods of novelty, reform, instability, and fear"—none of which, one hastens to add, is in short supply today. "Politics, culture, and law, at base, are forever linked."[77]

The links between politics, culture, law, and individuals—those who "make a difference"—are vividly portrayed in **Great American Judges**, a stout contribution to judicial biography that Middle Tennessee University political scientist John R. Vile has compiled and edited.[78] This two-volume set will doubtless become a frequently consulted resource for anyone interested in the backgrounds and decisions of the women and men—especially those on courts below the U.S. Supreme Court—who have achieved distinction. Few other collective works both span the whole course of American history and encompass both the state and federal judiciaries.

Vile's lengthy introduction, which follows a foreword by Utah State University legal historian Kermit L. Hall, addresses, among other things, the question that almost any reader would be sure to raise: how does one choose the judicial "greats"? The identification process that Vile used falls, as he explains, somewhere between the "scientific" and the "arbitrary."[79]

After compiling his own list of nominees from a variety of sources, Vile sent surveys to 150 scholars, asking each of them to mark (1) those persons on his list that they believed worthy of inclusion in a book of greats; (2) those whom they deemed unworthy of inclusion; and (3) those about whom they knew little or nothing. In addition, respondents were invited to rank as many as twenty-five judges "that they considered the most outstanding in American history." Finally, each respondent was given the opportunity to suggest the names of judges whose names should have been included in the questionnaire but had not been. Of the150 who were solicited, Vile received responses from seventy-seven, many of whom recognized only a handful of judges on the initial list. Yet Vile reports that "a surprising consensus developed around a key group of judges." All seventy-seven, for example, marked Benjamin Cardozo for inclusion. Of those among the 77 who submitted a ranking of their "top 25," Learned Hand's name appeared most frequently at the head of the list. Ultimately, 103 individuals made the cut; each of whom is the subject in Vile's volumes of a biographical essay of 3,500 to 4,000 words.

Who is among the 103? Sixteen were Justices on the U.S. Supreme Court.[80] Of those sixteen, seven were Chief Justices. Three (John J. Parker, Clement Haynsworth, Jr., and Bork) were federal judges whose twentieth-century nominations to the High Court failed in the Senate. Several, such as Thomas Drummond



In compiling his new book, *Great American Judges*, political scientist John R. Vile found that scholars consistently suggested Benjamin Cardozo (right) for inclusion as a great judge.

and Learned Hand, were at various times on presidential "short lists" for the Supreme Court, but were never actually nominated. Four served primarily in the colonial or late eighteenth-century period, thirty-six in the nineteenth century, and the balance in the twentieth century. Seventeen of the 103 were still living as of the date the book went into production, although some were in retirement. Reflecting changes in the business of federal courts during the last 125 years, the nineteenth-century list is heavily populated by judges from state courts of last resort, while those on the federal courts below the Supreme Court account for most of the twentieth-century roster.[81] In addition to the 103, some sixty-three other judges are featured in sidebars authored by Vile. These much briefer treatments include five U.S. Supreme Court Justices (Ginsburg, O'Connor, T. Marshall, Thomas, and Scalia) and an assortment of others as varied as Howell Heflin, George Mason, and Joseph A. Wapner.

Those familiar with American legal history will recognize the names of most of the individuals who are the subjects of the 103 essays. Yet, except for the well-read, anyone perusing the set will find new faces, and perhaps some surprises as well. Even in the case of judges about whom much has already been written, the essays provide the platform for a fresh look. For those who have suffered scholarly neglect in recent decades, there is opportunity for revisiting old issues and perhaps a reappraisal. And for those whose former preeminence has faded into obscurity, the essays offer the prospect for renewed appreciation in a new era.

Criteria for the model judge have been in abundance since at least biblical times.[82] A lawyer but never a judge, John Adams advanced his own criteria in 1776 in what came to be called his **Thoughts on Government**: judges were to be "subservient to none" and always "men of experience on the laws, of exemplary morals, invincible patience, unruffled calmness and indefatigable application."[83] Those who consult **Great American Judges** may decide for themselves whether the chosen 103, having been deemed great, have also passed the Adams test.

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

BAUGH, JOYCE A. **Supreme Court Justices in the Post-Bork Era: Confirmation Politics and Judicial Performance** (New York: Peter Lang, 2002). Pp. 128. ISBN: 0-8204-5683-7 (paper).

ELY, JAMES W., JR. **The Fuller Court: Justices, Rulings, and Legacy** (Santa Barbara, CA: ABC-CLIO, 2003). Pp. xiii, 318. ISBN: 1-57607-714-4 (cloth).

KERSCH, KEN I. **Freedom of Speech: Rights and Liberties Under the Law** (Santa Barbara, CA: ABC-CLIO, 2003). Pp. xxxi, 395. ISBN: 1-57607-600-8 (cloth).

PETERS, SHAWN FRANCIS. **The *Yoder* Case: Religious Freedom, Education, and Parental Rights** (Lawrence: University Press of Kansas, 2003). Pp. viii, 199. ISBN: 0-7006-1273-4 (paper).

VILE, JOHN R. **Great American Judges: An Encyclopedia**, 2 vols. (Santa Barbara, CA: ABC-CLIO 2003). Pp. xlviii, 981. ISBN: 1-57607-989-9 (cloth).

ENDNOTES

[1] Felix Frankfurter, **Mr. Justice Holmes and the Supreme Court** (1938) 9.

[2] Quoted in 1 Charles Warren, **The Supreme Court in United States History** (rev. ed. 1926) 31.

[3] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

[4] Widely expected to harbor conservative judicial values when appointed and to practice judicial restraint, Blackmun soon left the reservation. Insisting at retirement that the Court, not he, had changed, he was only partly correct. He had changed as well. At the hearings on his nomination in 1970, for example, Senators queried him on only a single specific constitutional issue: capital punishment. His position then on that question was the exact opposite of his position two decades later. While he still sided with the government on Fourth Amendment issues, in

nearly every other category of constitutional law he had become by 1991 the Court's most consistent voice in defense of individual rights. See, generally, D. Grier Stephenson, Jr., "Justice Blackmun's Eighth Amendment Pilgrimage," 8 *BYU Journal of Public Law* 271 (1994).

As of this writing, Justice Blackmun's papers were scheduled to become available for inspection at the Library of Congress on March 4, 2004. Blackmun had directed that the papers be opened for full and unrestricted access five years after his date of death. Tony Mauro, "Media, Scholars Anxiously Await Release of Justice Blackmun's Papers," 115 *Daily Report* 1 (Jan. 27, 2004).

[5]Even filling the six seats initially was not without difficulty. Washington's first choice for one of the first appointments was Robert Harrison. Five days after his confirmation by the Senate, Harrison was selected Chancellor of Maryland, a position he preferred to an Associate Justiceship on the Supreme Court.

[6]The five appointments were to fill four vacancies. Washington's recess appointment of John Rutledge as Chief Justice in July 1795 to fill the seat vacated by the resignation of John Jay was rejected by the Senate in December of that year. Washington then successfully placed Oliver Ellsworth in the Chief Justiceship in 1796.

[7]"It would deny all meaning to history to believe that the course of events would have been the same if Thomas Jefferson had had the naming of Spencer Roane to the place to which John Adams called John Marshall . . . ." Frankfurter, **Mr. Justice Holmes and the Supreme Court** 9.

[8]Marshall was "a man Jefferson considered as much his enemy as [Aaron] Burr himself." Garry Wills, **"Negro President": Jefferson and the Slave Power** (2003) 94.

[9]Because the election brought Federalist dominance to an end, John Adams referred to it as the "revolution of 1801." 10 Charles Francis Adams, ed., **The Works of John Adams** (1850–1856) 162. For Jefferson, the "revolution of 1800" was "as real a revolution in the principles of our government as that of 1776 was in form; not effected indeed by the sword, as that, but by the rational and peaceable instrument of reform, the suffrage of the people." To Spencer Roane, September 6, 1819, in 10 Paul Leicester Ford, ed., **The Writings of Thomas Jefferson** (1892–1899) 140.

[10]2 Page Smith, **John Adams** (1962) 902.

[11]Joyce A. Baugh, **Supreme Court Justices in the Post-Bork Era: Confirmation Politics and Judicial Performance** (2002) (hereafter cited as Baugh).

[12]See note 1.

[13]Baugh, 107. To avoid the perils and liabilities of a paper trail, Senator Robert Dole facetiously counseled anyone with ambitions to sit on the Supreme Court not to "write a word. I would hide in the closet until I was nominated." Quoted in Alpheus Thomas Mason and Donald Grier Stephenson, Jr., **American Constitutional Law: Introductory Essays and Selected Cases**, 13th ed. (2002) 13.

[14]The train of nominations between 1986 and 1994 and the turbulence that some of the nominees encountered stimulated a rash of book-writing about confirmation politics. See, for example, Stephen L. Carter, **The Confirmation Mess** (1994); John A. Maltese, **The Selling of Supreme Court Nominees** (1995); John Massaro, **Supremely Political: The Role of Ideology and Presidential Management in Unsuccessful Supreme Court Nominations** (1990); Mark Silverstein, **Judicious Choices: The New Politics of Supreme Court Confirmations** (1994); Norman Vieira and Leonard Gross, **Supreme Court Appointments: Judge Bork and the Politicization of Senate Confirmations** (1998); George L. Watson and John A. Stookey, **Shaping America: The Politics of Supreme Court Appointments** (1995); David Alistair Yalof, **Pursuit of Justices: Presidential Politics and the Selection of Supreme Court Nominees** (1999).

[15]Maltese, **The Selling of Supreme Court Nominees** 143.

[16]In fairness to the author, it should be noted that she does not use the word "hypotheses." That is this reviewer's characterization of the propositions that she lays out. She draws them from predictions made by "[s]cholars and other commentators from across the political spectrum." Baugh, 4. It should also be noted that she devotes little space to the Kennedy appointment, treating it merely as the conclusion to the Bork debacle. *Id.*, 17.

[17] *Id.*, 4.

[18]Professor Baugh has coauthored one with Christopher E. Smith: **The Real Clarence Thomas: Confirmation Veracity Meets Performance Reality** (2000). See also Scott Douglas Gerber, **First Principles: The Jurisprudence of Clarence Thomas** (2002); and Andrew Peyton Thomas, **Clarence Thomas: A Biography** (2002).

[19]Baugh, 107.

[20]Quoted in Mason and Stephenson, **American Constitutional Law** 14.

[21]Baugh, 102.

[22]*Id.*, 102.

[23]*Id.*, 108.

[24]The power of the Internet was demonstrated when several candidates for the 2004 Democratic Presidential nomination initially made substantial headway in garnering both supporters and funds by way of the Internet.

[25]See note 1.

[26]James W. Ely, Jr., **The Fuller Court: Justices, Rulings, and Legacy** (2003) (hereafter cited as Ely).

[27]The author of this review essay has written the volume on the Waite Court for Professor Renstrom's series.

[28]The series is published by Macmillan. No volume in the Holmes Devise series seems to have appeared since Owen Fiss's on the Fuller Court in 1993. The first two volumes in the Holmes Devise series, one on the pre-Marshall Court

by Julius Goebel and the other on the Chase Court by Charles Fairman, appeared in 1971.

[29]Published by the University of South Carolina Press under Herbert Johnson's general editorship, the initial volumes in this series, on the pre-Marshall and the Fuller courts, appeared in 1995; the most recent, on the Burger Court, was published in 2000. Professor Ely authored the volume in the Johnson series on the Fuller Court: **The Chief Justiceship of Melville W. Fuller, 1888–1910** (1995).

[30]3 Owen M. Fiss, **Troubled Beginnings of the Modern State, 1888–1910** (1993). See Ely, 189.

[31]Ely, 189.

[32]For example, see *United States v. Reese*, 92 U.S. 214 (1876); *United States v. Cruikshank*, 92 U.S. 542 (1876); and the *Civil Rights Cases*, 109 U.S. 3 (1883).

[33]158 U.S. 601 (rehearing, 1895).

[34]75 U.S. (8 Wallace) 603 (1870).

[35]158 U.S. at 671 (dissenting opinion).

[36]208 U.S. 161 (1908).

[37]156 U.S. 1 (1895).

[38]Mason and Stephenson, **American Constitutional Law** 47.

[39]134 U.S. 418 (1890).

[40]94 U.S. 113 (1877).

[41]169 U.S. 466 (1898).

[42]165 U.S. 578 (1897).

[43]198 U.S. 45 (1905).

[44]"Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof* . . ." Constitution, Amendment I (emphasis added). The Supreme Court applied the italicized provision to the states, by way of the Fourteenth Amendment, in *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

[45]Shawn Francis Peters, **The *Yoder* Case: Religious Freedom, Education, and Parental Rights** (2003) (hereafter cited as Peters). Peters is also the author of another volume about religious freedom: **Judging Jehovah's Witnesses: Religious Persecution and the Dawn of the Rights Revolution** (2000). See "The Judicial Bookshelf," 26 *Journal of Supreme Court History* 279 (2001).

[46]406 U.S. 205 (1972).

[47]Directed by Peter Weir, with Harrison Ford, Kelly McGillis, and Lucas Haas in lead roles, this 1985 film depicted an Amish widow and her young son who were caught up in the investigation of the murder of a police officer in Philadelphia. "Witness" was largely set and filmed in the Amish countryside of Lancaster County, Pennsylvania.

[48]Romans 12:2 (Revised Standard Version, 1946).

[49]Peters, 180.

[50]*Id.*, 1.

[51]*Id.*, 39–40. Other states had previously accommodated the Amish practice of ending formal classroom instruction after the eighth grade. In Pennsylvania, for example, nearly twenty years before *Yoder* came down, a plan had been worked out whereby Amish children could leave school after grade eight, provided there was some vocational schooling (in agriculture, woodcrafting, home duties, etc.) at least once a week.

[52]During his career, aside from religious freedom cases in state and lower federal courts, Ball argued nine cases before the U.S. Supreme Court and assisted in twenty-five others. See Wolfgang Saxon, "William Ball Is Dead at 82," *New York Times*, Jan. 18, 1999, p. B7.

[53]Justice Douglas submitted a partial dissent. See Peters, 147–48.

[54]*Id.*, 169–70.

[55]98 U.S. 145 (1879).

[56]*Id.*, 164.

[57]374 U.S. 398 (1963). Earlier decisions such as the second flag-salute case (*West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943)), had invalidated application of state laws to religiously inspired conduct, but the Court treated these primarily as free-speech cases, not free-exercise ones. Ironically, in *Barnette* Justice Frankfurter learned firsthand the veracity of his own 1938 observation that "men make a difference" in law (see note 1). Just three years before, in *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), Frankfurter had spoken for eight members of the Court in rejecting a claim brought by Jehovah's Witnesses for a religiously based exemption from a school board's requirement that all students salute the American flag. Only Justice Stone dissented. But in *Jones v. Opelika*, 316 U.S. 584 (1942), which did not involve a flag-salute rule, Justices Black, Douglas, and Murphy—all members of the *Gobitis* majority—went out of their way to say that they thought *Gobitis* had been wrongly decided. Their shifts, combined with the post-*Gobitis* arrivals of like-thinking Justices Jackson and Rutledge, transformed a solid majority *against* the free exercise claim into a 6–3 majority *in favor* of the more broadly based free-speech right announced in *Barnette*. *See generally* Alpheus Thomas Mason, **Harlan Fiske Stone: Pillar of the Law** (1956) 525–35, 599–601.

[58]Peters, 175.

[59]494 U.S. 872 (1990).

[60]For insights into the Smith case, see Carolyn N. Long, **Religious Freedom and Indian Rights: The Case of *Oregon v. Smith*** (2000).

[61]521 U.S. 507 (1997).

[62]Peters, 175–78.

[63]"Congress shall make no law . . . *abridging the freedom of speech* . . ." Constitution, Amendment I (emphasis added).

[64]Ken I. Kersch, **Freedom of Speech: Rights and Liberties Under the Law** (2003) (hereafter cited as Kersch).

[65]**Freedom of Speech** is a volume in the America's Freedoms series, for which the author of this review essay serves as general editor. As with the other books in the series, the narrative and analytical chapters in Kersch's

book (pp. 1–182) precede a substantial amount of reference material: an A–Z listing of key people, cases, and events (pp. 183–233); a documents section containing major cases, speeches, and essays (pp. 235–348); a chronology (pp. 349–60); a table of cases and statutes (p. 361–64); and a helpful bibliographic essay (pp. 365–70).

[66]Kersch, xxviii, 2.

[67]*Id.*, 67–68. Eventually, the Adams administration obtained indictments of fourteen individuals and convictions of ten. The Supreme Court did not rule on the constitutionality of the Sedition Act at the time. Indeed, substantial jurisdictional obstacles stood in the way. No appeal in criminal cases lay to the Supreme Court from a circuit court until 1891. Donald Grier Stephenson, Jr., **Campaigns and the Court: The Supreme Court in Presidential Elections** (1999) 34–35. However, in a long exercise of retrospection, the Court announced in 1964 that the law, which had cleverly expired by its own terms in 1801, was unconstitutional (*New York Times v. Sullivan*, 376 U.S. 254, 1964).

[68]Kersch, xxviii.

[69]*Id.*, 31.

[70]*Id.*, 97–160.

[71]395 U.S. 444 (1969).

[72]As an example, see Justice Black's concurring opinion in *New York Times Co. v. United States*, 403 U.S. 713 (1971).

[73]Kersch, 34.

[74]*Id.*, 145.

[75]491 U.S. 781 (1989).

[76]*Id.*, 799, 802.

[77]Kersch, 180–81.

[78]John R. Vile, ed., **Great American Judges: An Encyclopedia** (2003) (hereafter cited as Vile). The organization is similar to that of Vile's **Great American Lawyers** (2001). See "The Judicial Bookshelf," 28 *Journal of Supreme Court History* 81 (2003). Frequently omitted from edited works, but happily included in both the Judges and Lawyers sets, is a comprehensive index. This sometimes underrated but highly valuable tool allows the user to search not only by name, but also by topic, case, state, or other category, thus making the task of cross-referencing relatively painless. Thus, under "Holmes, Oliver Wendell, Jr.," one is pointed not only to the essay on Holmes but also to other places where he is discussed or otherwise mentioned, such as the essays on Felix Frankfurter, Learned Hand, Charles Evans Hughes, Lemuel Shaw, Harlan Fiske Stone, and Charles Wyzanski. The author of this review essay contributed the essay on Pennsylvania jurist John Bannister Gibson (Vile, p. 287).

[79]Vile, xxviii.

[80]Alphabetically, the list includes: Black, Burger, Cardozo, Field, Frankfurter, Gray, Harlan I, Harlan II, Holmes, Hughes, J. Marshall, Rehnquist, Stone, Story, Taney, and Warren.

[81]Indeed, some of the state judges from the nineteenth century featured in **Great American Judges** were pioneers in American jurisprudence. See, for example, the essays on John Bannister Gibson (p. 287), James Kent (p. 433), Robert R. Livingston, Jr. (p. 471), Joseph Henry Lumpkin (p. 479), Theophilus Parsons (p. 596), and Lemuel Shaw (p. 704).

[82]"You shall appoint judges and officers in all your towns which the Lord your God gives you . . . ; and they shall judge the people with righteous judgment. You shall not pervert justice; you shall not show partiality; and you shall not take a bribe, for a bribe blinds the eyes of the wise and subverts the cause of the righteous. Justice, and only justice, you shall follow . . . " Deuteronomy 16:18–20 (RSV, 1952).

[83]Quoted in David McCullough, **John Adams** 103 (2001).

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